

Rights or Restrictions?

An Examination of Several Key Issues and Debates Surrounding the Use and Potential Legislative Protection of DRM systems

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May 2007

CARL is the leadership organization for the Canadian research library community. The Association's members represent Canada's major academic research libraries plus Library and Archives Canada, the Library of Parliament and the Canada Institute for Scientific and Technical Information (CISTI).



1.0 Introduction

There is little doubt that widespread access to technological advances, such as increased access to the Internet by the general public, has had far-reaching implications for both creators and users of digital works. Creators use technology to both produce their works, and to aid in the dissemination of these works. Users are able to enjoy an ever-growing number of works with unprecedented ease of access. However, not every technological advance can be regarded positively. Copyright infringement and piracy of works have markedly increased in the digital era, as each digital reproduction of a work can be a perfect replication of that work, as opposed to traditional means of copying, such as photocopying, where each subsequent copy degraded in quality.

In light of this issue, many rights holders have turned to digital rights management (DRM) systems in order to protect their copyrights in the digital realm. These systems are technologies that protect works and automatically manage rights at all times, no matter who has possession of the work or where the work is located. Though copyright holders argue that DRM systems protect their rights, many users and user groups argue that DRM systems hinder lawful access to works and threaten the balance between private and public stakeholders in copyright discourse. The implications for institutions such as libraries are particularly chilling, as DRM systems can hinder not only the day-to-day activities of libraries, but also affect their ability to preserve works and access to these works for future generations.

This report is an examination of some of the key issues and debates surrounding the use and implementation of DRM systems, with particular attention paid to the implications of protection for DRM technology in copyright legislation. The first few sections define digital rights management and explain the difference between DRM and technological protection measures, as the two are often confused. The next several sections explain both why DRM systems are felt to be necessary by some rights holders, and also why these systems are regarded as highly problematic by the user community, with particular emphasis placed on the issues facing libraries in regards to DRM technology. The report then provides a brief snapshot of how the discourse surrounding DRM is being expressed in several countries, including the United States, Australia, the United Kingdom and the countries of the European Union. Several alternatives to the use of DRM systems are then explored. The report concludes with some general remarks, and makes recommendations based on the needs of Canada's research library community.

It is likely that DRM systems will continue to remain popular with rights holders as a means of controlling access to their works. Proponents of DRM have suggested that without legislative protection of these systems, digital piracy and infringement will remain rampant. Whether these systems should be protected by federal legislation, however, remains a highly contentious issue, as user groups insist that protection of these systems could have chilling implications for the future of research and dissemination in Canada. It is vital that the concerns of both rights holders and users be heard and understood by legislators before changes are made to Canada's *Copyright Act*.

2.0 What is Digital Rights Management (DRM)?

Digital rights management refers to the protection, or ‘management’ of copyrights in the digital realm. This protection is accomplished through use of any of several technologies that are “used to control access and usage of digital data or hardware”, such as encryption, surveillance mechanisms, licence management functionality and technological protection measures.¹ Essentially, DRM allows a copyright holder to control what someone else can do with their intellectual property, no matter where the work is located.

Products such as Apple iPod, Xbox, Playstation and Windows Vista all employ DRM systems. For example, iTunes, the digital media application for playing and organizing digital music and video files introduced by Apple in 2001, is free to download but comes with many DRM restrictions. The music files users purchase through the online iTunes store are encoded as Advanced Audio Coding (AAC), a format supported by iPods, and DRM is applied through Fairplay. FairPlay digitally encrypts AAC audio files and prevents users from playing these files on unauthorized computers. An intentional limitation of Fairplay is that iTunes customers are prevented from using the purchased music on any portable digital music player other than the Apple iPod, Motorola ROKR E1, Motorola SLVR, or iPhone. Apple also reserves the right to alter its DRM restrictions on the music downloaded by users at any time.

DRM systems are also currently being used on e-books from multiple publishers, such as those from VitalSource Technologies. The company produces books encoded with DRM called VitalBooks, which constitute not only novels, but also academic and scientific works. VitalBook textbooks are delivered to students by being preinstalled onto the hard-drive of a student’s computer via download, which the students purchase instead of printed version. The VitalBook titles are readable only on a computer the user has authorized, and can be transferred to other systems. Titles are owned by the user, who has printing and copy/paste capabilities.

DRM systems frequently limit access to a work. The technologies may, however, be used to facilitate access, as evidenced by the British Library in its secure electronic delivery service, which permits worldwide access to substantial numbers of rare documents that were previously only available to authorized individuals actually visiting the Library's document centre in England. It is uncommon, though, for DRM systems to increase access to restricted material as opposing to reducing it.

3.0 What is a Technological Protection Measure (TPM)?

A technological protection measure is one form DRM technology may take. TPMs are generally devices designed to control access to, or restrict use of, digital works, including the duplication of works. TPMs are often classified by function. Some control access to

¹ “Digital Rights Management.” Canadian Internet Policy and Public Interest Clinic. <
<http://www.cippic.ca/en/faqs-resources/digital-rights-management/>>

works, while others control how a work can be used. Many, however, display characteristics of both these functions.

Access Control TPMs are the equivalent of a virtual lock. Common methods used to identify whether a person is authorized to view information are passwords and cryptography. Use Control TPMs control how a work may be used, even once access has been obtained such as when the user purchases the work. This type of TPM is also referred to as a Copy Control TPM, as protection measures to prevent copying of a work are the most frequently utilized.

TPMs do not refer to the legal remedies available to publishers and authors whose copyrights have been violated. Nor can TPMs be seen as identical to DRM, as DRM systems do not necessarily have to employ TPMs (though most do), and DRM systems can also involve surveillance mechanisms and databases of works, owners and users. TPMs are only one type of DRM technology.

4.0 Why do Copyright Owners and Publishers Feel DRM and TPMs are Necessary?

For many copyright owners, these systems are a way in which they can maintain some degree of control over electronic access to their works at a time when the Internet has made unlawful access and copyright infringement wide-spread and seemingly unstoppable.

Digital piracy is both possible and profitable. Many rights holders feel that is necessary to protect digital works to a greater degree than their non-digital counterparts, as duplications of digital works tend to be of much greater quality, and therefore potentially worth more on the 'black market' for infringed material, than the duplication of a work through non-digital means, such as through photocopying. DRM, if used correctly, may be an effective method of protecting images, documents and other intellectual property from being stolen. DRM systems allow the creators of digital works to have the power to control the distribution and/or replication of copies of their works.

DRM can also be seen as a means to restore market equilibrium, as some rights holders feel the market has unfairly shifted to benefit users at their expense. DRM systems, therefore, can be used to prevent unauthorized duplication of works to ensure continued revenue streams. DRM systems allow the creators of digital works to have the power to control the distribution and/or replication of copies of their works.

5.0 What are the Problems Associated with DRM from a User's Standpoint?

Conversely, for many users of copyrighted works, these systems have little to do with either protection or rights. TPMs and DRMs drastically alter the way in which users can access the works they purchase. These measures can result in a loss of control for the user, a possible

invasion into the user's privacy, and in some cases appear to override federal legislation itself.

5.1 DRM can result in a loss of control for the user.

Problems can arise when a consumer purchases online access to content that is secured using a TPM such as a device binding tool. Device binding means a file is accessible only on a specific device, generally a computer, and is inaccessible from other devices, such as a different computer. This creates two problems directly related to a loss of control for the user. First, the user will be unable to access content from any other computer. This is problematic as many individuals use more than one computer- for example, they may wish to access the content from both their desktop computer and laptop. The second problem also relates to accessibility. Though the consumer may be a legitimate user, they may lose access to the content if the computer crashes. For example, the hard drive bearing the ID used by the device binding mechanism may fail, and thus need to be replaced by another hard drive. As this new hard drive would not have the ID used by the device binding mechanism, the consumer would be unable to access content that they had legally purchased.

5.2 DRM can result in an invasion of the user's privacy.

The use of DRM systems can override fundamental privacy protections accorded to the public, through both use of DRM technologies themselves as well as through the standard form-licences that these technologies implement. DRM technology frequently uses surveillance to monitor and collect information detailing how people access and use copyrighted material and other legislation. The nature and level of detail of the information collected, however, is unprecedented. As noted by 'Canada's Privacy Community,' DRM implicates privacy "because its continuous surveillance function can provide copyright holders with highly detailed information about the reading, browsing, listening and viewing habits of individuals."²

Rootkits, a form of DRM technology, can have drastic implications for a user's privacy. Rootkits are a set of tools used by third parties to gain unauthorized access to computer systems. Many rootkits hide deep within a computer's operating system to hide the fact that certain software files exist or that the computer is performing certain functions. Once the third party has gained access, sensitive information can be downloaded from the machine, such as passwords and financial information.

SonyBMG's use of rootkit DRM technology sparked widespread public outrage in 2005. Sony copy-protected its music CDs using a software called Extended Copy Protection. This software is a DRM tool that is intended to prevent copyright infringement and the creation of unauthorized copies of the work. In addition to preventing infringement, however, the software also downloaded itself onto users' computers without their explicit consent and in many cases, without their knowledge of the download at all. Not only was this a major

² "Background Paper: Critical Privacy Issues in Canadian Copyright Reform." 2006: 5.

violation of users' privacy, the rootkit also left the computer vulnerable to attack from other spyware and viruses. While SonyBMG did eventually release a patch to remove the rootkit from users' systems, the patch itself was poorly designed and came with its own privacy and security risks.

5.3 DRM, in some cases, appears to override federal legislation.

DRM systems afford limited access to the works which they protect. Thus, DRM systems have the potential to protect works for an indefinite period, even after the copyright has expired. This could result in a permanent 'lock down' of the public domain, thus upsetting the principle implicit in copyright legislation of balancing the interests of both creators and users or works.

The proliferation of user licences, coupled with the increasing use of DRM system to protect digital works, has led to a shift where consumers now lease works, as opposed to actually owning the copy of the work they purchase. Licences do not confer ownership rights. They merely specify the conditions under which copyrighted works can be used. With increasing frequency, copyright holders are using the terms of these licences to override existing legislation. As articulated by Guibault:

“Concerns arise from the possibility that an unbridled use of technological measures coupled with anti-circumvention legislation and contractual practices would permit rights owners to extend their rights far beyond the bounds of the copyright regime, to the detriment of users and the free flow of information. The copyright bargain reached between granting authors protection for their works and encouraging the free flow of information would be put in serious jeopardy if, irrespective of the copyright rules, rights owners were able to impose their terms and conditions of use through standard form contracts with complete impunity. If this were the case, the copyright regime would succumb to mass-market licenses and technological measures. Unless the legislator clarifies the issue, these concerns may become all too real with the gradual implementation of electronic copyright management systems, whose works are based on technology and contractual relations, with the generalization of mass-market licenses as the main vehicle for transactions in information ...”³

The apparent ability of DRM systems to override federal legislation through licensing agreements raises concerns not only about the power of these relatively recent systems, but also about the supremacy of Canadian legislation in its own jurisdiction.

³ L. Guibault, "Contracts and Copyright Exemptions," In Copyright and Electronic Commerce: Legal Aspects of Electronic Copyright Management. Ed. B. Hugenholtz. The Hague: Kluwer Law International, 2000.

5.4 Flawed DRM systems cannot be criticized in certain countries for fear of civil and possible criminal penalties.

Legislative protection of DRM systems has typically been quite extreme, particularly in the United States. Not only are individuals prohibited from circumventing DRM systems, in several noted cases, individuals have faced legal sanctions simply for discussing anti-circumvention technologies on American soil. This section will briefly describe two of these cases.

Sklyarov

In 2001, Dmitry Sklyarov, a Russian doctoral student and computer programmer, was arrested and jailed by American law enforcement over alleged software copyright infringement. Sklyarov had created a program his employer, ElcomSoft, called 'The Advanced eBook Processor,' which would allow a user to decrypt Adobe Acrobat PDF files and eBooks. Adobe Systems complained to law enforcement that the software violated protection measures embedded in its eBook file format. Although Adobe eventually withdrew its complaint, the United States Department of Justice decided to pursue the case.

After giving a presentation entitled "eBook's Security- Theory and Practice" at the DEF CON convention in Las Vegas on July 16th, Sklyarov was arrested by the FBI and charged with distributing a product designed to circumvent copyright protection measures, under the terms of the Digital Millennium Copyright Act. It is significant to note that Sklyarov did not actually commit an infringing act while on American soil. As well, the creation and use of the software was legal in Russia, both home to Sklyarov and the ElcomSoft Corporation. Essentially, Sklyarov had been arrested for committing an action that was perfectly legal in his jurisdiction.

Widespread outrage and public protest followed the arrest, as well as calls to boycott Adobe, which had initially supported the arrest.⁴ On August 6th, Sklyarov was released on \$50 000 bail but forced to remain in Northern California. The charges against Sklyarov were eventually dropped, and on December 17th, 2002, ElcomSoft was found not guilty of all charges under the DMCA.

Felten

Edward Felten is a professor of computer science and public affairs at Princeton University. In 2000, he and several colleagues participated in a contest devised by the Secure Digital Music Initiative (SDMI). SDMI was an initiative of more than 200 companies and organizations representing information technology, consumer electronics, security technology, the worldwide recording industry, and Internet service providers, to create a digital audio watermark to prevent infringement of music online. SDMI published the code for its software and offered \$10 000 to anyone who could remove the watermark and other TPMs embedded in the code. Despite having only three weeks to work on the decryption,

⁴ By July 23, 2001, however, Adobe backpedaled and released a statement along with the Electronic Frontier Foundation, calling for Sklyarov's release.

Felten and his team were able to crack the algorithms protecting the digital content, and thus remove the watermark.

In 2001, Felten prepared a paper detailing the methods used by his team to crack the technological protection measures. He was subsequently threatened with legal action, as under the DMCA, distribution of technology that circumvents protection measures and/or removes or alters copyright management information is prohibited. Felten declined to give the presentation, instead opting to read a brief statement about the threatened legal action.

Felten later presented his paper at the USENIX security conference in 2001. The Department of Justice has offered Felten and other researchers assurances that the DMCA does not threaten their work, and has stated that the legal threats were invalid.

6.0 What are the Concerns for Research Libraries?

The implications of these systems for librarians and archivists are particularly ominous. TPMs and DRMs have the capacity to prevent librarians from carrying out legitimate library functions, such as preserving content for archiving, for research purposes and for disabled access. The British Library sees this as an “international issue,” and has called for clarification within the *Copyright Act* to recognize the changing technological environment.

6.1 DRM can interfere with preserving content for archiving or research purposes.

As technology changes, librarians will need to transfer work from one format to another. If works are encrypted with DRM systems, however, librarians may be unable to duplicate works in the new format required. As well, if anti-circumvention laws are in place, altering the format of a work may prove to be a difficult-to-impossible task for libraries. The same issues apply to repairing damaged works. A librarian may need to make a copy of a work in order to repair damaged material. Without an anti-circumvention exception for libraries explicit in legislation, repairing and preserving content may become infringing activities.

Even if libraries are granted an exception under copyright legislation, they may not have the resources available to remove DRM systems from works. Although an exception from anti-circumvention legislation is necessary for libraries, it is not enough to ensure that they will be able to actually circumvent DRM systems and access an unencrypted form of the work.

That said, the most satisfactory solution would be the right to change to new formats as technology develops and as circumstances require, rather than relying on ‘at risk’ as the only criterion.

6.2 DRM can impact the ability of a library to provide services for its disabled patrons.

Digital copy protection may affect the ability of a library to provide services for its disabled users, such as transcribing works into an alternate format. DRM can also affect the ability of a library to provide works for its disabled patrons at all, as the library may be unable to provide works in a format the patron's computer can read, such as a perceptually disabled person's computer being unable to 'read' software due to TPMs. If libraries do not have permission to remove TPMs under federal legislation, obtaining permission to remove the TPM may be quite time-consuming, thus causing a lengthy wait for the patron. Even if libraries are covered under an exemption, there remains the problem of just how, exactly, library staff will be able to remove the TPM. If the publisher is not available, the library may have to hire a technician, potentially at considerable cost, thus stretching many libraries' limited resources even further.

6.3 DRM can impact a library's distance education services.

DRM can eliminate rights that are accorded to distance education. DRM can prevent distance education institutions from storing and transmitting content, especially if the material is protected through a licence that only guarantees access for a limited time frame. Institutions may need to repurchase materials every teaching session/year. This is particularly problematic for distance education, which tends to rely on digital materials. Through restrictive licensing agreements and DRM systems, the provision of distance education services may become quite costly, and thus increasing impractical for libraries to provide.

7.0 DRM Around the World

Although a relatively recent phenomenon, the implementation of DRM systems has far-reaching implications, both in Canada and around the world. The following section is a snapshot of some of the more recent developments and debates surrounding DRM systems and TPMs in the United States, Australia, the United Kingdom and the European Union. The section concludes with a brief examination of the current Canadian situation.

7.1 United States of America

To date, the United States is the only country with a significant body of decisions demonstrating how protection of DRM systems and anti-circumvention legislation have been interpreted by their courts. The 1998 *Digital Millennium Copyright Act* contained specific obligations to the 1996 WIPO treaties, including the prohibition of a TPM that effectively controls access to a work subject to copyright.

The DMCA criminalizes the production and dissemination of technology, services or devices that are used to circumvent DRM. It also criminalizes the act of circumventing an

access control, such as a TPM, even when there is no infringement of copyright itself. Infringement of copyright on the Internet is now subject to heightened penalties.

The DMCA contain several specific exceptions allowing the circumvention of a TPM in particular cases, including reverse engineering and an exception for non-profit libraries, archives and educational institutions. Concerns remain, however, that application of the DMCA may result in impairment of fair use doctrine under American law, a digital lock-down of the public domain, inadequate privacy for protection for individuals using works encrypted with TPMs and a chilling effect on the research and development community, as evidenced by the Sklyarov and Felten cases. Most significantly, the DMCA is seen as having skewed the balance of copyright policy towards private rights holders, to the detriment of the public interest.

7.2 Australia

The *Australia-US Free Trade Agreement*, which came into effect January 1st, 2005, contained obligations for Australia to increase protection of TPMs through legislative means. Australia has now fulfilled its obligations through an amendment to the *Copyright Act 1968*. The amendments were introduced by the *Copyright Amendment Act 2006* which received royal assent on 11 December 2006, with the relevant provisions having come into effect on 1 January 2007.⁵

Existing legislation already provided criminal penalties for dealing in circumvention devices. *The Copyright Amendment Act 2006* was designed to strengthen the laws surrounding manufacturing, importing, offering and providing devices, and offering and providing services that may be used to circumvent TPMs.

Significantly, an offence for using a circumvention device to break a TPM in circumstances where the person knows, or ought reasonably to know, that using the device in that manner would have that effect has been introduced. Prior to this time, it was not an offence to use a circumvention device.

The *Copyright Amendment Act 2006* provides specific exceptions to liability for using a circumvention device. These include circumvention for the purpose of encryption research, provided the researcher has obtained permission from the rights holder, and circumvention for the purpose of maintaining online privacy, where it is done for the sole purpose of identifying and disabling the undisclosed capability to collect or disseminate information about the online activities of a user. The Amendment also provides a specific exception for libraries and educational institutions, allowing them to use circumvention devices for the purpose of preservation.

⁵ To view the Australian *Copyright Act* in its entirety, please see: <http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/>

7.3 United Kingdom

In recent years, the debate on Intellectual Property reform in the U.K. has become increasingly polarized as digital media transforms the way information is stored, shared and copied. The British Library, the national library of the U.K., has been determined to ensure that its voice is heard in the discourse of IP reform. To that end, in September 2006 the British Library released its IP Manifesto.

The IP Manifesto's key recommendations include:

- Existing limitations and exceptions to copyright law should be extended to encompass unambiguously the digital environment;
- Licenses providing access to digital material should not undermine longstanding limitations and exceptions such as 'fair dealing'
- The right to copy material for preservation purposes – a core duty of all national libraries – should be extended to all copyrightable works;
- The copyright term for sound recordings should not be extended without empirical evidence of the benefits and due consideration of the needs of society as a whole;
- The US model for dealing with 'orphan works' should be considered for the UK; and finally,
- The length of copyright term for unpublished works should be brought into line with other terms (i.e.: life plus 70 years).⁶

Although the government has rejected calls to ban DRM in the U.K., it has recognized that the technology could undermine users' rights. On February 19th, 2007, the U.K. government explicitly acknowledged that the "needs and rights of consumers must... be carefully safeguarded."⁷

7.4 European Union

The *WIPO Copyright Treaty* has yet to be implemented in the European Union, although the first stage, the adoption of the EU Copyright Directive, has been achieved. The Directive is concerned with the harmonization of certain aspects of copyright and related rights, in order to implement most of the *WIPO Copyright Treaty* provisions.

The Copyright Directive includes a number of review mechanisms. These include Articles 12, in which the European Commission, every three years, shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of the Copyright Directive that will examine whether acts that are permitted by law, such as creating alternate formats for persons with perceptual disabilities, are being adversely affected by the use of legislatively protected technical measures.

⁶ To read the IP Manifesto in full, please see < <http://www.bl.uk/news/pdf/ipmanifesto.pdf>>

⁷ "U.K. Government Rejects Calls for DRM Ban." CNet News. < http://news.com.com/U.K.+government+rejects+calls+for+DRM+ban/2100-1028_3-6160760.html>

Full ratification can only happen when all EU members have implemented the Directive, and this is expected within the year. Copyright legislation will continue to remain unique to each country within the EU. Each country's rightsholders' lobbies will be different, and this will affect the outcome of copyright legislation in each country. Copyright law will also continue to reflect each individual country's cultural traditions and business practices.

8.0 The Canadian Situation

In 2003, the House of Commons Standing Committee on Canadian Heritage, chaired by Liberal M.P. Sarmite D. Bulte, was given the task of reviewing the operation and potential reform of the Copyright Act in light of the government's October 2002 report *Supporting Culture and Innovation: Report on the Provisions and Operations of the Copyright Act*. In May 2004, the Committee issued its *Interim Report on Copyright Reform*, commonly known as the "Bulte Report." The Report recommended that Canada pass laws to implement both the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty.

In June 2005, Bill C-60, *An Act to Amend the Copyright Act*, was introduced in the House of Commons. The bill addressed several WIPO Treaties implementation issues, including legal protection for technological protection measures and rights management information. Although Bill C-60 did not expressly prohibit the circumvention of TPMs, it did provide copyright owners and other rights holders with remedies against the circumvention of TPMs in certain situations, such as the circumvention of a TPM for the purpose of infringing copyright. Rights Management Information (RMI), which is information attached to a material form of a work that permits identification of that work or its author and describes conditions or terms of its use, was also protected under Bill C-60. As with the protection for TPMs, the Bill did not state that removal or alteration of RMI was an infringement of copyright, but rather provided copyright owners and rights holders remedies if an alteration of RMI facilitates or conceals an infringement of the owner's copyright.

Bill C-60 received its first reading in the House of Commons on June 20th 2005. Its second reading was scheduled for the fall of 2005. On November 29, 2005, however, the opposition to the government tabled a non-confidence motion that passed, which dissolved Parliament and effectively killed the bill.

What will happen next remains to be seen, as the current government has yet to table a similar bill. It is virtually certain, however, that proposed changes to the Copyright Act will be forthcoming. Michael Geist reports that, provided there is no election, the Conservative government will introduce new copyright legislation within the next several months. The legislation is purported to be a "Canadian DMCA", with much tougher anti-circumvention laws than those proposed in Bill C-60.⁸ If such legislation is in fact tabled, it will create considerable controversy and debate among both creator and user groups.⁹

⁸ M. Geist. "Canadian DMCA to be Introduced this Spring." <
<http://www.michaelgeist.ca/content/view/1875/125/>>

⁹ User groups have already begun to petition the Conservative government regarding TPMs, as evidenced by a petition presented by Timmins-James Bay MP Charlie Angus to the House on

9.0 What Does the *WIPO Copyright Treaty* Have to Say About DRM, TPMs and RMI?

Article 11 Obligations concerning Technological Measures

“Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”

Article 12 Obligations concerning Rights Management Information

“(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

- (i) to remove or alter any electronic rights management information without authority;
- (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.”¹⁰

Although Canada signed the both the *WIPO Copyright Treaty* and the *WIPO Performance and Phonograms Treaty* in 1997, the country has yet to ratify them. The Canadian government is determined to bring the *Copyright Act* into compliance with the WIPO treaty obligations, but only after thoroughly analyzing and consulting on the issues. Ultimately, however, “the purpose of ratification is to ensure that Canadian rights holders will benefit

March 27th, 2007. The petition, signed by thousands of individuals Canadians, as well as by organizations such as Canada’s Privacy Community, the Canadian Music Creators Coalition, the Canadian Federation of Students and the Canadian Library Association, calls for Parliament to “prohibit the application of a technical protection measure to a device without the informed consent of the owner of the device and to prohibit the conditioning of the supply of content to the purchase or use of a device, which has a technical measure applied to it.” For more information, see the edited Hansard of the 1st session of the 39th Parliament, found at <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=39&Ses=1&DocId=2812107#SOBQ-1988110>>

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=39&Ses=1&DocId=2812107#SOBQ-1988110>

¹⁰ “WIPO Copyright Treaty”. World Intellectual Property Organization. <http://www.wipo.int/treaties/en/ip/wct/trt_docs_wo033.html#P87_12240>.

from copyright protection recognized in all treaty countries.”¹¹ Whether users will also benefit from the implementation of WIPO treaty obligations remains doubtful. As evidenced in the United States, implementation of the treaty obligations can result in restrictive legislation which unfairly benefits rights holders to the detriment of the user community.

10.0 What Are Some Alternatives to DRM?

Digital Rights Management and Technological Protection Measures are not the only means by which intellectual property may be protected in the digital environment. Additionally, many copyright owners in Canada and abroad are currently able to protect their works without the need for legislative protection of DRM and TPMs. Alternatives to legislative protected DRM include using technology such as password protection to prevent copyright infringement and using nonexclusive Creative Commons licensing to define what rights an author or rights holder is reserving.

10.1 Using technology to uphold current copyright legislation.

Some publishing companies are attempting to use technology to uphold current copyright law, such as Taylor & Francis, located in the United Kingdom. Users are given 45 minutes to browse a publication before making a purchase. The company also allows users to print or download from a book a range from one page up to one chapter, up to a limit of 5% of a book. The printing or saving range is similar to photocopying costs. Using this method, money goes directly to the copyright owner, and not to the photocopier owner.

10.2 Using Creative Commons licensing.

Creative Commons is a Massachusetts-chartered 501(c)(3) tax exempt charitable organization, which was founded in 2001. Its Canadian counterpart, Creative Commons Canada, was founded in 2003 with support from the University of Ottawa Law and Technology Program and the Canadian Internet Policy and Public Interest Clinic.

The goal of Creative Commons is to restore “[b]alance, compromise and moderation” to the discourse of copyright.¹² Creative Commons makes licences and tools available to enable rights holders to licence their works on more flexible terms than those most frequently seen in the discourse. Using a Creative Commons licence, people can dedicate their creative works to the public domain or retain their copyright while licensing their works as free for certain uses, under certain conditions. In addition, Creative Commons licences are non-exclusive, meaning that a person can have a Creative Commons licence, letting the public access and use their work for free, and also enter into a different nonexclusive licence with another company for the purpose of making money from the work.

¹¹ “Copyright Reform Agenda.” Copyright Reform Process. <<http://strategis.ic.gc.ca/epic/site/crp-prda.nsf/en/rp00875e.html>>

¹² “History.” Creative Commons Canada. <<http://creativecommons.ca/index.php?p=history>>

Creative Commons is in the business of digital rights “expression”, not management. Though Creative Commons licences assist rights holders in expressing the rights they are reserving, the tools for enforcing the rights the author is preserving are not provided.

If a person attempts to protect a Creative Commons licensed work using DRM, they are violating the licence. All Creative Commons licenses prohibit licensees from “distributing the Work with any technological measures that control access or use of the Work in a manner inconsistent with the terms of this License Agreement.”¹³

Proponents of Creative Commons licensing believe that increased use of DRM systems, and legal protection of these systems, will not solve the problems of digital piracy and copyright infringement. Instead, they feel that the end result of widespread use of these systems may be that creativity in the digital realm is stifled.

“If creators and licensors have to negotiate not only complicated legal rules, but also burdensome technical barriers, many will either ignore the rules or not create... But more importantly, we believe, technological enforcement burdens unplanned creative reuse of creative work. We want to encourage such use. And we, along with many others, are concerned that the ecology for creativity will be stifled by the pervasive use of technology to “manage” rights... Copyrights should be respected, no doubt. But we prefer they be respected the old fashioned way — by people acting to respect the freedoms, and limits, chosen by the author and enforced by the law.”¹⁴

11.0 Conclusion: Remarks and Recommendations

With new copyright legislation likely to be introduced this year in Canada, it is crucial that the Canadian research library community lobby the government on the issues affecting content preservation and access, including the circumvention of DRM technologies such as technological protection measures. In order to ensure continued access, both for today’s and future generations, recognition of the unique role libraries play in facilitating research must be acknowledged through an explicit exception for libraries from legislation that hinders the research process and scholarly communication. At the same time, the rights of copyright holders must continue to be protected. Although rights holders should be able to protect their digital works using various technologies, this protection should not come at the expense of users’ privacy or rights accorded under current copyright legislation.

¹³ “Frequently Asked Questions.” Creative Commons. < <http://wiki.creativecommons.org/FAQ>>

¹⁴ Ibid.

Recommendations¹⁵

Circumvention of technological protection measures (TPMs) for lawful uses of copyright material must remain legal.

If the copyright law prohibits circumvention of a TPM for any purpose, it would be illegal for CARL libraries to use copyright material in circumstances that are legal today. For example, circumventing a TPM to copy pages to repair a damaged book, which is permitted under the maintenance and management exception in section 30.1, could become unlawful.

An absolute prohibition against circumvention of TPMs could result in possible invasions of privacy and restrict research and development in new technology. It could also upset the public policy balance between copyright owners and users.

Copyright reform must ensure that unintended restrictions on computer users' privacy rights are not put in place.

If all acts that circumvent technological protection measures are illegal, then the public has lost the right to exercise personal choice to protect its privacy.

Section 30.1 of the Copyright Act should be amended to permit the making of a copy in an alternate format when the format of the original is at risk of becoming obsolete or the technology required to use the original is at risk of becoming unavailable.

The current exception that permits a library, archive or museum to make a copy of a work, under certain circumstances, for the purpose of maintaining or managing its permanent collection, included a provision relating to technological obsolescence.

The provision, however, is problematic, in that, as it is written, it would appear to apply only after the format of the original has become obsolete or the technology required to use the original has become unavailable. In order to effectively manage and maintain works in their collections that are in digital formats, libraries, archives and museums will have to transfer these works to new formats and to new technological environments while the technology that enables them to access and read the original digital format is still available. Once the technology becomes unavailable transferring the work may in fact be impossible.

¹⁵ Several of the recommendations were taken from a pre-existing CARL submission to the House of Commons on "Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act." < <http://www.carl-abrc.ca/projects/copyright/pdf/CARLSubmissionfinal-e.PDF>>

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