International Federation of
Library Associations and Institutions

IFLA Statement on Technological Protection Measures, and the Proposed Integration of Encrypted Media Extensions into the HTML Standard (16 July 2017)

Digital channels are becoming ever more dominant as a means of sharing and accessing content. They bring a speed and simplicity of use, at near-zero marginal costs, that have brought us much closer to realising the objective of universal access to culture and innovation.

The same process has created challenges for the enforcement of copyright – once a work has been copied, it can spread rapidly, potentially faster than legal systems can respond. Technological Protection Measures (TPMs) in general, and Digital Rights Management (DRM) in particular, aim to reduce infringement of copyright by controlling the way in which a work is used by technical (rather than legal) means.

However, use of TPMs can also mean that even once someone has bought a work, they still do not have full control over how they use it. In addition to reducing infringement, it can also serve to prevent users and institutions from undertaking actions permitted in national laws through exceptions and limitations to copyright. Moreover, TPMs themselves are protected by international law[1], making their removal or circumvention illegal unless there are provisions to the contrary. This poses both a challenge to the balance between rightholder and user rights in copyright, as well as to the definition of ownership itself. It also has a concrete impact on the activities of libraries.

IFLA itself has already set out a broad position on the use of Technological Protection Measures (TPMs)[2]. In Article 16 of the proposed Treaty on Libraries and Archives (2011)[3], it suggested that:

Contracting parties shall take appropriate measures, as necessary, to ensure that when they provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures, this legal protection does not prevent [libraries and archives] from enjoying the limitations and exceptions provided for in this Treaty [footnote to explanatory note].

In its position paper on EU Copyright Reform[4], IFLA stressed the need to:

'Protect [...] exceptions from override by [...] technological protection measures. To achieve the objectives of stimulating pan-European collaboration on research, ensuring cross-border access to content at a local level and fostering European cultural diversity, it is crucial that

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[1] Article 11, WIPO Copyright Treaty (1996), http://www.wipo.int/wipolex/en/details.jsp?id=12740
[2] Digital Rights Management tools are a form of Technological Protection Measure (TPM). As their name suggests, these serve to control the use of digital content through technological (rather than legal means).
[3] Treaty on Libraries and Archives (2011), https://www.ifla.org/node/5858. The text is based on Article 7 of the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or otherwise Print Disabled, 2013 (Marrakesh Treaty)
[4] IFLA (2016), https://www.ifla.org/node/10866?og=29

rights to lawfully access content (including content made available to the public on agreed contractual terms which they may access where and when they choose) are not undermined by [...] technological protection measures'.

Extended Media Extensions

The HTML Working Group of the World Wide Web Consortium (W3C)[5] has been discussing the incorporation of Encrypted Media Extensions (EME)[6] into the HTML standard for a number of years. The aim is to make it possible to view video content over the Internet without having to install separate plug-ins for different content.

It would allow Web applications to interface directly with content protection systems used by content suppliers, through a common API, and so apply DRM directly at the level of the browser interface, rather than at the level of the network. W3C argues that there would not be an obligation to use DRM other than a form of Clear Key encryption.

The proposal was opposed by National libraries, archives, universities and research institutions, security researchers, accessibility and disability rights groups, and new entrants into the browser market, concerned about opposition to the publication of a DRM standard without protection for legitimate activities. Nevertheless, the W3C adopted the proposal on 10 July 2017.

Impacts for Libraries

As underlined above, IFLA understands that there is a role for DRM in the fight against infringements of copyright. This may be particularly true in the case of rental content. We do note, however, that in the library context the major players have been shedding DRM as a needless expense and impediment[7].

IFLA also understands the logic behind the integration of EME into the HTML Standard, in that this would bring a measure of simplification and unification of tools used. However, the proposals, by allowing TPMs a place within the very protocol which allow the Internet to function, risk exacerbating the problems that already exist for libraries. These include:

1. As suggested above, DRM can be used to block actions that are permitted under exceptions and limitations. For libraries, which have a public mandate to preserve, reproduce and/or lend books and other materials, these can serve to prevent them from achieving these goals. EME would likely make it harder for libraries to undertake the archiving and preservation of audio-visual materials[8].
2. Only some governments have explicit provisions in law allowing for the removal or circumvention of such DRM where it stands in the way of legitimate activities.

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[5] https://www.w3.org/
[6] https://www.w3.org/2016/03/EME-factsheet.html
[7] In the USA for example, Overdrive no longer uses DRM to control circulating copies of digital audiobooks, despite the high price-tags on these works (they are among the most expensive circulating items in libraries' digital collections). This move was fully supported by the "Big Five" publishers, major audiobook producers like Audible and Recorded Books, and the libraries.
[8] This can also be a problem when working with 'mixed' materials, which contain both copyrighted and non-copyrighted materials, such as CDs or DVDs. If TPMs apply to the entire medium, even non-copyrighted materials can be locked away.

Elsewhere, doing so can be a crime or civil offence. Moreover, even where circumvention or removal is legally possible, the procedure for doing this can be slow and beyond the ability of many organisations. Without effective mechanisms for disabling DRM which undermines legitimate uses, introducing EME would result, in many jurisdictions, on additional barriers to legitimate uses of works.

3. Unlike copyright itself, DRM does not have a sell-by date, or necessarily the ability to distinguish between users. Libraries risk finding themselves with materials which are no longer subject to copyright, but which are still subject to DRM. Specific users, such as national libraries, have a particular role in maintaining a record of national life. DRM will, however, not be able to identify these special users, and so make it difficult for such libraries to fulfil their mission.

The discussions around EME also raise issues which will be relevant to library users:

1) DRM does not necessarily allow for a transfer of ownership. This can make it impossible to pass on works when an organisation or business changes hands, or the owner dies.
2) The application of DRM will make it more difficult for users to make fair uses of works, for activities such as comment or criticism, limiting their own freedom of expression as granted under Article 9 of the Universal Declaration of Human Rights[9].
3) DRM, and in particular the absence or inadequacy of provisions for circumventing it, can hamper users' ability to repair, explore or test products they have bought.
4) In circumstances where such measures serve to enable data collection and analysis, further human rights concerns come into play, given questions raised about user privacy.

In all of these cases, incorporating EME into HTML without a similar effort to protecting the rights of libraries and their users creates a risk of unbalancing the Internet. IFLA therefore calls on the World Wide Web Consortium to:

- Reaffirm support for freedom of expression, as demanded by the Universal Declaration of Human Rights.
- Reconsider the integration of EME into the HTML standard, delaying this until adequate protections for user rights are in place.
- Restart the earlier, productive multistakeholder talks on amending the W3C's membership agreement to require members to respect limitations and exceptions to copyright by refraining from invoking DRM laws enacted following the WIPO Copyright Treaty over activity that is lawful save for the circumvention of DRM.

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[9] http://www.un.org/en/universal-declaration-human-rights/

- Explore means of providing such protections, both through advocating for laws that allow for straightforward circumvention[10] or non-application[11] of DRM when this is preventing legitimate uses, and for less invasive forms of DRM.

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[10] The most recent 1201 Report from the US Copyright Office suggests that, for example, there should be a permanent exemption from the bar on circumvention of TPM in the case of obsolete TPMs. Copyright Office, June 2017, *Section 1201 of Title 17, a Report by the Register of Copyrights*, https://www.copyright.gov/policy/1201/section-1201-full-report.pdf (consulted 24 June 2017).

[11] Australian legal deposit legislation for digital works obliges rightholders to send DRM-free copies to the National Library CDNLAO Newsletter, December 2015, http://www.ndl.go.jp/en/cdnlao/newsletter/084/847.html (consulted 17 June 2017)