

**ELECTRONIC FRONTIER FOUNDATION**

Protecting Rights and Promoting Freedom on the Electronic Frontier

August 5, 2016

Cory Doctorow
Electronic Frontier Foundation
815 Eddy Street
San Francisco, CA 94109
cory@eff.org

Re: Fair Warning: the Case for Labeling DRM-Limited Products

Dear Federal Trade Commission,

The Electronic Frontier Foundation is a member-supported 501(c)3 nonprofit, which has spent the past 25 years campaigning to ensure that the protections that we all enjoy in the “real” world remain with us into the electronic, information age. EFF participates in standards and treaty negotiations, works with regulators and governments around the world, and participates in litigation on key questions of fairness and labeling in the distribution of electronic products.

Since the passage of the Digital Millennium Copyright Act (DMCA) in 1998, we have received a steady stream of complaints from supporters and stakeholders about deceptive labeling of products with “Digital Rights Management” (DRM) systems. These systems, which use technical measures to limit how owners of games, books, music, videos, and devices can configure their property, are afforded special protection under section 1201 of the DMCA, which prohibits bypassing measures that restrict access to a copyrighted work. Because DMCA 1201 has limited and uncertain exemptions to this rule, customers who purchase DRM-encumbered products have limited options for overriding the restrictions imposed by DRM -- few firms or online communities are willing to risk the potential legal consequences of offering tools or advice to bypass the locks that manufacturers put in the products they sell.

The legal force behind DRM makes the issue of advance notice especially pressing. It’s bad enough to when a product is designed to prevent its owner from engaging in lawful, legitimate, desirable conduct -- but when the owner is legally prohibited from reconfiguring the product to enable that conduct, it’s vital that they be informed of this restriction before they make a purchase, so that they might make an informed decision.

Though many companies sell products with DRM encumbrances, few provide notice of these encumbrances. Of those that do, fewer still enumerate the restrictions in plain, prominent language. Of the few who do so, none mention the ability of the manufacturer to change the rules of the game after the fact, by updating the DRM through non-negotiable updates that remove functionality that was present at the time of purchase.

We request that the Commission take action on this problem, by requiring the relevant retailers to prominently notify their customers of these restrictions before any purchase is

815 Eddy Street • San Francisco, CA 94109 USA

voice +1 415 436 9333 *fax* +1 415 436 9993 *web* www.eff.org *email* information@eff.org

made, and to allow customers to search and sort through offerings based on whether they have these encumbrances or not.

To that end, we present the following stories from EFF supporters who wrote to us so that we could bring their cases to the FTC's attention.

Video Games

The video games market has been plagued by a variety of DRM schemes, some of which tie games to specific model consoles, or specific users' consoles. PC games have been bundled with DRM that disabled important operating system functions, revealed personal information about the player, or required constant Internet access to work.

Jim B bought Electronic Arts' "Need for Speed," only to have it cease working altogether, in both single- and multi-player mode, when Electronic Arts shut down its game server. The only warning was a confusing message that said the game was "intended to be social or an e-sport," but did not clearly give notice of the possibility the game would be rendered inoperable.

Jeff T bought "Sniper Elite" at a Fry's store. When he put the disc in his PC, the game also installed a DRM called Starforce (whose presence was not prominently noted on the game's packaging), which severely reduced the functionality of his DVD-RW drive, as part of its mechanism for interdicting attempts to copy the game disc. He was unable to burn CDs or DVDs successfully, and attempts to do so would max out his computer's CPU.

David A bought "Neverwinter Nights 2 Limited Edition" from Amazon, and was not notified in any way that the game was encumbered with DRM. The game was bundled with a DRM called SecureROM, which severely degraded the performance of his graphics card, dropping it to unplayably low frame-rates. David A's attempts to solve this problem led him to support forums where other players were reporting that this problem could only be solved by bypassing SecureROM, a potential violation of the DMCA.

Kevin W used the Steam platform to buy downloadable games, which were bundled with Microsoft's Games for Windows Live, which installed itself on his PC without his taking any affirmative step to do so. GFWL crashed on every launch, and Microsoft's support was unable to address his issue. He adds, "After hours of fighting, I still haven't played the game to this day."

Lindsay W bought "Asheron's Call 2" from a Best Buy store, but it would not play on his PC because the DRM's license server believed his key had been "cracked" and downloaded from an illicit Internet site. Best Buy replaced the copy, and that copy's key was also unusable. Lindsay W was never able to get an official working key for the game.

In 2012, CE F's Xbox 360 console began to experience hardware failures. He purchased a new console and carefully followed Microsoft's instructions to transfer his purchased games

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to the new system. When this failed, CE discovered that he was not able to try again because the Xbox's DRM limits how often an owner can attempt a "license transfer" within a 72 hour window. Seventy-two hours later, CE tried again, and failed. Microsoft support advised CE that it would take as long as 25 days for them to resolve this issue. When the issue was not resolved in 25 days, Microsoft said it would need another 25 days to address the issue. CE considered legal action, but was disheartened to discover that he had agreed to mandatory binding arbitration as a condition of using the Xbox. After several more months of navigating Microsoft's support system, a helpful person from Microsoft's "Customer Advocacy and Exception Management Team" was able to resolve the issue. Because of the DRM, only Microsoft could offer this help, and this multi-month process the only option open to CE.

Audiobooks

The audiobook market is dominated by Audible, an Amazon subsidiary. Audible requires DRM from its suppliers, and will not carry audiobooks unless the rightsholder agrees to have them sold with Amazon's proprietary DRM wrappers.

Ruth O bought Audible books with the intention of listening to them on her Sandisk Clip digital audio player. Audible advertises its audiobooks as playing on a "wide variety" of players, but her purchases would not play on the Clip. Converting the audiobooks to MP3 format -- which will play on her device -- is trivial, but requires bypassing Amazon's DRM, and potential DMCA liability.

Videos

In addition to the DVD distribution channels, new online video services have split into three markets: "download" services that purport to transfer permanent access to an audiovisual work to a purchaser; "rental" services that use DRM to revoke access to an audiovisual work after a set period; and "streaming" services that allow access to a shifting catalog of works for a flat fee. DRM is common in all three offerings, but rarely disclosed and never clearly explained.

Cynthia M is a college professor who teaches media studies. The producer Jenji Kohan gave her copies of the first and last drafts of the script for an episode of the TV program "Weeds" to use in her class. In 2009, Cynthia M used excerpts from these scripts to teach a class called "Media programming," and paid out of pocket for the relevant "Weeds" episode at Apple's iTunes store.

But when she tried to screen clips for her class, her Macbook Pro laptop refused to output the video over its VGA interface and to the class projector. Instead, it displayed an error message telling her that the video's DRM prohibited playback over VGA. When she attempted to take a screenshot of the error message, she discovered that the program had been designed to prevent this, and her screenshot came back blank.

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Ben W also bought a HD TV show episode from the iTunes store and ran into the same error: while a screen was connected to his Macintosh computer by an HDMI connector that didn't support the HDMI DRM scheme known as HDCP, the video would not play on any of his screens. He was not provided with notice of this limitation prior to his purchase.

Lena L bought a copy of "Rise of the Guardians" on DVD from Amazon as a gift for her mother, but it would not play back on her mother's elderly laptop, despite it being equipped with a DVD player and appropriate software. The DVD used a more recent version of the DVD-CSS DRM, which was not compatible with the older player. There is no way to sort Amazon listings to discover which DVDs will play on older players.

Harlan W bought a Zidoo-brand video-player for his TV from Amazon, which runs Google's Android operating system. He logged into his Google account and bought the motion picture "The Quiet Man" from the Google Play store. However, the video will not play back from his Zidoo device, because, "According to Google their license agreements with copyright owners do not permit playback on Android devices with video output connections, even ones like mine, which is fully HDCP compliant."

Software

Software vendors have a long history of deploying -- and regretting -- DRM. Customers rarely know how DRM will restrict their use of software, and DRM-related problems often arise too late to return software for a refund, even if the program's undisclosed restrictions render it unsuited for the user's purposes.

Jim H was advised to use Windows Media Center by his cable provider, Time Warner Cable, as the only option for viewing DRM-encumbered premium channels like Home Box Office without having to pay \$20/month to rent a set-top box. When Microsoft upgraded its Windows 7 product to Windows 10, it dropped support for Windows Media Center, leaving his expensive home setup orphaned.

Dan W bought Truverb, a music sound editing program, direct from Waves, its publisher. He found that conflicts with the program's DRM, from ILok, made it impossible to install. Eventually he found an out-of-date version of the program that pre-dated the ILok integration and managed to install it, but "now of course I can't upgrade when new patches come out." Dan W tried to warn other purchasers about this situation by posting a review to Waves' website, but the publisher deleted it.

Music

Though the iTunes Music Store and Amazon's MP3 store offer extensive catalogs of music from major labels with no DRM, the online world is still a hodgepodge of DRM and DRM-free offerings.

Adam J installed Microsoft's Groove and it automatically imported his iTunes and Amazon libraries, and automatically -- and erroneously -- flagged 30% of his collection as being DRM-encumbered. It then added Groove's own DRM to these tracks, and they will no longer play unless he buys a premium connection and even then, only when he is connected to the Internet.

Hardware

As the price of computing has fallen, many devices now include fully functional, general-purpose computers. Manufacturers have taken advantage of the capacity of these devices to run DRM, adding checks that control service, features and consumables for their products.

John F bought a 27" Sony Wega HD flat-screen TV from a Best Buy store in 2004, believing that the set's HDMI port would accommodate his PC, allowing him to use it as both a TV and a computer monitor. However, Sony had deployed DRM code to prevent this use, significantly reducing the value of his \$2,100 purchase. There was no notice of this DRM, and store personnel were not aware of it.

Meri M bought a Sony BDP-S3500 2D Blu-ray Player with WiFi from Walmart. When she first plugged it in, it disabled itself for several hours while undertaking a "firmware update." However, after this update, the player refused to play any of her purchased discs, displaying this error: "Unable to play disc. This disc is not a validly licensed product, please destroy it and purchase a legal copy from an authorized retailer." When Meri spoke to the manufacturer about this, they accused her of lying about buying her discs from reputable dealers, saying she had made illicit copies. She ultimately returned the player for a refund.

Jorge L bought a CatGenie Self-Washing Self-Flushing Cat Box from Amazon. When he refilled the soap reservoir, the cat box refused to use it. An undisclosed DRM was used to detect customer refilling. Refills cost \$25 for 15 oz. of detergent, and cannot be purchased from neighborhood stores; they have to be bought online. Without the soap, the litter box is nonfunctional. Jorge has had to buy a second litter box to use as a backup when he runs out of authorized detergent.

Ebooks

The market for electronic books is dominated by a few large players, with a long tail of smaller, independent companies also offering electronic books, with or without a custom reader, sometimes software and sometimes hardware. Most ebook retailers allow publishers to choose whether or not to use DRM, and at least one major publisher, Macmillan, has an entire

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DRM-free imprint (Tor Books, the largest science fiction imprint in the world). Nevertheless, no major ebook retailer consistently or plainly labels its product listings to indicate the presence or absence of DRM.

Chris M was an early adopter of ebooks. He purchased multiple titles from Embeed, which went bankrupt in 2006, leaving its custom ebook files orphaned. Before shutting down, the company encouraged its customers to download and back up these books, but Chris was never able to read them again.

Chris M subsequently bought many ebooks from Barnes & Noble's Ereader and Fictionwise store. When Barnes & Noble folded these stores into its Nook store in 2012, the company was not able to migrate about \$200 worth of Chris's ebooks to the Nook, because their deals with the books' publishers had expired. Chris permanently lost access to those books, including a 29-volume series, "The Survivalist," by Jerry Ahern, which was then out of print, and which Chris could not re-purchase for several years.

Because of the DRM on these books, Chris was not able to convert them to formats that would play on modern equipment, and the fear of legal liability from DMCA 1201 kept companies from marketing products to effect this conversion. The DRM on these books was not disclosed at the time of purchase.

Kristi T bought \$50 worth of ebooks from Powells.com, the online retailer for Portland, Oregon bookstore Powell's Books. These books required special DRM playback software from Adobe, which subsequently changed its software so that she could no longer access them. At the time of her purchase, Kirsti was not aware that the books she was buying had DRM on them, which stood in the way of her converting them to new formats as ebook technology progressed.

Curtis G bought Frommer's guide to Tokyo (6th Edition) from Amazon, downloading it onto his Macintosh computer and testing it to make sure that he could access it. But when he attempted to use the ebook on his flight from the US to Japan -- in the hopes of planning his trip in detail during the long voyage -- the Adobe software that Amazon required at the time would not open the book, because he did not have a connection to the Internet, which the software used to validate his purchase. This requirement was not clearly conveyed to Curtis at the time of his purchase, and he reasonably expected that he would be able to access a travel guide while travelling.

In 2012, Jason bought "Content Strategy for the Web (Voices That Matter)" in ebook form from Amazon and on 2015, he purchased Bruce Schneier's "Secrets and Lies: Digital Security in a Networked World," also in ebook form from Amazon. Though he knew that there was some kind of restriction with the books, he was unclear on how those restrictions functioned and was given no clear notice at the time of his purchase. However, he quickly ran up against a limit in the number of devices he could read his books on, and found that he was unable to load them on his preferred devices. He adds, "I immediately stopped using the Amazon

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Kindle app. . . I'm now willing to pay extra for non-DRM eBooks." He would like to be able to readily distinguish books with and without DRM restrictions when shopping.

James H bought Dean Koontz's novel *Innocence*, published by Bantam, from the Kobo store, (kobo.com) but was unable to get it to play on his Nook ebook reader, which is marketed by Kobo rival Barnes & Noble, despite following instructions to install a DRM player, Adobe Digital Editions (this player was subsequently shown to leak sensitive personal information about its users by gathering it and sending it to Adobe without encryption). He was never able to get the DRM to work and allow him to read the ebook. The existence of DRM on this title was not disclosed at the time of his purchase -- James consciously avoids DRM but was not able to find a disclosure of DRM prior to purchase.

Since James's experience with Kobo in 2012, the company has begun to clearly label its products, telling readers whether and which DRM they're getting before they buy. The fact that one retailer has done this shows that the lack of labeling with other retailers is a choice, not a necessity.

Kobo should be applauded for taking this obvious step to help readers navigate the ebook marketplace. We'd like to see them build on this by adding advanced search options to let readers search results to DRM-free books, and by adding links to explanatory text spelling out the restrictions with each DRM system.

Advocates for DRM say that customers don't mind restrictions on the media and devices they sell, but when there is insufficient notice about the restrictions that DRM imposes on those products, customers are unable to make informed decisions. Much of the conduct that DRM allows is itself commercially unfair -- monopolistic practices such as tying, for example -- but even worse than this conduct is the deceptive way in which these products are marketed, without meaningful notice to customers in advance of their purchases.

We ask the Commission to notify these retailers that they must clearly label their products as DRM-encumbered or DRM-free, and enumerate the restrictions imposed on these products in clear, easy to understand language.

Today, we published a letter [<https://www.eff.org/deeplinks/2016/01/you-have-right-know-what-youre-buying-online>] signed by publishers, rightsholders, creators' associations, and Internet users, calling for fair labeling practices for media with DRM restrictions.

We look forward to discussing this further with the Commission.

Respectfully submitted,

/s/ Cory Doctorow
Cory Doctorow
Electronic Frontier Foundation
cory@eff.org