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Canada's Potential Copyright Lockdown

Why DRM protections are a Trojan horse of just plain bad law...

by KEITH E. RISLER
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The two major concerns

Having been involved in copyright-related issues for the past decade, I see two concerns related to the opportunity costs associated with proposed copyright law changes in Canada. Legislation that could lock down citizens' use of intellectual property is likely to be pushed forward soon in Canada's federal Parliament.

A solution to both concerns would be to skip outlawing the cracking of digital locks on software and content and any software that can do the same, and let the marketplace decide whether Digital Rights Management (DRM) is a good technology or not. I believe that if we enshrine digital locking, we may 1) alter fundamentally the traditional role of the legal system to enforce contractual agreements in the area of intellectual property, denying citizens the right to due process as afforded by the legal system.

And we would 2) artificially widen the practical scope of typical copyright licenses by making some of the more extreme license terms that have historically not been generally enforceable fully binding on users. My concerns thus relate to the dramatic elevation of rightsholder power which the ongoing technical evolution of DRM-aided artificially by bad law-could too easily impose.

As it's already illegal in both civil and criminal terms to infringe copyright, on no account should a technical mechanism be permitted to get in between a citizen's right to due process in terms of defending against the accusation, on any other basis than general acceptance by the marketplace.

DRM and its downside explained

DRM is a software process that as presently evolved imposes a lock or allows a use of digital content such as text, audio, or video based on a digitally assigned permission (or lack thereof) which may even be tracked in real-time via active "call-home" routines built into the DRM-locked software or content. DRM may fairly be said to encompass locked audio, video, and text, but also active locks on software that is "activated" or tracked at each system bootup by such mechanisms as the Microsoft Windows Genuine Advantage system.

In Canada there has been for some time an anticipated change to our copyright law that would make it illegal to crack such digital copy locks or to acquire or use software that can do so. This provision should not be enacted, because it would deny citizens due process should they be in effect accused of copyright infringement via a DRM-enacted consequence.

The problem with DRM is that it tends to enforce penalties such as an evolving "revocation" function in the absence of any court-determined guilt. DRM allows rightsholders to lock down content in previously unimagined remotely-enforceable ways, while it imparts no equal ability on the part of the individual citizen to control his or her own content in the same way, or to challenge the digitally-imposed denial of access.

In effect, an elite communications control right is created for those with the technical leverage to access costly systems that can create and manage DRMed content.

Quick mechanical piracy nothing new

It is critical to note that the mechanical ability to pirate content in dramatic ways pre-distribution is not something that software makers and Hollywood first experienced. Rather, publishers ran into these kinds of issues considerably before the time of Samuel Clemens (Mark Twain). It was not uncommon for books that were to be published first in England to be pirate-published in the U.S. even before being published in England.

This was because, even a relatively long time ago, the mechanical nature of publishing post-Gutenberg meant that if you could steal the technology, you could pirate the content in a relatively quick time. Those many decades ago, no special perks in law were considered necessary; and today there is no greater need for special protection in terms of making cracking software illegal.

In the U.S. the origins of copyright are often traced to the U.S. founders who, Ben Franklin the printer being among them, had an interest in establishing the idea of copyright. This ancestry in fact is not the true origin of copyright law, which traces back to something called the Statute of Anne around 1709 or 1710. But there was a previous legal process for protecting works as early as the late 1660s. The Statute of Anne's goal was to control the copying of books, which even by that time had become a relatively quick and easy steal, a point that lawmakers are often not apprized of by well-intended copyright lobbyists.

Copyright originally not meant to regulate users

Significantly, copyright law does not have its roots in regulating end users, but in regulating the publishers of bootlegged content. And yet even now Windows Vista PC buyers are feeling the effects of relatively recent U.S. copyright reforms as well as the reality that previously hard-to-enforce license terms will soon be fully enforceable by DRM, in terms of significantly heavier hardware requirements to run that OS, dictated by the pervasive processor-heavy Vista DRM.

In the mid-1990s here in Canada I was heavily involved with a national arts group that advocated with considerable success for tighter copyright laws in Canada.

Our group realized some time after 1986 or so that technically the copyright law in Canada makes even the copying of magazine articles, and newspapers using a photocopier illegal. With the help of the publishing industry, we eventually created a licensing regime for this, so that almost everyone in Canada pays a license fee for every photocopy they make.

This is done via blanket licensing to schools and governments, as well as per-copy individual licensing. DRM will eventually allow text content to be metered, and as I understand it remains a Holy Grail of the licensing agency that does "reprographic" copyright licensing in Canada, for example. When every content item is metered and regulated by DRM, which may happen eventually, the cost to licensees--and we are all content licensees in some capacity--will rise correspondingly.

DRM artificially magnifies contractual bindings

My second major concern with DRM is that historically many contracts that are penned between parties (a copyright license works in the same way) tend to be loaded up on onerous terms on the premise that, despite the tough language, the terms aren't that tough in reality because they are costly to enforce--a point made to me during my training toward qualification as a mediator. So a typical contract such as a loan agreement may be over-written to allow for the weak enforceability.

DRM stands to make this over-written component of a software license binding in full without the judgment of the law courts that would normally enforce an alleged copyright infringement, absent DRM.

Denial of due process also a threat

The Canadian government in my view should consider the effect DRM-enabled systems may have in denying due process to the end user, as well as DRM's effect in artificially enhancing contractual bindings on content licensees, in terms of any copyright law changes.

I don't in principle object to DRM, but feel that if DRM does have legs, it should be in a free marketplace. Such evolution will be more properly balanced in terms of end users if DRM is not protected by an artificially legislated advantage. We must allow the marketplace to decide the issue of DRM appropriateness.

Legislation to regulate DRM may be wise

It may also be wise to consider legislating limits on DRM, since DRM has the potential to take intellectual property rights out of the sphere of fair trade in the marketplace, and to in effect lock down end users outside of any practical legal recourse, in terms of DRM-enacted cutoffs that occur on an automated basis.

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[Thoughts on Music](http://www.apple.com/hotnews/thoughtsonmusic/) - Apple's Steve Jobs speaks out against DRM
(<http://www.apple.com/hotnews/thoughtsonmusic/>)

[How the Net Turns Code Into Politics](http://news.bbc.co.uk/2/hi/technology/6325353.stm) - BBC column on Vista DRM
(news.bbc.co.uk/2/hi/technology/6325353.stm)

For a continuing discussion of DRM and other security-related issues, point your Newsgroup software to news.grc.com and subscribe free to security expert Steve Gibson's *Security Now* newsgroup [grc.securitynow](http://news.grc.com). Steve Gibson also maintains Creative Commons licensed copies of his vastly popular *Security Now* podcast at: <http://www.grc.com/securitynow.htm>

[30 Days of DRM](http://tinyurl.com/yq585b) - Examines exceptions and limitations that should apply to any Canadian DMCA-style legislation.
(<http://tinyurl.com/yq585b>)

NEW! [The Cost of Windows Vista DRM](http://www.cs.auckland.ac.nz/~pgut001/pubs/vista_cost.html) - Article by New Zealand researcher Peter Gutmann looks at the "cost" imposed on end-users by the "baked in" Digital Rights Management in the new Windows Vista operating system.
(www.cs.auckland.ac.nz/~pgut001/pubs/vista_cost.html)

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