

Submission by International Policy Network to Gowers Review of Intellectual Property

20 April 2006

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Summary:

- Digital Rights Management (DRM) in principle enables the protection of digital content.
- DRMs include both identification systems (analogous to brands or tags) and copy restriction systems (analogous to locks on safes and doors).
- Tags enable rights-holders more effectively to identify illegitimate copies. Locks seek to prevent the creation of illegitimate copies.
- DRM systems have been developed for a variety of creative works, including written works, music, and art.
- Recent technical problems encountered in the attempt to introduce a DRM for music do not undermine the principle of DRM, rather they suggest that such systems are at an early stage of development and need to be adapted better to suit the demands of consumers.
- As with systems developed to protect physical property, DRM systems and DRM-cracking will co-evolve.
- If developers are free to innovate new DRMs, within the context of strong intellectual property protection, it seems likely that forms will emerge that ensure content is protected at least for a significant period of time. This in turn will ensure that the creators of that content may continue to be rewarded for the investment that they make in their works, thereby incentivising the development of more content.

Digital Rights Management (DRM) in principle offers a means by which the owners of digital material, such as works of art, music, film, or literature, might protect their material from would-be thieves and pirates. As such, an effective DRM system would enable creators of such works more easily to benefit from the production of those works. Other things being equal, this should mean that more creative works are produced, since the incentive to create such works will be greater.

The ability to protect one's investments has long been recognised as not only a moral right but also an economic imperative. The owner of a piece of land knows that she will be the beneficiary of any investment she makes in that land – be it sowing seeds or building houses. Clear ownership rights thereby create incentives to make such investments. By contrast, when ownership rights are unclear, the incentives to make investments are reduced.

But the right to own property is only part of the story. Means of protecting that property are also needed. In the context of strong legal protection of property rights, entrepreneurs have invented many ways of improving the definition and enforcement of those rights, which in turn have increased security of ownership and enhanced incentives to invest in improvements to that property. Two examples bear mentioning: brands/tags and locks. Brands and tags enable owners and others to identify their property (e.g. animals), so that if they are stolen or lost they may be recovered. Locks enable owners to prevent thieves from stealing their property.

In the past hundred years, investments have increasingly shifted towards intellectual assets; these now represent the majority of all investments and underpin much of the modern economy. Such assets require not only different legal rules to those that apply for physical property – rules such as those pertaining to trademark, copyright and patents – but also different means of protecting them.

The need for new means of protecting intellectual assets has become acute since the recent widespread increase in digital connectivity made possible through high-speed, low-cost connections to the Internet. This is especially true for creative works that may be distributed digitally. DRM offers just such a means.

DRM systems include both digital tags, which enable owners of digital property – from artworks to music – to identify their creations, and digital locks, which enable owners to limit who may open their property.

DRM systems reduce the costs of protecting rights. In combination with the very low costs of distributing digital works over the Internet, this means that creators are able to reach a wider audience. For some this may mean being able to reach an audience for the first time.

Imposing restrictions on the development or dissemination of DRM systems would undermine the ability of creators and other rights owners to utilise a potentially highly effective means of protecting property. It would be akin to imposing restrictions on the use of tags and locks – effectively saying to property owners: “you must not put any distinguishing marks on your property or lock your doors.”

Some critics of DRM complain that it undermines “fair use” – that is, limited duplication or lending of copyrighted works – and they claim this is a violation of “consumer rights”. But the concept of “fair use” emerged in the context of works that were freely copy-able; the quid pro quo for fair use is that such works would sell for a higher price. A good example is books and journals primarily sold to libraries. These command a substantially higher price than similar items sold to individuals, reflecting the fact that they will be copied repeatedly, often with little or no payment to the rights holder.

By ensuring stronger protection of copyright works, DRM enables those works to be sold for less. An example is the single or low-multiple use DVD, which is being contemplated as an alternative to rentals. Likewise, suppliers of audio and visual content are beginning to offer subscription services that enable streaming or limited downloads of a very wide range of materials. The business models of these services are predicated on the ability to restrict copying and to the extent that they are considered desirable by consumers (who continue to have the option of purchasing materials in more-readily copy-able forms), it seems unreasonable to complain that this is a violation of ‘fair use’ or ‘consumer rights’.

In Britain, consumers are protected by the law of contract and by the Sale of Goods Act, which mandates that goods are fit for purpose and of satisfactory quality. Consumers do not need to be further 'protected' from vendors of DRM-protected material. If a good is not fit for purpose or does not fit the description provided by the vendor, then the consumer has a right to return the good and receive a full refund. Rather than whingeing about DRM, those who purport to favour 'consumer rights' ought to do more to explain to consumers what rights they actually have.

It is up to rights owners themselves to determine how their property will be protected but it is in their interests to ensure that the system they use is suitable for consumers. In the process of discovering better forms of DRM, some rights-holders may well attempt to use a DRM system that is considered undesirable by the buying public. In such cases, they will likely suffer reduced profits, either directly or through the effect on their reputation.

The complaint that different DRM systems are incompatible fundamentally misunderstands the way that markets function, which is through competition. The development of competing systems increases choice and – if finally one system becomes dominant or 'standard' – ensures that the standard has characteristics that consumers prefer.

When video cassette recorders were first developed for the mass market, three different systems emerged. The system that eventually dominated, VHS, was not the first on the market but it was the first to provide a recording length of two hours on one tape. That turned out to be a 'tipping point' because consumers in the US, who represented the largest single consumer market, wanted a tape long enough to record an entire football game.

It is plausible that DRM may follow a similar path, with companies developing competing systems finding that consumers exhibit a significant preference for one over another. But it is also possible that competing systems may continue to coexist, each filling a specific niche market.

In addition, it is likely that DRM systems will be 'cracked' – that is, ways of removing tags or copy restrictions will be discovered. Where this happens, the developers of the DRM system will have to find ways of making the system more secure, just as car manufacturers have had to find increasingly secure methods for protecting cars from thieves.

While governments should not outlaw DRM or impose restrictions on its use, they also should not mandate specific forms of DRM. Were they to do so, they might prevent more desirable and more secure forms of DRM from being developed.

It is possible that some DRMs may become obsolete and content unreadable on future machines. Content providers may choose to obviate this risk by guaranteeing that they will supply a copy in the new format but they should not be forced by mandate to guarantee forward compatibility as this would impose an unnecessary restriction on the development of DRMs. If tape manufacturers had been forced to make their subsequent machines compatible with 8-track, the cassette tape might never have been developed – or competition limited to manufacturers who had not made 8-track tapes.

Even where a DRM is not cracked, analogue renditions of creative works without the DRM may be produced and new digitised versions created. For this reason it is incumbent upon the developers of DRMs to ensure that their system is seen as desirable by consumers; otherwise they will fail to compete with illegal copying. At the

same time, it is imperative that sanctions on illegal copying remain stringent, since the desirability of DRMs will in part be a function of the perceived cost of engaging in illegal copying.

The interests of consumers, producers and society at large are inextricably linked through the most efficient and democratic method of facilitating greater access to and supply of creative works – the market and associated institutions: property rights and the rule of law. In order to incentivise continued generation of creative works – from computer games to classical symphonies – it is essential that creators and owners of creative works are able to protect those works through copyright and DRM systems of their choice.