

DIGITAL RIGHTS MANAGEMENT AND MUSIC IN AUSTRALASIA

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ABSTRACT

While there are many stakeholders in Digital Rights Management (DRM) systems for music, this paper argues that the most important - the user/listener - is rarely considered. Viewing DRM systems from the user perspective helps clarify crucial points of tension in existing DRM regimes, and we draw from existing literature and a number of interviews to identify the critical legal, economic, and technical issues raised by DRM systems. The most important is that DRM constitutes a form of 'private law' that ignores established legislative limits to copyright's exclusive license, such as fair dealing. This is particularly critical as the technological platforms and standards are developed outside of Australasia - copyright law is being outsourced. Existing DRM systems also benefit large economies and companies to the detriment of smaller ones. We conclude that it is critical for smaller players - whether nations, labels, or artists - to have DRM systems that serve their needs. Governments have a role to play in looking out for their region's economic interests in updating relevant legislation, which should include support for alternative platforms to ensure that platforms exist to support the distinctive needs of the local environment.

DIGITAL RIGHTS MANAGEMENT

The Contemporary DRM Terrain

Technologists tend to see Digital Rights Management (DRM) as a technological solution, lawyers worry about its relation to copyright law, economists concern themselves with the market issues, and labels - and some musicians - see it as a way to maintain their right to extract revenue from the use of their intellectual property. And for the listeners, who are after all the source of market demand, DRM provides mainly headaches but few tangible benefits. While much of the Digital Rights Management debate concentrates on legal, economic, or technical issues, we focus on the implications of such issues for the user experience, which we believe will be a primary determinant of the success of DRM systems¹. We finish with a set of questions and recommendations that are particularly focussed on the Australian environment and its musical production.

DRM emerges from a specific set of problems within the content industries in the wake of technological changes that have radically transformed the range of available content, and the methods for obtaining it. These changes include the shift from analogue to digital technologies in the production, distribution and storage of musical and other content, and the associated increase in the flexibility of content formats which can now be reconfigured, remixed, and redistributed quickly and easily using standard consumer devices. As the INDICARE report on consumer acceptance of DRM noted:

¹ INDICARE, *Digital Rights Management and Consumer Acceptability. A Multi-Disciplinary Discussion of Consumer Concerns and Expectations*. (2004) <<http://www.indicare.org/soareport>> at 20th January 2005.

So what have consumers got in the past thirty years, during the evolution from VCRs to portable MP3 players? They have got used to obtaining content conveniently – they do not even have to stand up from their chairs any more – and having other (in many cases cheaper) ways to obtain content than buying it in shops.²

However, for reasons which at least *appear* commonsensical, content providers do not want their products to be transferable anywhere and reproduced free of charge. They are unhappy with the inability of the law to deny access and discourage copying, even though the history of failed legislative attempts to limit consumer choice and convenience – from the fixed-frequency radio sets of the 1920s to the debate over cassette tapes in the 1960s and 70s or present-day region-encoding schemes for DVDs – already points to the ultimate futility of such efforts. Therefore, content industries are working with technology developers to deploy a range of measures to provide ‘digital enforcement’ of rights protection. As Lawrence Lessig has demonstrated, ‘code is law’, and software is an instrument that constrains and enables behaviour, outside of the legal system we traditionally rely on³. This observation can be further extended to also include some of the hardware measures used to enforce DRM regimes.

A form of ‘vigilante justice’ by IP holders, DRM-related Technological Protection Measures (TPMs) can be seen as an attempt to bypass any legislative “copyright bargains” which have traditionally been struck between the incentives for commercial producers and the public benefits from non-commercial circulation. The network of devices existing under any specific DRM regime becomes a separate jurisdiction in its own right, and raises fundamental questions about the ability of nations such as Australia to legislate in support of the development of their culture and content industries. When Windows computers automatically download ‘Windows Media Player 10’ updates from Microsoft, altering their embedded DRM structures, neither Microsoft nor the users are waiting to consider whether these changes provide any ‘national benefit’ to Australia, or whether indeed they are compatible with the various types of copyright exceptions specified in Australian law. For the end user, the ‘copy’ menu item will simply be greyed out, with little or no ability to appeal this change in order to uphold traditional ‘fair dealing’ or other legislated rights.

Thus, national policy in this field will continue to play ‘catch up’ with processes that are largely outside the control of individual nation-states. The technological DRM systems predominantly in use today overwhelmingly emerge from the United States, and following the signing of the U.S.-Australia Free Trade Agreement we can expect greater harmonisation of Australia’s intellectual property regime with that of the U.S. – although as Young and Collins⁴ have pointed out, this harmonisation will be selective. Australia has a markedly different economic position in the global music industry from that of the United States, and may have economic interests that are often opposed to the aims of the major U.S. music and technology corporations. Kim Weatherall has noted that through this bilateral trade agreement Australia has committed itself to a detailed 29-page IP framework which has had no formal assessment by relevant government bodies such as

² Ibid 73.

³ Lawrence Lessig, *Code and Other Laws of Cyberspace* (1999).

⁴ Sherman Young and Steve Collins, 'Fair Enough? Copyright and the Australia - United States Free Trade Agreement' (2004) (Paper presented at the Mobile Boundaries / Rigid Worlds : The Contemporary Paradox, Macquarie University, Sydney, 28th September).

the Productivity Commission, and reviews of the FTA either ignored the IP chapter or even suggested negative implications for Australia's economy.⁵

Senior Staff Attorney Fred von Lohmann from the Electronic Frontier Foundation uses Jessica Litman's formulation on how debates over copyright legislation appear from the end user perspective. Overall, it is fair to assume that the public has little incentive to reduce infringement for its own sake. However, 'taken to the extreme, rampant infringement will result in the collapse of the music, movie and publishing industries, say copyright owners.' As a lawyer responding to such claims on behalf of the public, 'you would likely treat this argument with some skepticism. While unlawful copying is (and always has been) a problem, no one is proposing that copyright law be eliminated. Accordingly, copyright-based incentives for continued production of creative works will remain.'⁶ From the public's perspective, then, the question associated with Digital Rights Management is not how DRM technologies can be used to stamp out unsanctioned content use completely, but how they can be deployed to ensure such incentives for content producers without infringing on the rights of end users, or criminalising them altogether.

However, for legislative and technological reasons, it appears increasingly likely that decisions in US entertainment and intellectual property law, which may have previously acted as a marker or guide for local scholars, will increasingly become an integral part of the Australasian legislative framework as well. The DRM systems that are possible or imaginable in the local environment are unlikely to be unique; they will largely be instances of global platforms and protocols. Rather than inventing an ideal DRM system, the challenge will be to forge a shared understanding of local priorities in this global field that is heavily shaped by non-local legal, economic, and technological concerns. Consequently, we summarise both local and non-local issues from the DRM literature and a series of interviews, with the purpose of assessing where the significant 'points of leverage' that shape the system might be found.

This paper draws upon 20 semi-structured interviews with musicians, performers, intellectual property experts, broadcasters, economic development agencies, collecting societies, industry bodies, commentators, and academic experts in Australia and New Zealand. The interviews were conducted in-person by Danny Butt between October 2004 and February 2005, with locations provided in the notes. Interviewees were asked for comments on wide-ranging topics including: copying, sampling, and re-use of music; clearances and collection agencies; trends in intellectual property law; alternative rights management systems; DRM systems, and the future of digital music. The aim was not to test particular hypotheses about DRM, or gain a representative consensus on key topics; but rather to gain illustrative perspectives on these issues from a variety of points of view.

The Stakeholders in DRM

Protection against duplication has been the overwhelming driver of DRM adoption, even though DRM can be used for other purposes, such as specifying use rights and tracking royalties. Content providers have posited that strong DRM measures will result in a benefit for consumers as more content is being made available again. This claim is usually justified through a prediction of increased participation in the digital content arena by content providers if they feel more

⁵ Kimberlee Weatherall, 'Locked In - Australia Gets a Bad Intellectual Property Deal' (2004) 20 (4) *Policy* 18-24.

⁶ Fred von Lohmann, *Fair Use and Digital Rights Management: Preliminary Thoughts on the (Irreconcilable?) Tension Between Them* (2002) Electronic Frontier Foundation at November 20 2004.

secure. The validity of this claim has yet to be tested, however – indeed, there is a great dearth of independent evidence that increased copyright infringement through filesharing and other exchange systems has had any direct negative impact on the development of new content at all.

However, there appears little if any direct consumer benefit built into DRM systems. In an Australian industry panel on DRM in 2004, Kim Anderson of Southern Star Entertainment suggested that ‘there is almost a complete contradiction between what users and rights-holders want in terms of portability and flexibility.’⁷ Currently, consumer electronics manufacturers and computer software developers are doing their utmost to develop users’ expectations of the digital network as an environment to share and transform content – witness, for example, Apple’s ‘Rip. Mix. Burn.’ campaign; in addition, there is also a strong tradition (from filesharing platforms such as the original Napster through to other content and information exchange systems including podcasting, Audioscrobbler, or the Internet CD and movie databases) of users themselves developing the tools to enhance their experience of digital content. Amidst a surfeit of content, users look for new ways to manage and experience that content through a combination of such tools and new hardware devices such as iPods and personal video recorders. As Foxtel CEO Kim Williams put it on the same panel, these devices reduce consumption versus ‘lifestyle conflicts’⁸.

Compared to the device manufacturers, however, content providers remain in a largely defensive and reactive position, concentrating on legal avenues to limit the power of these new tools and devices rather than on the development of new business models. Their stance is also further complicated since a number of device manufacturers coexist with content providers under the same corporate umbrella – so, for example, Sony Electronics’ line of MP3 players, DVD burners, and personal video recorders can be seen as a direct threat to Sony Music’s revenue streams, while sales of AOL broadband access are driven in good part by the very filesharing practices which Warner Music would prefer to stamp out.⁹

Thus, the question which we believe will drive the development and acceptance of DRM systems is: “Who can remain close to the customer?” For example, who does the listener turn to when finding music? Historically, this has shifted from the live performer to the venue owner, the radio station, and the music video programme. Currently, demand in digital music is overwhelmingly driven by the computer and device manufacturers, who must balance the needs of labels and the desires of consumers, and consumer initiatives (such as filesharing) themselves, which focus almost entirely on the needs of the end user. As the labels express their desire to regain control of the listener relationship in the online environment, a range of different business models and technical platforms with different and incompatible DRM systems will continue to emerge. However, the success of Apple’s iTunes Music Store shows that users have a clear preference for unobtrusive DRM systems, convenient access, and “ownership” (rather than rental or subscription) of their music purchases.

The challenge for major content companies will be to move back into a position of supplying what the customer wants (and building a sustainable business model around this transaction) instead of preventing customers from getting what they want. In the meantime, however, they will

⁷ See Danny Butt, *Report on Digital Rights Management and Cooperation Seminar* (2004) Association for Progressive Communications <http://rights.apc.org.au/culture/2004/10/report_digital_rights.php> at 29 October 2004.

⁸ Ibid.

⁹ See, eg, Frank Rose, ‘The Civil War inside Sony’ (2003) 11 (2) *Wired*. <<http://www.wired.com/wired/archive/11.02/sony.html>> at 28 April 2005.

jostle for legislative support (increased penalties for piracy, mandated DRM, outlawing the bypassing of technological protection measures, etc.) to shore up existing business models. Electronics and computer companies try to maintain customer demand through innovative products, on the other hand, while attempting not to alienate too many of the content companies who may refuse to license their material for platforms that do not support complete content company control over the digital content experience. User advocates will attempt to maintain the traditional exemptions associated with copyright in a digital environment even though DRM can be used to undermine them. Users themselves will continue to pursue usage they now see as 'customary' in the digital environment: the ability to shift formats of recordings through time and space, in the process making copies for personal use. The interplay between these groups will shape the future success of DRM and alternative licensing schemes, and we suggest that in light of the continuing failure of 'hard DRM' approaches to win consumer approval and change end user practices there will – and must – be a move toward more consumer-oriented DRM design and business models.

TWO WORLDS

Drawing from our interviews, we have developed a clear picture of two relatively discrete "music ecologies" at work in digital music, each with their own legal, economic and cultural dynamics. This analysis perhaps reflects other literature in sociology and economics that describes a bimodal nature of informational economies¹⁰.

The first is the "industry", dominated by the five major record companies; their vertical integration with other major media, retail, and hardware / software companies; as well as their articulations into various policy-making bodies. The tightly-integrated 'distribution-driven ecology' of the major industry sector is overwhelmingly driving the adoption of Digital Rights Management. Wallis et al. point to a wide range of literature identifying an increasing concentration of ownership in the global industry, and concomitant formal and informal integration within and between different sectors¹¹. Together, Polygram (Netherlands), Sony (Japan), Warner (US), EMI (UK) and BMG (Germany) account consistently for 70–80 percent of global music sales. The mainstream industry is also characterised by a marked disconnect between content providers and audiences – major labels (and even some major acts under contract to them) are seen predominantly as commercial operations which engage in exploitative business practices and command little listener loyalty, if not even engendering outright resistance.

The second ecology is constituted by a much more disorganised set of relationships among mostly (but not exclusively) independent producers, distributors, markets, and audiences. While its share of the market is smaller, it constitutes a much higher number of musicians (employment) and musical products (i.e. intellectual property). The primary drivers in this ecology are production and niche market demand, and while the taste cultures supported by this ecology frequently span the globe, the companies involved often have a much stronger local basis

¹⁰ See, eg, Otomar J. Bartos, 'Postmodernism, postindustrialism, and the future' (1996) 37 (2) *The Sociological Quarterly* 307-326; Saskia Sassen, *The Global City: New York London and Tokyo* Updated Edition (2000) [1991]

¹¹ Wallis, Roger, Charles Baden-Fuller, Martin Kretschmer, and George Michael Klimis. 'Contested Collective Administration of Intellectual Property Rights in Music The Challenge to the Principles of Reciprocity and Solidarity' (1999) 14 (1) *European Journal of Communication*, 6.

than the majors.¹² For smaller economy policy-makers, this ecology therefore also offers the most sustainable national benefit. As Murray Jeffrey from New Zealand's economic development agency NZ Trade and Enterprise points out:

We've got something like 80 or 90 independent record companies in New Zealand. MP3 is a huge opportunity for them. Getting on the radio in the US is not going to happen without a huge investment. It [the digital distribution channel] might be a niche market but in a large export market a niche is more than our national sales.¹³

This tier of the industry is able to build on a much stronger sense of customer loyalty – to individual artists, but frequently also to labels themselves where they are seen as strong supporters of specific taste cultures.

Industry development and DRM

The development of the 'music industry' is not a straightforward proposition. A recent briefing on the needs of the Australian music industry concluded that the majority of the challenges facing the industry could be traced to a lack of integration and cooperation, particularly in terms of communication to key stakeholders (government and community)¹⁴. What is rarely explored is that the economic interests of various parts of the industry are not only different, but ultimately opposed. For the local arms of the multinationals, the highest revenue comes from sales which have minimum investment in product development and rely on their cross-media marketing and distribution networks: e.g. overseas 'hit content.' For local musicians, a healthy independent scene, particularly at the publishing level, may be the surest path to sustainable development. The same may also be true for regional economic development strategies. These generally have employment and IP generation as their goal, and thus have an incentive to support the producer-driven ecology. As Kate Oakley points out:

Brand development, marketing and the boosting of sales of a local artist, even by a big label, is of no major economic benefit to Queensland's economy if the State loses the rights on income through intellectual property (IP) on the artist or his or her production.¹⁵

One might note that the intellectual property rights of local musicians are important, and DRM can surely benefit them. Anti-DRM campaigners are sometimes aligned with anti-copyright movements, but important distinctions must be made. The critique of DRM is not a critique of artists' rights to make a living from their work. Few anti-DRM campaigners claim that copyright laws should be overturned. Instead, it is noted that existing DRM systems are focussed on the distinctive needs of a few very large companies and exceed the provisions of the law, but that it is very difficult for independent artists, businesses and users to shape DRM systems to their own needs. As Chris Atkins suggests, usage tracking is a potential boon to the independent artist, but

¹² A similar 'major'/'minor' dichotomy also became highly visible in the recent conflicts over Webcasting royalty frameworks in the United States – see, eg, Axel Bruns, *Fight for Survival: The RIAA's Sustained Attack on Streaming Media* (2004) M/C Journal <<http://journal.media-culture.org.au/0302/07-fightforsurvival.php>> at 28 April 2005.

¹³ Interview with Murray Jeffrey, New Zealand Trade and Enterprise (Auckland, 19 October 2004).

¹⁴ Allen Consulting, *An Integrated Approach for the Australian Contemporary Music Industry* (2004) <http://www.allenconsult.com.au/contemporary_music> at November 2 2004.

¹⁵ Abraham Ninan, Kate Oakley and Greg Hearn, *Queensland Music Industry Trends: Independence Day?*, ISBN: 1 74107 056 2 (2004) 29.

the overwhelming emphasis of DRM systems is on protection against casual copying, rather than these more positive DRM features. It is also worth noting that regardless of the success or otherwise of DRM measures in policing copyright, 'in an industry founded on exploitation, oiled by deceit, riven with theft and fuelled by greed' (as veteran musician and record label operator Robert Fripp has famously put it¹⁶) most musicians continue to receive only a minute share of the revenue from sales of their music, *after* label expenses have been recouped. Where this is the case, most musicians are likely to have only limited interest in supporting standard DRM systems.

Thus, content protection technologies in DRM are *designed for dominant players in the market*. When applied to less popular content, they form a barrier to its discovery, use, and popularity. It is interesting to observe in this context that even Microsoft will not pursue technical forms of IP protection in markets where it is not in a dominant position. Scheiner notes that Microsoft's Steve Ballmer has been quoted as wanting to enable Windows to be pirated in China in the short term, as a way of gaining mind share. He suggests that new entrants in a market always benefit from having their content pirated in the short term¹⁷. This is hardly a new approach for Microsoft – its MS-DOS operating system was one of the most pirated software products of the 1970s and 80s, contributing significantly to the current market position for the successor platform Windows – but it does undermine the music industry's claims that copying (whether in the form of taping, ripping, or filesharing) inevitably 'kills music'.

This is because, unlike many other commodities, music is highly diverse and not always substitutable: it is the circulation of music which creates the demand for a particular piece of music. For example, I may feel like going out to buy a new CD. Choosing between hip hop artists Eminem and 50 Cent, my preference for one or the other may not be great, and so the price of these CDs may be an influence in my decision. However, this situation differs from the music listener who hears Shania Twain on the radio then decides to buy the CD. They are not going to buy an Eminem CD (or a Britney Spears CD) even if it is a quarter of the cost. This is how circulation of music generates demand. (In the U.S. this is recognised for example in the fact that terrestrial radio stations are not required to pay sound recording royalties to music publishers for broadcasting their songs – instead their doing so is considered to provide a beneficial free service to the music industry.¹⁸) As Petrick notes, 'the introduction of a work that is diverse enough in relation to the other works may create new value by creating previously non-existent (or below price level) demand.'¹⁹ The challenge for independents is almost always creating demand, and given the market demand for artists with a track record, it makes sense that the challenge in the short term is building a critical mass of audience support.

However, the economic implications of prematurely controlling copying through heavy-handed Digital Rights Management regimes are not limited to the end listener's experience and

¹⁶ Robert Fripp, *DGM's Founding Aims and Mission Statement* (1997) <<http://www.disciplineglobalmobile.com/foundingaims.shtml>> at 28 April 2005.

¹⁷ Bruce Schneier, *Secrets And Lies: Digital Security In A Networked World* (2000), 252-3.

¹⁸ Webcasters tried unsuccessfully to use this exemption to argue for a corresponding exemption for online music transmissions during the bitter Webcast royalty disputes of 2002 – See, eg, Stephen H. Wildstrom *Royalties: A Royal Pain for Net Radio* (2002) <http://www.businessweek.com/bwdaily/dnflash/mar2002/nf20020329_5377.htm> at 28 April 2005.

¹⁹ Paul Petrick, *Why DRM Should be Cause for Concern: An Economic and Legal Analysis of the Effect of Digital Technology on the Music Industry*, Berkman Center for Internet & Society at Harvard Law School Research Publication No. 2004-09. (2004), 20.

limiting consumer demand. In environments where digital production, sampling and remixing are the norm, DRM can equal a direct loss of licensing revenue opportunities, as effective sampling can rarely be predicted prior to use. As Melbourne electronic musician Andrew Garton notes, 'If I think about using something as a sample, I copy it, see if it works, and then think about rights issues later. If I can't copy it, I'll use something else.'²⁰ The irony is that even artists whose work is based on sampled material may have its re-use compromised by DRM. This was the case for hip-hop group the Beastie Boys, who eventually had to apologise to their fans for the copy-protection applied by label EMI to their CD²¹.

Beyond such well-known celebrity cases in the commercial arena, wider cultural and economic issues are at play. Sampling, remixing, and other forms of creative content reuse and reappropriation (or even de-propritation, as one group has called the practice²²) have now become part and parcel of the growing trend towards grassroots and vernacular creative practices which have emerged especially in reaction to the rise of digital media production and distribution technologies. Commentators such as Leadbeater²³ and Howkins²⁴ point to the fact that Western economies are swiftly developing into creative economies which are based in good part on DIY cultural practices and the growing cultural participation of previously passive audiences as active 'pro-am' content producers²⁵. The creative community acts as both user and producer of content, and increasingly combines both practices in the act of what can be termed 'produsing'²⁶ – the collaborative creation of new content based on existing material from other sources. Such content has significant potential both from a cultural point of view, as it enables a wide swathe of society to be active cultural participants rather than merely passive recipients of content, and from a narrower economic perspective as this increased cultural production is also likely to spawn new commercially viable content, content genres, and content producers.

However, current intellectual property provisions, already significantly extending traditional copyright terms beyond the life of the author and now reinforced through hard DRM measures, significantly stifle this trend towards more 'pandemic' DIY creative practices. They make it difficult for grassroots creatives to draw on existing content, as they do not have the legal resources necessary to negotiate clearances. As a partial response to this crisis, recent years have seen the successful introduction of the Creative Commons project²⁷ – not as a way of eradicating intellectual property (as is sometimes claimed by its detractors), but as a means of specifying copyright-style usage limitations which are more conducive to widespread creative practice while maintaining the moral and (where required) economic rights of authors. The Creative Commons system, which is based on a set of clearly formulated content licences, reintroduces certainty about user (including re-user, i.e. remixer) rights and limitations for each piece of content to

²⁰ Interview with Andrew Garton, (Melbourne, December 7 2004).

²¹ Cory Doctorow, 'New Beasties disc has DRM' (2004)
<http://www.boingboing.net/2004/06/11/new_beasties_disc_ha.html> at 23 March 2005.

²² Snafu, 'Wu-ming: 54: Re:inter:view' *OYES* make-world-paper #2, 4.

²³ Charles Leadbeater, *Living on thin air: the new economy* (2000).

²⁴ John Howkins, *The Creative Economy: How People Make Money from Ideas* (2001).

²⁵ Charles Leadbeater, 'Open Innovation and the Creative Industries' (2004) (Lecture at Creative Industries Research and Application Centre, Queensland University of Technology, Brisbane, 2 March).

²⁶ Axel Bruns, *Gatewatching: Collaborative Online News Production* (2005).

²⁷ <http://creativecommons.org/>

which its licences are applied, and thereby significantly reduces transaction costs for content use while increasing the potential for creative reuse and collaboration.

Currently, creative commons licences are attached to content mainly in the form of visible or invisible metadata (for example as part of Website metadata structures or through the embedding of CC licence logos and links in pages or text files which accompany licenced content). There is nothing which would prevent the application of DRM frameworks and technologies to CC-licenced content, however – deployed in this fashion, DRM tools could therefore be used to specifically permit and even encourage further uses of licenced content rather than mainly preventing them.

Copyright Exceptions and Fair Use

In addition to such new approaches, countries with developed intellectual property policy frameworks tend to retain various exceptions or exclusions from the unique license to exploit intellectual property. The exemptions recognise that fundamental conflicts exist between the property rights of the rights holder and the rights of freedom of expression and privacy of the user, as well as dividing the ‘bundle of rights’ between the product owner and IP owner²⁸. A second rationale accounts for the “public good” nature of creative works in an economic sense. In the former British Commonwealth, these consist of various exemptions (‘fair dealing’), mostly for the purposes of “research and private study” or “criticism, review and news reporting”. Uses outside of these areas cannot be considered fair dealing, no matter how ‘fair’ they are. The right to engage in fair dealing is considered a right of the user, and the Commonwealth system is focussed on the balance between user and authorial rights.²⁹

In the United States, a less settled doctrine of ‘fair use’ provides for the ‘public good’ nature of creative works more directly – rather than granting rights, fair use is assessed in terms of whether it promotes overall the ‘Progress of Science and useful Arts’. The beneficial aspects are expressed in economic terms by Paul Petrick: ‘music has potential positive externalities that a copyright holder cannot assess nor recoup when selling it; fair use provides a means to subsidize uses that create sizeable value.’³⁰ Thus many of the most interesting legal cases relating to DRM have taken place under U.S. law, as activities such as peer-to-peer (P2P) file sharing are illegal per se in the Commonwealth, regardless of whether they advance the cause of music or not. In fact, digital music players such as Apple’s iPod have almost no legal use in Australasia, even though the devices themselves are not illegal and everyone buys them to engage in illegal activity – listening to CDs they have bought in another format.

²⁸ Interview with Brian Fitzgerald, Faculty of Law, Queensland University of Technology (Brisbane, March 6 2005). The language of “user rights” has caused some controversy, but support can be found in, eg, the Copyright and Contract review of the Copyright Law Review Committee, available at <<http://www.ag.gov.au/www/clrHome.nsf/AllDocs/RWP092E76FE8AF2501CCA256C44001FFC28?OpenDocument>>. We are grateful to an anonymous reviewer for this suggestion.

²⁹ Associated with the intellectual property provisions of the Australia-US Free Trade Agreement, the Australian Government is currently engaged in a review of the fair dealing provisions in Australian copyright law. See for example the issues paper *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age (2005)* <<http://www.ag.gov.au/agd/WWW/agdhome.nsf/o/E63BC2D5203F2D29CA256FF8001584D7?OpenDocument>> at October 6 2005.

³⁰ Petrick, above n 18, 11.

Many of the exceptions to both copyright and fair use rights take the specific situation of use and consumption into account. However, this is rarely the case for Digital Rights Management systems, which concentrate on allowable uses predetermined only by the content owner³¹ – DRM systems development at present remains driven mainly by what is possible from a technological point of view, not by what is required or desirable from a cultural, social, or moral perspective. While there has been some work done on so-called “symmetric” Rights Expression Languages (REs) that can provide context sensitivity and can enable requests for special exemption, these are faced with many problems, not the least of which is a lack of a key institution to resource handling of these requests. In the analogue world, consumer requests for exemptions are essentially granted *until* a claim against them is made in a court by the content provider. DRM takes precisely the opposite approach, meaning that the courts never get to decide (unless for example cases are brought to determine whether certain DRM regimes undermine basic civil liberties).

DRM AND THE END USER

While industry associations talk up the perils of piracy, the average user’s resistance to DRM is often for more mundane reasons, and these raise a number of significant legal and policy issues.

Music with DRM is a product that might be called ‘usage-impaired’³². From the consumer or user’s point of view, use restrictions may prevent them from private copying or backing up; using content on various devices such as MP3 players (despite there being no legal way to purchase many artists’ music in a digital format that is not bound to a physical carrier medium such as CDs or DVDs); and using it in different locations (some copy-protected CDs will not play on certain makes of car stereo or computers), not to mention an overall reduced ease-of-use for accessing content. Slowinski notes that DRM tends to create time-consuming workarounds for non-infringing uses of content, and this particularly affects not-for-profit organisations such as educational institutions and libraries³³.

As DRM systems are further interwoven with so-called ‘trusted computing’ platforms, such problems are likely to be further exacerbated. Trusted computing is the latest in a series of exchanges in a technological arms race between hardware manufacturers (acting in concert with copyright industries) and independent users (seeking to circumvent any usage restrictions introduced through hardware or software measures); it aims to introduce hardware measures which either prevent unsanctioned content uses altogether or at the very least make such use more easily traceable through unique machine identifiers. While in theory hardware-based measures to this effect will be more difficult to overcome than software-based protections, it is likely that they will only delay rather than completely prevent circumvention; as the history of region encoding in DVDs has shown. In fact, hardware manufacturers themselves are often complicit in the development of circumvention measures since insurmountable usage limitations

³¹ Tim Jackson, *Comments on the Informal Consultation of the Final Report of the High Level Group on DRM of the European Commission, DG Information Society* (2004) <http://europa.eu.int/information_society/eeurope/2005/all_about/digital_rights_man/doc/jackson_tim.pdf> at March 20 2005.

³² INDICARE, above n 1, 24.

³³ F. Hill Slowinski, *What consumers want in Digital Rights Management (DRM). Making content as widely available as possible in ways that satisfy consumer preferences.* (2003) <<http://doi.contentdirections.com/mr/aap.jsp?doi=10.1003/whitepaper1>> at March 25 2005.

impact negatively on sales. Too heavy-handed approaches to trusted computing are also likely to speed the exodus of users from proprietary platforms towards open source operating systems.

This illustrates the intertwining of business, cultural, and social issues in DRM. The business rules established by software and hardware vendors for content protection can affect consumer rights and use practices in ways which are as relevant to consumer protection law as they are to copyright law. For example, the usage rules associated with rights-managed content are rarely transparent. The widespread use of complex 'click-through' or 'shrink-wrap' licenses – where users are asked to agree to extensive terms and conditions before using digital products – creates uncertainty at the purchase level about fitness-for-purpose.

A deeper concern is privacy. For DRM to work, data associated with identity and authentication must usually be provided to the vendor. However it is difficult for the user (or governments) to monitor how this information will be used and protected. Many consumer groups such as the European Consumer Organisation (BEUC) are concerned about the impossibility of anonymous access to content under DRM regimes. Under this scenario, it is unlikely that users will trust a number of smaller providers with their data. There is a clear role for third-party authentication schemes or government intervention in this context – however, this brings with it the danger of excluding better platforms for rights and identity management.

A final issue is whether the desire to protect content through DRM technologies (and the associated legal support) is cost-effective or worthwhile. Technology commentator Mark Pesce claims that users will always find ways to bypass overly restrictive rights management systems, and this has been proven in the history of digital media technologies. Instead, he advocates for the commercial potential of such systems - suggesting that the iTunes model proves that users will happily pay for content if it is delivered at the right price in the most convenient format³⁴. Far from trying to squash Bittorrent, content providers could see it as a massive *investment* by users in the distribution of content.

Working with users

The standard music industry anti-copying slogan 'stealing kills music' is demonstrably wrong in its overly generalising approach, and is therefore widely dismissed by users – copying does not necessarily equate to stealing, while as a form of additional exposure for artists copying can even help *increase* sales. However, amongst the majors, DRM is currently viewed as a means of preventing or at least severely inconveniencing uses of music that are often seen by a majority of users as customary and acceptable. For example, from the listener's perspective, duplicating CDs for private use in one's car does not impact on sales since one does not expect to buy multiple copies of the same CD. However, this experience is not reflected in the rhetoric of industry bodies such as the Australian Federation Against Copyright Theft. Their executive director, Adrienne Pecotic, suggests, somewhat implausibly:

"Consumers are not entitled to replacement goods if they break their crystal glasses or stain their new clothes. Once a right exists to create an unprotected copy of a DVD film, that film is then exposed to unrestricted copying, whether a single copy for personal use or 10,000 copies for sale around the world."³⁵

³⁴ Interview with Mark Pesce, (Sydney, 15th February 2005).

³⁵ Adam Turner, 'Do you copy?' (2004)
<<http://www.smh.com.au/articles/2004/09/15/1095221649806.html>> at September 16 2004

Quite apart from the common industry hyperbole which sees any one copy as inevitably spinning out of control to become part of a major counterfeit trade, this metaphor is also flawed in that DRM-protected CDs or DVDs should be likened more accurately to crystal glasses which are only able to hold one type of beverage, or clothes which can be worn only at specific hours of the day. DRM-protected CDs or DVDs constitute a product whose uses are so severely restricted that it can be regarded as inherently defective. As a result, the listener experience with DRM is as a strategy that seems greedy. In buying CDs listeners purchase a licence to access intellectual property, and CDs cost twenty times their manufacturing cost due to such intellectual property considerations. But when listeners want to shift this intellectual property to another format for convenience, they are forced to buy the licence again as if a CD was a purely physical product.

However, rather than just making consumers buy things twice because one can, it is possible to use tools developed for DRM for other ways of stimulating the music economy. For example, watermarking of tracks can establish a relationship between a digital audio file and a specific user who may have paid for it. Other users who access this file can be directed to a Website where they are encouraged to buy other tracks, albums, or merchandise. It would be possible for the original user to get a cut on these transactions, providing an encouragement for them to share the track in a way that generates revenue for the artist. At least in the second tier of the music industry, there often exists a strong loyalty between artists (and sometimes labels) and listeners, and such constructive approaches to using DRM may well prove successful where the more standard cease-and-desist belligerence of the mainstream music industry only engenders further animosity and resistance. Another business model could involve tracks that contain advertising, which can be removed on payment. Or unauthorised tracks may even just remind the user of their obligations, relying on a moral incentive.

While the potential models obviously rely on technological solutions, the overwhelming focus on content protection in the industry must be seen in the context of a *lack* of investment in innovative and user-friendly approaches. For the oligopolistic major labels, who make little investment in their own brands for consumer purposes, there is little to fear from consumer backlash against their DRM tactics. Listeners just won't buy digital music, rather than not buying from BMG or Sony in particular. This represents a great opportunity for independent or artist-run labels who establish stronger presence in consumer consciousness. They may also significantly *profit* from the use of filesharing and other (technically copyright-infringing) technologies as a form of word-of-mouth marketing – it is worth noting in this context that despite claims to the contrary there is little evidence to suggest that filesharing has had any statistically significant effects on music sales.³⁶

According to Audible.com CEO Donald Katz 'the realm of piracy will diminish most profoundly when the consumer perceives a great product at great prices from good people with well-meaning aspirations'³⁷ and Condry notes that his students reinforce this point when asked 'Is there some music you would always pay for?':

Most students said yes. They mentioned indie artists, or artists from their hometown, whom they know 'need the money'. Some students identified major groups 'with a solid track record of good albums'. Other students mentioned entire genres of music, notably, jazz and classical music,

³⁶ See, eg, Suw Charman, *Listen to the Flip Side* (2004) <<http://www.guardian.co.uk/online/story/0,3605,1265840,00.html>> at 28 April 2005.

³⁷ David Becker, *An Ear for Downloads* (2004) <<http://news.com.com/2008-1025-5317234.html>> at April 20 2004.

because 'they stand the test of time', and because they are not adequately supported by major record companies.³⁸

Ultimately, then, instead of a continuing, costly, but futile DRM arms race between IP holders and IP users, it would seem more effective to develop a more consensual and cooperative approach to deploying DRM systems. This would include fair pricing and fair usage limitations and a form of DRM policing that is based less on litigation than on encouragement for users to activate the desire to pay for content mentioned by Condry's students above. It would harness existing user-driven content exchange spaces as means of promoting new content, rather than dismissing them simply as a realm of piracy – in essence, this approach appeals more to users' ethics rather than their fear of legal retribution.

It is not inconceivable that a deepening split between the sectors will result from this, even leading to the emergence of at least two clearly distinct DRM regimes - one that serves the major label interests, and one more suited to smaller, independent artists or those from smaller economies. While the generally diffused nature of the second tier might hinder effective cooperation on developing new DRM approaches (at least in comparison with the concentrated efforts of the first tier), governments – especially those outside the US – could play an important role in helping the second tier coordinate its efforts. As noted above, the independent and often locally based sector of the music industry is an important contributor to national and regional economies in many countries, and should be supported in areas where its growth is at odds with transnational mainstream music industry interests.

An effective, non-adversarial DRM system, perhaps with ties to collection societies which focus on distributing royalties fairly to artists rather than mainly benefiting the major labels, could sustain local music industries, support widespread DIY cultural production, and halt the current trend to criminalise music users for customary small-scale infringements. Government policy could support such developments, and in the process would also help avoid the emergence of a global DRM monopoly controlled by the major music labels and hardware manufacturers. By contrast, the emergence of this monopoly would provide its operators, which also happen to be the major players in the global music industry, with a means to lock non-compliant content producers out of the market altogether. An interesting policy proposition by Weiser suggests that governments may have a role in supporting 'competitive platforms' as part of their innovation policy, whenever there is a chance of a platform monopoly stifling innovation³⁹.

Further alternatives

Pesce mentioned above the self-education of users as a distinctive trait of the contemporary digital environment. Many users have also taught themselves how to, for example, disable region-encoding on their DVD players, block pop-up ads on their Web browser, or check for spyware on their computer – with such success, in fact, that pop-up blockers have now been included as standard features in Internet Explorer and other browsers, and that region encoding can be said to have soundly failed in its mission to maintain geographically separate markets for DVDs. Users do this because they feel they have a right to use the products they have purchased in whatever ways they see fit, and to bypass licensing restrictions that are seen as out of step with their understanding of property. Cory Doctorow contrasts the 'private laws' (such as region encoding)

³⁸ Ian Condry, 'Cultures of music piracy An ethnographic comparison of the US and Japan' 7 (3) *International Journal of Cultural Studies* 347.

³⁹ Philip J. Weiser, 'The Internet, Innovation, And Intellectual Property Policy' (2003) 103 *Columbia Law Review* 534-614.

that have sprung up in the digital environment with the copy protection attached to a book, which can be taken anywhere and sold or given away after use. It is the kind of 'objectness' associated with the book or the CD that perhaps provides the model for how we expect our digital content to behave.

However, in the digital environment the competing standards of possible file types, DRM systems and operating systems further complicates the market for content. This interoperability is one of the key challenges facing content providers today, and the work of Europe's High Level Group on DRM reiterated its importance⁴⁰. Interoperability between devices and platforms is needed to allow customary uses such as time and space shifting, but also to reduce the risk of customers losing access to their purchases if software and hardware become obsolete, a significant barrier to trust in e-content. Unfortunately, manufacturers and content owners have short-term incentives to create proprietary DRM systems that do not interoperate with others (maintaining barriers to entry and protection of incumbent market positions).

This is due to a phenomenon called suboptimisation, where the individual interests of actors in some imperfect markets result in a less beneficial outcome than would otherwise be possible. In this case, DRM might reduce total market and social good, but industries will still pursue it. 'This is due to the fact that price discrimination [available through DRM] increases the ability of a producer to appropriate a larger proportion of the surplus created. Thus, it is possible that while total surplus might decline, a producer's profits might increase'⁴¹. However, through incentives to collaborate, a larger overall surplus may be able to be obtained. But as Bremer and Buhse point out, another reason for the lack of common DRM standards is that the requirements are very different at different points of the value chain, and so the different stakeholders have conflicting views on what would constitute a viable DRM system⁴².

William Fisher makes the strongest argument for a system that will overcome the economic issues of suboptimisation that come from privatised public goods⁴³. He shows that a levy system could be devised that would fairly compensate artists while reducing transaction costs for music listeners. However, while his scheme benefits many in the digital music ecology, it does not benefit the long term strategic dominance of the major players, which greatly reduces the likelihood that it will be taken up in the current political and economic environment. Nevertheless, Fisher includes a role for DRM systems in tracking usage, which could be of great benefit to independent artists, labels, and collecting societies. What seems more likely, however, is that usage tracking mechanisms are employed to determine compensation among the rights holders and distribution partners, without recourse to public good requirements.

This is an area where collecting societies have been trying to position themselves as well placed to manage the process of collection and distribution. However, whenever collection societies attempt to position themselves as intermediaries, there is a swift response from the industry. In Australia, the Australasian Performing Right Association (APRA), representing songwriters and publishers, has called for a Canadian-style levy on blank CDs, DVDs and digital

⁴⁰ See for example the overview comments on the website of the EU's High Level Group at <http://europa.eu.int/information_society/eeurope/2005/all_about/digital_rights_man/high_level_group/index_en.htm> at October 5 2005.

⁴¹ Petrick, above n 18, 28.

⁴² Oliver Bremer and Willms Buhse, 'Standardization in DRM - Trends and Recommendations' (2003) 2770 (November 2003) *Lecture Notes in Computer Science* 334 - 343

⁴³ William W. Fisher, *Promises to keep: technology, law, and the future of entertainment* (2004).

music players to compensate artists for the effects of copying. However, the Australian Record Industry Association tends to view such solutions as both unnecessary and a legitimization of copying it sees as simply illegal.⁴⁴

CONCLUSIONS

Wallis et al. believe that the shift of copyright revenues from physical distribution to intellectual property rights will benefit IPR owners, with the “danger that the revenue distribution of IPRs will only be safe for the most successful artists and largest record companies, and that barriers to entry will be erected against smaller companies and less known entrepreneurs.”⁴⁵ With the majors controlling 80% of the revenues flowing through the collecting agency system, there is a strong economic incentive for them to gradually withdraw from this system in favour of their own arrangements. It appears that DRM is likely to bring a massive transformation in the entire infrastructure of music circulation.

The interplay of technical and legal barriers to use through DRM leaves the consumer with digital music systems that:

- a) prevent consumptive uses which should be allowable under fair use/dealing provisions,
- b) lack workable provisions to exercise legal exemptions,
- c) have contractual restrictions on legal exemptions that would otherwise be available⁴⁶,
- d) are not usable on many free operating systems, and
- e) require tightly integrated hardware and software (“trusted computing”), leading to “digital lock up” - a reduction in user choice of technology.

While there are no simple solutions to these troubling issues, we can note three broad strategies that must be addressed to achieve a viable future for digital music.

The first is a review of copyright law, in light of the fact that in light of the fact that copyright developed in very different social and technological situations, with differently commodified relations between producers and consumers than we have today. Copyright law defines the rights of rights holders of a work, but not the rights of users. There is a need for “enforceable consumer rights” that are not infringed by DRM, click-wrap licenses etc.

The second is to address the low level of consumer and consumer-advocate involvement in discussions with respect to Digital Rights Management. While this burden primarily falls to technology and content companies who must take user rights more seriously, there is also an important role for government and academic bodies in brokering discussions across the domains of business, policy, artistic creation, and end users. It will be through the formation of shared understanding - as opposed to defensive tactics - that the prospect of successful Digital Rights Management will emerge.

The third and final strategy falls to governments: it points to the need to support alternative platforms for rights-managed digital content. This would ideally be directed to the needs of local or independent producers for the purposes of supporting creative and economic development. But even more importantly, it will mean that a monopoly situation is avoided and more control is

⁴⁴ Julian Lee, *Click at your own risk*. (2004)
<<http://www.smh.com.au/articles/2004/08/02/1091432115074.htm>> at 3 August 2004.

⁴⁵ Wallis et al, above n 10, 8.

⁴⁶ INDICARE, above n 1, 70

retained over policy-making for cultural and economic objectives. A monopoly DRM environment truly functions as private law, and the laws governing the social and economic future of our creative sector are too important to outsource to overseas technology and entertainment companies.