

## Need for a comprehensive re-thinking of ‘DRM’ systems and copyright

Péter Benjamin TÓTH

(shorter version published in INDICARE, www.indicare.org)

February 24, 2005

**Abstract:** In my previous article (Tóth 2004) ‘Digital Rights Management or Digital Content Control’ I pointed out, that as a rule so-called DRM systems (for which I offered the new expression: Digital Content Control Exercise systems or DCCE) do not involve the management of copyright. The technical power offered by these technical tools can exist over any digital content and can prevent any activities regarding these contents. This strong monopoly conflicts with several interests and therefore needs to be examined comprehensively.

### Introduction

Copyright is a *legal monopoly* created by an independent branch of power based on wide discussions (expert conciliations and parliamentary decision making). However monopolistic this field of law is, it is closed within several boundaries, limited by rules to protect different legitimate interests. On the other hand, the control provided by so-called DRM systems is a *technical monopoly* unilaterally adopted by the “content owner”, hardly limited by legal regulations. In comparison with the barriers of copyright law:

“frontier”	existence in copyright, short description	existence at DRM systems
<i>material scope</i>	<b>Yes.</b> (The law defines what content is protected by authors’ rights and related rights.)	<b>No.</b> (It can be applied to any digital content, irrespective of its copyrighted nature.)
<i>term of validity</i>	<b>Yes.</b> (After the expiry of the protection term, works belong to the public domain.)	<b>No.</b> (It can be applied to any digital content, irrespective of how “old” it is.)
<i>restricted acts</i>	<b>Yes.</b> (Only certain activities are subject to the exclusive right of the rightholder.)	<b>No.</b> (It can restrict any <i>digital</i> acts, irrespective of its relevance in copyright.)
<i>exhaustion</i>	<b>Yes.</b> (The rightholder can no longer control the distribution, if the copy of the work has been lawfully put into circulation in an EEA member state.)	<b>No.</b> (Although the distribution of physical copies can not be prevented by DRMs, the consumer can be kept from accessing the works, practically evading the law.)
<i>conditions of exercising rights</i>	<b>Yes.</b> (In some cases the copyright law provides for a mere right to remuneration without an exclusive right to license the use – see for example Article 12, Rome Convention on the communication to the public of a sound recording released for commercial purposes)	<b>No.</b> (The mere rights to remunerations can be turned to an exclusive right through a DRM technology.)
<i>conflicts with other prioritised interests</i>	<b>Yes.</b> (Exceptions, limitations from the exclusive right of the rightholder, in some countries these limitations are called “free” or “fair” uses – see Article 5, Infosoc. Directive.)	<b>Partly.</b> (The Infosoc. Directive appointed 7 paramount exceptions, the beneficiaries thereof can benefit from them – even against the technical protection)

This observation of a DRM-user overstretching its copyrights is presented by Helberger in her Article “It’s not a right, silly...” (Helberger 2004): “If someone was to fence in a piece of land (...) that does not belong to him, (...), he would be acting contrary to the law, and therefore such behaviour would be simply not permissible.” This example however, does not describe perfectly what a DRM-applier “content owner” does. Therefore let me try to enrich her property-right-based example:

We have an apple tree, one branch of which stretches out to public territory (Fig.1.).

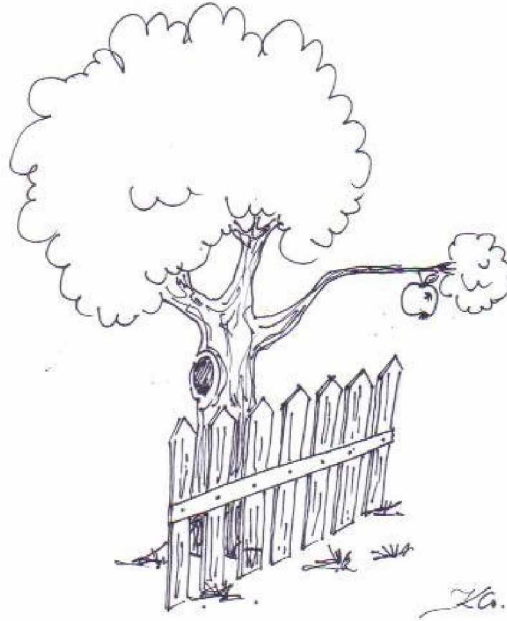


Figure 1 - © Kurka Csilla, 2005

In the legal system inheriting the tradition of Roman law, the apple falling to the public domain can be obtained by anyone collecting it. Our proprietor – actually, a well-trained teacher in a wizard school – knows about this legal regulation, and as he can not be present when the apple grows ripe, although he needs the apple, first he thinks, he will have to do without the apple.

He keeps on thinking, as he highly wants this apple. He does not want a conflict with the Ministry of Magic, therefore he decides that anything he will do will be totally lawful. Then a solution comes suddenly to his mind: he curses the apple when it is still on the branch (Fig.2.).

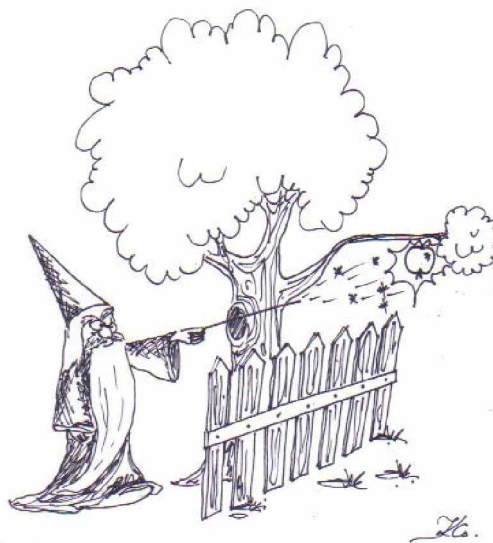


Figure 2 - © Kurka Csilla, 2005

The effect of this curse is, when it falls down to the ground, no one can touch it unless he knows the countercurse (Fig.3.).



Figure 3 - © Kurka Csilla, 2005

Accidentally, the proprietor-wizard is the only one who knows it, so no one will be able to obtain the apple, only he and those whom he authorizes to do so. Is this practice of the proprietor unlawful? No, it is not – he did not do anything to the apple when it was outside his property. But does it hamper the goal of the two-thousand-year-old property law provision? It definitely does.

But we do not necessarily need to go this far to find an analogy to the copyright-evading nature of DRMs. We can take the example of libraries and museums, which allow access to old, unique paintings and books only if the user asks permission from them. They often also fix the conditions of copying (photocopying or taking photos), and even the conditions of further uses of the copies. In many cases they also require payment, “quasi-royalty” from the user for the secondary uses (publication of the text or using the photos in a diary). This is very similar to the copyright-DRM controversy: the museum or library prevents uses on a property law basis that are not limited under copyright.

One could think, that since the mentioned practice of libraries and museums are not addressed by the legislator, we do not need to talk about the same problem at DRMs. I personally, do not think this way could lead forward. The main difference is in the quantity: at new publications and on the internet DRMs in years will be the rule, rather than the exception. Then there are two theoretical aspects that need attention:

- 1.) Firstly, the barriers of copyright are the outcome of long debates. If we think, that these debates were not in vain, some elements of these solutions should be applied to DRMs as well, as a legal regulation.
- 2.) Otherwise: if – with the wide, unlimited recognition of DRM systems – we accept, that these barriers are not necessary, then we should consider, whether they are needed at all in copyright. Should we erase the definition of “public domain” from copyright?

The consumer protection issues addressed in the INDICARE State-of-the-Art Report (2004) are important, but they cannot answer the above questions. The purpose of that branch of law is different of copyright, and is only applicable to “consumers”, although the DRM-problem affects all kind of users. *Copyright Law must continue to create a balance of interests.*

In the next section I briefly present the area where the European legislator tried to solve this problem, then I will share some comments on those fields, where they have not dealt with the conflict of interests.

## Regulation in effect

First I would like to present you the current legislation contained in 2001/29/EC (Infosoc.) Directive [Art. 6.4]. This regulation deals with the situation, when a technological protection measure (TPM) – and therefore the DRM system based on it – conflicts with the exceptions provided for by the Directive. The problem is evident: in these cases the copyright holder would have no right to claim for remedies against the user, but with a technical action he can nevertheless prevent him from this use.

As every legislator, the European one also tries to balance the interests of copyright holders, of users and of other interested stakeholders, therefore it gives exceptions from the exclusive rights to some beneficiaries with (theoretically) well-defined conditions. This effort could remain fruitless if the rightholders (or in this case we should rather call them “content owners”) simply make this balancing technically impossible.

At this point we need to mention that the exceptions – although in some countries formalized as “rights” – basically give no enforceable right to users, they only mean the simple limitation of the exclusive rights under copyright. [See eg. Helberger (2004)] In other words: when a country’s Copyright Act states, that someone ‘may freely make a copy...’, it means, that if someone is able to make a copy, the rightholder cannot protest against it.

When the European legislator observed this problem, it tried to solve it as follows:

1.) The Directive [6.4] appoints seven prioritised exceptions:

- reproductions by reprographical means [Art 5(2)(a)];
- reproductions made by libraries, schools, museums, archives [Art 5(2)(c)]
- ephemeral recordings of broadcasting organisations [Art 5(2)(d)]
- reproductions of broadcasts made by social institutions [Art 5(2)(e)]
- illustration for teaching or scientific research [Art 5(3)(a)]
- uses for the benefit of people with a disability [Art 5(3)(b)]
- uses for the purposes of public security [Art 5(3)(e)]

It also appoints another prioritised exception separately:

- private copying of natural persons [Art 5(2)(b)]

2.) The regulation continues as follows: in these 7+1 cases, when technological measures make the exception unavailable to the public, *the rightholders should make available to the beneficiaries of these exceptions the means of benefiting from that exception.* (In the appr. 14 other cases the directive does not require rightholders to make the exercise of such limitations possible.) Ie. the member states are to give a first chance to the rightholders to deal with this matter, and only after they have failed to do so, must legislators interfere.

3.) a/ In the first seven cases, if the rightholder does not make these exceptions available, the member states *shall* take “appropriate measures” to ensure their realization. It means, that in these cases when technological measures and exceptions conflict with each other, the latter triumphs. As the law finally can not give any other means to solve a legal dispute, in case the rightholder and the beneficiary of the free use can not agree in these questions, the final solution of any such ‘appropriate measure’ can only be a court decision on the case.

3.) b/ In the case of private copying, if the rightholder does not make this exception available, the member states *may* take appropriate measures to ensure its realization. If a member state does not take any such measures to ensure private copying, nothing happens. The only “sanction” is that the member state will have to take into account the application or non-application

of TPMs in the levies compensating rightholders for the private copying. (See Art. 6.4 and 5.2(b) of the Infosoc Directive.)

4.) The above regulations are not applied, ie. TPMs prevail by all means, if the works are made available to the public on agreed contractual terms, for example through “online music shops”. With the shift of copyright-related commerce to online solutions, this surprising regulation of the European legislator will become more and more discriminative and unjustifiable.

### Regulations needed

The broad collision of technological measures and uses irrelevant to copyright is of course not a new discovery. “With the advent of technological measures for the control of access to and use of works, and with the beginning of the actual application of such measures, the question emerged quite logically whether these measures would – or should – allow the continued application of exceptions and limitations recognized by international treaties and national law.” [Ficsor (2002), 556-557.p.].

However, up to now, all regulations addressed only the conflict of *exceptions* or limitations and technological measures. As I tried to demonstrate in the introduction, this topic covers only a small part of the problem. The controversy caused by DRMs is however much broader: what happens, if it prevents uses that are not relevant to copyright? What happens if it prevents uses of works not protected by copyright (eg. news, folklore works, works of authors died more than 70 years ago, data)? These technical barricades also cause conflicts of interests.

What is the current answer to these questions? Under

- the WIPO Copyright Treaty (Art. 11) only technological measures “that are used by authors in connection with the exercise of their rights” are protected;
- the Infosoc. Directive (Art. 6) only those technological measures are protected, that are designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright(...).”

It means (somewhat simplifying), that *if a technological measure is applied for not-protected works, it can be circumvented legally*. This solution is not a good one for those who could otherwise freely use these contents: they must become hackers to enjoy the public domain. But this solution is also bad for the “content owners” using DRM technology to prevent acts: they will use the same technology to protected contents, and if someone freely hacked these measures, all their measures would become unprotected. And finally, it is not a good solution for the public at large, because it leads to an “armaments race” outside the rule of law.

The solution could therefore be a comprehensive re-thinking of the question. The simpler answer would be the total ban of using technological protection measures where no copyright exists.

Another option could be a general anti-circumvention protection to all technological measures, with the thorough investigation of every barrier of copyright: should they remain dead letter, or shall we fight for their continued application? However, and without any creativity, at least the already existing regulation of the Infosoc. Directive could be extended to DRMs that prevent acts that are otherwise not relevant from a copyright point of view. In the present situation it is quite absurd, that a library can ask for copies from the copyrighted works that are protected by TPM, but if a non-copyrighted content (eg. an old poem or a court decision) is protected by technical measures, the same can not be asked from the publisher. This would mean, that the legislator should address the already mentioned 7+1 beneficiaries, and should prioritise them also against those TPMs, that are preventing non-uses, or any acts regarding already-non-protected-works and non-protected-contents.

**Bottom line**

My conclusion is – maybe irregularly – a question and a request. The copyright legislation of the Community solved somehow the conflict between exceptions and technological measures. I would like to ask the INDICARE community (if any such exists) to help thinking together: outside this circle, does the conflict of otherwise freely accessible and exploitable contents and DRM systems need further legal regulation?

**Sources**

- ▶ Tóth (2004): Tóth, Péter Benjamin: Digital Rights Management or Digital Content Control, online available at [http://www.indicare.org/tiki-read\\_article.php?articleId=67](http://www.indicare.org/tiki-read_article.php?articleId=67)
- ▶ ROME CONVENTION: International Convention for the Protection of Performers, Producers of Phonograms and Broadcasters Organization, 1961. Online available at WIPO's website: <http://www.wipo.int/treaties/en/ip/rome/index.html>
- ▶ 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, online available at [http://europa.eu.int/comm/internal\\_market/copyright/copyright-infso/copyright-infso\\_en.htm](http://europa.eu.int/comm/internal_market/copyright/copyright-infso/copyright-infso_en.htm)
- ▶ 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, online available at [http://www.europa.eu.int/comm/internal\\_market/copyright/management/management\\_en.htm](http://www.europa.eu.int/comm/internal_market/copyright/management/management_en.htm)
- ▶ Helberger (2004): Helberger, Natali: It's not a right, silly! The private copying exception in practice, in: INDICARE Monitor 7 October 2004, online available at: [http://indicare.berlecon.de/tiki-read\\_article.php?articleId=48](http://indicare.berlecon.de/tiki-read_article.php?articleId=48)
- ▶ INDICARE: Digital Rights Management and Consumer Acceptability. A Multi-Disciplinary Discussion of Consumer Concerns and Expectations. State-of-the-Art Report, Natali Helberger (ed.), December 2004, online available at: <http://www.indicare.org/soareport>
- ▶ Ficsor, Mihály: The Law of Copyright and the Internet. The 1996 WIPO Treaties, their Interpretation and Implementations, Oxford University Press, 2002
- ▶ WIPO COPYRIGHT TREATY, 1996. Online available at: <http://www.wipo.int/treaties/en/ip/wct/index.html>