



14.9.2004
DAJ/HR/fw
English only

TO THE COMMISSION OF THE EUROPEAN COMMUNITIES

Final Report of the High Level Group on DRM

EBU Observations

The role of DRM (pages 5-6)

The multifaceted role of DRM systems is only partly described in the report. As one of the basic principles, there needs to be a proper assessment of the appropriateness and effectiveness of any DRM solution, particularly if it involves a copy protection measure against (mass) piracy, as compared to other threats of such piracy and/or to other stages at which such piracy occurs. For example, free-to-air broadcasting of *feature films* takes place at the last stage of the film distribution chain, while all film piracy occurs at earlier stages, i.e. at present when the films are released for cinema and/or DVD distribution, or even earlier. It would therefore not be realistic or appropriate to expect that film piracy could be effectively prevented at the stage of free-to-air broadcasting.

Moreover, it was brought to the attention of the High Level Group that there is an absolute need to keep free-to-air broadcast signals in the clear so that *encryption can never be recognized as a protection mechanism* to enforce any DRM solution for such broadcasts. However, this important conclusion does not appear in the final report. It must therefore be stressed again that new DRM technology should not lead to any requirement for digital broadcast content to be encrypted. Such a result would be unacceptable to public service broadcasters because it would be incompatible with European audiovisual policy, notably the free movement of broadcasting services in the Internal Market (country-of-origin principle) and the objective that all European citizens should have access to a wide choice of radio and television programmes.

If DRM systems are used as a copy and consumption control mechanism, it is of decisive importance that there is a *consensus among all the interested parties* on the desirability and the (legally permissible) extent of any such control. It has recently been stressed by the European Commission (Internal Market)¹ that acceptance by all stakeholders, including consumers, and compatibility with basic principles of copyright law are both a *conditio sine qua non* of any DRM system. This implies the availability of

¹ Communication on the management of copyright and related rights in the Internal Market, of 19 April 2004. See http://europa.eu.int/comm/internal_market/copyright/management/management_en.htm.

open standards for providing true, global interoperability, allowing for a horizontal content receiver market, on all media platforms, and at the same time permitting freedom of choice (for equipment, network, services and content) for consumers.

Moreover, the EBU wishes to underscore the Commission's assessment that *DRM systems cannot be a policy solution* for ensuring an appropriate balance among all interests involved, as DRM systems are not in themselves the proper means for determining copyright protection or the exceptions and limitations thereto. When acts permitted by law, such as use for quotation or critical review, for reporting on current events or within other limitations in the public interest, are adversely affected by the use of technological measures (so called "technological lock-up"), effective legislative action must be possible to remedy such situations. These aspects have not been acknowledged at all in the report.

Current Status of DRM (page 6):

The final report does not seem to take stock of the various ongoing discussions on broadcast technology. Whether that was intended or not (in order not to complicate the discussion), the EBU wishes to reiterate that any technological measures which may be developed in the future for digital broadcasting would be acceptable only if they met the various (basic) requirements set out in the recent EBU Memorandum on Digital Rights Management (included herewith as an Attachment). Consequently, any such technical protection measure must be appropriate and cost-efficient. In particular, insofar as broadcast content is concerned, such measures:

- must be strictly limited to addressing unlawful redistribution via on-demand services over the Internet,
- must include a safeguard for broadcasters against any direct or indirect requirement to encrypt or scramble the broadcast signal,
- must be attractive for viewers and listeners of digital broadcasts, by maintaining the existing possibilities for them to copy for private use, and
- must guarantee the protection of the personal data of viewers and listeners.

Standards (pages 7-8)

The report does not refer to the fact that technical standards can be related to a certain *region* only. A certain technology specifically developed for a particular region of the world, such as Europe, does not necessarily have to fit in with distribution schemes and/or equipment used elsewhere. Each region may decide for itself how to identify its own solutions in this field, by developing and responding to its own specific sector requirements. In contrast, a DRM system developed for a regional standard elsewhere should not be used as a pretext for promoting the use of that standard in other regions.

Moreover, the *cost-efficiency* aspects and questions of *liability* when implementing DRM standards are not touched upon by the report in any meaningful way.

Evolution and timeline (page 9)

The report seems to neglect the *hardware legacy* problem of DRM implementations. It is not difficult to imagine that the development of new technical specifications would have a clearly deterrent effect on "early adopters" who had purchased recording and/or viewing/listening devices if those devices would not function without being upgraded or replaced by DRM-compatible devices. Huge equipment resources of large-scale distributors are put at the same risk.

Interoperability (pages 9-10 and 18)

Interoperability is a key issue, in the area of broadcasting too, because consumers of (analogue or digital) broadcasts should be able to exchange lawfully-acquired content between devices of different functionality, from different manufacturers and/or implement various forms of technology. This seems to be acknowledged on page 18.

However, pages 9-10 of the report create the (wrong) impression that preference should be given to certain existing solutions. This cannot be done without analysing first all other related matters, such as the licensing terms, the necessary investments to implement these solutions, compatibility with systems as proposed in other groups or fora, etc., etc. In particular, where the reports states that "the Rights Expression Language (REL) and Rights Data Dictionary (RDD) are in place for MPEG21", it seems to neglect the fact that these components are developed (by ContentGuard) as proprietary standards that would contradict *the common desires for openness* in the field of technical standards,² in order to avoid the risk that a single proprietary technology could be used to create a gatekeeper's position across various communications platforms and reduce consumers' ability to enjoy freely-available content (i.e. compared to currently applied terms and conditions for such enjoyment).

There may also be other *competition law* concerns. For example, broadcasters should have the possibility to use open, interoperable standards for the digital delivery of their programmes (including their own navigation devices, such as electronic programme guides) without the risk of any degradation of their signal, and whatever the content of these programmes may be. In particular, since Recital 48 of the 2001 EC Copyright Directive states that technical protection measures should not prevent the normal operation of electronic equipment and its technological development and that technical measures should not be required in products or services as long as these do not otherwise fall within the prohibition of Article 6 of that Directive, these principles would seem to lead to the preliminary conclusion that copyright owners are prevented from requiring, e.g. via a copyright licence agreement for broadcasting, the integration of certain protection measures into broadcasts.

² The European Commission's merger control unit has recently decided to open an in-depth investigation into the proposed joint acquisition by Microsoft and Time Warner of ContentGuard, as it appeared to the Commission that this might create or strengthen a dominant position by Microsoft in the market for DRM solutions. The joint acquisition could also slow down the development of open interoperability standards and allow the DRM solutions market to "tip" towards the current leading provider, Microsoft, while possibly having spill-over effects on a number of related markets.

Private copying levies and DRMs (pages 14-16)

Although the report correctly states that the scope of the private copying limitation has now been harmonized to some extent (although its establishment in national legislation is not mandatory) at EU level in the 2001/29/EC Copyright Directive, it seems to underestimate that *the extent to which this right is not harmonized* may have a crucial role to play in attempts to reach a consensus on the appropriateness of any proposed DRM system. After all, as DRM is not a policy solution, it cannot be used to create a global system determining, in respect of all national private copying exceptions, what is and what is not allowed. Moreover, it is for each Member State to decide whether it wishes to provide or not for private copying levies, and the Copyright Directive intentionally did not touch upon that discretion.⁴ Finally, it may well be that such levies and DRM systems co-exist at the same time.

It can hardly be overlooked that DRM is much more than a copyright issue, as there may also be other regulatory or policy matters at stake. For example, insofar as it concerns broadcasting, any serious limitation of the current possibilities for private copying by broadcast viewers or listeners would go against the interests of a rapid change-over from analogue to digital broadcasting.

Promoting Migration to Legitimate Services on the Internet (pages 17-18)

The report mentions only briefly the concerns about the protection of user's *privacy and data protection*. However, these concerns are of no less importance than the other above-mentioned matters. In particular, public service broadcasters could not support any DRM systems which made the actual enjoyment of their broadcasts dependent on individual viewers or listeners revealing and/or submitting personal data, without any safeguards for the usually anonymous reception of free-to-air broadcast signals.

1 Annexe

⁴ See *Reinbothe*, Conference on "Private Copying, Levies and DRM's", 8 September 2003, at http://europa.eu.int/comm/internal_market/copyright/documents/2003-speech-reinbothe_en.htm



20.05.2003

DAJ/HR/mp

Original: English

EBU MEMORANDUM ON DIGITAL RIGHTS MANAGEMENT

Impact and importance of DRM for broadcasters

A universally-accepted definition of Digital Rights Management does not (yet) exist. Most frequently, the keyword DRM stands for the management of rights by digital means and thereby encompasses not only technical *anti-copying protection measures* but also the electronic *administration of contractual rights*. The latter could be the technical processing of rights "metadata" of protected matter (information on usage and/or media limitations, etc.), including the tracing and monitoring of usage of such protected matter. Anti-copying measures are intended to control digital copying, such as the number of copies, the storage or redistribution thereof or, where necessary, even to prevent the making of any such copies. In the enforcement of contractual terms, e.g. when the DRM scheme controls the length of time of viewing or listening, these types of DRM measures may partly overlap.

The basic idea behind the development of DRM is to facilitate the licensing and acquisition of copyright or neighbouring rights through technical means, while also preventing by such means premium content from being used without authorization. Although the idea of making licensing easier can generally be shared both by rightholders and users (as distributors) of protected content, it should also be realized that certain rights or mass use of protected matter, e.g. for multi-repertoire licensing in the area of music, cannot, in practical terms, be authorized or remunerated otherwise than through collective management agreements.

It is apparent that both radio and television broadcasters must be intensively involved in any discussion of a possible DRM scheme for digital broadcasting. For example, DRM solutions may be helpful with respect to controlling the *use* (i.e. redistribution) of protected content but they should not be applied with the intention of limiting *access* to such content. Widespread access to new digital services requires the desired competition to be maintained on all delivery platforms, in order to avoid a foreclosure of certain markets or similar "gatekeeping" effects.¹ Moreover, DRM measures should make the broadcaster's own administration of rights acquisition and licensing significantly easier, e.g. allowing for the automatic reporting of the use of musical works and commercial phonograms. In addition, concerning mass piracy

¹ See the EBU comments on the EC Commission's Working Staff Paper on "Openness and interoperability in digital television", of 14 February 2003, at the EBU's website at www.ebu.ch/departments/legal/position.php.

of their own premium content via the Internet, such as with respect to television programmes on major sports events, broadcasters have certain interests in controlling such illegal copying and redistribution activities.

On the other hand, the above-mentioned interests cannot fully determine the most appropriate technical solution. It must be taken into account that premium content which is particularly sensitive to mass piracy is included only in a very small part of the regular programme output of free-to-air broadcasters. Moreover, the main interests of today's (or future) e-commerce operators differ structurally from the regular activities pursued by EBU Members. As a general rule, technical protection should be proportionate to the actual piracy threat and apply where that threat actually occurs. Consequently, any DRM application for broadcasting would require sufficient *flexibility* to deal with various situations.

DRM issues are closely related (but not limited) to the implementation of the 2001 EC Copyright Directive for the Information Society. However, DRM is a *complementary* (technical) protection measure only and cannot - and certainly should not - be used to overrule the legal framework for copyright protection. It is of prime importance that any DRM system should include certain safeguards, such as for traditional exceptions or limitations under national copyright laws.

Insofar as DRM schemes are not limited to the control of unlawful usage via the Internet, they may also have an impact on the generally-desired transition from analogue to digital broadcasting. This means that, in addition to the obvious need for *absolute interoperability* and standardization, the extent of broadcasters' active implementation of DRM technology and the possible dilemma of encryption are at stake. It goes without saying that any DRM scheme must respect the principle of free flow of information and should not limit the possibilities for free-to-air broadcasting via satellite. Consequently, any technical solution should allow the broadcaster itself to decide whether or not it wishes to encrypt the broadcast signal at the source. Particularly in view of the free movement of broadcasting services in the Internal Market, DRM schemes should always support, and preferably increase, the public's access to a wide choice of European programmes.

Principles and requirements

N.B. The requirements under sections B and C are, to a large extent, specifications of the general principles under section A. The requirements under section D follow on also from the relationship of public service broadcasters with the general audience.

A. GENERAL PRINCIPLES

Any DRM system should respect the underlying principles of European Community law and policies, such as:

- the free movement of broadcasting services, on the basis of the country-of-origin principle,
- the promotion of cultural and linguistic diversity, and
- the strengthening of the European audiovisual industry.

In particular, any DRM system should be compatible with regulatory aims to help ensure that all European citizens have access to a wide choice of radio and television programmes from different Member States.

If DRM technology is used for broadcasting on a global basis, then broadcasters must first be granted the substantive rights (e.g. through a WIPO Treaty) upon which the legal protection of such technology can be based.

Any DRM system for broadcasting must guarantee the integrity of the broadcast signal and the editorial freedom of broadcasters.

B. BROADCASTERS AS CONTENT PRODUCERS

1. Anti-copying protection methods should be flexible and tailor-made, in proportion to the perceived piracy threat given the type of medium, the value of the content and the way such content is made available to the public

DRM anti-copying technology should focus primarily on providing a reasonably effective remedy with respect to the unauthorized redistribution of premium content via on-demand services over the Internet.

2. No mandatory regulation, unless interoperability cannot be guaranteed otherwise

Voluntary consensus on a single, open standard is the best solution. If that cannot be achieved, full interoperability of technical standards and no addition of unreasonable costs should be guaranteed, particularly from the consumer's perspective (i.e. allowing for a horizontal receiver/recorder market).

3. Due account of the legacy issue

A certain period for equipment migration should be ensured, in order to meet reasonable expectations (of all parties involved) on the continuing usefulness of production, recording and other electronic equipment.

C. BROADCASTERS AS USERS OR DISTRIBUTORS

1. DRM systems should not be used to make obsolete the benefits for broadcasters resulting from exceptions or limitations under copyright law

This applies, in particular, to the possibility of making incidental reproductions of protected matter for broadcasting purposes.

2. DRM systems should not interfere with the broadcast signal

Anti-copying protection is inherently different from conditional access. Consequently, DRM systems should always leave the choice of whether or not to scramble the transmission of the signal to the sole discretion of the broadcaster concerned. Visible, audible or time-delaying effects caused by copy-protection measures may occur only once the signal is captured or recorded on DRM-compliant devices.

3. DRM systems should facilitate or simplify the usual clearance of rights

The usual clearance of rights for broadcasting and related activities via collecting societies should not be hindered. Moreover, DRM systems should not be misused to obstruct the acquisition of transnational rights and/or the availability of cross-border broadcasting services, or as a means of foreclosing the markets for on-line and/or on-demand services.

4. DRM systems should be cost-efficient

DRM schemes should not lead to an increase in administrative costs or give rise to other costs for legitimate digital broadcasting. Moreover, the implementation of any DRM solution imposed by content providers is acceptable for broadcasters only against fair reimbursement of their costs. This applies, in particular, if it is required that a DRM scheme should be embedded into the broadcast signal.

5. No liability after implementation of DRM

DRM schemes for broadcasting are acceptable only under the strict condition that broadcasters are exculpated from any liability for infringement by third parties.

D. INTERESTS OF VIEWERS/LISTENERS

1. Private copying

DRM systems should allow broadcasting services' viewers/listeners to make a personal copy of programmes, in particular for time-shifting purposes. Concerning the private use of such copies, DRM systems should not negatively affect the attractiveness of digital technology for viewers/listeners, thereby jeopardizing a rapid change-over from analogue to digital broadcasting.

2. Platform neutrality

DRM systems should be equally suitable to all forms of broadcast delivery (e.g. terrestrial, cable, satellite, UMTS), in order to ensure the availability of broadcasting services to the public over different media platforms.

3. No prejudice to legitimate privacy interests

DRM systems should not require the registration of individual viewers/listeners or their signal-receiving equipment (i.e. other than for supplementary warranties or services). Moreover, DRM schemes which include the processing of data on, or control over, the personal recording activities of broadcasting services' viewers or listeners should be subject to their consent after they have been adequately informed of the purposes of such measures.
