Enforcing Consumer Protection Interest in Copyright – A Comparison of United States and Europe

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Abstract

This paper describes the emerging consumer protection interest in copyright and discusses its enforcement from a comparative viewpoint. The paper starts by describing briefly the different tools for enforcing consumer policy both in Europe and United States. Then, the paper moves on to discuss two recent cases where the consumer interest in copyright has been at stake. The aim is to compare enforcement in the United States to that of Europe.

In the Sony rootkit case, a number of class actions based on unfair trade practise regulation were settled in the United States. The settlements forced the copyright owner to change its licensing policies. In Europe, these cases did not result in legal actions. In the ongoing Apple iTunes case, class actions in the United States are based on anti-trust law. There has been some speculation of competition policy investigation in Europe as well but without any practical actions. Unlike in Sony case, consumer protection authorities in some European Union member states have taken action against Apple and this lead Apple to change its licensing policies in these countries. Also some copyright owners have changed their licensing policies.

Next, the paper reports the results of a survey to European consumer protection authorities about copyright issues. The goal was to find out on what grounds the decisions on copyright-related question are made and what are the main reasons for their relative inactivity. We asked for example if an economic analysis of the current market situation has any role or whether the decisions are based on strictly formal legal arguments. In addition, we tried to find out on a more general level how the consumer protection agencies see the relation between consumer protection regulation and copyright law.

The paper concludes by creating suggestions on more efficient enforcement of consumer interest in copyright. It is argued that the systems used in the United States and European have their advantages and disadvantages.

1. Introduction

Historically, copyright can be described as a self-sustaining area of law. It has had little interaction with consumer protection among others. Also studies on copyright have rarely taken consumer interest explicitly into account. Approach has been to study indirectly the economic effects of copyright's limitations and exceptions, such as fair use. Some copyright experts have even argued that since the copyright law already carefully balances the interests of the public and authors alike, there is no need for additional legal safeguards.

External developments have made this argument obsolete. First, technological development has implied that copyright has become more relevant to individual end users. In the past, copyright supposedly handled mainly problems with individual authors and institutional copyists. Today, copyright is also used as a tool to control the behaviour of individual consumers and the general flow of information. Second, the emergence of a global mass consumption society implied the birth of explicit consumer protection regulation. Today, consumer protection applies and is enforced also to information products including copyrighted works.

Indeed, from a practical perspective it is obvious that an isolated analysis of copyright is necessarily imperfect. In fact, much focus has been already put to study the legal and economic issues in the interface between copyright and competition policy. It is rather surprising that consumer perspective lacks similar research efforts since consumer policy shares many economic characteristics with competition policy. Both are concerned with harmful market behaviour and rely heavily on governmental intervention. As a practical example, black lists of forbidden contract clauses exist in both systems. There are also similarities in the approaches between the United States and Europe – regulation is applied in a more political context in the United States.

The aim of this paper is to contribute to this gap in literature and learn about the emerging consumer interest in copyright law and its enforcement. The paper proceeds as follows. It starts by describing briefly the different tools for consumer policy both in Europe and United States. Then, the paper moves on to discuss two recent cases where the consumer interest in copyright has been at stake. Enforcement in the United States is compared to that of Europe.

In the Sony rootkit case, a number of class actions based on unfair trade practise regulation in addition to cases filed by attorney generals were settled in the United States. The settlements forced Sony BMG to change its policy on how technical protection measures are used in CDs. In Europe, the Sony rootkit case did not result in legal actions.

In the ongoing Apple iTunes case, class actions in the United States are based on anti-trust law. There has been some speculation of competition policy investigation in Europe as well but without any practical actions. Unlike in Sony case, consumer protection authorities in some European Union member states did take action against Apple and this lead Apple to change its licensing policies in these countries. These changes did not, however, tackle the main competition law concerns.

Next, the paper reports the results of a survey to European consumer protection authorities about copyright issues. The goal was to find out on what grounds the decisions on copyright-related question are made and what are the main reasons for their relative inactivity. We asked for example if an economic analysis of the current market situation has any role or whether the decisions are based on strictly formal legal arguments. In addition, we tried to find out on a more general level how the consumer protection agencies see the relation between consumer protection regulation and copyright law.

The paper concludes by creating suggestions on more efficient enforcement of consumer interest in copyright. It is argued that both the American and European models have their advantages and disadvantages.

2. Consumer Policy in Europe and the United States

2.1 Europe – harmonized regulation but major variations in enforcement

Substantive European consumer policy and its enforcement are clearly separate issues. Substantive consumer policy is realized through a number of directives. The most relevant of a total of nine directives are Consumer Sales Directive, Unfair Contract Terms Directive, Unfair Commercial Practices Directive and Injunctions Directive. The last three of these directives are also applicable in situations, where a consumer buys a copyrighted work online. Consumer Sales Directive defines currently consumer goods as “any tangible

movable item". In other words, if a consumer buys a CD, the directive and the national consumer laws applies. However, if the same songs are purchased from a download service, the transaction does not fall in the scope of this directive. The EU Commission has recognized this as a problem and is considering to extent the directive's coverage to digital media as well (Commission, 2007)

Otherwise the scope of application of the directives is rather broad. For example, the Unfair Contract Terms Directive defines "unfair" contract clauses in the following way (Art 3, paragraph 1):

> *A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.*

Obviously, this directive can be used to limit the scope of many user or licensing agreements, which deal with copyrighted content. The directive also includes a list of forbidden contract clauses. The list is only indicative so a clause that it is not included can still be found to be unfair. (e.g. Tribunal Supremo, 2003). On other hand, if the term is listed, a consumer cannot consent to it:

> *"Directive... fully protects the uninformed and uneducated consumer by declaring unfair terms not binding, no matter whether or not the consumer was informed about their content" (Rott 2007).*

Directives differ somewhat with their approach. Unfair Commercial Practices Directive sets higher criteria for intervention:

> *The Commercial Practices Directive protects the ''average consumer,'' the benchmark consumer known in the case-law as the ''reasonably well-informed and reasonably observant and circumspect consumer, taking into account social, cultural, and linguistic factors, as interpreted by the Court of Justice (Recital 18)." (Incardona & Poncibo)*

The most important directive from enforcement perspective is Injunctions Directive. It gives certain rights for consumer authorities in all of those cases, in which one or more of the substantial directives (or more exactly their national implementations) are infringed. The tools, which have to be available for the authorities include cessation or prohibition of any infringement, publication of the decisions, and daily fines for non-action.

It must be noted, however, that the directives do not regulate how to organize enforcement in practice. Consequently, there is quite a lot of variation between the member states in this area. The main tools for enforcement — depending on jurisdiction – are:

- Consumer Protection Agency
- Consumer Ombudsman (not available in every state)
- Private class actions in national courts (not available in every state)

Governmental consumer protection agencies can be said to be European-wide. Organizationally, the agency may be an independent unit or alternatively part of the ministry of trade. In addition, some states (e.g. Nordic countries) have a separate Consumer Ombudsman and even a specialized court for consumer affairs. One relevant point is also that consumer protection authorities are not typically politically elected officials but civil servants. This means that their incentives are neither monetary nor political.

Traditionally, European consumer policy has been state-lead. Different consumer protection authorities monitor, informally negotiate, and even formally enforce consumer policy with the tools they have available. In the recent years, also private class actions have become available in some member states. In the UK, class actions have been possible for some time and also Sweden enacted a new law that came into force in 2003. Other Nordic countries will have new laws on class action from 2008.[1] Since class action is a new instrument, there is yet not much evidence of its effects on the enforcement of consumer policy. In the future, class actions may complement government enforcement.

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[1] There are also major variations in the approach of these laws. While Sweden, Norway and Denmark allow private class actions, the Finnish law limits its scope of application only to cases where Consumer Ombudsman is the lead attorney.

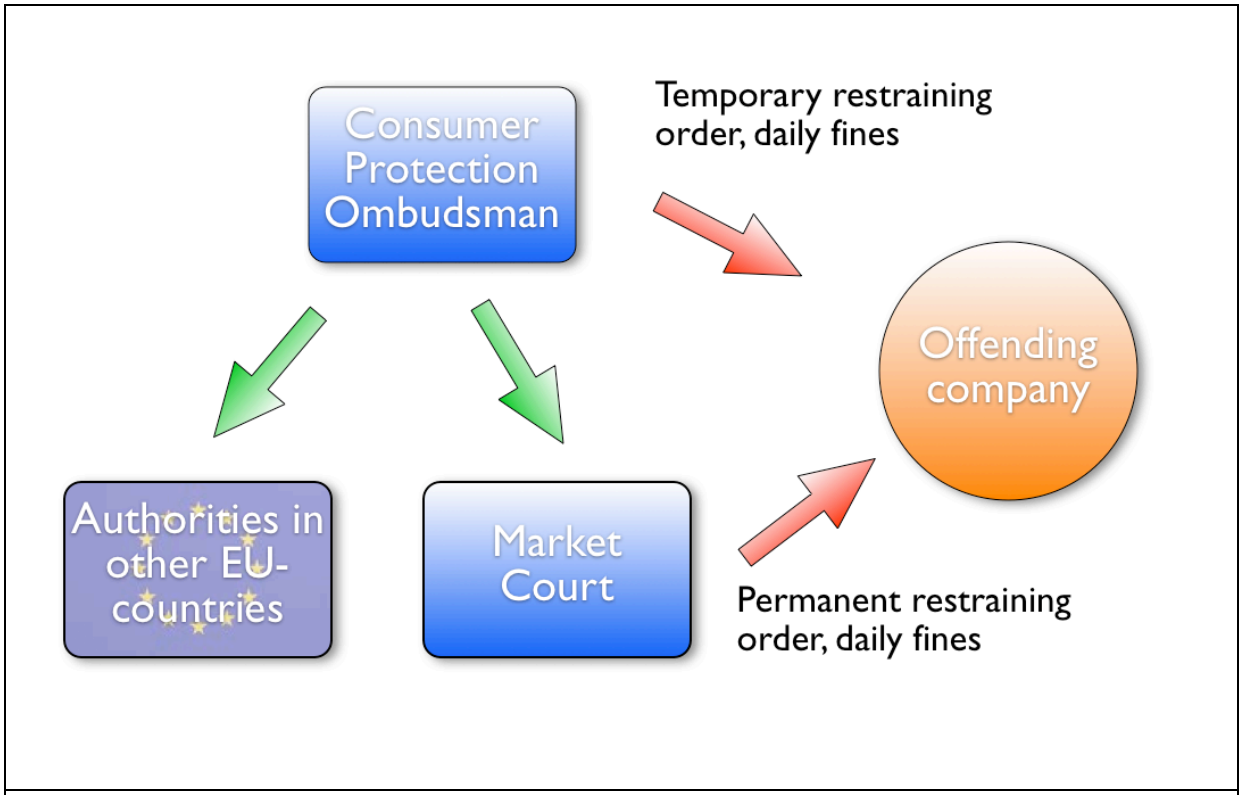

Figure 1. Governmental consumer protection enforcement in Finland at the moment.

2.2. United States – more variation in regulation but powerful enforcement based on political and economic incentives

A traditional view held by many European may be that there is not much consumer protection in the United States. To a large extent, this view is misguided. One must first understand that substantive consumer policy and its enforcement can not be separated in the same way as in Europe. In fact, there are many potential enforcers, which have authority and also incentives to intervene also in consumer protection issues:

- Federal Trade Commission (FTC, federal level)
- Attorney Generals (state level)
- Private class actions in state and federal courts

FTC's role in consumer protection is based on the section 5 of the FTC Act, which prohibits "unfair methods of competition," and also "unfair or deceptive acts or

practices". In addition, there exists plenty of narrow sector based regulation enforced by FTC.[2]

The attorney generals enforce state laws, which include a wide range of different regulations. Unlike civil servants in FTC, attorney generals are directly elected officials, who may have political incentives to intervene. There are typically some limitations on what kind of cases attorney generals can take. For example in Texas:

> *State law prohibits our office from filing a lawsuit whose only purpose is to recover money or property for a single person. In those instances, it is appropriate for the consumer to seek legal advice from a private attorney, legal aid society or other organization. Our office does file suit against companies that violate the laws protecting consumers. However, we file these lawsuits to protect the public interest, not private interests. (Texas Attorney General, 2007)*

Perhaps the most famous method for consumer protection is class action lawsuits. Commentators note that the modern version of class actions was designed in the social upheaval of the 1960s mainly as a preventive social policy tool. (see e.g. Gilles & Friedman, 2006 and Kaplan, 1969) The system of private enforcement fit in the United States of the time since the government intervention had been traditionally weak. The idea was that courts would enforce substantive law and even make political decisions, if necessary. (Burbank, 2006)

The power of this method goes further than governmental enforcement due to the risk of enormous economic sanctions it carries. In addition, the class action suits can be lucrative business for lawyers, which means that there are enough monetary incentives to really "dig deep" into the cases. About 25-30% of all class action cases in the United States can be classified as dealing with consumer protection issues.(e.g. Henser et all, 2000)

3. Case Sony rootkit

3.1 Background

[2] E.g. the Fairness to Contact Lens Consumers Act and the Funeral Rule etc.

The proceedings pertaining the Sony BMG's unfortunate "rootkit-accident" are a good example of what kind of different legal enforcement mechanisms are available in United States. The outcomes in those cases are relatively striking – especially compared to the total inactivity in Europe.

The saga was started by security researcher Mark Russinovich, who was testing a special tool for detecting deeply hidden software (so called "rootkits") and found to his surprise that one of his computers actually had this kind of software installed and running. After a meticulous investigation, he was able to determinate that the culprit, which was installed the software (XCP), was Sony BMG's Get Right with the Man CD by the Van Zant Brothers. Russinovich published his findings in his blog and the story spread soon like a wildfire – first to the IT-press and soon afterwards also to the mainstream media. (Russinovich, 2005)

There were three basic problems with the Sony BMG's new technical protection measure.[3] Firstly, the software was installed without user's consent i.e. the EULA did not have any information about the rootkit. Secondly, there was no easy way to uninstall the installed software. Thirdly, the software was so badly written that it consumed 1-2% of resources even if the user did not used the CD and in addition, the software made it also much easier to other malware to hide in the computer. (Halderman & Felten, 2006). Sony BMG had used the software in 52 separate titles with sales over 4.7 million CDs so the program was already widely spread.

3.2 United States

After the facts became public, both private and public enforcement of consumer rights ensued. The Attorney Generals in Texas, California and New York launched their own investigations. Federal Trade Commission joined soon the fray. Three class action suits were filed and soon afterwards combined to one big case at the District Court at Southern District of New York.

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[3] There were actually three different software used i.e. XCP and MediaMax 3.0 and MediaMax 5.0

The situation was rather bleak for Sony BMG. For example, in Texas the Consumer Protection Against Computer Spyware Act of 2005 carries civil penalties of $100,000 for each violation of the law and the Deceptive Trade Practice Act adds additional $20,000 per violation – and there was approximately 130 000 affected consumers. The company did not have any other real options than to try to settle the cases as quickly as possible. The outcome was four settlements (Texas and California had identical outcome) with closely similar content:

Settler	Main Content of the Settlement
FTC	*"…settlement requires Sony BMG to clearly disclose limitations on consumers' use of music CDs, bars it from using collected information for marketing, prohibits it from installing software without consumer consent, and requires it to provide a reasonable means of uninstalling that software. The settlement also requires that Sony BMG allow consumers to exchange the CDs through June 31, 2007, and reimburse consumers for up to $150 to repair damage to their computers that they may have suffered in trying to remove the software."*
Texas & California	*… Claimants could receive up to $175 each to compensate them for the costs of repairing computers damaged by Sony BMG products. Those without proof of out-of-pocket expenses are still eligible for $25…The judgment also requires that Sony BMG continue encouraging consumers to return XCP or MediaMax-enhanced compact discs… agreement permanently prohibits Sony BMG from manufacturing and selling compact discs that contain the XCP or MediaMax software that formed the basis for Texas' lawsuit. Additionally, future Sony BMG CDs with anti-piracy programs are prevented from including any hidden files and must prominently disclose specific items on the CD packaging and on its Web site. The required disclosures include: system requirements; limitations on the number of times a CD can be copied; limitations on the digital file formats into which music on the CD can be converted; and any potential incompatibility issues…$ 750 000 payment to the State.*
New York and rest of	*Sony BMG agreed to pay a total of $4.25 million to the settling states, including approximately $315,000 to New York. As part of the settlement, Sony BMG also agreed to provide restitution to consumers whose computers*

the states	*were damaged by its DRM software. Just one year ago, Sony BMG had agreed with the New York Attorney General's office to recall its CDs with DRM software and to offer consumers refunds or exchanges for previously purchased CDs.*
Class Action	- *stop manufacturing SONY BMG CDs with XCP software ("XCP CDs") and SONY BMG CDs with MediaMax software ("MediaMax CDs");* - *immediately recall all XCP CDs;* - *provide software to update and uninstall XCP and MediaMax content protection software from consumers' computers;* - *ensure that ongoing fixes to all SONY BMG content protection software are readily available to consumers;* - *implement consumer-oriented changes in operating practices with respect to all CDs with content protection software that SONY BMG manufactures in the next two years;* - *waive specified provisions currently contained in XCP and MediaMax software End-User Licensing Agreements ("EULAs");* - *refrain from collecting personal information about users of XCP CDs or MediaMax CDs without their affirmative consent; and* - *provide additional settlement benefits to Settlement Class Members including cash payments, "clean" replacement CDs without content protection software, and free music downloads.* (In re: SONY BMG CD Technologies Litigation, Case No. 1:05-cv-09575-NRB)
Table 1. Settlements in Sony rootkit cases in the United States.	

Soon after the settlements were reached, Sony BMG decided to stop using copy protection in CDs. Other record companies have more or less followed the example and currently almost all CDs on the markets are without any kind of technological protection.[4]

3.3 Europe

[4] For example, in Finland less than 1% of the sold CDs contained copy protection during 2006 and as matter of fact, from autumn 2006, none of the new CDs were copy protected. (Opetusministeriö, 2006)

As noted, in Europe consumer protection agencies did not react to the problem at all. A good example is Finland, where Finnish consumers protested openly against the problems of copy protections. After pressure from journalists, the Finnish Consumer Agency announced it would have a meeting with Sony BMG representatives before it could make any statement of the case. That statement never came.

It has to be pointed out that Sony did not officially released CDs with the rootkit in Europe. However, since gray market versions of the CDs ended up in the markets (and even to some libraries in Europe etc.), a case for action would have existed for consumer authorities. European consumers bought CDs using services like Amazon.com and thus imported the problem to the European continent. The situation apparently still shielded Sony BMG somewhat as no formal action took place in Europe as far as the authors of this paper are aware.[5]

4. Case Apple

4.1 Background

In the Apple iTunes case, the main question has been is it legal to use technical protection measures to tie customers to a certain service and hardware. The music protected by Apple's Fairplay-protection works only in iPods and iPhones and those computers, which have iTunes-software installed.[6] This horizontal model has been very effective to Apple as it has

[5] ALCAI (a consumer rights group in Italy) made a formal complaint on November 4th 2005 to the Commander in Chief of the Fraud Contrast Group of the Financial Police in Italy (Guarda di Finanza) but apparently there were no results.

[6] It is possible to burn the purchased music to CDs and re-rip it back to computer without protection; however, that is burdensome and the quality of music suffers in the process. In addition, Fairplay has been cracked several times, which has allowed more knowledgeable consumers to "liberate" the songs.

been able to use its dominance on portable players to prevent customer leakage to competing music stores like Napster[7]:

> *"Currently, there are a limited number of devices that offer the portable subscription functionality that is required to support our Napster To Go and Napster Mobile services and certain current manufacturers may not be able to profitably continue to offer existing devices. Our software is not compatible with the iPod music player, the current equipment market leader, nor do we expect it to be compatible with the iPhone cell phone, when that product is launched. If we cannot successfully design our service to interoperate with the music playback devices that our customers own, or if music-enabled devices fail to grow significantly over time, our business will be harmed." (Napster, 2007)*

Apple has leveraged its dominant position also against the record companies. The record companies would like to have much more nuanced pricing structure (more price discrimination) and in addition, higher prices. (e.g. BBC, 2005). Apple has been so far resilient against these demands.

4.2 United States

In the United States, the enforcement of "consumer rights" is done this time with ongoing class action suits against Apple based on anti-trust laws (Apple i.e. Charoensak vs. Apple and Tuckery vs Apple). The theory is that Apple is using its "Fair Tunes" technological protection system to tie iPod-users to iTunes (and vice versa) and that this is forbidden in Sherman Act:

> *"…alleges two theories of antitrust tying: (1) Apple has used technological restrictions to force purchasers of Apple's iPod (tying product) to purchase only Online Music and Online Video from iTMS (tied product); and (2) Apple has used technological restrictions to force purchasers of Online Music and Online Video*

[7] To get some perspective: Napster has currently approximately 800 000 customers worldwide. Apple sold 700 000 iPhones during the first weekend of the sales.

from iTMS (tying product) to purchase only Apple's iPod (tied product).” (Tucker vs. Apple, 2006)

To prove the illegal tying, Sherman Act requires a three-step test to be met:

“(1) a tie between two separate products or services sold in relevant markets; (2) sufficient economic power in the tying product market to affect the tied market; and (3) an effect on a non-insubstantial volume of commerce in the tied product market." (Tucker vs. Apple, 2006)

Since these cases are still in their early stages it remains to be seen whether this can be done in a legally solid way. At least the courts have already dismissed Apple’s demands on dismiss the cases on summary judgement.

4.3 European Consumer Protection Authorities

As described earlier, the European consumer protection law framework gives flexible tools to consumer protection authorities to intervene against the use of any consumer contract terms, which are unfair.[8] Thus it appears that consumer protection law may also be applicable when a company tries to “lock” consumers with technical protection measures.

This theory is now being tested in Norway. The Norwegian Consumer Council started the case in 2006 by lodging a complaint to the consumer Ombudsman. The complaint asked the Ombudsman to investigate several possible breaches of local Norwegian Marketing Control Act by Apple. (Grøndal, 2006)[9]

Apple responded to the complaint by agreeing to clarify certain parts of its user agreement. However, the company argued that technical protection measures and the sale of copyrighted works are part of the copyright regulation, which does not fall under consumer ombudsman’s

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[8] Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

[9] It should be pointed out that the complaint also mentioned a few other music services, which were using similar terms in their user contracts at that time (CDON.com, prefueled.com and MSN.no).

jurisdiction. In addition, the company claimed that its actions couldn't be held as anti-competitive as it is not in the monopoly position. (Tøndel, 2006)

The Ombudsman consequently made a preliminary ruling in June 2006 that the technical protection measure scheme used in Apple's iTunes Music Store was breaking section 9a of the Norwegian Marketing Control Act. The Ombudsman also ruled that aspects of Apple's terms and conditions were also illegal e.g. the clause that put Norwegians under an English legal contract and the term that allowed Apple to freely modify the terms without the consent of the consumer. Swedish and Danish consumer authorities joined the process at this stage and confirmed that the service violates similarly their consumer protection laws.

Two rounds of negotiations between the consumer authorities from Norway, Sweden, Denmark and Finland (which joined the "Nordic front" at this stage) and Apple followed. However, there was not adequate progress and Norwegian Ombudsman made new ruling in January 2007, in which he set a deadline of October 2007 for Apple to make relevant information available to other technology companies so that it abides by Norwegian law. At this stage the Norwegian efforts to build a larger coalition took a significant step forward as the consumer organizations from France, Germany and the Netherlands decided to join the process. (Ermert, 2007)

To fulfill the demands of consumer authorities, Apple had basically two options – start licensing Fairplay or alternately stop using it. The first option was (and is) strongly favored by the most of the recording industry. The second option was something that was almost unthinkable as the mantra "without technical protection measures there is no digital content business" was rooted deeply to the mindsets of the record executives. However, the dispute was giving Apple a tool to press the issue:

> *"But Schadler [Forrester analyst] also believes that the European campaign could help persuade music labels to gradually loosen licensing restrictions on songs." (Emlign, 2007)*

Indeed, this was one of the recognized goals at least for the Norwegian authorities:

"...Norwegian Consumer Protection Ombudsman Bjoern Erik Thon: "It will also allow Apple to renegotiate better conditions with the music labels." (Ermert, 2007).

Apple's CEO then took the case to the public by addressing the issue in his open letter and directed the blame to the record companies:[10]

"...The third alternative is to abolish DRMs entirely. Imagine a world where every online store sells DRM-free music encoded in open licensable formats. In such a world, any player can play music purchased from any store, and any store can sell music which is playable on all players. This is clearly the best alternative for consumers, and Apple would embrace it in a heartbeat. If the big four music companies would license Apple their music without the requirement that it be protected with a DRM, we would switch to selling only DRM-free music on our iTunes store. Every iPod ever made will play this DRM-free music." (Jobs, 2007)

Interestingly, EMI, one of the big record companies followed and soon announced that it starts selling its music without technical protection measures (EMI, 2007). It remains to be seen if other large record companies follow the example. Even if that is not the case, Apple has now a strong argument in its hands: it has done whatever it can to ease the interoperability-problem.

4.4 National Copyright Law - France

The "old way" to take into account consumer interests – as argued by some copyright scholars – is to tackle these problems in substantive copyright. The French example shows all the drawbacks a legislative process brings into enforcement.

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[10] He also made a point that record companies are mostly European and thus naturally better target for European regulation*: "Perhaps those unhappy with the current situation should redirect their energies towards persuading the music companies to sell their music DRM-free. For Europeans, two and a half of the big four music companies are located right in their backyard. The largest, Universal, is 100% owned by Vivendi, a French company. EMI is a British company, and Sony BMG is 50% owned by Bertelsmann, a German company."*

The Apple case became topical at the time the French parliament was discussing a major reform in its national copyright law in 2006. After lobbying efforts from various interest groups, the French parliament supported a strong interoperability provisions for technical protection measures in its national copyright law (Välimäki and Oksanen, 2006):[11]

> *- One can request interoperability information from a DRM provider and a court can order the provider to release it*
> *- Only information transmission charges can be applied and no royalties for use can be charged*
> *- DRM provider can not prevent the publication of the source code of an interoperable computer program*

However, the outcome was met with fierce counter-lobby from Apple and record companies and as a result the law was changed significantly for the final version:

> *- A regulatory authority will mediate interoperability requests; it has the power to impose fines of up to 5% of the global turnover if its decision are not followed*
> *- DRM provider can however escape interoperability requests (1) if it has acceptance from all copyright holders to keep the format secret and non-compatible, or (2) if there is a security risk that the DRM could be then unusable because it would be generally circumvented*
> *- Licensing terms for interoperability information must be non-discriminatory and may have reasonable royalties; obviously the regulatory authority will finally decide whether the DRM provider can prevent open source implementations*

The parliament voted for the revised text in June. After that it was finally reviewed and accepted by the Constitutional Court in July 2006, which stressed that licensing terms must bear reasonable compensation further decided by the regulatory authority. In essence, consumer rights can not be said to be enforceable through such means. The licensing mechanism is meant to suit the needs of competitors.

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[11] Loi sur le droit d'auteur et les droits voisins dans la société de l'information, abbreviated as DADVSI, article 7 as proposed in March 2006.

5. A Survey to European Consumer Agencies

The case examples discussed above left one to wonder why European consumer authorities have been mainly passive so far save for the actions of some agencies in the Apple case. In order to have a better overview of the overall positions of the consumer protection agencies towards copyright, we conducted a small-scale email survey. It was done in two parts. The first version (Appendix 1.) of the questionnaire was sent with email to all Nordic consumer authorities (Finland, Denmark, Iceland, Norway and Sweden). After the answers were received, it became evident that the result has to be verified. Thus, an updated version of the questionnaire was sent with email to nine additional European consumer agencies, which had public email addresses. (Appendix 2.) In addition, the questionnaire was submitted to three other agencies, which had a web-form for questions.

Outcome of the survey is summarized in table 2. below:

Country	Q1: Decided cases?	Q2: Pending cases?	Q3: Jurisdiction?	Q4: Positive consumer rights?	Q5: Economic analysis?	Q6: Acquis review
Sweden	No	No	N/A	N/A	N/A	N/A
Denmark	No	No	N/A	N/A	N/A	N/A
Finland	No	iTunes	Only for contracts	Yes	Kind of	Indirectly
Ireland	No	No	N/A	N/A	N/A	N/A
UK (NCC)	No	No	Only for contracts	Yes	Yes	Yes
Hungary	No	No	N/A	N/A	N/A	N/A
Slovenia	No	No	Not for copyright	No	No competence	No

Table 2. Summary of survey results. N/A = No Answer.

As can be seen from the table, the answers we received did not contain much information. Interestingly enough, the answers from Sweden and Norway show that the persons who answered were not aware about their own actions regarding iTunes. We believe that this is itself actually rather valuable information. It shows that copyright-related questions are not

generally familiar to the consumer authorities save for those few individuals who have worked with the cases directly.

In addition, we did not receive any answers from Norway, Germany or the Netherlands. Those countries might have had better knowledge regarding the topic. For example, the German consumer organisations prepared together with their government recently "A Charter on Consumer Sovereignty in the Digital World."

Still, there were some other useful pieces of information in the answers. Finnish Consumer Agency's answer about economic analysis is most likely valid for most of the European consumer agencies:

> *We do not have possibilities to do scientific economical analysis of market situations ourselves. However, part of our job is to find out which are the phenomena that are important for the consumers and try to focus on these problems and situations. Since we can only focus in some of the phenomena in the market, that kind of information has a role in our every day work. (Eerikäinen, 2007)*

Maybe the most interesting development is a kind of definition for positive consumer rights in copyright. The British National Consumer Council argued in the following that copyright exceptions should be changed to positive rights for consumers:

> *Consumer rights should be incorporated into copyright legislation. In the first instance by amending UK legislation to use the full scope of the exceptions and exclusions allowed under EU law, including the right to private copy; and in the medium term by influencing the EU copyright review to provide clear consumer rights in EU legislation.*

Also the Finnish Consumer Agency shared this view. Interestingly, even more detailed list of digital consumer rights is found from the Norwegian Consumer Council:

- *Make backup copies*
- *Watch and/or listen to content when you want to*
- *Move content between players*

- *Convert content to an appropriate format*
- *Adapt equipment*
- *Use digital content without being monitored*
- *Make use of public and private services*
- *Make use of necessary technology and assistance to exercise your digital rights (Norwegian Consumer Council, 2007)*

These positions could mean significant change for the current system, which does not recognize consumer rights as such. Even if copyright law itself remains intact, it really does not matter if it is not possible to sell or license any copyrighted work without giving these rights for consumers. Moreover, these public statements shape inevitably what consumers are supposed to consider reasonable. Of course, it may take a while to have these issues as a uniform part of consumer policy. As noted, so far only a handful of agencies have formed a policy standpoint in copyright issues.

6. Conclusions

Location	Sony Rootkit	Apple iTunes
Europe	No actions taken	Some consumer protection authorities acted: - Change of licensing terms - Giving up the use of problem technology (?)
United States	Private class action suits & FTC and Attorney Generals investigated the case. - Large fines - Refunds and replacement CDs for consumers - Limitations on how technology could be used in the future	Nothing so far (Class actions pending)

Table 3. Summary of the cases.

The two analyzed cases are obviously not enough to make any strong conclusions. Still, it seems that public interventions are at least as effective as private enforcement and perhaps may be even quicker instruments to get results. In the case of iTunes, the process related to the class action suits is still in the beginnings in the United States and at the same time there are already practical results in Europe. This finding supports the claim that consumer protection enforcement is designed to handle situations in which consumers' welfare requires imminent action (e.g. there is a dangerous toy in the market).

The problem with public enforcement seems to be its selectiveness. In Europe the consumer authorities did not react to Sony rootkit at all. In the United States Apple's lock-in practice is considered to be acceptable. At least in Europe the inactivity can be partly explained with the lack of knowledge about digital realm. However, even if the consumer agencies would get competent staff, there are most likely always more cases to take than there are resources. Moreover, it is hard to believe that public authorities would be able to really know what are the most urgent problems facing the citizens in the very quickly moving digital markets. By comparison, in the United States attorney generals are elected officials with personal political incentives for successful enforcement. The system there may work better because of this.

With these facts in mind, one is left to wonder why class actions could not be used in countries with strong states as complementing the powers of regulatory authorities. Obviously, class actions are not always an optimal way to maximize for example consumer protection since entrepreneurial attorneys may settle suits with less left to the consumers than in an optimal situation. Class actions can however provide a way to reach something to consumers when there is unwanted behaviour on the markets, which the regulatory authorities have no resources to identify or take action against. Recent legislative developments in Europe towards allowing class actions leave this option open for the future.

	Copyright	Competition law	Consumer Protection law
Requirement for Economic Analysis	Only in case of fair use analysis	Typically extensive	Very little to none
Enforcement	No rights to	Slow and political	Mostly by

	enforce	but very high sanctions possible	discussing with violators. Quick injunctions and concurring fines
Table 4. Some features of regulation			

Finally, does it make to sense to use consumer protection law to enforce consumer interest in copyright? For example, the economic analysis is more nuanced and careful in the case of competition law and therefore one could make an argument that the outcomes should be therefore better suited for copyright. As a tool competition law is however indirect to consumer interests and has many practical drawbacks such as time lag and relative ineffectiveness (e.g. Välimäki and Oksanen 2006).

In theory, changing copyright law directly could also advance consumer interests. However, the public rent seeking by the right holders makes any legislative process very slow, unpredictable and cumbersome as most recently seen in the French case. Therefore it seems that in the current situation consumer protection law may offer the best change to advance consumer interests – this is also economically justified, if it brings more trust and balance to markets.

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Appendix A - Surveys

Version 1.

Questionnaire – Consumer Protection Agencies and Copyright

1. How many copyright law-related cases/proceedings your organisation has decided / taken part to?
1.1. Are the decisions online / otherwise available?
2. Do you have pending copyright-related cases?
2.1. If yes, is there publicly available information available about the cases?
3. What is your organisation's position to the claim that consumer agencies don't have authority over copyright issues because copyright law is already balanced with its internal limitations to the exclusive rights?
4. Should consumers have positive rights in copyright law?
4.1. If yes, what rights?
5. Does economic analysis of e.g. relevant markets has the role in your decisions to take action / not take action in a specific case?
5.1 If yes – what kind of analysis you do?
6. Did you address any copyright-related questions in you reply to the commission's Review of the Consumer Acquis?

Version 2.

1. How many copyright law-related cases/proceedings/actions your organisation has decided / taken part to?
1.1. Are the decisions online / otherwise available?
2. Do you have pending copyright-related cases?
2.1. If yes, is there publicly available information available about the cases?
3. What is your organisation's position to the claim that consumer agencies don't have authority over copyright issues because copyright law is already balanced with its internal limitations to the exclusive rights?
4. Should consumers have positive rights (e.g. right to make backup-copies etc.) in copyright law?
4.1. If yes, what rights?
5. Does economic analysis of e.g. relevant markets has the role in your decisions to take action / not take action in a specific case?
5.1 If yes – what kind of analysis you do?
6. Did you address any copyright-related questions in you reply to the commission's Review of the Consumer Acquis?