

## Digital Rights Management or Digital Content Control,

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### Abstract

In quite a short time, the term Digital Rights Management (DRM) has conquered the world of copyright. The number of definitions given by law or IT professionals is inestimably high. Still, I try to give a new point of view on this matter, starting not so much from the practical realisation of DRM systems, but from the term itself. I wish to assert that DRM systems cannot be described as "digital rights management systems" as they usually do not involve the management of copyright.

### What does Rights Management mean?

The term „rights management” is not a new one in copyright; it has been in existence for several decades. As the European Commission states in its communication on the management of copyrights, „The term 'management of rights' refers to the means by which copyright and related rights are administered, i.e. licensed, assigned or remunerated for any type of use.” (source.). Briefly, rights management in my phrasing is:

- the licensing of relevant uses under an exclusive right based on copyright or related rights regulation (against payment, i.e. „royalty” or for free);
- the distribution of collected royalties (if it is not the rightsholder who carries out licensing in person);
- the prohibition of relevant uses under an exclusive right based on copyright or related rights regulation.

To sum up: in case of copyright management the right to license or prohibit a use is based on provisions of law. The following factors have to be explicitly regulated in law:

- the right itself;
- the uses that require a license;
- the person who holds the right;
- the limitations of copyright;
- the sanctions of infringements.

### What has to be excluded from the definition?

Now let me try to conclude in a negative way what activities can not be considered as „rights management”:

- *Permission or prohibition regarding contents that are not protected by copyright.* An example for this: someone has an idea that has commercial value, and intends to reveal this secret only to a person who gives money for his idea. Ideas as such are not protected by copyright; this activity is not rights management, but secrecy.
- *The permission or prohibition of activities not specified as relevant uses in copyright.* For example, when someone gives mere access or allows perception of the work only on condition of payment – the bookshop sells a book, the movie theatre sells tickets to the show. As the consumer does not carry out a relevant „use” (watching the movie, reading the book), the movie or the bookshop does not manage any copyright, they just exercise their proprietary rights. None of the consumers who steals a book or goes into the movie theatre without buying a ticket is a copyright infringer.

- *The permission or prohibition of activities specified as „free uses” in copyright law.* The term „free use” means an exception from the exclusive rights of the rightsholder. This term is often used also in cases where the use is not totally „free”, i.e. it is accompanied by payment in some form. This is the case when a phonogram producer uses a digital copy control system that prevents the consumer from making copies for his private purposes, for example to listen to that CD also in the audio system of his car. As private copying is free use under several jurisdictions, the prohibiting activity of the phonogram producer is not rights management – it is just taking advantage of a technical possibility.

### Why so-called DRM systems are not DRM systems

With the example of the copy-protected CDs we have arrived at the definition of so-called "DRM" systems. As most scholars agree, the term „digital rights management” can be understood in two ways: (a) rights management carried out in a digital way or (b) the management of digital rights. We can base our following arguments on any of these two approaches, as in both cases the *genus proximum* of DRM is „rights management”.

Now let us see, what the main DRM developer and provider companies present to us when trying to market their products. Their very simple model has three actors ( see Fig.1): the author, the consumer, and the DRMprovider that helps the author in protecting the work.

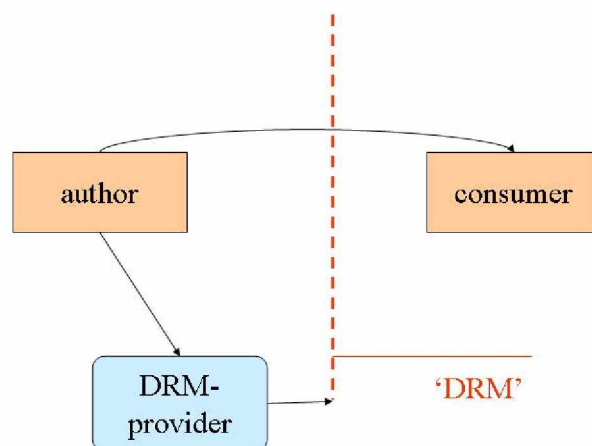
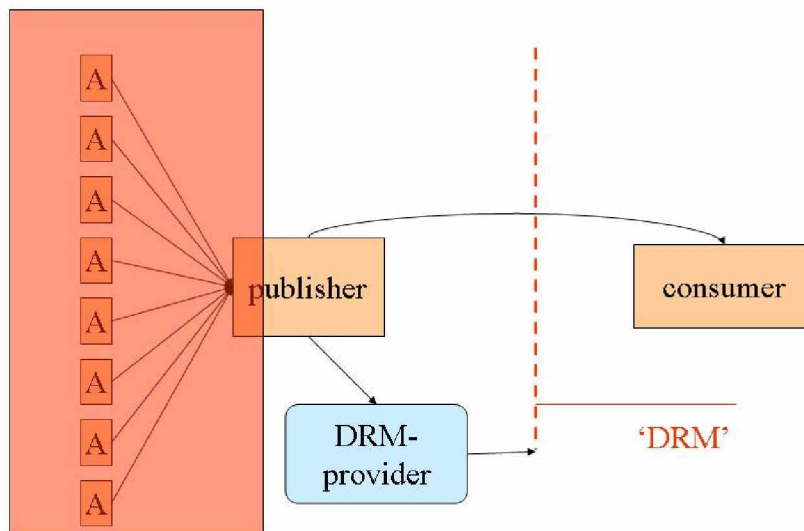


Fig.1.Simple model with three actors

There is one small, but not irrelevant problem with this model: it does not exist in practice. We proceed with more practical examples. In Fig.2 we see the model of an electronic magazine publisher.



*Fig.2. Model of an electronic magazine publisher*

On the left hand side there are the authors (journalists or scholars, photographers, graphic artists, etc., signed with 'A') of the periodical. They license the publisher to reproduce and distribute (or make available to the public) their works. The e-publisher sells the magazine to the consumers, and – in order to defend his financial interests – pays for the services of a DRM-provider to safeguard the content.

In this figure there is one activity that can be regarded as rights management – it is the licensing activity of the authors towards the publisher. Therefore rights management does not appear on the right-hand side of the picture (where the activity of the DRM-provider takes place), but happens on the left-hand side, where there is no DRM. The space where real „rights management” takes place is signed in red in Fig. 2.

If a consumer wants more than simple access to the works – for example he intends to republish some of the articles – he will not necessarily obtain a license from the publisher for it, he may have to agree with the authors directly. In most cases the agreement between the authors and the original publisher extends to other uses and also to sublicense other users, but in legal terms it is not necessary. Therefore it cannot be excluded that the relationship between the publisher and the consumer (seller and buyer) may also turn into „rights management”, but this is not imperative.

Let us go into details with another, recently typical use: the on-line music store (e.g. Apple iTunes). We can see the simplified licensing and marketing model of this service in Fig.3.

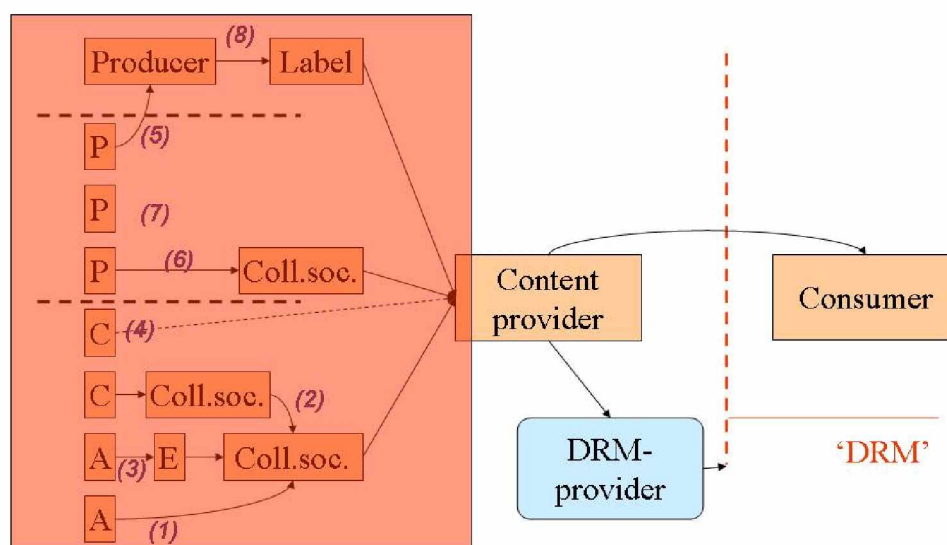


Fig.3. Model for an online music store

In the on-line music store, the musical works are usually sold fixed on a phonogram (and then turned into a common audio file format), in the interpretation of performing artists. Therefore we have three categories of original rightholders:

- authors of the musical works (using the hundred-year-old acronyms in the world of rights management 'C' stands for composers, 'A' stands for author, i.e. here lyricists);
- performing artists of the sound recording (signed with 'P');
- phonogram producers.

As all persons in the above categories have exclusive rights to license the making available of their works/performances/recordings under copyright or related rights, a lawful user has to obtain license from each of them.

In practice, these rights are not exercised individually by the original rightholder.

(1) The composers and lyricists usually form their own collecting society and trust them to manage their copyrights.

(2) These collecting societies trust each other to license their repertoire on their territory respectively. Reciprocal representation agreements exist in the field of online uses. These agreements of composers' and lyricists' collecting societies, the so-called Santiago- and Barcelona Agreements, are currently under competition law revision by the Commission.

(3) Some authors do not only trust their collecting society but also a music publisher (using again the French-based traditional acronym coming from the term 'Editeur', signed 'E' in the figure), and therefore he and the publisher both have a right to royalty-share. In Fig. 3 I could not present the complicated practice of music publishing – co- and sub-publishing agreements, repertoire transfers, etc. –, but in a fully developed rights management system one has to take all these into account. Presently the musical collecting societies track all these changes, and pay royalties to the authors themselves, their music publishers or sub-publishers and foreign collecting societies.

(4) Finally, some of the authors decide to exercise their rights individually.

(5) The performing artists generally transfer all their rights to the phonogram producer.

(6) However, the possibility may not be excluded, that some of them also form a collecting society, or

(7) keep their rights in their own hands.

(8) The related right of the phonogram producer is also often transferred to other producers or to one of the five "majors".

If the content provider (in the case of iTunes: Apple Inc.) intends to carry out this activity legally, it has to clear all these rights. This clearance, the licensing practice of all the rightholders, is called „rights management” (signalled with red in the figure again). The DRM system used by Apple is, however, used in another relationship: between Apple and the consumer. This is not „rights management, because Apple does not give any right to use the work. If the downloader wishes to play the music files in his restaurant, he has to obtain a license from the rightholders (or their collecting society) directly. If he wants to create a PC-based jukebox, he also has to clear the rights, he will not be able to get a license for this use from Apple. This may also depend on the contracts between all rightholders and Apple, but in legal terms the opposite solution would mean the exception not the rule.

Let us summarize our conclusions in a chart, showing the difference between real rights management activity and the so-called „Digital Rights Management”.

	<b>Real Digital Rights Management System</b>	<b>So-called (IT) Digital Rights Management System</b>
<i>basis</i>	right (granted by copyright law) on special subject matters (specified by copyright law)	technical control (power) over any digital content
<i>substance</i>	licensing/prohibition of copyright-relevant uses	permission/forbidding of any acts based on a mere technical possibility to prevent these acts
<i>name</i>	Digital Rights Management	Digital Content Control Exercise

Consequently **Rights Management** is the exercise of rights based on copyright legislation. The key action is **to license**. On the other hand **so-called DRM** is the exercise of possibilities based on digital technological protection measures (TPMs). TPM is defined by the Directive 2001/29/EC, Art. 6.3: „For the purposes of this Directive, the expression ‘technological measures’ means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject matter, which are not authorised by the rightholder (...)”. The corresponding action is about **permission**.

As this is not a realisation of „rights management”, I propose a new name to it: **Digital Content Control Exercise** (DCCE). In my view this concept emphasises that this phenomenon is not based on legal regulations, its basis is a purely technical power or control over any content.

### Bottom line

In my opinion it was an obvious and basic fault of the Commission to include the term „DRM” (correctly: DCCE) in their communication on „The Management of Copyright and Related Rights in the Internal Market”, as a form of copyright management. ‘DRM systems (...) clearly are an important (...) tool for rights management in the Internal Market of the new digital service’ (Communication 2004, 1.2.5.). As a rule, „DRM systems” have nothing to do with „rights management”, they are just a tool for defending interests of content providers.

### Sources

- Directive (2001): Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society;
- Communication (2004): Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on „The Management of Copyright and Related Rights in the Internal Market” Brussels, 16.04.2004, COM(2004) 261 final;