

A Scissor-less, Paperless, Tome: Business, Law and Libraries – the eBook and Mobile-Reader Debate

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Abstract

Announcing the impending release of the 'Sony Reader' on the US market at the 2006 Consumer Electronics Convention, April 2007 is set to re-open the eBook and mobile-reader debate once more, when Sony unleashes the next generation of portable, dedicated, reading-devices. Eager to rectify the shortcomings of its Japanese predecessor - the 'Librié' – the 'Sony Reader' purports to revolutionise the act of reading with electronic paper and eInk, its on-demand 'CONNECT' eBook store of 12,000 titles, an indefinite shelf-life for your title purchases, weaker Digital Rights Management ('DRM') (DRM = Technological Protection Measures + Standard Form Contracting), and increased interoperability with DRM-free text, Microsoft Word, Adobe PDF and its own proprietary BroadBand eBook format. In light of what could be heralded by librarians, academics, publishers and our tech-savvy public akin, as a step closer to realising the fullest potential of mobile reading-devices to enhance our reading experience - both in and outside of the library - it is submitted that the Sony Reader could, in reality, prove a futile business pursuit; another intellectual property quandary in the DRM debate; and the device itself - like so many before it - a scissor-less, paperless tome.

INTRODUCTION

In light of the release of yet another single-user business model for eBooks, this paper readdresses the longstanding eBook debate pertaining to both the business of library lending and the end market for individual users. It is submitted that the requirements for adoption of eBook distribution by both aforementioned customers are one and the same. A lack of interoperability mars both the endeavours of libraries to effectively lend eBooks and reading-devices to its public, and the desires of individual readers to effectively access and 'cut-and-paste' as many titles as they may wish - fair dealings in copyright permitted - and make the most of a plethora of electronic titles available, both 'on' and 'off' the market. Stringent DRM employed by information-industry-intermediaries¹, keen to protect their intellectual property, and unique retail models, from the perceived threat of rapacious internet pirates do not serve the same end. An authoritative investigation of mobile-reading devices, eBook software, commercial eBook stores and not-for-profit eBook depositories, interoperability issues, DRM currently employed on eBook titles, and the current corpus of copyright law will set the parameters of the debate. A further analysis as to whether baking permitted exceptions to copyright into DRM architectures will achieve increased

¹ Namely the 'middlemen' seeking to govern the flow of IP from its author to his public. Economic justifications for online publishers and the sweat of their brow is becoming increasingly untenable, given the comparative ease with which the Internet allows authors and end users to 'hook-up' online. Eschewing the business of the intermediary - or "cutting out the middlemen" , as the www.creativecommons.org licence offered by Lawrence Lessig as a collaborative alternative to traditional copyright, affectionately calls it - is not only a cadence to arms against business practice seeking to profit from the creative endeavours of others, but another welcome advent of the Internet age.

market acceptance; and a suggested best-practice model more attuned to the interoperability demands of its customers, **will** serve this end.

The intention of this paper is to draw attention to an emerging debate that has been somewhat overshadowed by a more emphatic one, namely, that pertaining to online digital music distribution. It is submitted that, **it** is the eBook debate in which we should be the most emphatic. Whilst it may not prove as lucrative an enterprise as the former, the sanctity of the written word still holds the highest sway in the promulgation of knowledge, and the future of learning. Whilst the 'paperless word' presents one of the most apparent evolutionary courses for technological development, the 'scissor-less word' (one which cannot be cut, pasted and manipulated in pursuit of fair use) remains an untenable reality for users who welcome the advent of text manipulation tools to improve their working, academic and everyday lives. If the endeavours of the eBook industry to lock-up the titles they release remains unchecked, a realisation of the fullest potential of eBooks will be lost, and mobile reading-devices will remain scissor-less, paperless, tomes at best.

I. BUSINESS

The market for mobile eBook-reader devices has been a historically tumultuous one, conjoined with the initial shortcomings of the nascent eBook industry of the dot.com era. Their experience was telling: the market had failed to grow due to inadequate reading devices, the lack of a robust catalog [sic] of available titles from publishers and pricing issues². However, unlike a lot of the venture capital of the dot.com boom supporting it, the market for eBooks and mobile reader-devices hasn't entirely vanished - the eBook Forum of 2004 recording a twenty to forty per cent growth rate of an estimated \$15 million industry³ - though it is still very much in the early stages of development, and a lot of mistakes previously made remain unlearned from. In a 2006 eBook User Survey conducted by the International Digital Publishing Forum ('IDPF')⁴ eighty-two per cent of the participants conceded to purchasing an eBook title in the same month of the survey. Unsurprisingly, however, only eight per cent admitted to borrowing an eBook title available for library download in the same time frame. Those who had never purchased an eBook title cited the following key reasons for not doing so:

1. eBooks were too expensive
2. Lack of selection of titles available as electronic books
3. Proprietary formats and associated DRM causing a lack of interoperability between reading systems, fear of longevity of formats and general lack of flexibility of files once purchased⁵.

Furthermore, only four per cent of the participants who regularly consume commercial eBook titles do so for use on dedicated reader-devices, in contradistinction to a seventy-nine per cent consensus that PDAs are the reader-device of choice⁶. It is therefore submitted that a lot of the problems that plagued the previous market still remain as obstacles to a successful uptake of mobile-reader devices. If eBook titles remain marginally less expensive than their electronic counterparts, and hardware devices fail to offer value for money through increased interoperability, customers will be less inclined to make use of them, especially if the selection of electronic titles remains relatively small. In furtherance of this aim, uniform open standards - which have been lacking to date - would be a welcome advent to this fledgling industry, as would

² Herther, N, "The e-book industry today: a bumpy road becomes an evolutionary path to market maturity" (2005) *The Electronic Library* 23 (1), pp.46-47.

³ Herther, *Ibid.*

⁴ http://www.idpf.org/doc_library/surveys/IDPF_eBook_User_Survey_2006.pdf

⁵ *Ibid.* p.3.

⁶ *Ibid.* p.4.

a less stringent DRM regime. If Sony emerges cognisant of these demands, their new Reader may prove a worthy product of our attention. However, as the evolutionary tale of mobile-reader devices to date illustrates, it may serve to ultimately discourage its potential customers from the onset.

Mobile Reader-Devices: An Evolutionary Timeline

- 1968: Postgraduate student Alan Kay articulates concept of the 'Dynabook'; "a portable interactive personal computer, as accessible as a book"⁷.
- Early 1980s: 'Dynatext', from Electronic Book Technology, a company in Rhode Island started by Andy Van Dam, the Brown University researcher who coined the term *electronic book*. "Their vision was limited to sending text that was fixed and consistent – in this case, whole books"⁸.
- 1986: Franklin entered the market first with a handheld 'Electronic Dictionary' capable of displaying one line at a time.
- 1991: Franklin 'Electronic Bible' featuring a four line screen and keyboard.
- Early 1990s: Sony 'Data Discman' otherwise known as the 'Electronic Book Player'. Played audio CDs, books on CD-ROM and came with a bundle of 'Compton's Concise Encyclopaedia', 'Wellness Encyclopaedia' and 'Passport's World Travel Translator'. 'Sony Electronic Book Authoring System' software enabled other compatible titles to be created, but retailing at \$9,000, few additional titles were ever made for this format.
- Mid 1990s: 'Bookman' (required book cartridges). Initially produced by Sony; later by Franklin.
- Mid 1990s: Franklin 'Pocket PDR Medical Book System' (required book cards).
- Mid 1990s: Kay's 'Dynabook' vision was eventually realised with the 'AppleNewton MessagePad', the world's first PDA (capable of displaying electronic titles in their proprietary 'NewtonBook' format). It was discontinued in 1998.
- 1998: Saw the arrival of 'PalmPilots', 'Handspring Visors', and 'Pocket PCs' to supersede the 'AppleNewton MessagePad'.
- October 1998: 'Rocket eBook' (from 'Nuvomedia').
- October 1998: 'SoftBook' (from 'SoftBook Press').
- January 2000: Nuvomedia and SoftBook Press were acquired by 'Gemstar eBook Group' ('Rocket eBook' and 'SoftBook' are thus no longer manufactured). RCA, through a licensing deal with Gemstar now manufacture the 'REB1100' (previously 'Rocket eBook') and the 'REB1200' (previously 'SoftBook').
- Mid-2000 to date: Other companies have joined the market, notably the 'Sony Clie', and 'goReader' (which purports to be 'Open eBook' format compliant)

⁷ Kay, A. & Goldberg, A. 'Personal Dynamic Media' *Computer* 10 (3) March 1977 pp.31-44

⁸ Berners-Lee, T 'Weaving the Web: The Past, Present and Future of the World Wide Web by its Inventor' (1999 Orion Business Books), pp.29-30

- Mid-2004: 'Sony Librié' is rolled-out to the Japanese market.
- April 2007: 'Sony Reader' is currently rolled out on the U.S. market, with no present intention roll out in Europe or elsewhere.

Mobile-Reader Devices: An Overview

Dedicated Reader Devices

- CyTale CyBook Reader
- Franklin Electronic Dictionary
- Franklin Electronic Bible
- Franklin Pocket PDR Medical Book System
- Gemstar REB 1100 (former Rocket eBook)
- Gemstar REB 1200 (former Softbook)
- The Korea eBook
- Xerox X-Libris

Hybrid Devices (more than just a dedicated mobile-reader)

- Franklin eBookman
- Handspring Visor
- Hiebook
- MyFriend
- Nintendo Game Boy
- Panasonic SigmaBook
- Sony Clie
- Sony Librié
- Sony Reader

PDAs (mobile devices offering eBook-reader functionality)

- AppleNewton MessagePad
- Casio Products
- Compaq Products
- Handspring Visors
- Hewlett & Packard Products (e.g. HP Jordana 548)
- PalmPilots
- Pocket PCs

Given that the vast majority of mobile reader-devices once manufactured by the likes of Gemstar, Franklin and RCA are no longer on the market, the Sony Librié and Reader offer the most recent, isolated examples of such devices to date. Whilst both the Librié and the Reader present hardware devices more attuned to the feel and functionality requirements of its users (improved screen resolution with the aid of elnk technology relieves the need for constant refreshment, thus sustaining up to 7,500 continuous page turns on a single battery charge), it is important to note from the onset, that Sony has already learnt many a valuable lesson from its release of the Librié on the Japanese market. Whilst the Librié is undoubtedly a flashy bit of kit, the tying down of titles to a maximum of four devices, and the use of their own proprietary Open MG DRM technology on all titles available from their dedicated download store - coded to lock-up after 60 days - proved somewhat untenable, as the device was met with middling consumer acceptance.

As one pundit posited at the time “the books are cheaper than their real-world equivalents, but who in their right mind is going to buy books that simply evaporate after two months?”⁹

E-Book Formats: An Overview

- ASCII
- Adobe PDF
- Apple’s proprietary NewtonBook
- HTML
- RTF
- Sony’s proprietary BBeB
- TXT

Eager to rectify the Librie’s inefficiencies, the Reader now purports to offer an indefinite shelf-life for your title purchases on up to 6 devices, and increased interoperability with other file formats (TXT, RTF, Adobe PDF, JPEG, GIF, BMP, PNG, MP3, and AAC); as well as their own proprietary Broad Band eBook (‘BBeB’) files supplied through their CONNECT eBookstore. Whilst this appears to answer consumer pleas for increased interoperability to their advantage, the sad reality is that their own BBeB format will remain the Reader’s preferred format of choice. As can be inferred from a bout of questions answered by Sony at www.makezine.com they recommend using the CONNECT Reader Software to import and transfer files to the Reader, as it will enable faster page turns and re-sizing on the Reader itself. Furthermore, whilst the pdf-format is still, without doubt, the format of choice for desktop eBooks¹⁰, on your Sony Reader an Adobe PDF will be scaled to fit on the screen and that will in most cases compromise readability¹¹. “Today’s consumer expects a uniform standard for e-books and yet that is far from reality. Microsoft Reader, Adobe Acrobat eBook Reader, Gemstar eBook, and Palm Reader are each attempting to position themselves as the *de facto* e-book standard and, despite the efforts of the Open eBook Forum¹², no agreement on a uniform format has been reached¹³.” On top of this stack of Reader Software we find yet another, new proprietary ‘reader’ in the form of Sony’s CONNECT reader software.

Reader Software: An Overview

- Adobe Acrobat eBook Reader (w/ CoolType)
- eRocket
- Game Boy Book Reader (written in Assembler and developed by MQP Electronics to enable book texts to be read on a Nintendo Game Boy screen).
- Glassbook Reader
- Microsoft Reader (w/ClearType)
- MobiPocket Reader (lets you read TXT, Palm, and HTML files on any PalmOS and Windows CE versions 2.0 and later compliant devices)
- Palm Reader (for PalmPilots, Handspring Visors and PDAs)
- Sony CONNECT Reader
- TK3 Reader

⁹ Lytle, M, “Nice ebook, shame about the DRM” (2004) <http://www.vnunet.com/personal-computer-world/news/2043236/nice-ebook-shame-drm>

¹⁰ Bohn, P, “eBooks – The Stony Road to Success and the Role of DRM” INDICARE Monitor Vol.2, No 5, 29 July 2005, p.163.

¹¹ http://www.makezine.com/blog/archive/2006/08/sony_responds_to_our_sony_read.html

¹² Led by the Association of American Publishers, and the Open eBook Forum (now the International Digital Publishing Forum): OEB Publication Structure Version 1.0 was released in September 1999, OEB Publication Structure Version 2.0 in December 2006.

¹³ Burk, R, “E-book devices and the marketplace: in search of customers” (2001) *Library Hi Tech* 19 (4), p.329.

Since no one wants to invest in the BetaMax of e-books, publishers, with their slim profit margins, have thus been reluctant to partner with particular players in the e-book market¹⁴. Sony, however, hopes to offer approximately 12,000 titles through its CONNECT eBook store. As Nick Bogarty, executive director at the International Digital Publishing Forum observes, ebook titles haven't been the problem: "Content has been there. All the major trade publishers release works in ebook form. If you look at the New York Times print best-seller list, probably 70% or so of it is also available in electronic form¹⁵". While the catalogue of the eBook industry's formative years "reflected the interests of their major market segment – technology-oriented early adapters – and included selections heavily favoring [sic] science fiction, technology, selected best-sellers and other fiction titles...[t]oday's offerings are more robust, reflecting a growing audience for these products¹⁶". Here, commercial book stores inhabit the same Web space as other eBook 'projects' striving to offer free access to digital content online.

Commercial E-Book Stores: A Non-Exhaustive List of 'Main Players'

- Amazon
- Contentlink eBookstore.
- CyberRead
- Digital Book Index
- eBookExpress.com
- eBooks.com
- eBookMall, Inc.
- Ebrary
- Elibron
- Fictionwise
- Glassbook (purchased by Adobe)
- ipicturebooks.com
- NetLibrary (previously www.peanutpress.com)
- OverDrive
- Qwestria
- Sony CONNECT
- all commercial e-journal publishers, e.g. Emerald, JSTOR, etc

Not-For-Profit/Public Domain Projects: An Overview

- Bartleby.com
- Google Book Project
- Internet Public Library
- Project Gutenberg
- University of Virginia eText Centre

Amidst all these commercial enterprises, and not-for-profit/public domain projects competing for our attention, the interoperability demands of open-access and uniform file formats discussed above, becomes even more imperative. In order to fully realise the current potential for mobile-reader devices, one must be able to purchase reader-hardware that enables full advantage to be taken of all the electronic titles now at our disposal; both 'on' and 'off' the market. Take Google's Book Project as a recent example of such collaborative endeavours 'off' the market. In reporting Google's desires to digitally archive out-of-copyright 'classics' the mainstream press appears to have missed the market for mobile-reader devices completely, assuming the fullest realisation of

¹⁴ Coyle, K, "Stakeholders and Standards in the E-Book Ecology: or, it's the Economics Stupid!" (2001) *Library Hi Tech* 19 (4), p.315.

¹⁵ Miller, R, "Can the Sony Reader Push eBooks into the Mainstream?" (2006) <http://www.econtentmag.com/Articles/ArticleReader.aspx?ArticleID=15308>

¹⁶ Herther, *op.cit.* p.48.

the electronic titles made freely available is either through our PC screens, or on carbon-copy print outs:

“At present home download and computer speeds, it could end up being more expensive to get hold of a free copy of a classic work. An 1825 complete works of Shakespeare, found by the Google book search, runs to 908 pages and takes 56.6 megabytes of data. Downloading the tome would take up to five minutes on a broadband fast internet link, and could take approaching an hour on a traditional dial-up connection. But the determined reader would have to endure reading the plays on a backlit screen. Printing out, though adds to the complexity. Using a cheap home printer working at 12 pages a minute, it would take 75 minutes to produce the entire book for bedtime reading. The exercise could easily consume an entire ink cartridge, which costs between £35 and £40. On Amazon it is possible to buy a paperback *Complete Works of Shakespeare* for £4.79¹⁷.”

Google's complete works of Shakespeare however, despite costing nothing to view on a mobile-reader device, could prove infinitely more valuable than a £4.79 paperback if a student wishes to read it 'horizontally'; using search tools to root out key words and congruent themes in the bard's work to aid his studies. Furthermore, a free copy of Herman Melville's 'Moby Dick', for instance, will almost certainly appear more attractive than Sony CONNECT's \$3.16¹⁸ equivalent; even if it is considerable cheaper than a codex paperback. It is thus submitted that Sony CONNECT may not only be pricing themselves out of the market for such publications, it may also prove guilty of directing the potential movement of e-books away from a largely publishing and computer orientation, into the world of consumer electronics: As such, eBook vendors may find themselves with little left than the provision of content for placement on devices designed and used more often for entertainment than information¹⁹. If capable of harnessing a diffuse range of electronic title formats, the Sony Reader, could potentially, present itself as the eBook Reader equivalent of Apple's iPod; an expensive must-have device capable of supporting multiple file formats, backed up by an on-demand commercial store. Then again, if interoperability issues and stringent DRM continue to plague user acceptance, it might prove nothing more than a commuter fad at best (albeit a rather expensive one when compared to similarly priced PDAs offering additional functionality).

Whilst the bulk of the discussion pertaining to DRM will be addressed below, it is important to note from the onset that I perceive DRM as a business strategy, given 'teeth' by anti-circumvention legislation. The issues relate not only to technology and the law, but also to issues of social acceptance²⁰. With the advent of TPM, the eBook industry, threatened by an omnipresent discourse of Internet piracy, now pursues an increasingly futile arms race for stronger technological access and copy controls on the content it distributes, as an everyday business practice. “This is what Glassbook learned in 2000, when unprotected copies of Stephen King's "Riding The Bullet" materialized [sic] two days after the eBook version (supposedly secured against this kind of thing) was released²¹”. Nonetheless, this ultimately did little to prevent King profiting from his labour, selling 400,000²² legitimate copies of said e-book, in a single day.

II. LAW

¹⁷ Sabbagh, D. & Malvern, J. 'Online books are coming free, forgetting the extras' The Times, Thursday August 31 2006

¹⁸ <http://ebooks.connect.com/product/400/000/000/000/000/039/005/40000000000000039005.html>

¹⁹ Herther, *op.cit.* p.50.

²⁰ Herther, *op.cit.* p.46.

²¹ Schneier, B, "Secrets & Lies: Digital Security in a Networked World", (2000 Wiley), pp.251-311

²² Herther, *op.cit.* p.46.

"I opened it at page 96 – the secret page on which I write my name to catch out borrowers and book-sharks." (Flann O'Brien: *Myles Away from Dublin* (1990))

Nothing says 'this intellectual property ('IP') is mine!' better than technological protection measures ('TPM') (which fall under the umbrella of DRM when coupled with equally restrictive standard form contracts). Fearing the unrestricted dissemination of IP across a worldwide distribution network, permanently outside any State's jurisdiction, rightholders engaging in e-commerce have transcended law through technology, with the birth of TPM; technological fences erected by copyright rightholders to protect their IP from the perceived inefficiencies of the internet, and the omnipresent threat of rapacious pirates. In many ways, the ability of computer code to govern behaviour can be more effective than mere laws which serve the function of rule and sanction. Instead of punishment, TPM can lead to prevention, with anti-circumvention now in the statute books. In chronologically assessing the legislative attempts of the World Intellectual Property Organization ('WIPO'), the United States ('US'), and the European Union ('EU'), I will seek to support the claim that in giving too much deference to the protection of TPM employed by rightholders, the global legislature are edging closer and closer towards the creation of a copyright that is, what the technology behind it does, by effectively 'locking-out' those with legal rights mandated by fair use and permitted exceptions. It is submitted that such business practices are publicly unacceptable, as is the legislative framework that enshrines their protection, and it is toward this argument I now turn.

THE WORLD INTELLECTUAL PROPERTY ORGANISATION ('WIPO') TREATIES

The WIPO Copyright Treaty ('WCT') (and the WIPO Performances and Phonograms Treaty²³ ('WPPT') (collectively referred to as 'The Treaties'²⁴) was not only the first treaty to mandate protection "against the circumvention of effective technological measures²⁵" employed by authors and their licensed intermediaries per se, it was the first "special agreement²⁶" of international reach to do so²⁷. Affording such measures only a minimum level of protection - which contracting parties may choose to exceed.

The fundamental tenet of copyright law enshrined in WCT is that "copyright protection extends to expressions and not to ideas²⁸". Whilst Art.11 only mandates the protection of TPM used to safeguard such 'expressions' - giving due immunity to recognised exceptions and limitations not authorised by the authors concerned, but nonetheless permitted by law²⁹. Present US and EU anti-circumvention provisions however, address *any* use technology can encapsulate over and above uses covered by copyright, and consider exceptions and fair uses as a market failure of copyright that technology can heal³⁰. In attempting to provide "effective" remedies against circumvention, the law also proscribes the production and distribution of devices used to circumvent TPM, and the trafficking/making available of said devices. Keen to deconstruct the

²³ Art.18 WPPT.

²⁴ Adopted at the WIPO Diplomatic Conference in Geneva on 20 December 1996 - and came into force on 6 March 2002.

²⁵ Art.11 WCT.

²⁶ As defined in Art.20 Berne Convention for the Protection of Literary and Artistic Works 1979 ('Berne'), and therefore, must be interpreted as offering the minimum level of protection as that provided for by Berne.

²⁷ Bäsler, W, "Technological Protection Measures in the United States, the European Union and Germany: How Much Fair Use Do We Need in the 'Digital World'?" (2003) *Virginia Journal of Law and Technology* 8 (13), p.5.

²⁸ Art.2 WCT

²⁹ It has been posited (See: Foged, T, "US v EU Anti-Circumvention Legislation: Preserving the Public's Privileges in the Digital Age" (2002) *E.I.P.R.* 24 (11), p.529, and Ganley, P, "Digital Copyright and the New Creative Dynamics" (2004) *I.J.L.I.T.* 12 (3), p.326) that works protected by TPM in which copyright term has expired under national law, therefore fall outside the protection of Art.11 WCT.

³⁰ Dusollier, S, "Technology as an Imperative for Regulating Copyright: From the Public Exploitation to the Private Use of the Work" (2005) *E.I.P.R.* 27 (6), p.203.

perception that TPM better benefit developed countries³¹, WIPO regrettably failed to mandate a maximum level of protection for such technological fences. As will be illustrated below, the US, and EU Member States have all succeeded in legally 'locking-up' their intellectual expressions to a greater extent than WIPO could have reasonably foreseen. It must be borne in mind that as well as being articles for market consumption, copyrighted expressions also contain the intermediary building blocks for progress³². We stand on the shoulders of giants, as the time-honoured maxim testifies...that is, unless you are a developing nation, or academic scholar, fenced-off from the (copyright exemptions/permissions of) the public domain by the all-encompassing TPM of 'Silicon Valley'.

THE DIGITAL MILLENIUM COPYRIGHT ACT ('DMCA')

On 28 October 1998 Congress passed the DMCA, amidst extensive lobbying from the entertainment industry³³ against the perceived threat of rapacious Internet pirates. Its passage would have been impossible without the backdoor approach of aligning Europe through WIPO, and bringing the law back home as part of the WIPO Treaties package³⁴ implemented through Art.1. Adopting a 'minimalist approach'³⁵ in its implementation of The Treaties - it was necessary to recognise the WCT and WPPT as points of attachment for protection, but no changes were needed to substantive rights as US law already met the requirements of The Treaties - adding, *inter alia*, the new Chapter 12 (§1201-1205) to Title 17 of the US Code ('The Code'), regarding TPM.

§1201(a)(3) and §1201(b)(2) define the effectiveness of TPM very broadly. Here, The Code draws an important distinction from the onset, between TPM protecting 'access control'³⁶ and those safeguarding the exclusive rights of the copyright owner, or 'copy control'³⁷ in only imposing civil and criminal sanctions on the circumvention of the former. Furthering its 'minimalist approach', the protection of 'copy control' measures was deemed undeserving³⁸ of DMCA codification, since circumvention resulting in unlawful copying is already circumscribed by The Code³⁹. Delineation of the contrast- between access to, and exploitation of, copyright content - is unproblematic. Under this typology, circumventing access control measures is the electronic equivalent of "breaking and entering": the gravamen here is not copyright infringement at all; the invasion of another man's "castle" is the offence in question⁴⁰. Whilst a 'fair use' defence may permit copying a book or recording - in whole, or in part - it does not allow the theft of it as a means to such end⁴¹. Whilst it is easy to lose sight of this distinction in public domain and innovation-promoting discourses promulgating a feared 'fencing-off' of works in which copyright has expired, the methodology employed by the DMCA in this respect, should be applauded. The complete works of Shakespeare may have outlived copyright, but one cannot expect a printed volume to come at no cost, and this should remain true for works distributed on the Internet.

³¹ Keplinger, M, "Enforcement of Copyright and Related Rights in Digital Networks, the Technology and its Possibilities for Infringement and Surveillance: The Enforcement Rules under the WCT and the WPPT" (2001) *WIPO/CR/EC/MNL/01/3*, p.2.

³² Ganley, *op.cit.* p.295.

³³ Cradduck, L, & McCullagh, A, "Designing Copyright TPM: A Mutant Digital Copyright" *I.J.L.I.T* (2005) 13 (2), p.165.

³⁴ Hiaring, A, "Fair Use and TRIPS: Too Much of a Good Thing?" (2005) *Journal of Internet Law*, p.3.

³⁵ Braun, N, "The Interface between the Protection of Technological Measures and the Exercise of Exceptions to Copyright and Related Rights: Comparing the Situation in the United States and in the European Community" (2003) *E.I.P.R* (11), p.496.

³⁶ 17 U.S.C. §1201(a)(1).

³⁷ Whilst it is important to note that the latter category of acts are not limited to copying, this broader consideration has been replaced by a 'copy control' discourse in the bulk of the literature reviewed, and serves as a convenient short title for the discussion at hand.

³⁸ Bäslér, *op.cit.* pp.6-7.

³⁹ 17 U.S.C. §501-513.

⁴⁰ Nimmer, D, "Copyright: Sacred Text, Technology, and the DMCA" (2003 *Kluwer*), pp.394-5.

⁴¹ Braun, *op.cit.* p.497.

Market competition, and distribution costs dictate the price of access - which may prove very low, given the extensive endeavours of 'netizens' striving to offer free access to information online.⁴² Given that I was instantly able find a free text-only copy of Romeo and Juliet with a light-hearted Google search, Sony CONNECT's \$4 equivalent⁴³, repackaged with resurrected copyright⁴⁴ in its typographical layout, proves somewhat unappealing. Freedom of information must never be conflated with freedom from expense. Yet, given the low overheads, collaborative capabilities and technological advances facilitating the increased dissemination of works online, the realisation of a 'freedom of information at freedom of expense' will not be long in coming. The ethos of sharing and the technology to do so are already with us; only the all-encompassing TPM of intermediary information-industry rightholders stands as a barrier to its fruition

After this initial differentiation between copyright infringement and outright theft, it is somewhat erroneous that the main thrust of the DMCA proscribes the trafficking in devices that circumvent *both* access⁴⁵ and copy⁴⁶ controls. Prima facie, the wording of §1201 posits no problems for a fair use claim, expressly stating "nothing...shall affect rights, remedies, limitations or defenses [sic] to copyright infringement, including fair use."⁴⁷ However, a resultant string of case law has confirmed academic suspicion that the anti-circumvention provisions of the DMCA, in practice, exist as an entirely different rights structure to copyright law, with no carefully nurtured guarantee that valuable limitations to copyright will be maintained⁴⁸. Since fair use is only a limitation on copyright - a permitted exception to its infringement - it is wholly irrelevant to the copyright-independent violation of access control circumvention⁴⁹. However, whilst circumvention of copy control mechanisms is not illegal for fair users, dealing in circumvention devices that enable fair use is⁵⁰. Simply put, digital crowbars have been unjustifiably outlawed. Furthermore, it was somewhat confusing held by Judge Whyte in *US v. Elcom, Ltd.* that whilst it was the clear intention of Congress to impose a blanket ban on all trafficking in circumvention devices⁵¹ and that such a ban was not unconstitutional, in doing so the DMCA does not eliminate fair use⁵². The prior submission - that technology enabling copying for fair uses is not primarily designed for the purpose of circumvention, or has a commercially significant purpose other than the circumvention of TPM⁵³ - has been ignored before these courts. Perhaps some solace may be found in the recent ruling of *IMS Inquiry Management Systems Ltd. v. Berkshire Information Systems*⁵⁴. Here Judge Buchwald sensibly held that for a work to receive DMCA protection through the use of TPM, the work itself has to be one capable of protection under US copyright law. If a work is not,⁵⁵ then neither the circumvention of, nor trafficking in circumvention technology to thwart any TPM deployed to protect it will contravene the DMCA. It is submitted that such reasoning can be sensibly extended to copy control restrictions on works in which

⁴² E.g. 'Wikipedia' (www.wikipedia.org); a portal, that since its 2001 creation has rapidly grown into the largest reference Web site on the Internet. The content of Wikipedia is free, and is written collaboratively by people from all around the world: 'Project Gutenberg' (www.gutenberg.org); a free eBook and eText archive of over 20,000 'Plain Vanilla ASCII' titles: and The University of Virginia's E-Book Library (www.etext.lib.virginia.edu/ebooks); the oldest and largest public eBook library on the Web, having delivered approximately 8.5 million free ebooks to over 100 countries since its 2000 inauguration.

⁴³ <http://ebooks.connect.com/product/400/000/000/000/000/037/667/40000000000000037667.html>

⁴⁴ A newly formatted version of such a work attracts a new copyright *in the formatting only* (Adams, A, "Introduction: Valid Protection or Abusive Control?" (2006) *International Review of Law Computers & Technology* 20 (3), p.236).

⁴⁵ 17 U.S.C. §1201(a)(2).

⁴⁶ 17 U.S.C. §1201(b)(1).

⁴⁷ 17 U.S.C. §1201(c)(1).

⁴⁸ Ganley, *op.cit.* p.285.

⁴⁹ *Universal City Studios v. Reimerdes* 111F.Supp.2d294(S.D.N.Y.2000) and *RealNetworks, Inc. v. Streambox, Inc.* 2000WL127311(W.D.Wash.2000).

⁵⁰ *US v. Elcom, Ltd.* N.D.Cal.,No.CR01-20138RMW 5/8/02.

⁵¹ *Ibid.* p.11.

⁵² *Ibid.*

⁵³ Bäsler, *op.cit.* p.9.

⁵⁴ 2004 U.S. Dist. LEXIS 2673 (albeit regarding databases, to which copyright law does not apply).

⁵⁵ as was proven the case with databases.

copyright has expired: 'Alice's Adventures in Wonderland', Dante's 'Divine Comedy', Shakespeare's 'Romeo and Juliet' et al. However, given the recent, 20-year expansion of copyright duration brought about by the 'Mickey Mouse Protection Act'⁵⁶ - and the suggestion that an obvious loophole may lie in the bundling together of copyright and non-copyright material⁵⁷ in eBooks claiming new copyright in typographical layout and added commentaries and prefaces, thus resurrecting copyright term in a rather procrustean manner - realisation of permitted exceptions to the copyright regime, may once again, prove a long time in coming. To this end the business practices of public domain profiteers such as 'Disney Corporation'⁵⁸ - one of the largest lobby groups behind the CTEA - provide an apropos illustration. Lest we not forget, the birth of Disney (with the release of 'Steamboat Willie' on 18 November 1928) pre-dated the VCR, the DVD and the Peer-To-Peer. I have never seen the cartoon in its entirety; only fleeting glimpses of Mickey serving as helmsman of his steamboat, that have been deemed representative of the motion picture by almost every television documentary charting cartoon history. 'Steamboat Willie's' copyright term was set to expire in 2003. Thankfully for Disney Corp, its intellectual property is now protected from any possibility of entering the public domain until 2023, furnishing them with a further 20 years to digitally replicate their cine film, release it online and on DVD in a read-only format⁵⁹ and cream off the profits of nostalgia indefinitely⁶⁰. I have faith that in 2023 someone with the capability to acquire a digitised copy of 'Steamboat Willie', will circumvent its TPM, and make it freely available online (on Peer-To-Peer networks, and at no cost)⁶¹. Whilst the endeavours of such an actor will effectively set 'Steamboat Willie' free to permeate the public domain, he will undoubtedly fall as a martyr to his cause. Despite such actions being in the public good and a permissible exception to TPM-protected works in which copyright term no longer exists - the stand-alone offence of circumvention per se, and its threat of imprisonment, will either dissuade him from his a noble act⁶² or reprimand him as one would a 'hacker'. While the entertainment industry generally, and Disney specifically, benefit from the new laws, the losers are less well defined; after all "you can still read books, use the Internet, and watch Mickey Mouse"⁶³, albeit through another damaging concomitant of TPM referred to as "economic acquiescence"⁶⁴. Of course you can still read Alice's Adventures in Wonderland - in libraries, online, and on-screen - but the same book as an e-book is effectively governed by a different set of rules⁶⁵. The now-infamous, free eBook version of the aforementioned book previously available from Adobe, implicitly stated, and technologically mandated, that you were not allowed to copy it, lend it, give it away, or read it aloud; leading some emphatic academics to the absurd

⁵⁶ Sonny Bono Copyright Term Extension Act 1998 ('CTEA').

⁵⁷ Craddock, L, *op.cit.* p.168.

⁵⁸ Who, it is submitted, already have a lengthy history of profiteering in the public domain: namely in the pillaging and re-branding of folk-legends (Sleeping Beauty, Cinderella, etc). When the public domain facilitated the realisation of Walt's dreams ("There is more treasure in books than in all the pirate's loot on Treasure Island") Disney Corp was happy. With the passing of the CTEA, and Machiavellian disregard for a public domain that essentially made them 'what they are' Disney is happy once again; having effectively 'changed the rules of the copyright game' to further protect their economic interests.

⁵⁹ Rife with all-encompassing TPM.

⁶⁰ Given that the stand-alone proscriptions on anti-circumvention contained within the DMCA, unless repealed, remain in force post-2023.

⁶¹ "Once it is dispersed hither and thither, it can be impossible to retrieve. If a digital copy of The Lion King ever gets distributed over the Internet, Disney will not be able to delete all the copies" (Schneier, *op.cit.* p.25.). As decentralised distribution is a natural law of the internet, TPM remain the only vanguard of Disney's desire to forever-profit from its IP.

⁶² Namely, the act of sharing.

⁶³ Halbert, D, "Resisting Intellectual Property" (2005 Routledge), p.13.

⁶⁴ It is submitted that Bielstein's argument (that economic acquiescence with a particular business model promulgates a misleading belief that public domain works require rightholder permission - usually combined with an unnecessary, but not unreasonable looking fee - in pursuance of a legitimate copyright exception) (see: Bielstein, S, "Permission, a Survival Guide: Blunt Talk about Art as Intellectual Property" (2006 University of Chicago Press), pp.10-33) can be extended to TPM, as technological guardians of the rightholder's preferred business model.

⁶⁵ Lessig, L, Free Culture (2004 Penguin) pp.144-153

conclusion that Adobe was restricting the right of parents to read the book to their children⁶⁶. Of course, what Lessig was really eluding to here is the use of the Adobe Reader's 'Read Aloud' capabilities, though it is worded as such, to give the impression that one may not read it aloud either. Given that we are talking about a freely available, no-cost eBook version of a now copyright-expired classic, it is submitted that it is somewhat otiose for Adobe to seek to technologically proscribe permissions to which we are now, all legally entitled to. These, scissor-less words, do nothing to aid the endeavours of the 'horizontal' reader, 'ctrl-f' searching for themes in Carroll's work and seeking to cut and paste relevant quotations to serve his academic motivations, or the eBook reader who may wish to Bluetooth a copy from his local library, and Bluetooth it on again, to any number of his peers⁶⁷. There is nothing in the copyright corpus to say that this cannot be done, but everything in the world of anti-circumvention, where these copy rights can only be fully realised through legally proscribed circumvention. Merely by digitizing [sic] something, it is now possible to claim things that have been in the public domain for decades⁶⁸, and in the twenty years after the Sonny Bono Act, while one million patents will pass into the public domain, zero copyrights will pass into the public domain by virtue of the expiration of a copyright term⁶⁹.

These proscriptions in the DMCA are not without their noted limitations. In striving to strike a reasonable balance Congress introduced⁷⁰ a closed list of narrowly defined exceptions to the prohibition of circumventing access controls and the trafficking in devices that circumvent both access and copy controls. These exceptions however, have been tailored to specifically justify their inclusion, and are narrowly confined to purposes such as law enforcement, national security and encryption research so as not to compromise the adequacy and effectiveness of the technical protection measures employed. The DMCA also introduces an administrative rulemaking procedure into The Code⁷¹ whereby the Copyright Office will conduct a tri-annual assessment of access control mechanisms that adversely affect the ability to make non-infringing use of such works: however, these too, have only been granted subsequent exemption in specific, technical instances such as malfunction, or lists of websites blocked by filtering software⁷². Evidently, exempting the trafficking in devices that would allow circumvention of copy control mechanisms for the purpose of fair use will provide substantially more people with the tools to do so than the limited number of technical experts and government representatives the DMCA seeks to confine this know-how to.

THE EU COPYRIGHT DIRECTIVE

The EU Copyright Directive⁷³ ('The Directive'), eventually adopted by the European Parliament and the Council of the European Union on 22 May, 2001 - and entering into force on 22 June, 2001 – also sought to bring the EU in line with their respective obligations under Art.11 WCT and

⁶⁶ See: Thierer, A. and Crews, W, *Copy Fights: The Future of Intellectual Property in the Information Age* (2002 Cato) p.38: "If you buy *Alice in Wonderland* in eBook format, among the things that you click through before you can activate it is a legal enjoinder from reading it out loud – because that's a form of reproduction."

⁶⁷ It is also of relevance to note here that the first sale doctrine, enshrined in §109 of The Code is generally unavailable to digital content: "Compounding the abridgement of property rights of alienation, trade, and the right to enjoy the work wrought by this anticircumvention law is the fact that digital transmissions do not fall within the first sale exception" (Graham, J, "Preserving the Aftermarket in Copyrighted Works: Adapting the First Sale Doctrine to the Emerging Technological Landscape" (2002) STAN. TECH. L. REV. 1, http://stlr.stanford.edu/STLR/Articles/02_STLR_1, para 4.

⁶⁸ *Ibid.*

⁶⁹ Lessig, *op.cit.* pp.134-135.

⁷⁰ 17 U.S.C. §1201(d)-(j).

⁷¹ 17 U.S.C. §1201(a)(1)(B)-(E).

⁷² Braun, *op.cit.* p.498.

⁷³ 2001/29/EC.

Art.18 WPT, and to harmonise the Member States' national legal framework on copyright and related rights to ensure that competition in the internal market remains undistorted⁷⁴.

The bulk of the provisions pertaining to the protection of TPM are to be found in Art.6. Art.6(1) and Art.6(2) of The Directive set out the initial scope of the protection to be afforded TPM as defined in Art.6(3). Article 6(1) requires Member States to provide "adequate legal protection against the circumvention of any effective technological measures" introducing a subjective limitation distinct from the DMCA that circumvention be carried out "...with knowledge, or with reasonable grounds to know" that it is being done so. This language implies that mere negligence is insufficient; rather gross negligence or intent is required⁷⁵.

Art.6(3) of The Directive defines "technical measures" and when they shall be deemed "effective" in a similar manner to §1201(a)(3)(B) and §1201(b)(2)(B) of the DMCA. Here, Séverine Dusollier is as emphatic about The Directive as she is about the DMCA in stressing "[o]ne could not dream of a better tautology: obviously, since the rightholder has decided to technically protect an act of use related to his or her work, it means that he or she was willing not to authorise such an act"⁷⁶ and that any TPM employed by a rightholder, even if it denies the copying of now public domain book, is a TPM to be protected from circumvention. It can also be observed that Art.6(3) fails to fully implement Art.11 WCT by omitting the final adjunct "or permitted at law." As noted above, this adjunct serves to emphasise that works in which copyright term has expired fall outside the scope of the anti-circumvention proscriptions. However, in only prohibiting circumvention "not authorised by the rightholder", from the onset, The Directive appears to ignore the possibility that national law may already justify circumvention, truncating copyrights role in the balancing of appropriate entitlements, leaving the matter to be concluded by the sound commercial interests of the rightholders. Such a wide interpretation of "rightholders" appears to be contrary to the underlying objectives of the WIPO Treaties and The Directive to protect TPM⁷⁷. In this respect The Directive can be seen as primarily geared towards protecting the rights and interests of the 'main players' in the information industry, not the creators that provide the actual content driving their industry⁷⁸.

Many academics have also observed the wider reaching scope of The Directive in contradistinction to the DMCA, in not differentiating between access control and copy control measures⁷⁹. However, it is submitted that in failing to at least distinguish what has been referred to above as outright theft, and copyright infringement, a more damaging discourse of rapacious circumventers is perpetuated than under the DMCA, by bundling the varied motivations of the outright thief and the cryptography student (neither of which care for copyright infringement) and the rapacious pirate and the fair user (neither of which need to access a work they already own) into the same perceived threat from the onset, regardless of any rights and defences that may later arise.

The major difference between The Directive and the DMCA however, lies in Art.6(4) designed to address the difficulties faced by the beneficiary of a copyright exception who is restricted from making use of that exception when the content is protected by TPM⁸⁰. Art.6(4) only applies to the anti-circumvention proscriptions of Art.6(1) and - similar to the DMCA - does not extend to the anti-trafficking prohibitions of Art.6(2). Member States are obliged to "take appropriate measures

⁷⁴ Foged, *op.cit.*p.534.

⁷⁵ Bäsler, *op.cit.* pp.12-13.

⁷⁶ Dusollier 2005, *op.cit.*p.203.

⁷⁷ Braun, *op.cit.*p.499.

⁷⁸ Hugenholtz, B, "Why the Copyright Directive is Unimportant, and Possibly Invalid" (2000) E.I.P.R. 22 (11), p.502.

⁷⁹ Bäsler, *op.cit.*pp.11-12, Braun, *op.cit.* p.498, Dusollier, S 'Fair use by Design in the European Copyright Directive of 2001: An Empty Promise' *International Review of Industrial Property and Copyright Law* (2003) (34), p.70, and, Craig, C., & Graham, R, "Rights Management n the Digital World" (2003) *Computer law and Security Report* 19 (5), p.360.

⁸⁰ Braun, *op.cit.*p.499.

to ensure that rightholders make available to the beneficiary of an exception or limitation...the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation...where that beneficiary has legal access to the protected work or subject-matter concerned.” Not only does this prevent rightholders from remaining ‘passive’⁸¹ to the rights of exception-beneficiaries - as the DMCA permits - but it radically purports to “tip the balance in favour of the users seeking to exercise their rights, before the onset of sanctions against circumvention” by giving them “a positive meaning and not only a defensive nature”⁸². In practice however, Art.6(4) is nowhere near as radical as it would appear to be: its initial emphasis is to entrust “voluntary measures taken by rightholders, including agreements” with the safeguarding of these exceptions. Here the intervention of the lawmaker is seen as subsidiary; voluntary measures undertaken by rightholders as the preferred solution⁸³. Any attempt at defining the vagaries of the voluntary measures and agreements preferred is not to be found within The Directive⁸⁴, though it has been submitted, by gleaning examples from the legislative history of The Directive, that ‘building copyright exceptions by design’, and providing some leeway through licensing and business models, are obvious omissions that would better protect exceptions in a private orderings model than a public and democratic law-making process⁸⁵.

A. Exceptions and Limitations to Copyright in The Directive

Art.6(4) distinguishes between a broader category of ‘public policy’ exceptions⁸⁶ and a single ‘private copying’ exception⁸⁷. Member States are only obliged to legislate on the former, and may choose to legislate on the latter. For the purpose of harmonisation across the E.U the list of exceptions found in Art.5 is exhaustive; Member States are not permitted to legislate further than those exceptions cited within The Directive. Yet, the WIPO Treaties explicitly recognised that in the digital environment, further exceptions to copyright, and limitations to the copyright owner’s exclusive rights, will undoubtedly, be required⁸⁸. This ‘closed’ list system also differs substantially from the ‘open’ system of the U.S. where an adaptive fair use doctrine allows copyright limitations to evolve from a real-time, legal balancing act. However, under the ‘closed’ list of exemptions contained within The Directive, the process by which new exceptions and limitations are assented⁸⁹, as there inevitably will be - given the rapid pace of technological advancement - will leave the evolutionary claims of such beneficiaries in the EU at a staggered disadvantage. 6 years prior to the assent of The Directive, the Supreme Court of the Netherlands held,⁹⁰ considering themselves fully entitled to extend an exhaustive list of copyright exceptions, that in embodying a balance of private and collective interests, copyright rationale can never consider a list of exceptions to be effectively closed. However, it is submitted that The Directive no longer permits the courts of its Member States to take such considerations into their own hands: unless instigated through Art.12(1) they would be in contravention of their obligations under The Directive⁹¹. “Now, thanks to The Directive, if some unforeseen use that we all agree should be exempted emerges, we’ll have to wait at least three years⁹², if not longer, for The Directive to be amended”⁹³. Given that the underlying intention of The Directive was to harmonise exceptions across the EU it is somewhat otiose that of the 23 enshrined in Art.5(1)-(3), only the temporary copying exception set out in Art.5(1) requires mandatory implementation.

⁸¹ *Ibid.*

⁸² Dusollier 2003, *op.cit.*p.63

⁸³ *Ibid.*p.62.

⁸⁴ Recital 51, where this assertion is reiterated, unfortunately, provides no further clues.

⁸⁵ Dusollier 2003, *op.cit.*p.72.

⁸⁶ Arts.5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) and (3)(e).

⁸⁷ Art.5(2)(b).

⁸⁸ Ganley, *op.cit.*p.312.

⁸⁹ Art.12(1) reports on the application of Art.5 exceptions (inter alia) are to be submitted to the European Parliament, The Council and the Economic and Social Committee every 3 years.

⁹⁰ *Dior v. Evora*, Hoge Raad, 20 October 1995, N.J.1996No.682.

⁹¹ Bäsler, *op.cit.*pp.23.

⁹² A very long time when technological advancement is concerned.

⁹³ Hugenholtz, *op.cit.*p.501.

It must also be noted, that under Art.5(5), all the exceptions contained therein are to be interpreted in light of the “three-step-test” under Art.9 Berne (backed up by Art.13 TRIPS), namely, restricted to “special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.” It has been largely assumed that the “legitimate interests of the rightholder” are economic⁹⁴ though it should borne in mind, that conflating this limb of the Berne test with economic detriment, does nothing to further the rationale that innovation is not necessarily economy-dependent, and public domain works remain an available pool of knowledge from which we may wish to copy – copyright policy must eschew a construct of value premised simply on the idea of consumption⁹⁵ - but does everything for the ‘copyright optimists’⁹⁶, who seek to ensure all value that can be derived from their property is captured; even if their property is but a typographical eBook of its public domain equivalent.

B. The Private Copy Exception

The private copy exception of Art.5(2)(b) is made optional in the second indent of Art.6(4): “A Member State *may*...take such measures” subject to the caveat that they cannot prevent rightholders from adopting “adequate measures regarding the number of reproductions.” Only in default of such measures may Member States act, but nothing in The Directive indicates when a default from the side of the rightholder would be sufficiently patent to permit state intervention: it would seem that any minimal measure prevents the State from choosing to safeguard this public interest, and ultimately gives too much of an unrestrained power to the rightholder⁹⁷. Art.5(2)(b) beneficiaries cannot seek the aid of The Directive if “reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned⁹⁸” providing a loophole for rightholders to limit private copying to a small number. If the reproduction of content for private use has not been made possible by the rightholder to the minimum extent necessary to benefit from the exception, then the ‘3-step-test’ of Art.5 must be taken into consideration. Examples of businesses that already purport to offer “adequate measures regarding the number of reproductions” include Sony’s CONNECT Reader PC Software: “The DRM rules allow any purchased eBook to be read on up to six devices (at least one of those 6 must be a PC). Although you cannot share purchased eBooks on other people’s devices and accounts, you will have the opportunity to register five Readers to your account and share your books accordingly⁹⁹”. Whilst this does little to aid someone in the making of a private copy of their Sony CONNECT titles (it is primarily intended to allow a title to be accessed from alternate devices should you break or lose your preferred reading device) it may be an adequate enough measure regarding a number of reproductions to block state intervention, whilst not effectively providing for private copies at all.

Finally, the fourth indent of Art.6(4) problematically states that the any measure pursued by Member States to aid the beneficiary of an exception “shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.¹⁰⁰” One instance in which this may prove applicable is under new business models

⁹⁴ Bainbridge, D ‘Using Technology to protect Copyright Works’ *Computer Law and Security Report* (2004) 20 (5), p.366.

⁹⁵ Ganley, *op.cit.* pp.306.

⁹⁶ Goldstein, P ‘Copyright’s Highway: From Gutenberg to the Celestial Jukebox’ (2003 Stanford).

⁹⁷ *Ibid.* p.72.

⁹⁸ Art.6(4) 4th indent.

⁹⁹ http://www.makezine.com/blog/archive/2006/08/sony_responds_to_our_sony_read.html

¹⁰⁰ It is submitted that the author cannot perceive a better parlance for the workings of the World Wide Web itself, where everyday information-exchanges are made available, subject to standard-form click-wrap contracts pertaining to their use, in a way that members of the public may access it from a place and time individually chosen by them.

proposed by the music industry, in which a large quantity of music will be made available to you for a limited period of time, e.g. a weekend where you intend to organise a wedding, a funeral, or both. It was thus lobbied by the International Federation of Phonogram and Videogram Producers ('IFPI') that applying the exceptions contained within The Directive¹⁰¹ to such new business models would render them otiose¹⁰². Prima facie, this submission is unproblematic. As Séverine Dusollier vibrantly illustrates "If Warner Music 'lends' you Björk for your birthday party, it does not mean you can keep her any longer unfortunately. If a technical device obliges Björk to go home¹⁰³ once the party is over and other guests have left, you cannot rely on Art.6(4) to force Warner Music to change the rules of the game"¹⁰⁴.

It is submitted however, that this example is nothing more than music industry rhetoric. In essence, what is really being provided is hired music. If you do not own it you cannot make a private copy of it. However, this unequivocal endorsement by The Directive fails to consider potential beneficiaries of works that are made available on a contractual basis so that members of the public may access them from a place and at a time individually chosen by them, such as Sony's CONNECT Reader PC Software. Instead of purchasing their electronic titles outright, it is the software itself that facilitates storage and use of the content they market; effectively turning a sale of eBooks model, into an 'on-demand' service for subject-matter, made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them. Other pertinent examples of such 'on-demand' services are the legal resource databases Lexis Nexis and Westlaw. Should their rightholders decide to place copy-control or print-control TPM on their documents, they will find protection in the anti-circumvention framework of the fourth indent of Art.6(4). We will be left with no option but to pursue futile legal action, resign ourselves to the prospect of using our CPUs as a one-stop shop for viewing legal documentation, and tediously transcribe quotations without the aid of time-saving, 'cut and paste' devices. It is thus submitted that Westlaw would not remain in the market for very long should it decide to disable such measures, but lest we not forget, their market is the promotion of academia, not mistakenly conflating every eBook copied with a 'lost sale' and making that sale count. "No need to panic over scholarly journals yet. Your scholarly journal publisher or other third party supplier is unlikely to present you with such detailed options tomorrow. But you may already be licensing other digital content that is DRM-protected, such as...e-books that require a hardware e-book reader"¹⁰⁵.

Art.9 and Recital 30 also underscore that the Directive is without prejudice to the law of contract. The misguided belief that a contract regime will generate the optimal set of rules for information use assumes that contracts are voluntarily entered, reflect the bilateral assent of the parties, and occur in a competitive market: in fact, none of these conditions are met when 'standard form' contracts can be so easily used to impose overly-restrictive terms on access to information¹⁰⁶. It is thus submitted, that this indent presents a vague loophole for those who wish to extend their control over a copyright work even further in the digital world: the technology to fully exploit it, by making on-demand provision of works on the Internet a standard is already available. Such contractual measures have the same 'take it or leave it' approach as TPM in that they both permit no variation of terms governing access and use¹⁰⁷. The requirement that such services must be delivered on contractual terms is trifling, given the technological ease in which 'click-wrap' licenses and 'standard form' contracts have been embedded in digital products to date, and when assenting to an agreement to obtain access to works made available on-line/demand, users may

¹⁰¹ Namely, Art.5(2)(b).

¹⁰² Dusollier 2003, *op.cit.*p.76.

¹⁰³ Or 'self-destruct'.

¹⁰⁴ Dusollier 2003, *op.cit.*p.76.

¹⁰⁵ Bailey, C 'Strong Copyright + DRM + Weak Net Neutrality = Digital Dystopia?' *Information Technology and Libraries* (September 2006) p.121.

¹⁰⁶ Elkin-Koren, N, "A Public-Regarding Approach to Contracting Over Copyrights' in Dreyfuss, R, Zimmerman, L, & First, H, "Expanding the Boundaries of Intellectual Property" (2001 Oxford), p.195.

¹⁰⁷ Foged, *op.cit.*p.525.

be inadvertently signing¹⁰⁸ away the (limited) protection of Art.6(4) itself. Feigning an interest in downloading Sony's CONNECT Reader PC Software, I was eventually able to obtain a copy of their End-User Licence Agreement ('EULA'), which I chose to actually read, instead of merely deciding to click 'yes, I accept.' Therein, I was surprised to find, that not only would I be making myself contractually bound not to reverse engineer or circumvent their TPM (even in pursuit of a legitimate exception to copyright), I would also be consenting to the jurisdiction of the State of New York, waived trial by jury, and other standard waivers and exclusive rights to terminate and amend their EULA. It may ring true that restrictive terms can be challenged before the court but they do not present a 'lesser problem' than overly restrictive TPM because of it¹⁰⁹. Even if successful, a court action would only invalidate the specific contact in question and would do little to aid the greater public.

III. LIBRARIES

It is submitted that the requirements for adoption of eBook distribution methods through mobile-reader devices by both libraries and individual users are one and the same. A lack of interoperability mars both the endeavours of libraries to effectively lend eBooks and reading-devices to its public, and the desires of individual users to effectively access and 'cut-and-paste' as many titles as they may wish - fair dealings in copyright permitted. An increased use of DRM by the eBook industry severely hinders libraries in their conjoint aim to simultaneously disseminate information and digitally preserve it: DRM moves libraries from a position of ownership to a more limited and ambiguous position, since, fair use notwithstanding, it may place limits on such things as how many times an object can be viewed or the ability to export that content to other formats¹¹⁰. Libraries also have to contend with publisher-specific TPM, which may depend on particular hardware/software platforms, eliminate fair or otherwise legal use of DRM-protected information, make it difficult to assess whether to license DRM-protected materials, and increase the difficulty of providing unified access to information from different publishers and vendors¹¹¹.

Whilst Libraries have shown every intention of negotiating licensing agreements with publishers of electronic texts to obtain less restrictive access to eBooks, comparable at least to the licensed access allowed by e-journal publishers¹¹², trial implementation of mobile-reader devices have proven relatively unsuccessful. Many mobile-reader devices similar to that of the Sony Reader, delivering licensed content to library users, lock content to specific hardware. Whilst a welcome advent of eBooks in libraries is the apparent ease of lending multiple copies of a specific eBook to multiple users at any one time, such business models do little to welcome the advancement of technology and strive to support an untenable one user/one book model¹¹³. Until library models more attuned to the 'all you can eat' model used by e-journal publishers are implemented, mobile-reader devices will remain nothing more than electronic equivalents of paper tomes. Furthermore, some sectors of the eBook industry seem perfectly content to eschew any possible library models for their products in pursuit of single sale models for individual users; a business model alien to (analogue) libraries.

A BEST-PRACTICE MODEL

It is submitted that a best practice model for the sale of mobile-reader devices will contain both a legal arm, and a business model. If the endeavours of the eBook industry to lock-up the titles they release continues unchecked, a realisation of the fullest potential of eBooks will be lost, and

¹⁰⁸ Or should that be 'yes-I accept these terms which I haven't read-clicking'?

¹⁰⁹ Elkin-Koren, *op.cit.* pp.192-193.

¹¹⁰ Altman, M http://www.hmdc.harvard.edu/micah_altman/papers/DigitalLibraryOverview.pdf p.5.

¹¹¹ Bailey, *op.cit.* pp.124-125.

¹¹² Brown, G, "Beyond print: reading digitally" (2001) *Library Hi Tech* 19 (4), p.391.

¹¹³ Coyle, K, "The role of digital rights management in library lending" *INDICARE Monitor* Vol.2, No 5, 29 July 2005, p.51.

mobile reading-devices will remain scissor-less, paperless, tomes at best. American scholars and activists, sympathetic to the sanctity of the public domain, and time-honored limitations to copyright ought to consider lending their support to both Senator Boucher's 'Digital Media Consumer Rights Act' and Senator Lofgren's 'BALANCE Act'; currently coupled in pursuit of reform of the DMCA anti-circumvention provisions. It has also been submitted, by Bernt Hugenholtz, that a less ambitious European legislature might have easily achieved its goal by copying the provisions of the WIPO Treaties; but in its ambition to set the copyright norms of the world, the European Commission chose not to settle for the level of protection agreed upon at WIPO level, but to raise the standard¹¹⁴. A strict, textual interpretation of Art.11 could have served to ameliorate the problems posed by one-sided TPM from the onset; giving teeth to those with legitimate cause to circumvent overly-restrictive technical fences. Given that WIPO perceive Art.11 as primarily targeting those seeking to 'pirate' a protected expression¹¹⁵ it is submitted that it would not have been outside the intention of The Treaties to authorise the creation and subsequent distribution of circumvention information/devices that facilitate legitimate use. He has also submitted that one of the best ways of removing this monstrosity would be to challenge its legal basis pursuant to Art.230 (ex 173) EC Treaty: founded on the same EC Treaty Articles¹¹⁶ as the Tobacco Advertising Directive¹¹⁷ successfully challenged by Germany¹¹⁸. His services have been offered pro bono to anyone wishing to take up the gauntlet¹¹⁹.

Given the uphill battle in the courts and legislatures, Creative Commons licences or similar licences) and open access are particularly promising strategies to deal with copyright and DRM issues. As are 'baking-in' permitted exceptions to copyright currently prevented by stand-alone anti-circumvention proscriptions. Copyright laws do not need to change for these strategies to be effective¹²⁰. Technological protection systems are already designed to code-in or bake-in the permissible access and use for any particular work based on the copyright owner's choices. If we are to preserve certain access and use rights, these rights must be "baked-in" along with the permissible access and use choices made by the copyright owner¹²¹.

The Association of American Publishers, working with Anderson Consulting, has released a 66-page document entitled *Digital Rights Management for Ebooks: Publisher Requirements*, detailing key DRM requirements book publishers will be seeking from DRM vendors in the future. One of the requirements relates to rights specification language ('RSL'), allowing publishers the flexibility to assign digital rights that could vary depending on the particular business model, including an institutional lending model that would permit libraries to transfer content across device types from one e-book reader to another, disabling access on the first reader and enabling access on the other (Association of American Publishers, 2000, p.39)¹²². It should also be noted that as of November 2004 Adobe has discontinued the use of its Content Server DRM system, replacing it with the LiveCycle Policy Server solution; a move that indicates Adobe is abandoning DRM-solutions for publishers to concentrate on the enterprise documents market¹²³. Sony too, has conceded that strong DRM is a definite turn-off for would be users; the Reader purporting to have already resolved user concerns with untenable TPM. Lest we not forget, however, that Sony's previous TPM endeavours have proven anything but acceptable; as the case related on 42hours.org (of a UK PhD student who no longer has access to the 42 hours of interviews he recorded with his Sony product, the loss of months of work because of automatic application of

¹¹⁴ Hugenholtz, *op.cit.* p.501.

¹¹⁵ Keplinger, *op.cit.* p.17.

¹¹⁶ 47.2, 55 and 99 (ex articles 57.2, 66 and 100A).

¹¹⁷ 98/43/EC.

¹¹⁸ *Germany v. European Parliament and Council of the EU*, Case C-376/98.

¹¹⁹ Hugenholtz, *op.cit.* p.502.

¹²⁰ Bailey, *op.cit.* p.125.

¹²¹ Loren, L. (2002): 'Technological Protections in Copyright Law – Is More Legal Protection Needed?' See: <http://www.bileta.ac.uk/Document%20Library/1/Technological%20Protections%20in%20Copyright%20Law%20-%20Is%20More%20Legal%20Protection%20Needed.pdf> p.33.

¹²² Burk, *op.cit.* p.330.

¹²³ Bohn, *op.cit.* p.163.

paranoid DRM¹²⁴) and the furore caused by their now infamous SonyBMG CD copy-protection rootkit TPM, undoubtedly illustrate.

In sum, it is submitted that whilst the market for dedicated eBook reading devices is rife with shortcomings, it is certainly 'there for the taking' if you remain sensitive to the demands of eBook users, at the expense of the current hyperbole surrounding Internet piracy. Whilst the Sony Reader presents a technologically advanced mobile device, the interoperability it claims could, in reality, prove slanted towards its own proprietary BBeB format: a scissor-less, paperless tome, for a pay-per-use business model. The future shape of the portable electronic book is also dependant on whether the trend towards convergence applies equally towards eBooks as it does to other technologies¹²⁵. To this end, it is submitted that IDPF standards should be applied consistently across the board, though; initially making ASCII, HTML, TXT and PDF 'industry' formats wouldn't be a bad start.

¹²⁴ Adams, *op.cit.* p.236.

¹²⁵ Wilson, R, "Evolution of Portable Electronic Books" (2001) <http://www.ariadne.ac.uk/issue29/wilson/>