

Protecting TPMs in the EU; A Regulation in Bits and Pieces

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Abstract

Of all the issues of copyright policy in the last twenty years, probably the most controversial has been the issue of technological protection measures (TPMs). TPMs constitute self-help mechanisms, such as copy protection for DVDs, password protection for online services, and encryption of television broadcast signals, which are designed to prevent acts of infringement and exploitation of intellectual property rights by controlling copying or access to works. As it was anticipated that ways would be found to circumvent these copy and access controls, the legal systems of many countries provide TPMs legal support by giving to the right holders concerned specific protection when trying to enforce and manage their rights by technical means. In the EU anticircumvention provisions can be found in the Information Society Directive, the Software Directive and the Conditional Access Directive.

The adoption of divergent anti-circumvention provisions in different legal instruments raises concerns of applicability of the relevant legislation according to their subject matter. The overlapping anti-circumvention provisions in the three EU Directives, threaten to nullify the safeguards embedded in each instrument to the detriment of users of digital works, competitors of right holders and the market for digital media as a whole. Within this environment of legal uncertainty there are significant differences regarding the scope of protection of TPMs according to the subject matter protected by TPMs. These differences affect fundamental matters: the prohibited acts, the *mens rea* of the infringer, the circumvention means, the protected technological measures and the relation of the anti-circumvention provisions to contract law and to the limitations of copyright law.

In that regard, this paper uses examples to demonstrate how the overlapping of regimes in the EU is problematic. Part II identifies the differences in the regulation of

anticircumvention by the different legislative instruments in the EU and Part III examines the overlaps in the application of the EU Directives regulating anti-circumvention. The paper will conclude that there are great inconsistencies within the regulation of anti-circumvention in the EU, which demand a reevaluation of the policies that led to the adoption and to the current form of anticircumvention norms.