ABSTRACT

DRM systems have been implemented in the past few years by the Content Industry as the panacea against all copyright (and Intellectual Property Rights in general) infringements over the Internet. The validity of this statement shall be assessed in this analysis, identifying its strengths and record to-date and highlighting its shortcomings in an increasingly complex e-commerce (Web 2.0) environment. While doing this, particular attention shall be given to (mostly EU) Intellectual Property Law, Consumer Law, Data Protection Law, and Competition Law.

THE (LEGAL) BACKGROUND

Before embarking upon the legal analysis of contemporary DRM e-commerce systems, as elaborated in other chapters of this book, a short presentation of the background that led to their development is deemed essential. DRM systems, as it will immediately be seen, have been the Content Industry’s technical, but not necessarily legal, response to a relatively recent and otherwise unprecedented volume of attacks against the copyright scheme, that could have ultimately brought its demise. Nevertheless, DRM e-commerce systems, essentially reflecting business rather than technical models, it remains to be seen whether they will indeed fare well under the legislative environment that regulates a number of their aspects.

The Digitization of Information

The digitization of information signaled the first difficulties for the copyright scheme. Until that time the copyright system for protecting intellectual property had worked relatively successfully for around
200 years. It was first developed in the United Kingdom back in 1709\(^2\), when the development of printing and the sale of legislative (and Shakespearean) texts begun evolving into an industry\(^3\). Law-makers of the time identified thus a new type of property, “intellectual” property. This had not been as evident then, as it perhaps appears to us today: for thousands of years before that time, property was divided into only two categories, fixed assets (land) and mobile assets (furniture, equipment, garments etc.). Only at that time did mankind realize that works of the intellect could be of an economic value, and therefore constituted “property” of their author (or right-holder). In this sense, the system that was then developed, and is still in use today, focused upon protection of the “work” of the intellect against unauthorized reproductions (copyright = right to copy). The author of such a protected work deserved compensation for each and every use (reproduction, copying) of his work by others.

The digitization of information challenged the practical, not theoretical, parts of this scheme. Until then reproductions (copies) of any “work” were relatively easy to control (and thus, ask for a fee): books had to be printed and sold on bookshelves, music had to be copied into vinyl and sold on record stores, paintings could only be seen at the premises of the person who owned them. All these actions of reproduction included cost (and thus could not be undertaken by anyone), and were controllable because of the relatively small distribution channels (shops) and the fragmented market (international commerce meant totally different things at the time). The digitization of information managed the first blow to this scheme: once texts and music and pictures became digital, anyone could reproduce them at minimum cost. No more were printing and binding machines or vinyl-cutting industries needed; once “works” became digital, anyone, even home users, could easily copy and store them in their computer systems for (unlimited) future use. Evidently, the 17\(^{th}\) century scheme, whereby any act of copying would confer money to the author of the work automatically became obsolete: copying became so vast that the Content Industry could no longer control it as effectively as it did in the past. Even when new “works” emerged (for instance, movies) it was only a matter of time before digitization affected them in the same way too.

The Internet (Mostly P2P) Factor

The Internet managed the second, and crucial, blow to the copyright scheme: it increased exponentially the distribution channels. Until its emergence the digitization of information, regardless whether annoying in itself for the content industry, remained inevitably “computer-isolated”: any user could store tons of protected material in his computer, but use essentially was confined to his computer alone. Because networks did not exist (at least outside the academic or work environment) any exchange of protected works with other users had to be performed physically, by means of copying onto a disk and carrying the disk to another computer in person. Consequently, even at that time the Content Industry was not particularly discomforted\(^4\): although its property was digitized and copied massively, user-isolation meant that purchases of originals were not substantially affected.

Once the Internet emerged this was no longer the case: connected users were suddenly able to exchange “files” (incorporating unauthorized copies of copyrighted material) without moving from their homes, at a single press of a button and at a marginal cost. Traditional distribution channels (i.e., shops) were shattered. No longer was it necessary at least for some users to purchase the original in order to digitize the work in it – the, vast, Internet community made sure that once a single user in the whole wide world purchased the original and digitized it everybody could then have it for free through a simple download\(^5\).