

WHY TECHNOLOGICAL PROTECTION MEASURES ?

By Esther DUPAIN, IP Lawyer, Cabinet REGIMBEAU

And Evelyne Roux, Partner, Cabinet REGIMBEAU

The original objectives of Intellectual Property are, on the one hand, to provide the authors with enough control over their work to be motivated to create and disseminate it and, on the other hand, to place sufficient limits on this control so that society can benefit from access to the work. Therefore, in certain circumstances, the public is allowed to access to and use of the works without prior permission from the right holders. These fair use/fair dealing exceptions differ from country to country.

However, nowadays, copyright works in digital form are easier and cheaper to copy than in the past. Thus, do we have to reduce the exclusive rights of the owners to the detriment of the creation?

To protect their works, copyright owners have turned to technologies adopting 'Technological Protection Measures' (TPM), 'self-help mechanisms', 'Automated Rights Management' or 'Digital Rights Management' (DRM). These measures permit access to or copying of the subject matter by an authorised owner only: a "key" is needed to open the technological "locks" to read or to listen to the work.

Nonetheless, any TPM is vulnerable to circumvention. So it was considered that technical protection was not sufficient; legal protection of such technical protection was needed too.

This was the subject of the World Intellectual Property Organisation (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) which were adopted in Geneva on December 20th, 1996. These treaties establish for the first time that technological measures used by an author to protect his or her works benefit from an independent protection. To implement such a regime, each Member State had the obligation to adopt new laws conferring legal enforcement of TPM.

The United States was the first country to give effect to the WIPO Treaties in October 1998 with the Digital Millennium Copyright Act (DMCA).

In Europe, the European Union Copyright Directive (EUCD) entered into force on June 22nd, 2001 and its Article 6 deals with the protection of technological measures. This directive forced Member States to meet the requirement established in the WIPO Treaties before December 22nd, 2002. Only Greece and Denmark met this deadline. In France, after many political debates, controversies and dissensions between users and authors, the EUCD was finally implemented by the law of 1st August 2006, known as DADVSI law, incorporated in the Intellectual Property Code (IPC, notably Articles L.331-5 to L.331-22). France was the last of the 25 European Union Member States to implement the Directive.

The first Australian anti-circumvention provision was Section 116A of the Copyright Act 1968 (Cth), introduced by the Copyright Amendment (Digital Agenda) Act 2000 (Cth) in March 2001. However, after signing the Australian-United States Free Trade Agreement (AUSFTA), Australia modified its Copyright Act adopting the Copyright Amendment Act 2006 (Cth) on December 5th, 2006.

According to the new definition, TPMs are devices, products and components preventing acts which are not authorised by authors. Previously, a TPM was only protected by law if it prevented unauthorised acts by law. Consequently, owners have the right to define the performance requirements and what is allowed or not.

Thus, they can lock their works more broadly than before. Not only copying of the work, but also, circumventing a “lock”, will be considered as illegal.

Nevertheless, the author must give certain keys allowing the “public” to benefit from the legal exceptions.

► THE SPECIAL CASE FOR FRANCE: IMPLEMENTATION OF THE DADVSI LAW

The French Law of August 1st, 2006 (known as DADVSI Law) provides legal protection for Digital Rights Management (DRM, Article L. 331-5 of IP Code) which, until then, apart from the technical difficulty, were circumvented with total impunity. “Pirates” were only prosecuted for copyright infringement, and not for having circumvented the technical protection system.



Today, authors can act by raising not only the breach of their copyright, but also the circumvention of a TPM. In fact, any use of the work is subject to the control of the author who is the only person able to authorize access to and use of their work by third parties.

Therefore, the mere circumvention of a TPM, without breach of copyright, may now be forbidden.

There is therefore no doubt that this law reinforces the power and the hold of authors over their work, in particular with regard to downloading and unauthorized copies.

However, the author must allow the legal exceptions that do not require the author's permission.

Any author of intellectual work is indeed the only judge as to whether the work can be distributed for a given time. During this period, any copies or publications without the author's consent are prohibited.

However, the law provides a certain number of exceptions to this principle.

In France, these exceptions are laid down in Article L.122-5 of IP Code, according to which:

When the work has been released, the author may not prevent for instance:

- 1) Private, free showings within the family home;
- 2) Copies or reproductions strictly reserved for the private use of the person making the copy;
- 3) Reproduction for storage purposes and for transmission in situ.

According to the new provisions of the DADVSI Law and Article L. 331-9 IPC, authors are allowed to insert TPM on condition that they also adopt any "necessary provisions" which enable and guarantee recourse to exceptions, such as an access code or other measures.

In the French system, it is incumbent upon the author to organise the provision of access. The author can define in advance the conditions for releasing his work, the measures to limit or control its distribution (insertion of DRM or not), and the modalities enabling the public to make use of these legal exceptions.



Nonetheless, if the author of a work locked using MTP does not provide the necessary provisions, any attempt to make a copy by a user will be then considered as illegal. The person being prosecuted, having acted within the framework of the legal exceptions can refer a case to the new Regulatory Authority (Articles L. 331-17 to L. 331-21 CPI) which, in the first instance, will give preference to conciliation, before making a final decision.

This is why, with regard to other systems implemented to incorporate into law the WIPO's Treaties, it may be considered that the author plays an important role because the author must arrange for the right to invoke exceptions.

The comparative study in English of the American and Australian systems shows that the adopted systems differ and do not follow the same logic.

Esther Dupain, IP Lawyer, Cabinet REGIMBEAU
(dupain@regimbeau.fr)

PARIS

Cabinet Regimbeau
20, rue de Chazelles
75847 PARIS CEDEX 17
Tél. : +33 (0) 1.44.29.35.00
Fax : +33 (0) 1.44.29.35.99
Contact : paris@regimbeau.fr

RENNES

Cabinet Regimbeau
Espace performance
Bâtiment K
35769 ST GREGOIRE CEDEX
Tél. : +33 (0) 2.23.25.26.50
Fax : +33 (0) 2 23.25.26.59
Contact : rennes@regimbeau.fr

LYON

Cabinet Regimbeau
139, rue Vendôme
69477 Lyon Cedex 06
Tel : 04 72 83 85 70
Fax : 04 78 24 30 78
E-mail : lyon@regimbeau.fr

GRENOBLE

World Trade Center
5 place Robert Schuman
BP1510
38025 Grenoble Cedex 1
Tél. : +33 (0) 4 76 70 64 79
Fax : +33 (0) 4 76 28 28 49
Contact : grenoble@regimbeau.fr

www.regimbeau.fr

Evelyne ROUX, Partner, Cabinet REGIMBEAU
(roux@regimbeau.fr)

Paris, January 2008.

About Regimbeau:

Cabinet Regimbeau Industrial Property Law Firm has supported public and private sector companies and project owners for more than 75 years in protecting, strengthening and making profitable their innovations (patents, brand names, designs and models). 9 partners head up a team of 180 people whose skills are put into practice in all the strategic aspects of industrial property: technological intelligence, licensing contracts, IP portfolio audits, partnership negotiations, acquisition of rights, disputes. The consistent strike force of Cabinet Regimbeau and its regional offices means that it can support an international strategy, while maintaining a personalized relationship of very high quality with its clients.