Digital Rights Management: Merging Contract, Copyright and Criminal Law

Yee Fen Lim

Associate Professor of Law,
Dept of Law,
Macquarie University,
Sydney, Australia
YeeFen.Lim@mq.edu.au

Abstract. This paper examines the impact of digital rights management systems on the copyright regime. It argues that digital rights management systems in effect bestow copyright owners with more rights and control than what is stated in the copyright legislation. The end result is a regime that bears a remarkable resemblance to tangible property and which in some sense, is more powerful than tangible property.

1 Introduction

In the early nineties, John Perry Barlow predicted the demise of copyright law. He wrote:

Intellectual property law cannot be patched, retrofitted, or expanded to contain the gases of digitized expression any more than real estate law might be revised to cover the allocation of broadcasting spectrum. We will need to develop an entirely new set of methods as befits this entirely new set of circumstances.1

It is now nearly ten years since Barlow first penned those words and copyright law is still going strong. In some quarters though, what seems like the protection given by copyright law is slowly undergoing a transformation taking it beyond copyright law into some other genre of property law. Although Barlow may not have been correct in predicting the death of intellectual property law but he was not too far off the mark when he predicted the development of a new set of methods to deal with the new set of circumstances. Copyright law has been stretched to deal with digital technology but it is its strange coupling with contract law in the digital rights management system arena that has brought about a new set of methods.

2 Background

The WIPO Copyright Treaty 1996 requires states to prohibit circumvention of technological protection measures used to protect copyright,2 as well as to prohibit the

---

2 Article 11 WIPO Copyright Treaty 1996.
removal or alteration of rights management information. In Australia, these have been implemented by the Copyright Amendment (Digital Agenda) Act 2000. Section 116A of the Australian Copyright Act 1968 prohibits the making, dealing in, or distribution of circumvention devices for technological protection measures as well as their importation for commercial purposes through giving copyright holders civil remedies. The prohibition is not on the use of such devices. The section also contains a rebuttable presumption that the defendant knew, or ought reasonably to have known, that the device would be used to circumvent, or facilitate the circumvention of, technological protection measures. There are exemptions from liability in instances where the device is supplied for ‘permitted purposes’, such as to make interoperable products or to correct program errors. However, none of the fair dealing exemptions are included in the definition of ‘permitted purposes’. What this means is that although legally a user is entitled to exercise her fair dealing rights over digital products and services by using anti-circumvention devices, the anti-circumvention provisions mean that no-one in Australia will be able to legally help her exercise her fair dealing rights as she would not be able to legally obtain such a device in Australia. Such is the predicament of the average consumer of digital copyright protected material in Australia. The criminal equivalent of s116A is contained in subsections 132(5A) and (5B).

Section 116B prohibits the removal or alteration of electronic rights management information, and s 116C prohibits commercial dealings with works whose electronic rights management information have been removed or altered. In addition to the civil remedies available under these two sections, subsections 132(5C) and (5D) create criminal offences corresponding to the civil actions under sections 116B and 116C respectively.

On the face of it, these sections address the copyright problems posed by digital technology and in particular, the internet. They go some way in giving back to copyright owners some of the power they lost in controlling their works with the advent of digital technology. It is true that digital technology and the internet allow perfect copies of copyright protected materials to be made without permission and then enable these illegal copies to be widely transmitted. The use of copyright management systems prevents and curb illegal reproductions and illegal dealings with copyright protected materials. The validity of such systems is upheld by the copyright legislation. Further, the legislation effectively prevents any circumvention of these systems except in a few stated circumstances. This seems like a happy solution to the digital headache that copyright owners have faced since the early nineties. However, this theoretical model is slightly flawed in one respect: Digital rights management systems may, and often do, ignore the user rights that exist under copyright law. As the anti-circumvention provisions of the Copyright Act give broad

3 Section 116A(1)(c).
4 Subsections 116A(3), 116A(4) and 116A(7).
5 See sections 40, 41 and 42. The fair dealing rights are here referred to as rights for the sake of simplicity but the author acknowledges that there is continued debate on whether the fair dealing rights are in fact rights, or mere interests or mere exemptions. In many jurisdictions such as in the US and countries in Europe, there has been considerable debate on whether the copyright limitations actually grant certain rights to users or whether copyright limitations are mere defences against the rights of copyright holders.