

DRMS or TPMs and Access to Knowledge

Barbara Stratton

Senior Copyright Adviser, CILIP

Secretary to LACA: the Libraries and Archives
Copyright Alliance

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- DRMS/ Digital Rights Management Systems is a generic term for a suite of technologies which identify, protect and manage intellectual property in digital form.
 - ❖ DRMS comprise **Rights Management Information (RMI)** and **Technological Protection Measures (TPMs)**
- RMI identify digital works and manage the provision of material to customers.
 - ❖ Transmit information about the use of the product to the rightholder e.g. one purpose would be to enable remuneration to authors etc.
- TPMs enforce the licence terms and may restrict access and use. They prevent unauthorised copying.
- RMI expresses the rightholders' intent. TPMs ensures that this is honoured. (*Intellect* evidence to APIG, 2006).

Terminology: DRMS, RMI, TPMs?

- Circumvention of TPMs / removal of RMI prohibited by
 - ❖ WIPO Copyright Treaty 1996 (WCT)
 - » Arts.11 (TPMs) & 12 (RMI)
 - ❖ Information Society (InfoSoc) Directive (2001/29/EC) implementing WCT
 - » Arts 6 (TPMs) & 7 (RMI)
 - ❖ UK Copyright Designs and Patents Act 1988 implementing InfoSoc Directive (CDPA s.296)

The Legislative Framework

➤ DRMS a Trojan horse for control?

- ❖ So regarded by a number of pro-user technology lobbyists
- ❖ Digital *Restrictions* Management Systems
- ❖ TPMs can be seen as an instrument which transforms copyright from an economic right to control reproduction or use of the work into a direct control by the owner over the user.
 - » **This is a dramatic change not directly sanctioned by any legal instrument** - could have implications for people's human rights

Disadvantages to Users

➤ RMI

- ❖ Can monitor intellectual consumption and user behaviour
- ❖ They invade a sphere with sensitive personal data potentially revealing political convictions, religious or philosophical beliefs, sexual orientation or race.
- ❖ The consumer will often be ignorant of these monitoring devices or the information they collect and will have no control over its use by the DRM controller
- ❖ Such data need the full protection of data protection laws.
- ❖ In a post 9/11 situation with anti-terrorism laws increasingly invading people's privacy, the information collected by RMI may become accessible to government agencies.

Disadvantages to Users - RMI

➤ Statutory Exceptions & Limitations

- ❖ TPMs can prevent users from copying (including printing) digital material for fair dealing or public administration purposes provided by statute
- ❖ For research or private study (CDPA s. 29)
- ❖ To quote for criticism and review, or for the reporting of current affairs (CDPA s.30)
- ❖ For the conduct of judicial or parliamentary proceedings or Royal Commission and other statutory inquiries (CDPA ss.45-46)

Disadvantages to Users - TPMs (1)

➤ Print disabled people

- ❖ TPMs on many products are contravening disability discrimination law (SENDA, DDA, CDPA s.31A-F)
- ❖ They often prevent legitimate copying for the production of accessible copies for 'print disabled' people and the deployment of 'read aloud' software to aid the visually impaired.
- ❖ Visually impaired people have additional statutory rights (CDPA s.31A-F) allowing them to have works converted into accessible formats in a timely manner, yet these rights can be adversely affected by TPMs, leaving them without access to that material.

Disadvantages to Users - TPMs (2)

➤ Licensing

- ❖ Libraries own analogue print publications but they do not own copies of digital works – they can only **buy access** to them by **licence**.
- ❖ Many libraries can only obtain non-negotiable digital licences
- ❖ Rightholders have monopolies on their information so Libraries are often in inferior bargaining positions
 - » Unless libraries are very big or members of major purchasing consortiums able to afford lawyers and negotiate ‘big deals’ – even then they can come off worse.
- ❖ Libraries do not have consumer protections

➤ Licences are **contracts**

❖ Contracts in the UK may override copyright Exceptions

“...Digital material generally comes with a contract, and these contracts are nearly always **more restrictive** than existing copyright law and frequently prevent copying, archiving and access by the visually impaired.”

(Lynne Brindley, CEO British Library, BL Press Release 05/06/06)

➤ From a sample of 30 licences offered to the BL

❖ Only 2 provided access compliant with statutory fair dealing (28 did not).

❖ Other than these, only 2 allowed archiving

❖ None permitted copying of the whole work by visually impaired people.

(BL Press Release 05/06/06)

- Most TPMs make copyright **perpetual**
 - ❖ This goes against the long-standing principles of all existing intellectual property laws.
 - ❖ TPMs don't expire when copyright expires
 - » The ownership of the rights may be impossible to trace rendering the product orphaned. Probable that no key would still exist to unlock the TPM.
 - ❖ However most DRMS last about 5 years
 - » They can be withdrawn yet still lock up the work e.g. one at the BL with a life of 3 years has been withdrawn from service, so in 3 years time no one will be able to access the content it protects.

(APIG Oral Evidence Transcript 02/02/06)

TPMs & Libraries: Perpetual ©

- Libraries are custodians of human memory
 - ❖ Many libraries need to keep their access to digital works in perpetuity
 - ❖ They may need to transfer them to other formats or new operating platforms
 - » In order to preserve them and continue to make the content accessible and usable
 - » While the work is in copyright and once out of copyright
- Libraries need to be careful about the digitisation deals they make, or
 - ❖ **Out of copyright content** in the **public domain** held in libraries in analogue formats, can, when digitised by commercial companies, become locked up by TPMs.

TPMs & Libraries:
Digital Preservation & Access

➤ InfoSoc Directive Article 6(4)

- ❖ Safeguard for users where TPMs deny enjoyment of statutory provisions for copyright Exceptions & Limitations.
 - » “in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned” for Member States to “take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law”.
- ❖ **Therefore doesn't apply to licensed works!**

➤ UK Secretary of State (DTI) can intervene

- ❖ If a claim is made that a TPM prevents a permitted act, provided no licence applies. (CDPA s.296ZE)

Statutory Safeguards

- S.296ZE fails to meet users' need for timely access to works and inspires little faith
- ❖ An order made by the Secretary of State can be ignored – Government can only name and shame.
 - ❖ Onus is put on the user to seek judicial redress.
 - ❖ Likely to be time consuming and expensive to the complainant.
 - ❖ More than 2 years since its introduction, The Patent Office hasn't introduced any complaints procedure.
 - ❖ Vague process serves to stifle complaints - no one has yet actually complained, though there have been enquiries.

UK implementation Art. 6(4):
CDPA s.296ZE

- Digital content could be lost forever unless urgent action is taken to provide libraries with reliable and accessible means *ab initio*
 - ❖ to secure keys to unlock protection measures
 - ❖ or to secure clean copies of digital works.

LACA Position on TPMs (1)

- Many TPMs interfere unacceptably
 - ❖ with users' and libraries' enjoyment of statutory Exceptions & Limitations
- There should be regular Government reviews
 - ❖ involving librarians and rightholders and an effective appeal system for TPMs.
 - » To determine exceptions to the prohibition against circumvention
 - » The Copyright Tribunal could be deployed as the appeal authority with enforceable judgments, and to provide a very swift 'small claims' procedure

LACA Position on TPMs (2)

- The Exceptions and Limitations to copyright in UK law were provided in the public interest.
- The copyright 'balance' between users and rightholders has, since the WIPO Copyright Treaties 1996 (WCT and WPPT) been precariously tilted by legislation towards rightholders in both the analogue and digital environments
- It is wrong for contracts and licences and their wholly protected TPMs to be able to remove statutory Exceptions and Limitations to copyright and further upset the copyright 'balance'.

LACA Position on Contracts & Licences

➤ WIPO Member States still discussing TPMs 10 years on

- ❖ Members beginning to recognise the problems that libraries, archives and print disabled people face
 - » BL and LACA responses & oral evidence to APIG Inquiry influential in Geneva this year
 - » Interventions by IFLA and eIFL (Electronic Information for Libraries) in the last year at WIPO also have had impact.

DRMS a Live Issue - WIPO

➤ Content Online in the Single Market

http://ec.europa.eu/comm/avpolicy/other_actions/content_online/index_en.htm#consultation

- ❖ EC Public Consultation (closed 13/10/06) – objective to establish a true European single market for online content delivery. **Communication** expected late 2006
- ❖ Commissioner Reding said at the **Public Hearing** held 11/10/06 that the Commission
 - » Sees DRM as a key to making online content more available
 - » Is looking for ways to guarantee adequate protection of copyrighted material as well as a “high level of consumer friendliness” without lowering consumer privacy and free speech rights

(*Intellectual Property Watch* 11/10/06 <http://ip-watch.org/weblog/wp-trackback.php?p=422>)

DRMS a Live Issue – Europe 1

➤ **EBLIDA response to Content Online**

http://www.eblida.org/position/Content_Online_Response_October06.doc

- Provision for public interests is being eroded. The few exceptional uses of copyright material to facilitate education and the diffusion of culture are sometimes obstructed by DRMS.
- In some Member States the statutory exceptions may be set aside by the contracts governing the delivery of online material.
- DRMS *are* an appropriate means to manage and secure the distribution of copyright material if, and only if, they are not merely designed to prevent access to the material. As mere protection measures they almost inevitably prevent authorised use as well as unauthorised use, because they do not recognise statutory exceptions allowing copying.
- DRMS would be excellent if they genuinely mediated (rather than prevented) access, and if they genuinely managed income amongst right holders but we know of no DRM system that seriously manages rights beyond restricting access until payment has been made.
- Libraries tend not to use DRMS because they usually promote their online services and products as a gratis public good.

DRMS a Live Issue – Europe 2

➤ All Parliamentary Internet Group (APIG)

- ❖ Inquiry into DRMS Nov 05-Feb 06
- ❖ Evidence submitted re library and disability issues by LACA, BL, SCONUL, Share the Vision, RNIB
- ❖ Report (launched at BL 5th June 2006 recommends *inter alia* that

- The Government consider granting a much wider-ranging exemption to the anti-circumvention measures in the CDPA for genuine academic research.
- When the advice from the Legal Deposit Advisory Panel has been received, the DCMS hold a formal public consultation, not only on the technical details, but also on the general principles that have been established.

DRMS a Live Issue – APIG (1)

- The DCMS review the level of funding for pilot projects that address access to eBooks by those with visual disabilities; and that action is taken if they are failing to achieve positive results.
- The government does NOT legislate to make DRM systems mandatory.
- The DTI revisit the results of their review into their moribund “IP Advisory Committee” and reconstitute it as several more focused forums.
- One of these should be a “UK Stakeholders Group” to be chaired by The British Library.
 - ❖ It should specifically address the complex issues surrounding DRM, not just from the point of view of experts on the technology, but with a wide-ranging membership that includes representatives of consumers, libraries and the creators of content – as well as the ‘usual suspects’ from the rights holders and content distribution industries.

DRMS a Live Issue – APIG (2)

➤ Gowers Review of Intellectual Property

- ❖ Report expected November 2006
- ❖ Apparently 900+ responses from UK and internationally
- ❖ DRMS also covered – APIG evidence sent to Gowers

➤ LACA Response included

- ❖ The ***LACA/Museums Copyright Group Joint Proposals for Revisions to CDPA***

www.cilip.org.uk/laca

- » The Proposals have also been submitted to the UK Patent Office

DRMS a Live Issue - Gowers

- Contracts should not be allowed to override and diminish the statutory exceptions and limitations to copyright provided in UK, European and international law.
 - ❖ This is the case in Ireland (Copyright and Related Rights Act, No. 28 of 2000 ss.2(10) and 57**(4))
 - ❖ This is also already the case in UK law but only with regard to *sui generis* right in original databases (CDPA ss.50D(2) and 296B)

- DRMS should be required to cease effect upon expiry of copyright
- The expiry of the copyright term should become a defence against circumvention of DRMS.
- Circumvention should be permitted
 - ❖ Where the TPM obstructs access by the user or their agent for the purpose of exploiting a statutory exception to copyright (or database right)

➤ Librarians and archivists should have a new Exception allowing them as **trusted intermediaries** to

- ❖ Circumvent TPMs and/or
- ❖ Require producers/publishers to give libraries and archives clean digital copies or the keys to TPMs *ab initio*, so that
 - » They can make copies which are permitted under statutory Exceptions and Limitations to copyright or database right, including providing accessible copies to print disabled people, and to support those with other disabilities
 - » They can migrate content to different platforms and formats in order to continue to make it accessible and to preserve it in digital form.

- Exceptions and Limitations to copyright already apply in the digital environment
- ❖ Provided by WCT Art. 10 Agreed Statement and the InfoSoc Directive
 - ❖ UK law is compliant with the above but is not specific on this point.
 - ❖ The **LACA/Museums Copyright Group Joint Proposals for Revisions to CDPA** are intended to clarify this.
 - ❖ The BL has also advocated for clarification in the law. See the BL **IP Manifesto** (25/09/06)
<http://www.bl.uk/news/2006/pressrelease20060925.html>

Negotiate good licences

- Improve market clout – wherever possible form purchasing consortia for e-products so you can negotiate licences
 - ❖ Get legal advice from an IP lawyer if necessary
- Try to avoid restrictions to Exceptions & Limitations
 - ❖ Insist on a clause which ensures none of the statutory exceptions to copyright are overridden by the licence
- Tell publishers/producers what is wrong with the licences – they may be willing to improve them
 - ❖ Consider not buying into bad licences - tell the vendor why
- If you encounter difficulties with TPMs
 - ❖ Consider publicising these even if governed by a licence
 - ❖ If no licence applies, complain to the Secretary of State (DTI) via the Patent Office

What can Libraries and Archives do?

- Digital environment is a new Frontier
 - ❖ Copyright balance main ground of contention between users and rightholders
- Librarians are in the vanguard of the debate
 - ❖ Not 'gate keepers' to information but **trail blazers to knowledge**
- Become activists in the cause of Access to Knowledge
 - ❖ Network - share information & examples - join relevant lists/newsletters (see next pages)
 - ❖ Educate your colleagues and users on the issues
 - ❖ Lobby your UK and EU politicians & civil servants

What can Librarians & Archivists Do?

- APIG Inquiry into DRMS 2006 <http://www.apig.org.uk/current-activities/apig-inquiry-into-digital-rights-management.html>
- American Library Association OITC – DRM and Libraries page <http://www.ala.org/ala/washoff/WOissues/copyrightb/digitalrights/digitalrightsmanagement.htm>
- Australian House of Representatives Inquiry into TPM Exceptions 2006 www.aph.gov.au/house/committee/laca/protection/report.htm
- BEUC (European Consumer Organisation) - Consumers Digital Rights page http://www.consumersdigitalrights.org/cms/index_en.php
- CPTech (Consumer Project on Technology) - Access to Knowledge page www.cptech.org/a2k (**a2k list**)
- drm.info www.drm.info New information portal launched 3rd Oct 06
- DRM Watch www.drmwatch.com/
- EBLIDA (European Bureau of Library, Information and Documentation Associations) Position on Digital Rights Management Systems http://www.eblida.org/position/DRMS_Position_Feb03.pdf
- European Digital Rights - **EDRI-gram Newsletter** www.edri.org

Selection of information sources (1)

- EFF (Electronic Frontier Foundation) DRM page www.eff.org/IP/DRM/
- GODWIN, Mike. Digital Rights Management: A Guide for Librarians. American Library Association OITC, January 2006
<http://www.ala.org/ala/washoff/WOissues/copyrightb/digitalrights/DRMfinal.pdf>
- INDICARE Monitor and Blog www.indicare.org
- LACA Consultation Responses www.cilip.org.uk/laca
- MUIR, Adrienne. Preservation, access and intellectual property rights challenges for libraries in the digital environment. IPPR, June 2006
http://www.ippr.org/ecommm/files/preservation_access_ip.pdf
- National Consumers Council - Consumers and Intellectual Property page <http://www.ncc.org.uk/intellectualproperty/index.htm>
- WEINGARTEN, Rick. Technological Locks on Information: Issues for Libraries. World Library and Information Congress 2003, Berlin 1-9 August 2003. <http://www.ifla.org/III/clm/p1/Weingarten03.pdf>

Selection of information sources (2)