

# Rights Management Information

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In the S A V O Y :

Printed by *Henry Lintot*, Law-Printer to the King's most excellent Majesty; for D. BROWNE at the *Black Swan*; J. WORRALL at the *Dove*, both near *Temple-Bar*; and A. MILLAR at *Buchanan's Head* opposite *Catherine Street* in the *Strand*, 1757<sup>1</sup>

## A. RIGHTS MANAGEMENT INFORMATION IN BRIEF

The Rights Management Information (RMI) of a work<sup>2</sup> is simply data that provides identification of rights related to that work, either directly or indirectly.<sup>3</sup> RMI in this sense is not a new concept. In the realm of distribution of creative works, it may be seen as the economic analogue to the right of attribution within moral rights jurisprudence, or even permissions on files

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1 This "RMI" is from the front of Lord Chief Baron Gilbert's "A treatise of Tenures in Two Parts," 1757. As an aside, Lintot and Millar were well known publisher/booksellers in London at the time.

2 The term "work" is being used here to restrict this discussion to RMI in data that may be subject to copyright.

3 For example, "Mark Perry" indicates the authorship of this paper, which may lead to assumptions regarding moral rights or economic rights in the absence of other more detailed indications.

in Unix.<sup>4</sup> Since the beginning of time, or at least since the beginning of the creation of artistic works, authors and owners of works have wished to be identified, and so have put their name with the title on the front cover, as well as the inside of the book. In recent centuries such identifications have typically been accompanied by information specifically related to the rights in the works, such as by the insertion of copyright notices, publishers' information, dates, disclaimers, permissions, ISBN, acknowledgements, and so forth, that are typically inserted on the verso of the title page inside the work in printed volumes. An early example can be seen above. In the last couple of decades, given the growth in the digital market in particular, the types of RMI accompanying works have shown increased variety, and some would even say that RMI only became meaningful in the digital era. This paper addresses some of the technologies that are being used to attach RMI to works, especially works distributed in a digital format. It also looks at the potential RMI-related treaty obligations, and examines suggested and implemented legal protection for these rights in Canada.

## B. TECHNOLOGIES

RMI is one of the cornerstones of systems that regulate the rights held in digital works. From a technical perspective, it has much in common with watermarking and steganography, both of which provide information over and above that contained in the primary work. Steganography differs in that the information is generally hidden from all but the intended recipient, whereas watermarks are typically "obvious" in printed paper works, or reasonably easy (for the technically minded) to find in digital works. Such information can be embedded in all types of works, although the technology is yet to be perfected and may involve the introduction of undesirable artifacts upon reproduction in some cases.<sup>5</sup> Under the Secure Digital Music Initiative (SDMI), a number of watermark technologies were being contemplated, and, despite the failure of SDMI, many watermarking technologies are in use today.<sup>6</sup> For example, BlueSpike Inc. developed the

4 Jonathan Weinberg, "Hardware-Based ID, Right Management, and Trusted Systems" uses the Unix example, in N. Elkin-Karen & N.W. Netanel, eds. *The Commodification of Information* (New York: Aspen Publishers, 1999) at 343–64.

5 See Brian Dipert, "Security scheme doesn't hold water (marking)" (2000) 45:26 *EDN* 35 (21 December 2000).

6 SDMI seemed promising with 200-plus companies and organizations participating to find the answer to the problems posed to music publishers by digital technologies, but environments such as Napster or Gnutella overtook the

Giovanni Watermarking system<sup>7</sup> for use with music distribution. Watermarking goes some ways towards satisfying the need to identify, locate, sort, and collate works. It becomes possible to identify watermarked music products on a music-sharing server even if the songs have been given bogus titles and artist names to obfuscate their provenance. Apple iTunes includes *FairPlay* Digital Rights Management with songs that customers purchase and download.<sup>8</sup> In addition to restricting the playing of such songs on authorized computers (up to five), RMI is also included in the file. With the iTunes application, the user can see various copyright and other information, such as the name of the work, album, singer, “(p)” owner (presumably the performer’s performance), that the song is a “protected AAC audiofile,”<sup>9</sup> the size, bit and sample rates (of encoding), the account name and purchaser name of the file, and the encoding complexity. However, it is unclear to the user how much of this information is attached to the music file itself, what other information has been recorded, and how much is kept on the local computer. With a little investigation it can be seen that in addition to the information related to the work directly (i.e., such as titles, copyrights, etc.), also embedded is the name of the user and the user’s account identity. There may be other encrypted information. Sometimes it is difficult to see what is strictly RMI, relating to the work, and what is information on the user. It should be noted that FairPlay is not strictly a “copy protection scheme,” but rather more of a “distribution management scheme” since a user can make as many copies of the same work on an individual computer as he or she likes.<sup>10</sup>

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initiative, as well as inherent weaknesses in the technology. The SDMI website <[www.sdmi.org/](http://www.sdmi.org/)> also notes “as of May 18, 2001 SDMI is on hiatus, and intends to re-assess technological advances at some later date.”

- 7 For a description of the technology used by BlueSpike Inc. in their Giovanni Digital Watermarking Suite see “Giovanni Digital Watermarking Suite,” online: BlueSpike <[www.bluespike.com/giovanni.html](http://www.bluespike.com/giovanni.html)>.
- 8 Apple’s iTunes has now an 82 percent market share, as of May 2005: Steve Jobs, Apple CEO keynote presentation video online at <[www.apple.com/quicktime/qtv/mwsfo5/](http://www.apple.com/quicktime/qtv/mwsfo5/)>, and also the report of the keynote at <[www.macworld.com/news/2005/06/06/liveupdate/index.php](http://www.macworld.com/news/2005/06/06/liveupdate/index.php)>.
- 9 Advanced Audio Coding (AAC) coded was developed as part of the MPEG-4 specification. Details can be found at <[www.m4if.org/mpeg4/](http://www.m4if.org/mpeg4/)>.
- 10 The other aspect of such schemes, beyond the scope of this paper, is that they typically rely on a user contract (the Terms of Service requiring acceptance before permission is granted to access and download from system) that specifically defines the terms of use of the service. There are also some fairly simple means of circumventing such protection schemes for the computer proficient,

### C. ALTERING RMI

Whatever technologies are used to “fix” RMI into a work, there are always those who are going to attempt to engage in circumvention practices. For some electronic works, changing the file name or deleting the RMI is an effective evasion strategy. Unless a very sophisticated scheme of RMI locking is used, it will remain as easy to remove for the technically minded as it is to remove RMI from a printed book by ripping out its copyright notice. As fast as technological measures are developed, new means of circumvention arise, and there is a cycle of escalation in the types of technologies used — iTunes, concomitant with its popularity as a music source, has seen very rapid development on that front. With strong encryption techniques, this will not happen so fast. However, strong encryption has its own drawbacks. RMI information, whether for a music file or text, that has been encrypted with strong techniques will typically take more processing time to handle, thus requiring more powerful chips or greater allocation of resources for rapid access than weaker encrypted versions. In other words, there is a balance between security and performance. In addition, although these measures are often touted as being for the protection of publishers and artists from copyright infringement, in many cases they offer publishers much broader commercial opportunities, such as getting users to pay further for use of the material in a different format or for other “added-value” services.

### D. WIPO TREATMENT AND JURISDICTIONAL IMPLEMENTATION

In December 1996 two new treaties were adopted under the management of the World Intellectual Protection Organization (WIPO): the *WIPO Copyright Treaty (WCT)* and the *WIPO Performances and Phonograms Treaty (WPPT)*. These were the first treaties to address intellectual property rights in the digital network environment. To date, fifty-three of the eighty signatories to the *WCT* have ratified, and some fifty-one have ratified the *WPPT*.<sup>11</sup> The majority of countries that have adopted these measures are

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and software available online readymade for those that are not so proficient. For discussion of usage contracts see Stefan Bechtold, “Digital Rights Management in the United States and Europe” (2003) 52 *Am. J. Comp. L.* 323.

11 Including Albania whose ratification will come into effect August 2005, and Oman whose ratification will come into effect September 2005. With the accession of Gabon and Ukraine, the *WCT* received the requisite thirty instruments

developing countries or countries in transition. Only a small number of industrialized countries have ratified either of these treaties. For example, although the entire membership of the European Community has signed these agreements and members are expected to ratify them, no member has done this as yet.<sup>12</sup> Furthermore, Canada has been a signatory of the *WCT* and *WPPT* since 1997; it has only recently introduced legislation that will entrench *WCT* obligations into Canadian legislation.<sup>13</sup> It can be argued that the *WCT*<sup>14</sup> and *WPPT* only make small extensions to copyright<sup>15</sup> as proscribed in the *Berne Convention*,<sup>16</sup> which Canada implemented long ago,<sup>17</sup>

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of ratification and came into force on March 6, 2002. The preceding information about the *WCT* and *WPPT* is current as of June 13, 2005 and can be updated through viewing the link at <[www.wipo.int/treaties/en/ip/wct/index.html](http://www.wipo.int/treaties/en/ip/wct/index.html)> and <[www.wipo.int/treaties/en/ip/wppt/index.html](http://www.wipo.int/treaties/en/ip/wppt/index.html)>, respectively. It is notable that very few highly developed nations have ratified either of these treaties as of yet.

- 12 In March of 2000, the European Council adopted a Directive relating to the ratification of the *WCT*. See EC, Council Decision 00/278 of 16 March 2000 on the approval, on behalf the European Community, of the *WIPO Copyright Treaty*, and the *WIPO Performances and Phonograms Treaty*, [2000] O.J. L. 89/6.
- 13 Bill C-60, *An Act to amend the Copyright Act*, 1st Sess., 38th Parl. 2005.
- 14 According to Article 1(1) of the *WIPO Copyright Treaty*, 20 December 1996, online: <[www.wipo.int/treaties/en/ip/wct/index.html](http://www.wipo.int/treaties/en/ip/wct/index.html)> the *WCT* is “a special agreement within the meaning of Article 20 of the *Berne Convention*”; article 20 of the *Berne Convention*, *ibid.* at Article 20 provides that “[t]he Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention.”
- 15 The *WIPO Performances and Phonograms Treaty* [*WPPT*] was also adopted in Geneva on 20 December 1996, online: <[www.wipo.int/treaties/en/ip/wppt](http://www.wipo.int/treaties/en/ip/wppt)>, but does not contain such a ‘special agreement’ clause as the *WIPO Copyright Treaty* above, but Article 1(2) provides that “[p]rotection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.”
- 16 *Berne Convention for the Protection of Literary and Artistic Works*, S. Treaty Doc. No. 99-27 (1986), 1161 U.N.T.S. 3. In 1998, Canada acceded to the 1971 version of the *Berne Convention for the Protection of Literary and Artistic Works*. The *Berne Convention* was first established in 1886 and has been revised and amended a number of times. The *Berne Convention* sets minimum standards of protection for authors of literary, dramatic, musical, and artistic works and defines the scope and duration of protection: See the World Intellectual Property Organization website: <[www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html)>.
- 17 See for example, S. Handa, “A Review of Canada’s International Copyright Obligations” (1997) 42 McGill L.J. 961 at 969, where it is noted that “[a]lthough Canada did not become a signatory to the *Berne Convention* in its own right until 10 April 1928, the *Berne Convention* did apply to Canada as a colony of

and *TRIPS*.<sup>18</sup> In other words, Canada is already complying with much of the *WCT* and *WPPT*. However, the *WCT* does impose some significant new obligations and extensions to the law of copyright, most notably in connection with distribution rights, rights-management information, and technological measures employed to control the use of copyrighted works.<sup>19</sup>

Following the ratification and the entry into force of the *WCT*, a number of jurisdictions have brought in implementing legislation, including specific protection of RMI, since the *WCT* defined RMI and the obligations of contracting parties in Article 12:<sup>20</sup>

**Article 12 — Obligations concerning Rights Management Information**

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

- (i) to remove or alter any electronic rights management information without authority;
- (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and

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Britain, one of the original signatories.” Canada officially ratified the *Berne Convention* with passage of the 1931 amendments to the *Copyright Act*: see *An Act to Amend the Copyright Act*, S.C. 1931, c. 8.

18 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C 1869 U.N.T.S. 299 that Canada implemented by the *World Trade Organization Implementation Act*, S.C. 1994, c.47.

19 See Articles 6 (Distribution Rights), 11 (Technological Measures), & 12 (Rights Management Information) respectively, from the *WIPO Copyright Treaty*, online: <[www.wipo.int/treaties/en/ip/wct/trtdocs\\_woo033.html](http://www.wipo.int/treaties/en/ip/wct/trtdocs_woo033.html)>.

20 *WIPO Copyright Treaty* at Article 12, online: <[www.wipo.int/treaties/en/ip/wct/trtdocs\\_woo033.html#P89\\_12682](http://www.wipo.int/treaties/en/ip/wct/trtdocs_woo033.html#P89_12682)>.

conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.

The article carries a footnote:<sup>21</sup>

**Agreed statements concerning Article 12:** It is understood that the reference to “infringement of any right covered by this Treaty or the Berne Convention” includes both exclusive rights and rights of remuneration.

It is further understood that Contracting Parties will not rely on this Article to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty.

Article 19 of the *WPPT* is essentially identical and applies to information that identifies “the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram.”<sup>22</sup> The first notable feature of these Articles in the *WCT* and *WPPT* is the knowledge requirement, or “reasonable grounds to know” for civil suits, that the removal of the RMI will be for infringement. The second point is that the treaty definitions do not restrict RMI to electronic information, though the infringement parts of the articles are aimed at electronic RMI. The implementation of RMI protection in various jurisdictions has been varied, and a brief survey is warranted in light of the Canadian proposals discussed later.

## E. WHAT HAVE OTHER NATIONS DONE?

Even amongst those countries that have ratified the *WCT* or intend to shortly, there are significant variations in the approaches to RMI protection provided by “traditional” copyright regimes. A brief examination of the legislation of New Zealand, Japan, and the United States highlights

21 *WIPO Copyright Treaty* at Article 12, online: <[www.wipo.int/treaties/en/ip/wct/trtdocs\\_wo033.html#P94\\_13842](http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P94_13842)>.

22 *WIPO Copyright Treaty* at Article 19, online: <[www.wipo.int/treaties/en/ip/wct/trtdocssou\\_wo033.html#P122\\_18229](http://www.wipo.int/treaties/en/ip/wct/trtdocssou_wo033.html#P122_18229)>.

some of the diversity, but further discussion is outside of the scope of this overview.<sup>23</sup>

New Zealand is not a signatory to the *WCT*, but the New Zealand *Copyright Act* has a specific anti-circumvention section that addresses protection of a copyright work issued in an electronic form, although this protection is limited to a person that:<sup>24</sup>

- (a) Makes, imports, sells, lets for hire, offers or exposes for sale or hire, or advertises for sale or hire, any device or means specifically designed or adapted to circumvent the form of copy-protection employed; or
- (b) Publishes information intended to enable or assist persons to circumvent that form of copy-protection,

knowing or having reason to believe that the devices, means, or information will be used to make infringing copies.

The Act is silent as to RMI, although the Ministry of Economic Development Position Paper suggests that there may be a movement to bring the Act more in line with the *WCT* and *WPPT*, as the need of New Zealand dictates.<sup>25</sup> If such legislation is brought in, it will likely follow the anti-circumvention sections and be restricted to electronic works.

Japan was an early adopter of the attempt to address digital issues, and ratified the *WCT* before the treaty came into force; thus it became bound by the treaties on 6 March 2002, along with the other nations that had ratified by that time. The Japanese definition of RMI generally follows the *WIPO Treaties*, however, there exists some specificity that is not found in other international agreements. For example, Article 2 of the Japanese *Copyright Law* provides:<sup>26</sup>

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23 A WIPO review of the US, EU, and Australia can be found in WIPO's Standing Committee on Copyright and Related Rights, Tenth Session, Geneva, November 3–5, 2003, *Current Developments in the Field of Digital Rights Management*, online: <<http://wipo.int/>>.

24 Section 226, *Copyright Act 1994*, "Devices designed to circumvent copy-protection" online: <[www.legislation.govt.nz](http://www.legislation.govt.nz)>.

25 Ministry of Economic Development Position Paper December 2002 *Digital Technology and the Copyright Act 1994* online: <[www.med.govt.nz/buslt/int\\_prop/digital/position/index.html](http://www.med.govt.nz/buslt/int_prop/digital/position/index.html)>.

26 *Copyright Law of Japan, as Amended* (9 June 2004) at Article 2, from the Copyright Research and Information Center (CRIC) website, December, 2004. Translated by Yukifusa OYAMA *et al.* online: <[www.cric.or.jp/cric\\_e/clj/clj.html](http://www.cric.or.jp/cric_e/clj/clj.html)>.

(xxi) “rights management information” means information concerning moral rights or copyright mentioned in Article 17, paragraph (1) or rights mentioned in Article 89, paragraphs (1) to (4) (hereinafter in this item referred to as “copyright, etc.”) which falls within any of the following (a), (b) and (c) and which is recorded in a memory or transmitted by electromagnetic means together with works, performances, phonograms, or sounds or images of broadcasts or wire diffusions, excluding such information as not used for knowing how works, etc. are exploited, for conducting business relating to the authorization to exploit works, etc. and for other management of copyright, etc. by computer:

- (a) information which specifies works, etc., owners of copyright, etc. and other matters specified by Cabinet Order;
- (b) information relating to manners and conditions of the exploitation in case where the exploitation of works, etc. is authorized;
- (c) information which enables to specify matters mentioned in (a) or (b) above in comparison with other information.

The Japanese definition of RMI restricts it to electronic versions. The intentional alteration or removal of RMI, or distribution of copies of works knowing there has been unlawful addition or removal of RMI, is deemed by Article 113<sup>27</sup> to be an infringement of “moral rights of authors, copyright, moral rights of performers or neighboring rights relating to rights management information.” Excepting private use, Article 119<sup>28</sup> makes such actions punishable by imprisonment for up to five years or fines up to five million yen.<sup>29</sup>

The European Union (EU) adopted a Directive on “the harmonization of certain aspects of copyright and related rights in the information society.”<sup>30</sup> In addition to EU-wide harmonization, the Directive was aimed at

27 *Copyright Law of Japan, as Amended* (9 June 2004) at Article 113, from the Copyright Research and Information Center (CRIC) website, December 2004. Translated by Yukifusa OYAMA *et al.* online: <[www.cric.or.jp/cric\\_e/clj/clj.html](http://www.cric.or.jp/cric_e/clj/clj.html)>.

28 *Copyright Law of Japan, as Amended* (9 June 2004) at Article 119, from the Copyright Research and Information Center (CRIC) website, December 2004. Translated by Yukifusa OYAMA *et al.* online: <[www.cric.or.jp/cric\\_e/clj/clj.html](http://www.cric.or.jp/cric_e/clj/clj.html)>.

29 **Around CAN\$58,000.**

30 *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001*, online at <[http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32001L0029&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32001L0029&model=guichett)>.

gaining compliance with the terms of the *WCT* and *WPPT*.<sup>31</sup> The Directive addresses RMI in Article 7:

Obligations concerning rights-management information

1. Member States shall provide for adequate legal protection against any person knowingly performing without authority any of the following acts:
  - (a) the removal or alteration of any electronic rights-management information;
  - (b) the distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject-matter protected under this Directive or under Chapter III of Directive 96/9/EC from which electronic rights-management information has been removed or altered without authority,
 

if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law, or of the *sui generis* right provided for in Chapter III of Directive 96/9/EC.
2. For the purposes of this Directive, the expression “rights-management information” means any information provided by right holders which identifies the work or other subject-matter referred to in this Directive or covered by the *sui generis* right provided for in Chapter III of Directive 96/9/EC, the author or any other right holder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information.

The first subparagraph shall apply when any of these items of information is associated with a copy of, or appears in connection with the communication to the public of, a work or other subject matter referred to in this Directive or covered by the *sui generis* right provided for in Chapter III of Directive 96/9/EC

The adoption of this Directive meant that Member States agreed to implement it before 22 December 2002, but only Greece and Denmark met that deadline. There are still some EU Member states that are not in com-

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<sup>31</sup> *Ibid.*, at preamble (15).

pliance.<sup>32</sup> The definition of RMI in the Directive is not limited to electronic RMI.

The common measuring stick for the implementation of *WCT* and *WPPT* provisions can be found in the United States where the early adoption of the *Digital Millennium Copyright Act (DMCA)* and case law shows both the potential and the pitfalls of such legislation. The *DMCA* contains provisions regulating RMI that it refers to as Copyright Management Information (CMI). The definition of CMI combines the definitions of RMI in the *WCT* and *WPPT*:<sup>33</sup>

DEFINITION — As used in this section, the term “copyright management information” means any of the following information conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form, except that such term does not include any personally identifying information about a user of a work or of a copy, phonorecord, performance, or display of a work:

The *DMCA* has two levels of knowledge requirements in this regard. Section 1203 makes it illegal (criminally actionable) to knowingly remove or distribute works that are known to have had their CMI removed, “knowing, or, with respect to civil remedies under section 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.”<sup>34</sup> Thus, only those who have knowledge of the tampering with the CMI and also that the alteration is for infringing purposes, are liable. However, the alteration of a CMI to facilitate a prohibited circumvention would clearly satisfy this requirement. There is also a prohibition on the provision of false CMI for infringement purposes. There are a few particularly interesting facets of section 1203. The section specifically excludes user information in the definition; thus, the alteration of the user information that is included in the AAC encod-

32 In a recent press release of 21 March 2005 (IP/05347) it is noted “The European Court has already ruled against Belgium, Finland, Sweden and the UK — for the territory of Gibraltar — for their failure to implement the Directive. The Commission has now decided to start infringement proceedings against Belgium, Finland and Sweden for non-compliance with the Court’s rulings.” At <<http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/347&type=HTML&aged=0&language=EN&guiLanguage=en>>.

33 *Digital Millennium Copyright Act (DMCA)*, Pub. L. No. 105-304, § 1202 (c), 112 Stat. 2860 (1998).

34 *Ibid.*

ing information in iTunes downloaded files would not be protected by this section. Superficially this may seem surprising, but given the way that the technology now typically binds the RMI (CMI in US parlance) with other Digital Rights Management (DRM) encoding, it could be argued that the user information so bound with DRM is covered under the other anti-circumvention provisions of the *DMCA*. For example, software that is tied to use on a particular computer or set of computers would probably include user information in its security paradigm (or at least machine information). The types of RMI in the definition of CMI includes the usual suspects: title of work, name of author, copyright owner, other identifying information, conditions for use, identifying symbols, and, with the exception of public performance by radio and television stations, the identification of performer, writer director, performer's performance. Section 1202 also includes a number of exceptions for broadcast and cable transmissions and for adoption of standards in the broadcast and cable realm. Section 1204 of the *DMCA* sets the criminal offences and penalties, as well as the civil remedies, which are the same as those for circumvention provisions of section 1201.<sup>35</sup> The *DMCA* definition of RMI is not restricted to electronic versions.

The Secure Digital Music Initiative (SDMI) did raise an RMI fact situation. It was suggested by a group of computer scientists that one of the watermarking technologies being considered in that project had some weaknesses. In September 2000, the SDMI called on members of the public to attempt to crack several security technologies that SDMI was contemplating for use with the digital distribution of music. Contestants needed to click through a series of screens and "I Agree" buttons in order to take part in the contest in which SDMI offered a reward of up to \$10,000 for each successful attack. However, in order to collect the money the contestants needed to enter into a separate agreement assigning all intellectual property rights in the effort to SDMI and promising not to disclose any details of the attack. A group of researchers was successful in attacking one of the technologies, but subsequently refused to accept the \$10,000 as they wished to present their efforts in a scientific paper. After being warned by the SDMI, they decided not to present the paper and instead commenced an action against the constitutionality of the *DMCA*.<sup>36</sup> This case illustrates one of the problems common to all areas of anti-circumvention legisla-

35 17 U.S.C. §1201(a)(1)(B)-(E).

36 "Computer Scientists Challenge Constitutionality of DMCA" (2001) 7 No.24 *Andrews Intell. Prop. Litig. Rep.* 5 referring to *Felten et al. v. Recording Industry*

tion, namely the dampening effect on research into the area. Although the work described here was directed at developing a means of circumventing an RMI technology, other less targeted research could also fall foul of this “catch-all” legislation.<sup>37</sup>

## F. THE CANADIAN APPROACH

In the Copyright Reform Statement there is the suggestion that a simple following of the *WCT* and *WPPT* articles is sufficient to achieve the desired effect:<sup>38</sup>

In conformity with the *WCT* and *WPPT*, the alteration or removal of rights management information (RMI) embedded in copyright material, when done to further or conceal infringement, would itself constitute an infringement of copyright. Copyright would also be infringed by persons who, for infringing purposes, enable or facilitate alteration or removal or who, without authorization, distribute copyright material from which RMI has been altered or removed.

However, a simple codification of the minimal requirements of the Treaties, given the developments in the digital market, is unsatisfactory, although this is the approach that the Canadian government took on June 20, 2005 when the Canadian federal government introduced Bill C-60. This Bill has been brought in with the explicit purpose of amending the *Copyright Act* to make it compliant with the *WCT* and *WPPT*, including prohibitions on the circumvention of technological protection measures and on tampering with RMI. Despite the conformity of the section with the Treaties, it is clear that small variations in the wording of such legislation can also give very different effects to the market. The Bill amends the *Copyright Act* by adding the following section:<sup>39</sup>

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*Association of America Inc. et al.* No.3:01 cv 02669. Although this challenge failed, Felten and other researchers in this project were not pursued under the *DMCA*.

37 For example, downloading and testing software that removes user identities from RMI, or even using simple tools to uncover the content of RMI information as used for this paper, could fall foul of a broadly-drafted section.

38 Government Statement on Proposals for Copyright Reform (24 March 2005) <[www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/reform/statement\\_e.cfm](http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/reform/statement_e.cfm)>. The Bill to amend the Copyright Act was introduced the week of 20 June 2005.

39 Section 27, Copyright Reform Bill C-60 <[www.parl.gc.ca/PDF/38/1/parlbus/chambus/house/bills/government/C-60\\_1.PDF](http://www.parl.gc.ca/PDF/38/1/parlbus/chambus/house/bills/government/C-60_1.PDF)>.

34.01 (1) The owner of copyright in a work, a performer's performance fixed in a sound recording or a sound recording is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right against a person who, without the consent of the copyright owner, knowingly removes or alters any rights management information in electronic form that is attached to or embodied in any material form of the work, the performer's performance or the sound recording or appears in connection with its communication to the public by telecommunication and knows, or ought to know, that the removal or alteration will facilitate or conceal any infringement of the owner's copyright.

The Bill also modifies section 2 by adding, amongst others, the Canadian version of the RMI definition:<sup>40</sup>

“rights management information” means information that

- (a) is attached to or embodied in a material form of a work, a performer's performance fixed in a sound recording or a sound recording, or appears in connection with its communication to the public by telecommunication, and
- (b) identifies or permits the identification of the work or its author, the performance or its performer, the sound recording or its maker or any of them, or concerns the terms or conditions of its use.

The Canadian approach, thus far, is closely tied to the terms in the treaties, and does not limit the definition of RMI to the digital environment, but it does restrict the infringement section.

## G. IS THERE A BETTER WAY?

By combining access, copying, and RMI technologies into a complete DRM environment, a content provider is able to exercise much greater control over the ways in which content can be used by consumers. Such control measures range from limiting access to particular start and end dates, the number of times a product can be used, whether it can be copied, and/or what type of device on which a file can be played or transferred. RMI in itself, however, is fairly innocuous as in its naïve form it merely states what every consumer may like to know (i.e., the provenance of the work,

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40 *Ibid.* s. 1(2).

what can be done with the work, and when the work may be freely reproduced). Problems for the user of a work can arise when RMI is melded with user information, individual user agreements, contains information that is not available to the user, is used as a quasi-secret tracking device of user behaviour, or is inseparable from the total DRM system. RMI in digital works offers users a possible benefit that is often overlooked: namely, that the content of the work can be discriminated at a level of granularity unseen in physical works or analogue recordings.

The *WCT* and *WPPT*, although determined to address new technologies, are arguably already technologically outdated.<sup>41</sup> Rather than continue to pursue piecemeal and fragmented regulatory solutions, a new, more comprehensive approach to the control of distribution of digital works could be formulated. There is an opportunity for Canada to be ahead of the curve here, and legislation concerning RMI provides a unique opportunity to benefit all parties from end to end in the digital content stream. The following features introduced in legislation would provide benefits to all:

- **Transparent:** All RMI attached or embedded in a work should be fully readable by all users
- **Complete:** RMI should identify limits on the rights claimed; for example, parts of works that are not protected by copyright should be clear (e.g., parts in the public domain)
- **Private:** User information collected by suppliers of content should be identified, limited, and protected
- **Fresh:** The information should be current.

This may seem like a heavy transaction burden to place on the suppliers of content; however, typically users of RMI already go some ways to satisfy these requirements and this trend has been noted in the earlier Canadian study.<sup>42</sup>

At the same time, the departments ask whether the integrity of certain information ought to be protected, given that, over time, the information may cease to be accurate. Some commentators have noted that certain in-

41 For example, the ability to ‘trace’ documents over the Internet was not feasible at the time the treaties were developed. Digimarc’s ‘Mywatermarc’ technology allows a rights holder to “Track your covertly watermarked photos on millions of pages across the public Internet”: <<http://digimarc.com/>>.

42 *Consultation Paper on Digital Copyright Issues, 22 June 2001. Issued by Intellectual Property Policy Directorate Industry Canada Copyright Policy Branch Canadian Heritage*, online: <[http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/vwapj/digital.pdf/\\$FILE/digital.pdf](http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/vwapj/digital.pdf/$FILE/digital.pdf)>.

formation currently included as “rights management information” in accordance with the definitions provided in the *WCT* and *WPPT* may change often during the lifetime of the copyright. In particular, the rights owner may often change, though the author will not, or in the case of a particular sound recording, the performer will not. Similarly, terms and conditions may not only change, but have uncertain legal validity in Canada. This may cause confusion among users and detract from a rights management regime rather than promote it.

There is always the potential danger of confusing consumers by giving them information, but this is hardly an argument for keeping them in the dark. A framework can be developed, with the appropriate resources and timeframe, that will support informed digital work use in a fair market environment. The benefits to content publishers of RMI usage, particularly in a digital environment that uses sophisticated DRM, is clear, and the evolving business models depend on them. However, this cannot be a one-sided advancement into a digital era with all the benefits accruing to business; instead, balance must be brought to all sides of the digital market. All stakeholders in creative works — creator, copyright holders, and users — should be given the protection of transparency, completeness, privacy, and freshness that must underpin all RMI-related policy initiatives. The Canadian initiative fails to address these issues. It has merely adopted a minimal compliance with the *WCT* and *WPPT*, an inadequate solution to the problems facing creators and users in the digital arena.