

Digital Rights Management Systems as they apply to the Norwegian
Intellectual Property Act, Section 53a, Paragraphs 1 and 3, 2nd Sentence

Candidate Number:

Mentor: Lee Bygrave, førsteamanuensis

Semester: Autumn 2005

Date: 09 November 2005

Number of Words: 17,672

Table of Contents

Table of Contents	2
1 Introduction	4
1.1 What This Paper is About and Why	4
1.2 Primary Questions and Thesis	5
1.2.1 The Norwegian Intellectual Property Act and the Copyright Directive.....	5
1.2.2 Changing DVD Movies’ Formats.....	6
1.2.3 Breaking DRMs and Using Different Operating Systems and Software.....	6
2 Notes and Explanations of Technical Terms	8
2.1 Note on Translations	8
2.2 Limitations	8
2.3 Definition of Digital Rights Management (DRM)	8
3 The EU Directive on Copyright and Neighboring Rights in the Information Society, Directive 2001/29/EC.....	9
3.1 The Copyright Directive, Article 6, Paragraphs 1 and 3	10
3.2 WIPO Copyright Treaty (WCT).....	11
4 The Norwegian Intellectual Property Act, Section 53a, Paragraph 1	13
4.1 What the Law Protects	13
4.1.1 “Technical protection systems”	13
4.1.2 Defining the Term “Effective”	14
4.1.3 “The rightholder or the one to whom he has given consent”.....	17
4.1.4 “Control duplication...or make [the work] available to the public”	17
4.1.5 “Protected Work”	28
4.2 What the Law Prohibits	30
4.2.1 “Circumvent”.....	30
5 The Intellectual Property Law Section 53a, Paragraph 3, 2nd Sentence	32
5.1 “Hinder”	32
5.2 “Private User”	33
5.3 “Legally Acquired Work”	33
5.4 “Use”.....	33
5.5 “Commonly Perceived Relevant Playback Equipment”.....	34
5.5.1 Comparing the Directive Article 6, paragraphs 1 and 3 to the Intellectual Property Act Section 53a, Paragraph 3, 2 nd Sentence	34
6 Technical Protection Systems on DVD Movies	39
6.1 Introduction.....	39
6.2 Sources of Law and Their Interpretations	40
6.3 The Legislative History	41
6.4 The Debate in the Storting	42
6.4.1 The Value of the Debate in the Storting	43
6.4.2 The Opposing Proposition.....	44
6.4.3 Conclusion of Legislative History and the Debate in the Storting.....	44
6.5 Statutory Text	45
6.5.1 Determining Common Perception.....	45
6.6 Conclusion	51
7 Accessing Downloaded Material using Different Platforms	53
7.1 Changing Operating Systems	53
7.2 The Statutory Text	53
7.3 The legislative history.....	54
7.3.1 Three Problems with the Department’s Interpretation.....	54

7.4	Problems with Allowing Agreements to Decide what Constitutes “Commonly Perceived Relevant Playback Equipment”	55
7.5	Consumer Expectations	55
7.6	The Importance of Where and How People Purchase Works	56
7.7	The Agreement Type and Its Significance	57
7.8	Conclusion	58
8	Conclusion	60
Works Cited	61

1 Introduction

In the last few years, technology has developed quickly giving consumers more platforms and more freedom with which to watch movies and listen to music. With the advent of digital technology comes a new generation of audiophiles and movie buffs who want to use copies of CDs¹ and DVDs² in more ways than just playing them, as they did previously. People are becoming accustomed to carrying their whole CD collection conveniently in their pockets. Artists want to protect their works with technological protection measures, also called digital rights management (DRM). On the other hand, artists want to allow consumers fair access to the files, which creates tension between the artists and the consumers prompting the lawmakers to step in and regulate disputes.

1.1 What This Paper is About and Why

Intellectual property is a commodity traded internationally where music and movies are sold in a world-wide market. With the latest advances in technological developments, new challenges emerge, which the global market faces. Intellectual property rights have a significant international component. An international process to construct uniform rules governing and balancing the rights between the rightholders and the users is going on. In both the EU and the U.S.A., legislators are making laws, or have made laws, to implement their obligations under the WIPO³ Copyright Treaty of 1996. In the U.S.A., the Digital Millennium Copyright Act (DMCA) title 1, implements the WIPO Copyright Treaty⁴. In the EU and in the EEA⁵ (European Economic Area), the implementation tool is the EU Directive on Copyright and Neighboring Rights in the Information Society, Directive 2001/29/EC⁶, sometimes called the Copyright Directive⁷.

¹ Compact disc

² Digital Versatile disc

³ World Intellectual Property Organization

⁴ Lejeune, M., 2003. "Protection of Digital Content and DRM Technologies in the USA" In: E. Becker, et. al. eds. Digital Rights Management: Technological, Economic, Legal and Political Aspects, Berlin: Springer, 366.

⁵ EØS

⁶ Reinboth, J., 2003. "Protection of Digital Content and DRM Technologies in the European Union" In: E. Becker, et. al. eds. Digital Rights Management: Technological, Economic, Legal and Political Aspects, Berlin: Springer, 411.

⁷ Reinboth, J., 2003. "Protection of Digital Content and DRM Technologies in the European Union" In: E. Becker, et. al. eds. Digital Rights Management: Technological, Economic, Legal and Political Aspects, Berlin: Springer, 408.

An international community of legislators, rightholders, users, and judges are interested in how the different countries implement the new rules.

Norway is also obligated to implement the Copyright Directive through its participation in the EEA and the European Economic Area agreement of 1992⁸. The Copyright Directive has recently led the Storting, Norway's national assembly and legislature, to change the Norwegian Intellectual Property Act⁹ of May 12, 1961, number 2.

In this paper, I will discuss how the Storting has handled the issue of technological protection measures, especially in relation to article 6 of the Copyright Directive, which deals with technological measures.

The Norwegian implementation sparked great interest in the media. The arguments the media focused on, however, were often inaccurate and motivated by interest groups and party politics. The logic presented in the media is poorly reasoned and confused, raising the need for a person with a legal background to analyze the law in terms that the layman is able to understand.

A great deal has been written about DRM and the Copyright Directive¹⁰. To my knowledge, little or nothing has yet been written about the Norwegian implementation of the Copyright Directive; thus, the main focus for this paper will be the Norwegian law.

1.2 Primary Questions and Thesis

The main focus of the paper will be consumer-related problems people might have regarding the use of their legally purchased music and movies.

1.2.1 The Norwegian Intellectual Property Act and the Copyright Directive

The primary question this paper considers is whether the Norwegian Intellectual Property Act of May 12, 1961, number 2, section 53a, paragraphs 1 and 3, 2nd sentence, properly implement the Copyright Directive. This is the section of the law that made the people and

⁸ EØS avtalen

⁹ lov om opphavsrett til åndsverk m.v. (åndsverkloven)

the media refer to the proposed changes as the mp3 law. The core of the matter was whether or not people should be allowed to transfer their music CDs onto their mp3 players, even if the music CD was equipped with a technological protection system. The Storting changed the proposed law to make it legal to break the protection system to accommodate these transfers. Some politicians, the media, and legal authorities have questioned whether the Norwegian law complies with the Directive. According to an article in *Aftenposten*, August 6, 2005, page 9, in the Culture section, written by Odd Inge Skjærvellesland, it is likely that the EFTA Surveillance Authority will review the Norwegian Intellectual Property Act and decide whether or not it complies with the Copyright Directive.

1.2.2 Changing DVD Movies' Formats

People may wonder whether they may legally break the technological protection measures on DVD movies to change the format, thereby allowing them to watch the movie on different playing devices like their computers or their portable movie playing devices. As I stated in the above paragraph, the Storting legalized breaking the technological protection systems in order to transfer music from music CDs to their mp3 players. An interesting question arises—would the same rule apply for transferring movie DVDs to portable playing devices? These devices are becoming more and more popular and many users will want to know what the law allows.

1.2.3 Breaking DRMs and Using Different Operating Systems and Software

People may wonder whether they may legally break the technological protection measures to change the software to allow them to play a piece of music or watch a movie using a different software program and/or operating system than when they downloaded the works onto their computers. The downloaded files will have technological protection systems on them, which will limit the user's options on how they listen to music and watch movies. An interesting question for the users is to what degree they have to heed these systems. Downloading music and movies from the Internet is the most likely way people will buy such products in the future, making this a topic of current and future interest.

¹⁰ See, for instance, J. Reinboth's article "Protection of Digital Content and DRM Technologies in the European Union" in E. Becker, et. al. eds. *Digital Rights Management: Technological, Economic, Legal and Political Aspects*, Berlin: Springer, page 405

2 Notes and Explanations of Technical Terms

2.1 Note on Translations

Unless otherwise noted, all translations from Norwegian into English are my own. The reader will find the Norwegian text in the corresponding footnotes. For Norwegian names and titles, I have adopted the Norwegian convention of writing lowercase letters.

2.2 Limitations

Problems related to private copying¹¹ and technological protection systems are not discussed in this paper. Certain types of users might have special needs for circumventing DRM, these groups might include libraries, media, museums and schools. Special interests groups like these are not discussed in the paper. Nor is professional use of works. The focus is rather the ordinary consumer.

2.3 Definition of Digital Rights Management (DRM)

According to the free online encyclopedia website Wikipedia, DRM is

...an umbrella term referring to any of several technical methods used to control or restrict the use of digital media content on electronic devices with such technologies installed. The media most often restricted by DRM techniques include music, visual artwork, and movies¹².

The term “technological measures,” which is used in the Copyright Directive, and the term “technical protection systems,” which is used in the Norwegian Intellectual Property Act, both fall within the realm of the DRM umbrella. From a legal point of view, the technical definition of the term DRM holds little interest; rather we concern ourselves with the legal meaning of the terms technological measures and technical protection systems; which will be explained later. I will use DRM as an acronym for both.

¹¹ Privatbrukskopiering

¹² Anonymous, 2005. *Wikipedia* [online]. Available from: http://en.wikipedia.org/wiki/Digital_rights_management [Accessed July 3, 2005]. For alternative definitions and the difficulty of defining DRM see Rump N. 2003, “Definition, Aspect and Overview” in E. Becker, et. al. eds. *Digital Rights Management: Technological, Economic, Legal and Political Aspects*, Berlin: Springer, page 3

3 The EU Directive on Copyright and Neighboring Rights in the Information Society, Directive 2001/29/EC

Norway is part of the EEA and as such is bound by the EEA Agreement¹³ with the EU. Member States within the EU must implement the Copyright Directives into their own legal systems choosing the forms and methods of implementation as they see fit. Countries belonging to the EEA are similarly bound, as in Article 7, subparagraph b, from the EEA Agreement, which states that, "... an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation." This margin for maneuver also follows from the nature of the Copyright Directive qua directive (as opposed to regulation). As Sejersted, F. et al. wrote, "Directives are legally binding for the member states only in terms of result, but leave it up to the national authorities to decide form and means for the implementation¹⁴." Not surprisingly the result, therefore, is that different countries have implemented the Copyright Directive in different ways¹⁵.

The Directive will live through two phases. In the first phase, it will serve as the key source for how the national legislators implement its rules. After the legislators have written the rules, the sources of law have changed. Anyone operating in this field of law will first and foremost relate to the national law, but since the Directive was the reason for the Norwegian law, the Directive will keep serving as an important source for interpreting the Norwegian Law.

When we compare the Norwegian law to the Directive for rules regarding DRMs, it is not enough to only compare the Norwegian law to the Directive but to also understand that the two work together to form the rules.

¹³ EØS avtalen

¹⁴ Sejersted, F. et al. 2001 *EØS-rett*, 6th edition, page 25: "Direktiver skal ... være bindende for medlemsstatene "med hensyn til målsetting", men overlater forøvrig til nasjonale myndigheter å bestemme form og midler for gjennomføringen."

¹⁵ See, e.g., Gasser, U. & Girsberger, M. 2004 "Transposing the Copyright Directive: Legal Protection of Technological Measures in the EU Member States" 2004, 10.

The Directive was the major reason for the change in the Norwegian Intellectual Property Act¹⁶. “The circumstance that the reason for the Norwegian statutory text is a directive, entails ... that the directive it self will be a central interpretation factor¹⁷.”

When we try to determine the correct interpretation of the Intellectual Property Act, we begin by reading the statutory text and by giving the text the meaning an average person would give it. However, EU directives have many versions in different languages, because every citizen of the EU must be able to read the directives in their native languages. All of the versions are equally valid. Words are, though, by their nature imprecise. The fact that the same word may have slightly different connotations in the various languages makes it even more difficult to determine the correct meaning of the words. To interpret the Directive and the laws that derive from it, we should emphasize the spirit of the rules, and the meaning and reasons behind them, rather than scrutinize the text.

3.1 The Copyright Directive, Article 6, Paragraphs 1 and 3

Article 6, paragraphs 1 and 3, are the most interesting articles regarding the Norwegian Intellectual Property Act, 53a paragraph 1. Article 6, paragraph 1, of the Copyright Directive states that

Member States shall provide adequate legal protection against the circumvention of any effective technological measures...

And Article 6, paragraph 3, of the Copyright Directive states that

For the purpose of this directive, the expression “technological measures” means any technology, device, or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject matter, which are not authorized by the rightholder of any copyright or any right related to copyright as provided for by law... Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

¹⁶ Odelsting Proposisjon Number 46 (2004-2005): Om lov om endringer i åndsverkloven m.m. 5

¹⁷ Sejersted, F. et al. 2001 *EØS-rett*, 6th edition, page 190: “Den omstendighet at bakgrunnen for den norske lovtteksten er [et] direktiv, medfører... at selve direktivet vil være en sentral tolkningsfaktor.”

I will compare the legal protection for Digital Rights Management Systems (DRMS), as called for by the Copyright Directive, with the Norwegian Intellectual Property Act and point out a few areas where discrepancies seem to exist. I will also provide a preliminary conclusion on whether or not the Norwegian Intellectual Property Act fully implements the Directive, but I realize that this is a complex question that will require a more in-depth analysis of EU-related law than the scope of this paper permits.

3.2 WIPO Copyright Treaty (WCT)

In December 1996, the World Intellectual Property Organization (WIPO) arranged a convention in Geneva, which resulted in the WIPO Copyright Treaty¹⁸. Fifty-five countries currently make up the contracting parties. As stated above in section 1.1, the WIPO Copyright Treaty¹⁹ constitutes part of the basis for the EU Copyright Directive. Article 11, in the WCT deals with technological measures and states that

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

Since the focus of this paper is the Norwegian Intellectual Property Act and the Copyright Directive, and since others have written extensively about the WIPO copyright treaty²⁰, I will not delve into the WCT here. I would like to stress, though, the strong link between the WCT and the Copyright Directive, and that the Copyright Directive should be read with the WCT as a backdrop. The Royal Department of Culture and Church²¹ (the Department), wrote the Odelsting Proposition (the Proposition), number 46 (2005-2006). On page 5 the Department states that with the proposed changes in the Intellectual Property Act it will be possible for Norway to join the WCT. Since the WCT is a treaty

¹⁸ Wagle, A.M. & Ødegaard, M., 1997 "Opphavsrett i en digital verden", Cappelen Akademiske Forlag, Oslo, 54

¹⁹ Available online from <http://www.wipo.int/treaties/en/ip/wct/index.html> [accessed September 30, 2005]

²⁰ For a discussion of the WIPO Copyright Treaty see: Ginsburg, Jane C., 2005 "Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the US Experience", Columbia Public Law Research paper No. 05-93 Available online from <http://ssrn.com/abstract=785945> [current September 30, 2005]

²¹ Det Kongelige Kultur- og Kirke departement

that the EU and the U.S.A. have in common, the WCT will likely be the strongest working legal force in creating uniform rules on the global intellectual property rights market. Since so many countries²² have signed this treaty, verdicts in one contracting state might have value as an interpretation factor in other contracting states. As of September 30, 2005, Norway has not signed or ratified the WCT²³. According to the Department of Culture and Church, Norway intends to sign and ratify the WCT, but no proposition is currently forwarded to specifically reach that goal.

²²An updated list of contracting states is available online from
<http://www.wipo.int/treaties/en/ip/wct/index.html>

²³ An updated list of all treaties Norway has signed or ratified can be found online at
<http://www.lovdato.no/traktater/> [accessed on October 27, 2005]

4 The Norwegian Intellectual Property Act, Section 53a, Paragraph 1

The Norwegian Intellectual Property Act of May 12, 1961, number 2, regulates intellectual property in general. The Intellectual Property Act is special in that it forms the basis for both civil actions, see section 55, and criminal actions against the wrongdoer (see section 54). According to Section 54 paragraph 1, breaking the law carries the threat of fines or jail for up to 3 months. In severe cases, a person might spend up to 3 years in jail (section 53, paragraph 2).

Other Acts²⁴ than the Intellectual Property Act might regulate a given situation involving DRMS. The Intellectual Property Act does not operate in a legal vacuum. My purpose with this paper is to describe DRM in light of the Intellectual Property Act. I will not discuss other laws here.

The Intellectual Property Act, section 53a, Paragraph 1 is the main rule regulating DRM and states that...

It is prohibited to circumvent effective technical protection systems that the rightholder or the one to whom he has given consent uses to control duplication of a protected work or make it available to the public²⁵.

In the following, I will look at the different terms in paragraph 1. I will discuss some terms in more depth than others because they are key terms relating to the three main issues I mentioned in section 1.2.

4.1 What the Law Protects

4.1.1 “Technical protection systems”

“Technical protection systems” is a legal term not a technical term. The statutory text contains no legal definition. When analyzing the statutory text, we customarily begin with what we normally understand by the meaning of the words. Based on a normal understanding of the words, “technical protection systems” is a broad term. For instance,

²⁴ See the Marketing Act, June 16, 1972, number 47, section 1, and the Criminal Act May 20. 2005, number 28, sections 145 and 262.

²⁵ “Det er forbudt å omgå effektive tekniske beskyttelsessystemer som rettighetshaver eller den han har gitt samtykke benytter for å kontrollere eksemplarfremstilling eller tilgjengeliggjøring for allmennheten av et vernet verk.”

any kind of contraption used to keep someone out, such as the gate to a house, will fit the description.

The Department states that technical protection systems might refer to both physical and digital systems. The Proposition states on page 115: “When any technological contraption or component according to the Directive can constitute a [technical protection] system, the shape of the system in itself cannot be considered to represent a barrier of any significance in the evaluation of what can be considered a protected technical protection system.”

The Directive states in article 6, paragraph 3, that “the expression ‘technological measures’ means any technology, device, or component...”²⁶ We must assume that the term “technological measure” as used by the Directive must coincide with the term “technical protection system²⁷” as used by the Intellectual Property Act.

The statutory text, the legislative history, and the Directive support a broad interpretation of the term “technical protection system.” Under this interpretation, any system used to control duplication of or access to a work is a technical protection system in the legal sense.

4.1.2 Defining the Term “Effective”

The word “effective” is a legal term, but Norwegian law does not define it. Effectiveness relates to “technical protection systems.”

Again we start with what we would normally understand by the term “effective.” For a technical protection system to be effective, it has to achieve the objective that it set out to achieve. If the gate is closed, but the fence has a big hole next to the gate, the gate cannot be said to represent an effective barrier.

The Proposition provides us with two examples on page 115 of what it views as ineffective systems. The Department’s view is that

²⁶ For a detailed discussion on the meaning of “Technological measures” in the Copyright Directive see Bygrave, L. A., 2003. “Digital Rights Management and Privacy- Legal Aspects in the European Union” In: E. Becker, et. al. eds. Digital Rights Management: Technological, Economic, Legal and Political Aspects, Berlin: Springer, 439

²⁷ Teknisk beskyttelsessystem

...a system that can be neutralized by stroking a soft-point pen across the disk itself or by pressing a key when the computer is reading the disk will not fulfill the Proposition's requirements for protection and that such systems that are that easy to circumvent will not be considered technical protection systems in the legal sense.

Whether the Department views anything more complicated than stroking a pen across the disk or holding down a key constituting an effective technical protection system is unclear.

The Parliamentary Family, Culture, and Administration Committee²⁸ (the Committee) remarked on the Proposition before it reached the Storting in *Recommendation to the Odelsting*²⁹ from the Parliamentary Family, Culture, and Administration Committee, number 103 (2004-2005) (the Recommendation). These remarks are closer to the decision-making process in the Storting and should carry more weight when one interprets the law³⁰. In this case, the Committee states that "systems that a user with no formal or occupational special competence/connection can circumvent, cannot be said to constitute what this law considers to be defined as effective (37)."

We have a problem assessing whether or not a technical protection system is effective. The only way to find out if a technical protection system is effective, according to the Committee, is for people to try breaking it. Thus, for a non-professional user to find out if the technical protection system in front of him is effective or not, he must try breaking it. Given that the user does not have formal or occupational training connected to the particular DRM in front of him, he may attempt to break the DRM. If the user can break it, the technical protection system is not considered effective and is thus not protected by the Intellectual Property Act. If he cannot break it, the technical protection system is effective and is protected.

Interestingly enough, the average hacker could fit the above description of a non-professional. Frequently, hackers are people with no formal or occupational training. If we are to take the words in the Recommendation at face value, the average hacker is free to try to break DRMS. The DRMS he can break are not effective. The way the Committee interprets ineffective DRMS opens up the Intellectual Property Act for people like Jon

²⁸ Familie-, kultur- og administrasjonskomiteen.

²⁹ Instilling til Odelstinget

Johansen, who took part in breaking the DRM on DVD movies so that he could play DVD movies on computers running the Linux operating system³¹.

As I have shown, one must make quite a leap in thought from holding the shift-key or stroking a pen across the disk as mentioned by the Department in the Proposition to the Committee's Recommendations.

4.1.2.1 Criminal Attempt

According to the Committee, one needs to try to break the DRM in order to determine whether or not the DRM is effective. This sentiment might be at odds with section 53a, paragraph 1, which states that it is prohibited to circumvent technical protection systems. Section 54, paragraph 6 states that an *attempt* may also be punished. Accordingly, an attempt to break the DRM in order to see if the DRM is effective might be punishable by law.

It would be interesting to further discuss how to resolve criminal attempts with regard to DRM, but such a discussion would go beyond the scope of this paper.

4.1.2.2 The Copyright Directive's Definition of "Effective"

How then does the Directive define the term "effective?"

The Directive states in article 6, paragraph 2, 2nd sentence that

Technological measures shall be deemed 'effective' where the use of a protected work or other subject matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

The Directive operates with the phrase "achieves the protection objective" without indicating how to measure whether the technological measures achieve the objective or not³².

³⁰ Boe. E., 1996. *Innføring i jus*, Tano Aschehoug, Oslo, p. 236.

³¹ For more information about this case see Simons, B., 2003. "The Copyright Wars--- A Computer Scientist's View of Copyright in the U.S." In: E. Becker, et. al. eds. *Digital Rights Management: Technological, Economic, Legal and Political Aspects*, Berlin: Springer, 399

The lack of rules in the Directive opens the way for national legislators to decide whether or not a DRM is effective, and the remarks in the Recommendation remain the central legal source for interpreting the term “effective” in the Norwegian Act.

4.1.2.3 The Effort Factor

A factor might be how much time a person spends trying to break the DRM. We can label this effort as an effort factor. Any DRM that can be broken accidentally can hardly be said to be effective. Five minutes spent successfully breaking the DRM is probably not enough for the DRM to achieve the label of effective in the legal sense. Where the limit is, is difficult to determine, but any DRM that requires anywhere from several hours to several days to break could be said to be effective. In the end, the courts will have to decide whether or not to include an effort factor in determining whether or not a DRM is effective. The courts will also have to chisel out its limits.

4.1.3 “The rightholder or the one to whom he has given consent”

“The rightholder or the one to whom he has given consent” is not defined in the statutory text. To minimally qualify under this term as a rightholder, one must be the person who controls duplication and be the person who controls making the work available to the public, as described in the Intellectual Property Act, section 2, and referred to in the Proposition on page 116 as “intellectual property rights relevant actions.”

4.1.4 “Control duplication...or make [the work] available to the public”³³

“Control duplication...or make [the work] available to the public” are two legal terms that are defined in the Intellectual Property Act, section 2. These are the terms that the Proposition page 116, labels as “intellectual property rights relevant actions.³⁴” The Intellectual Property Act limits which technical protection systems are protected by the law to those technical protection systems that control intellectual property rights relevant actions.

³² For a more detailed discussion of the term “effective” in the Copyright Directive see Bygrave, L. A., 2003. “Digital Rights Management and Privacy- Legal Aspects in the European Union” In: E. Becker, et. al. eds. Digital Rights Management: Technological, Economic, Legal and Political Aspects, Berlin: Springer, 411.

³³ kontrollere eksemplarframstilling eller tilgjengeliggjøring for allmennheten

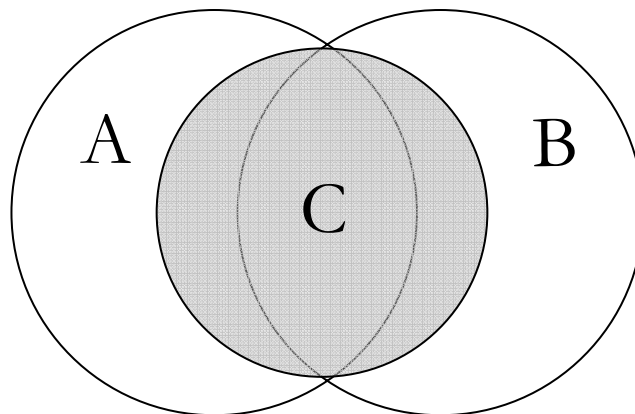
To limit legal protection for DRMS to systems that control intellectual property rights relevant actions might be contrary to the Copyright Directive. Does the Intellectual Property Act implement the Directive's rules on this point?

In the next section, I will compare the rules in the Directive with the Intellectual Property Act.

4.1.4.1 The Copyright Directive, Article 6, Paragraphs 1 and 3

As one can see from reading the Copyright Directive article 6, paragraphs 1 and 3, only certain technological measures are protected. The technical definition mentioned above in section 2.2 is irrelevant. What matters, however, is the will of the rightholder and the legal protection granted to him by law. Only DRMS that regulate acts not authorized by the rightholder or protected by law are DRMS in the legal sense. The diagram below illustrates this concept.

Figure 1



- Circle A Acts not authorized by the rightholder
- Circle B Acts related to copyright protected by law
- Circle C The legally protected DRM

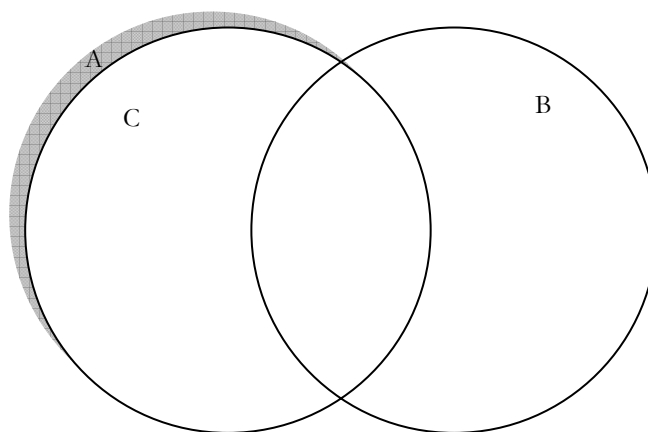
³⁴ opphavsrettslige relevante handlinger

The key phrase here is “acts... not authorized by the rightholder.” The question is what kind of acts the Directive refers to. As I see it, we have three alternatives to consider.

4.1.4.1.1 Alternative 1: Any Acts the Rightholder Could Think Of

Any DRMS that controls any acts “not authorized by the rightholder” or controls acts protected by law would be legally protected according to article 6, paragraphs 1 and 3. See Figure 2 where circle C covers circle A.

Figure 2



Circle A..... Acts not authorized by the rightholder

Circle B..... Acts related to copyright protected by law

Circle C..... The DRM

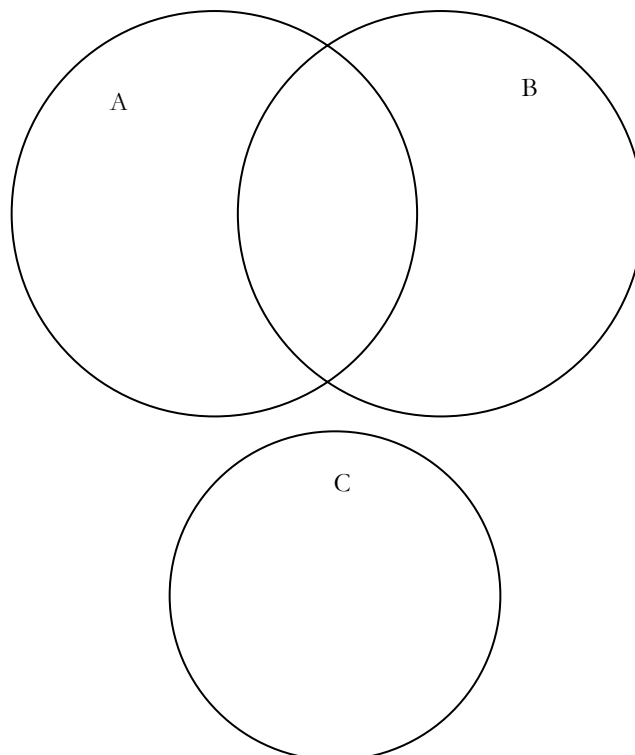
According to S. Dusollier, in her article “Tipping the Scale in Favor of the Rights Holder,” (p. 465) “[t]he key element here is the restriction of acts which are not authorized by the rightholder.” This means that taken at face value, article 6, paragraph 3 constitutes a broad protection for technological measures. Any DRMS that conveys and protects the private will of the rightholder is protected, no matter if the will is related to copyright infringement or not.

The following example illustrates how legal protection like this could work. Bob Right Holder wants people to wear a green sweater when listening to his music. He implements a DRM that checks what color sweater people are wearing. The music will only play when the DRM confirms that the user is wearing a green sweater.

An arguably more realistic example would be if Bob Right Holder wanted people to only play his music on a certain program or device. He implements a DRM on the work that makes sure that the work will play only on this one program or device.

DRMS that would not be protected in alternative 1 are DRMS that control acts outside circles A and B, see Figure 3. These are not DRMS in the legal sense and thus should not receive any legal protection according to the Directive.

Figure 3



Circle A..... Acts not authorized by the rightholder

Circle B..... Acts related to copyright protected by law

Circle C..... The DRM

One situation could possibly be that Bob Right Holder states that he is indifferent to what kind of device or program the users use to listen to his work. Still, by chance, the DRM that he implemented controls what kind of playback device that the consumer will use. This DRM does not control “acts not authorized by the rightholder” and thus should not receive legal protection according to the Directive.

4.1.4.1.2 Alternative 2: Intellectual Property Rights Relevant Actions

Intellectual property rights relevant actions limit acts protected by the Directive to what the rightholder could legally authorize by his power of being the rightholder, that is, rights allowing the work to be copied and to be made available to the public. An example could be implementing a DRM that prevents copying from one music CD to another music CD. This alternative interpretation is the one implemented in the Intellectual Property Act.

4.1.4.1.3 Alternative 3: Acts Anchored in a Valid Legal Agreement

“Acts not authorized” could also be limited to acts the rightholder could stipulate through a valid legal agreement with the users. Acts subject to the agreement could consist of a wide variety of acts, including the green sweater example mentioned above, provided the buyer agreed to the terms. The contract would then be subject to normal contractual rules. Such questions would include whether or not the user can be said to have agreed to the conditions and whether the conditions are unfair or meet current marketing laws.

4.1.4.1.4 Alternatives 1 and 3

Both alternatives 1 and 3 give the rightholder powerful tools to control any actions related to their works. The rights a rightholder has in alternatives 1 and 3 could be compared to the rights of a gallery owner who displays his own paintings. To clarify, let us assume the gallery owner is also the artist and thus the rightholder of the paintings displayed in the gallery. The artist could control what items visitors may carry inside the gallery with them before they are allowed to view his paintings. The owner can decide that in order to protect

the paintings, people are not allowed to carry cans of spray-paint or knives into the museum. Carrying spray-paint cans or knives are not acts related to copyright. The reason the artist may set these rules is because he owns the gallery. One can view the DRMS used to control a work as a fence around the work—one is not allowed to play the work unless you are allowed through the gate, which is controlled by the DRMS. The gallery example is transferable to music CDs and movie DVDs in that the DRMS could check that the user is not playing the music or movie on any playback equipment or program that could break the copy protection on the work.

Which of the alternatives 1, 2, and 3 is the correct interpretation of the Copyright Directive is debatable. One can argue successfully in favor for each of them. The fact that all three alternative interpretations might be equally right indicates that member states have room to choose which alternative they want to implement in their legislation spanning from giving the rightholders a very powerful tool as in alternative 1 to the more moderate interpretation in alternative 2.³⁵

To me, alternative 2 appears to be the most reasonable, because it gives the rightholders a tool to control their works with regard to copyright related actions and nothing more. To limit the rightholders legal rights in this way seems sensible. It maintains a fair balance between the rightholders and the users. The fact that the name of the Directive contains the word “copyright” indicates to me that the Directive means to control acts related to copyright.

4.1.4.2 Comparing the Directive Article 6, paragraphs 1 and 3 to the Intellectual Property Act

The Intellectual Property Act, section 53a, paragraph 1 states that

It is prohibited to circumvent effective technical protection systems that the rightholder or the one to whom he has given consent uses to control duplication of a protected work or make it available to the public.

When comparing the Intellectual Property Act to alternatives 1 and 3 from above, one obvious difference is that instead of reading “acts... which are not authorized by the

³⁵ See further Gasser, U. and Girsberger, M., “Transposing the Copyright Directive: Legal Protection of Technological Measures in the EU Member States” 2004, 10.

rightholder” as stated in the Copyright Directive, the Intellectual Property Act spells out these acts and limits them to duplicating and making [the work] available to the public. The technological measures protected by the Intellectual Property Act are then more narrowly defined than in the Copyright Directive.

The Norwegian view is based on the idea that only technical protection systems that protect the exclusive rights of the rightholder deserves legal protection, specifically, duplicating and making the work available to the public as mentioned earlier. The Department refers to duplicating and making the work available to the public as “intellectual property rights’ relevant actions³⁶”, see page 116 in the Proposition. The Department has thoroughly discussed this limitation in the Proposition, which has been accepted by the Storting; therefore, the Storting views the Intellectual Property Act to be in accordance with the Copyright Directive on this point, ruling out the option that the deviation from the Copyright Directive was unintended. When the courts interpret laws that derive from an EU directive, the courts can sometimes in the case of a perceived discrepancy, rule that the discrepancy was unintended and rule in accordance with the Directive³⁷, which is not an option in this instance.

The Nordic countries have a long history of cooperating with each other in the area of intellectual property rights. Limiting legal protection for DRMS to systems that protect “intellectual property rights’ relevant actions” is seemingly in accordance with how Sweden and Denmark have implemented the protection.

The Danish Intellectual Property Act, lbk. number 725 of July 6, 2005, section 75c, paragraph 4 regulates DRMS. The act itself does not state that only DRMS that intend to control duplication and making the work available to the public are protected by the Act, however, the Danish Proposition comments that only DRMS that control intellectual property rights relevant actions are protected by the new Act³⁸. The Swedish Act (1960:

³⁶ opphavsrettslig relevante handlinger

³⁷ Sejersted, F. et al., 2001. “*EOS-rett*”, 6th edition, Universitetsforlaget AS, Oslo, p. 53.

³⁸ Det følger af de nævnte definitioner, at tekniske foranstaltninger for at nyde beskyttelse efter bestemmelsen i § 75 c (direktivets art. 6) skal have til formål at forhindre eller begrænse handlinger, som ophavsmanden eller en anden rettighedshaver ikke har givet samtykke til. Det betyder, at de tekniske foranstaltninger skal være anvendt i forhold til handlinger, der er omfattet af de ophavsretlige enerettigheder, jf. ophavsretslovens §§ 2, 65-67 og 69-71. I tilfælde, hvor tekniske foranstaltninger anvendes i tilknytning til ikke-beskyttede værker eller frembringelser m.v., ydes der ikke beskyttelse mod omgåelse m.v. efter

729) about intellectual property states in section 52b that only DRMS that control duplication and making the work available to the public are protected.

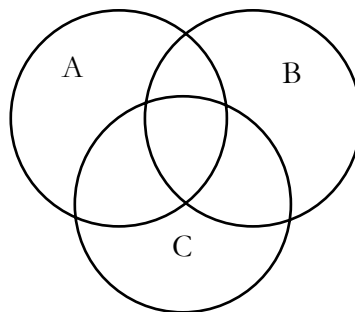
The Scandinavian countries agree in their interpretation of the Copyright Directive article 6, paragraph 3; that is, they agree on only protecting DRMS that control intellectual property rights relevant actions.

This interpretation of the Directive's article 6, paragraph 3 to limit protected DRMS to those that control intellectual property rights relevant actions creates a problem, which is how to handle DRMS that control both intellectual property rights relevant actions as well as other actions. I refer to these actions as the combined DRMS.

4.1.4.2.1 Combined DRMs in the Directive

One may have situations where the DRM controls “acts not authorized by the rightholder” or “acts protected by law,” in addition to controlling acts outside these two areas, circles A and B, see Figure 3 below.

Figure 4



Circle A Acts not authorized by the rightholder

Circle B Acts related to copyright protected by law

Circle C The DRM

One example would be where Bob Right Holder does not want people to copy his music, but he does not care what device or program they play his music with. The DRM Bob

bestemmelsen i § 75 c. Det samme gælder tilfælde, hvor tekniske foranstaltninger anvendes for at forhindre eller begrænse handlinger, der ikke er ophavsretligt relevante [Available online from

implements controls both. The part of the DRM, the copy part, should be legally protected; but the part that controls what playback program or device the users use should not receive legal protection because it is not a result of Bob's wishes.

The DRM could be made in such a way that the same DRM controls both copying and the kind of playback device the work will play on, then the user cannot break one without also breaking the other.

Whether or not such a combined DRM is a DRM in the sense of article 6, paragraph 3 is not explicitly resolved in the Directive and would be subject to interpretation. I will not explore this fully but note that the Directive leaves the legal state of such DRMs somewhat uncertain.

4.1.4.2.2 Combined DRMS in the Intellectual Property Act

As I stated above, the Directive does not take a clear stand on the matter of what I have called combined DRMS.

The Norwegian statutory text does not contain any rules about how to handle combined DRMS. Taken at face value, you could think any DRMS that regulates duplication or making the work available to the public should be protected by the act, no matter if it controls other actions, too.

Combined DRMS were discussed in-depth in the Norwegian legislative history (see the Proposition, 116-118). The Department initially suggested in their hearing that "Systems that controlled intellectual property rights relevant actions, but also hindered acts that aren't intellectual property rights relevant, should not be protected" (the Proposition, p. 117). In the Proposition, after having heard from the anti-piracy group³⁹ and IFPI Norway, the Department finds, "...after a renewed assessment that the limitation [in the hearing] would be too extreme with relation to the question of what constitutes a technical protection system", implying that combined DRMS are technical protection systems in the legal sense and thus protected by the law.

http://www.ft.dk/?/Samling/20021/lovforslag_oversigtsformat/L19.htm] [Accessed October 5, 2005]

³⁹ Antipiratgruppen

One particular interesting and practical example is related to movie DVDs that are equipped with a regional access control. The regional access control is a DRM that controls what playback devices the DVD can be played on. The DVD can then only be played on those DVD players that have the corresponding regional access code. A DRM that only controls what playback device the work can be played on is not regulating “copying” or “making the work available to the public,” which are the requirements for legal protection for DRMS, according to section 53a, paragraph 1 in the Intellectual Property Act. However, if these DRMS also contain a copy protection, like a DRM that prevents ripping⁴⁰, this DRM would control both an intellectual property rights relevant action (the ripping) and one that is not (controlling the playback device). This is then a combined DRM that is legally protected according to section 53a, paragraph 1, as I described in the paragraph above. Clearly this would be the result, despite the fact that the Proposition (page 116) states that DRMS that merely control regional access codes like movie DVDs are not protected.

Rightsholders can thus easily circumvent the Norwegian decision to limit legal protection to DRMS that control intellectual property rights relevant actions. All they must do is add into the DRM a program that controls duplication, and then it becomes a combined DRM and is thus protected by the law.

The Department suggests in their Proposition an exception from the legal protection for DRMS. The Department suggests that people would be allowed to break DRMS that hinder use of the work on relevant playback equipment. This exception, with some modifications, was taken into the act in section 53c, paragraph 3, 2nd sentence and was passed by the Storting. I will discuss this in detail later in this paper.

4.1.4.3 Has Norway Implemented the Directive Article 6 paragraphs 1 and 3 with Regard to what DRMS Protect?

We can see discrepancies between the Intellectual Property Act and the interpretations of the Directive in alternatives 1 and 3 regarding which DRMS are protected—DRMS that

⁴⁰ Copying audio and/or video data onto a hard drive. Ripping is explained in detail below.

enjoy legal protection are more narrowly defined in the Intellectual Property Act than in the Directive.

Article 6, paragraph 1, of the Copyright Directive states that

Member States shall provide adequate legal protection against the circumvention of any effective technological measures...

The word “adequate” can mean sufficient but also suitable or fit⁴¹. In either definition, the question remains, adequate for what? Being adequate depends somewhat on the legal system and the society the rule is being implemented into. The level of protection provided needs to fit into the legal system. The member states cannot be forced to implement long prison sentences for people breaking DRMS. The best people to judge whether the protection is adequate should be left to that country’s elected legislative body. In Norway’s case, that body is the Storting.

The fact that breaking a DRM in Norway carries the threat of criminal charges and up to three years in prison for severe cases made the decision for the Storting to legally protect DRMS that controlled acts not already protected by law a difficult one. A worry for the Storting could have been that people might have risked going to jail for breaking a DRM that controls any acts the rightholder could think of. Similarly, if a valid legal agreement was the basis for the acts controlled by the DRM, they could have found it unreasonable to punish people for not acting in accordance with the will of the rightholder or breaking a valid legal agreement. A need for precision was required—something the Storting has implemented with its passing of the changes in the Intellectual Property Act.

The wording of the Directive, if taken at face value as in alternatives 1 and 3, is too wide. A result might be that the legislators unintentionally end up protecting technological measures the legislators never meant to protect. Because virtually any contraption can be implemented with a DRM, a wide variety of producers of different products could seek protection under copyright laws. This happened in the U.S. in the case *Lexmark v. Static Control Corp.* and *Chamberlain Group v. Skylink Technologies*⁴² where the producers

⁴¹ Webster Encyclopedic Unabridged Dictionary of the English Language 1994. New Jersey

⁴² For a detailed discussion on these two cases, see Ginsburg, Jane C., 2005 "Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the U.S.

tried (albeit unsuccessfully) to get protection for printer programs and garage-door openers.

Another matter to consider is that the Directive will be part of sources of law when faced with legal problems in this area, and can modify the Norwegian law, and aid in solving discrepancies.

As I stated above, the legislators have some latitude when it comes to implementing directives into national law.

I conclude that the Norwegian legislation, on the point of implementing legal protection for DRMS, is within the boundaries of the latitude that Norway has when implementing directives.

4.1.5 “Protected Work”

“Work” is a legal term. Work is the legal term for the object of copyright protection (cf the Intellectual Property Act, Chapter 1). The Act also protects other performances (cf Chapter 5 in the Intellectual Property Act), i.e., the so-called related rights or neighboring rights, e.g., the performance of an artist (cf section 42) and database protection (cf section 43).

Neighboring rights are not copyrights in the legal sense, but they still enjoy legal protection similar to copyrights⁷. Since neighboring rights are not mentioned in section 53a, paragraph 1, which only mentions “work,” one might wonder if DRMS that are used to control neighboring rights have the same legal protection as those that control copyrighted works.

For example, databases that are not protected by copyright but are protected by section 43 are the results of collecting data. Databases that were created by simply collecting data are considered a result of labor and are not copyrighted works. Such databases enjoy similar legal protection as the copyrighted works even if they are not (see, e.g., the Database

Experience,” Columbia Public Law Research paper No. 05-93 [Available online from: <http://ssrn.com/abstract=785945>] [Accessed September 30, 2005], pages 13-16

Directive⁴³). These stipulations can be found in Chapter 5 “Other Rights” in the Intellectual Property Act. “Other rights” is just another way to say neighboring rights or related rights. Since these databases are not copyright protected works, it might seem as if DRMS that control these databases have no legal protection according to the section 53a, paragraph 1. If section 53a, paragraph 1 is taken at face value, a DRM that controlled access to a database with a list of all the telephone numbers in Norway would not receive legal protection, as only work is mentioned as the object for protection.

Copyrights are limited in time (cf the Intellectual Property Act chapter 4). The fact that section 53a, paragraph 1, uses the phrase “*protected work*” makes one wonder if the intention is only to award legal protection to works where the copyright has not expired. Works where the copyright has expired, according to section 40, are no longer “*protected works*” in the legal sense. DRMS used to control these works, thus, seemingly have no legal protection and would include sound CDs and mp3 files where artists or orchestras perform works in which the copyright to the work has expired. Examples of this would include recordings of Bach’s or Mozart’s works, as well as sound books based on expired copyrighted works like Ibsen’s and Shakespeare’s. The result would be the same even if the recording is new. Performers’ rights are regulated in section 42, which is located in Chapter 5. Performers’ rights are thus neighboring rights and not considered copyrights or protected works.

So if the rock star Madonna were to make a new recording of an old opera where the copyright has expired, and she implemented a DRM on the music CD and sold this CD in Norway, this DRM would not be legally protected as it would not be considered a “protected work.”

The Swedish Copyright Act section 52b, second paragraph, uses the phrase “copyright protected work”, and thus has the same limitation as the Norwegian statutory text. On the other hand, the Danish Intellectual Property Act, section 75c, paragraph 4, uses the phrase “works and performances and productions”, which could be seen as a reference to neighboring rights.

⁴³ Directive 96/9/EC of the European Parliament and of the council of 11 March 1996 on the legal protection of databases.

In the Proposition page 115, the Department, when talking about the Directive, article 6, paragraph 3 uses the phrase “protected works or labor⁴⁴.” When you read the Proposition, you get the impression that they wanted to protect both works and labor. It makes good sense to reference labor as in Chapter 5⁴⁵, which would be the same as a reference to related rights and to neighboring rights. Strangely, the statutory text only contains the word “works.” For the statutory text to match the text in the Proposition, the statutory text would have had to have read “works and labors” as well. When the statutory text does not, one can only speculate if this was an unintended mistake on the part of the legislators. The Directive uses the phrase “any right related to copyright” in article 6, paragraph 3. The phrase “any right related to copyright” could be seen as a reference to neighboring rights. The full name of the Copyright Directive is Directive on Copyright and *Neighboring Rights* in the Information Society. This indicates to me that the member states are required to provide legal protection for technological measures used to control neighboring rights.

To only offer legal protection for works in section 53a, paragraph 1 is not in accordance with the Directive, which is a major slip in the re-writing of the Intellectual Property Act.

Users who only read the law might believe that DRMS that control certain databases or works where the copyright has expired are not protected. When one interprets section 53a, paragraph 1, one might conclude that the correct interpretation could be to read “protected work or neighboring rights” into the statutory text, which would bring the statutory text into accord with the Directive.

The Directive article 6, paragraph 3, first sentence would weigh in heavily as a factor in the interpretation of the statutory text. The fact that the phrase used in the legislative history is “work or labor” further strengthens this interpretation of section 53a, paragraph 1.

4.2 What the Law Prohibits

4.2.1 “Circumvent”

⁴⁴ verk eller arbeider

⁴⁵ Wagle, A.M. & Ødegaard, M., 1997 *Opphavsrett i en digital verden*, Cappelen Akademiske Forlag, Oslo, 89

Section 53a, paragraph 1 of the Intellectual Property Act prohibits circumventing the technical protection system. “Circumvent” is a legal term. The term has no statutory definition. I will begin this discussion with the normal understanding of the word.

To circumvent means to avoid or to go around. In a legal sense, to circumvent may mean to disregard the law without literally violating its words. Since circumvention is prohibited, so must actually breaking the DRM be prohibited.

5 The Intellectual Property Law Section 53a, Paragraph 3, 2nd Sentence

The second sentence in paragraph 3 of section 53a is an exception to the main rule, and it reads...

The provision in paragraph 1 shall not hinder the private user from making use of legally acquired work on what is commonly perceived as relevant playback equipment⁴⁶.

The provision in paragraph 1 is a reference to the main rule, which I discussed in the section above.

5.1 “Hinder”

Is section 53a, paragraph 3, 2nd sentence an exception to the main rule or is it meant as merely a guideline on how to interpret paragraph 1? One might think it is just a matter of a legal technicality, but it is of interest because exceptions might sometimes be given a more restrictive interpretation⁴⁷. Section 53a, paragraph 1, uses the word “prohibited⁴⁸.” If section 53a, paragraph 3, 2nd sentence were meant to represent an exception, it would have been natural for the legislators to have used the word “allowed⁴⁹” to make it clear that the sentence was meant as an exception. The words “shall not hinder” could just mean that the result you reach after interpreting the prohibition in paragraph 1 cannot hinder the use of legally acquired works on what is commonly perceived as relevant playback equipment.

Nevertheless, it is clear from reading the Proposition that section 53a, paragraph 3, 2nd sentence is meant as an exception. The word “exception” is used several places in the text, see for instance page 118, where the Department states that they want an exception to preserve vital consumer interests.

⁴⁶ Bestemmelsen i første ledd skal heller ikke være til hinder for privat brukers tilegnelse av lovlig anskaffet verk på det som i alminnelighet oppfattes som relevant avspillingsutstyr.

⁴⁷ Selvmordsdommen Rt. 1984 s. 1425. Se Boe. E., 1996. *Innføring i juss*, Tano Aschehoug, Oslo, 45-46, 191-193

⁴⁸ forbudt

⁴⁹ tillatt

5.2 “Private User”

When consumers buy music and movies and use them in their own homes, these buyers must be said to qualify under the phrase “private user.” Problems related to the phrase “private user” might include questions such as what happens when the consumers bring their purchased music and movies to work, and what happens if the consumers operate the works in their home offices. Are the users still considered “private users” in the legal sense in these situations? The focus of this paper is the consumers, and an in-depth discussion of whether or not the consumer qualifies under the phrase “private user” will go beyond the limits of this paper. For the purpose of this paper, I assume that the user is considered private and qualifies under the phrase “private user.”

5.3 “Legally Acquired Work”

“Work” here must mean the same as “protected work” in paragraph 1. I refer to the discussion in the above chapter.

One can legally acquire a work in many ways. The most common and most interesting ways of acquiring a work for this paper will be renting and purchasing works.

The phrase “legally acquired work” has been included because it is a condition in section 12, which deals with private copying. Since one might sometimes need to make a private copy of the work in order to use the technically protected work on relevant playback equipment, a logical consequence is that the same condition must apply in these cases too (the Proposition, 32).

5.4 “Use”

“Use” is a legal term.

I will begin this discussion with people’s normal understanding of the word but first make a remark on the translation. I have chosen to use the word “use.” The Norwegian word used in the statutory text is “tilegnelse.” Tilegnelse means to make something your own. The word “tilegnelse” could equally well have been translated with the word “acquire.”

The text obviously does not refer to physically acquiring the work but to the mental acquisition of the work. Nuances might exist where there is a theoretical and factual difference between the word “use” and mentally acquiring a work, but in most cases, one finds no practical differences.

I will continue using the word “use” for the rest of this paper as it simplifies the exposition. The reader should be aware, though, of the small difference in the original wording in the statutory text and in the English translation.

5.5 “Commonly Perceived Relevant Playback Equipment”

5.5.1 Comparing the Directive Article 6, paragraphs 1 and 3 to the Intellectual Property Act Section 53a, Paragraph 3, 2nd Sentence

Another possible discrepancy between the Intellectual Property Act and the Directive in the protection of DRMS is the exception for commonly perceived relevant playback equipment in the Intellectual Property Act. Regardless of whether the DRM is legally protected or not, one may break the DRM in order to make use of the work, provided it is used on commonly perceived relevant playback equipment⁵⁰ (see Intellectual Property Act, section 53a, paragraph 3, 2nd sentence).

The Copyright Directive itself contains no rules about how to avoid technological measures preventing the normal use of the work on different kinds of electronic equipment.

The Directive, article 6, paragraph 4 regarding certain favored user groups (1st subparagraph) and private copying (2nd subparagraph) contains some secondary rules. Private users, who are the subjects in question in the Intellectual Property Act section 53a, paragraph 3, 2nd sentence, are not mentioned as part of any of the favored groups listed in article 6, paragraph 4, 1st subparagraph. The term “use” mentioned in article 6, paragraph 4, 2nd subparagraph is related to private *copying*⁵¹ (see article 5, paragraph 2(b)) and as such

⁵⁰ det som i alminnelighet oppfattes som relevant avspillingsutstyr

⁵¹ privatbrukskopiering

is not relevant for the rules regarding private *use* in the Intellectual Property Act section 53a, paragraph 3, 2nd sentence.

Article 6, paragraph 4, 4th subparagraph, limits the member states' rights to taking appropriate measures (as stipulated in subparagraphs 1 and 2) when works or other subject matter have been "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 a time individually chosen by them." Typically, this rule would apply if the rightholders have made their works available for download on demand on the Internet. Article 6, paragraph 4, 4th subparagraph may be seen as a defense the rightholders can make use of in order to avoid "appropriate measures" as stipulated in the first and second subparagraphs. This also means that article 6, paragraph 4, 4th subparagraph only applies to those cases mentioned in article 6 paragraph 4, 1st and 2nd subparagraphs and thus have no effect on the average consumer's attempt to play his legally acquired works, according to the Intellectual Property Act section 53a, paragraph 3, 2nd sentence.

I would like to point out one possible discrepancy between article 6, paragraph 4, 2nd subparagraph and the Intellectual Property Act section 12. According to the Intellectual Property Act section 12, paragraph 5, copying DRM controlled works is prohibited, unless it is necessary in order to circumvent technological protection systems that prevent private use as described in section 53a, paragraph 3, 2nd sentence. Article 6, paragraph 4, 2nd subparagraph states that member states may implement rules allowing for private copying of works or other subject matters controlled by technological protection systems as long as the copying can be done without preventing the rightholders from adopting adequate measures regarding the number of reproductions. Norway has not implemented such rules. However, frequently the user might have to make a copy of the DRM-controlled work in order to play the work on commonly perceived relevant playback equipment. In effect, this would mean that the user creates a copy without allowing the rightholders to take appropriate measures limiting the number of reproductions—a right the rightholders have according to the Directive article 6, paragraph 4, 2nd subparagraph.

In Scandinavia, a similar rule to section 53a, paragraph 3, 2nd sentence can be found in Sweden too. Denmark, which also limited legal protection for DRMS to intellectual property rights relevant actions, did not write such a rule. These discrepancies

notwithstanding, the end result for a given case might very well be the same in all three countries. Private playing⁵² of a work is not an intellectual property rights relevant action, since it is not duplication or making the work available to the public. A DRM that attempts to control private playing or that makes it difficult to play is not protected in any of the Scandinavian countries.

As we have seen in the case of combined DRMS, the Norwegian legislative history is clear that technical protection systems that control both intellectual property rights relevant actions and other actions, such as private viewing, are protected by law.

I will not pretend to be an expert on Danish or Swedish law. I will add, though, that the Danish legislative history⁵³ states that DRMS that make it difficult for consumers to view the work, such as regional coding on movie DVDs, are not protected. Access control and other similar controls are protected if the purpose is to prevent or limit copying or other intellectual property rights relevant actions. The Danish Proposition goes on to say that in the end it will be the EU courts that will have to draw the boundaries⁵⁴.

What is special about the Norwegian rule in section 53a, paragraph 3, 2nd sentence is that it does not depend on the legal status of the DRM. The legal status is irrelevant as to whether the DRM controls copying, which would make it a protected DRM, or any other action that is not an intellectual property rights relevant action.

The Swedish Copyright Act has a similar formulation. According to the Swedish Copyright Act section 52d, paragraphs 1 and 2, one can circumvent the DRM provided one has legal access to the work and it is done in order to listen to or view the work.

Section 53a, paragraph 3, 2nd sentence in the Norwegian Intellectual Property Act was initially meant as a narrow exception in the Proposition, but the term was given a broader

⁵² avspilling

⁵³ 2002-03 - L 19 Forslag til lov om ændring af ophavsretsloven

⁵⁴ Derimod omfatter bestemmelsen efter Kulturministeriets opfattelse ikke tilfælde, hvor personer foretager omgåelse af en kode, som har til formål at hindre eller besværliggøre den personlige tilegnelse af et værk, der er erhvervet ved køb eller lign.; dette gælder fx den såkaldte regionskodning af dvd'er.

Adgangskontrolanordninger og lign. omfattes af § 75 c, såfremt formålet er at forhindre eller begrænse kopiering eller andre ophavsretligt relevante handlinger. Det bemærkes, at den nærmere afgrænsning af beskyttelsen af de tekniske foranstaltninger i sidste ende henhører under EF-Domstolen. Available online at http://www.ft.dk/?/Samling/20021/lovforslag_oversigtsformat/L19.htm (click on "Forslag som fremsat" and scroll down to "Til § 75 c")

interpretation in the Recommendation, and it was the Committee's broader interpretation that was adopted by the Storting.

5.5.1.1 Does the Exception Go Further than Allowed by the Copyright Directive?

The exception for commonly perceived relevant playback equipment is based on the assumption that legitimate DRMS, that is, those protected by law, might cause problems for normally operating the work. The writers of the Directive, too, foresaw that DRMS could create problems for normal use of the works. The preamble (recital 48) to the Copyright Directive states that

Such legal protection [for technological measures] should be provided... without... preventing the normal operation of the electronic equipment and its technological development.

One cannot help but notice the similarities between section 53a, paragraph 3, 2nd sentence and the preamble (48). It might seem as if the preamble (recital 48) is the basis for the exception in section 53a, paragraph 3, 2nd sentence.

Preambles are considered part of directives and they weigh in when one interprets the meaning of the directives. The EU courts look to preambles to find the purpose of rules in directives (Fredrik Sejersted, *EØS rett*, 186, 6th edition 2001)⁵⁵. However, few Norwegian citizens will ever read the preamble of the Copyright Directive. In this case, it makes good sense that the motives from the preamble are included in the Norwegian law.

The rule itself also makes good sense. Consumers are put in difficult positions if all DRMS are legally protected and works will not play because of them. The exception for commonly perceived relevant playback equipment protects vital consumer interests.

The spirit of the Directive is clearly not to infringe on the rights the consumers have to normally operate their electronic equipment. Even though the Directive's articles themselves lack any stipulations about how to allow for normal operations, the Intellectual Property Act seems to conform to the spirit of the Directive.

⁵⁵ Fra EF-domstolens praksis vet vi at fortalene undertiden tas til inntekt for formålet med en gitt regulering

The Norwegian exception implements the spirit of the Directive in a sensible way. I refer to what is said above about how the member states have some freedom in how to implement directives.

I conclude that the Norwegian exception for commonly perceived relevant playback equipment is within the limits stipulated by the Directive and that Norway, in this case, has fulfilled its obligations in accordance with the EEA agreement.

6 Technical Protection Systems on DVD Movies

I will now discuss whether people may break the technological protection measures on DVD movies in order to change the format, thereby allowing them to watch the movie on different playback devices, such as their computers or their portable DivX playing devices. A DivX playing device is a playback device capable of playing DivX video files. This might seem a narrow problem, but the discussion below is relevant for a wide spectrum of formats and devices, such as whether or not people may transfer music from their DRM-controlled music CDs onto their future mp4 players or cell phones.

6.1 Introduction

To address the problem, I will first look at music CDs and their popular file format mp3 as they contain many similarities. Mp3 is a file format used for sound files and is the most popular format used to compress digital sound files from a music CD to a hard drive.

The Committee made it explicitly clear in their remarks in the Recommendation that consumers should be allowed to transfer music CDs to mp3 players, something the Storting consented to (see below).

The mp3 file format is to music CDs what the DivX file format is to movie DVDs. The biggest difference is that DivX files take up more space on a storage device than mp3 file formats. As hard drives become physically smaller and capable of storing larger amounts of data, handheld movie players will become more and more popular. Even today several models are available to consumers. See, for instance, the iRiver PMP 140⁵⁶. You can hook up these small DivX players to nearly any television to offset the disadvantage of the small screen. You can also store your mp3 music files on them. Consumers accustomed to ripping music CDs onto their mp3 players might soon start wondering if they can do the same with their DVD movies.

A consumer might think that if an mp3 player is “commonly perceived as relevant playback equipment” for a CD, then the same thing should apply to a movie DVD and portable movie player.

⁵⁶ See www.iriver.com

The Department suggested that mp3 players should not be considered relevant playback equipment for [music] CDs. The majority of the committee, however, did not share this view. Instead, they view the idea that digital music tracks purchased for playing on a CD player should be transferable and should be able to be played on an mp3 player (the Recommendation, page 38).⁵⁷

6.2 Sources of Law and Their Interpretations

The Intellectual Property Act is to a large extent technologically neutral, making it flexible to adapt to new and changing situations. On the other hand, it offers little guidance for consumers. The sources of law involved and the principles of interpreting these are complex. And, in relation to the main issue at hand, the sources of law point in somewhat different directions.

To interpret directives and the acts derived from them, we will emphasize the spirit of the rules, the meaning and reasons behind them, rather than scrutinize the text (see section 1.2.4).

The exception for “commonly perceived relevant playback equipment” is a Norwegian invention and as such not a direct implementation of the Copyright Directive. When the courts interpret the Intellectual Property Act on this point, they have no text in the Directive to compare it with, leaving the Norwegian statutory text as the only source. This means that the Directive’s text has seemingly less value on this particular point. The interpretation of the Intellectual Property Act still needs to conform to the spirit of the Copyright Directive.

If criminal charges are brought against a transgressor, you find an opposing principle called “*nulla poena sine lege*” as expressed in section 96 of the Norwegian constitution, “Nobody can be convicted without [written] law, or punished without judgment.”⁵⁸ The *nulla poena*

⁵⁷ Flertallet har merket seg at departementet mener en MP3-spiller ikke kan være en relevant avspiller for en CD-platte. Flertallet deler ikke dette syn. Flertallet ser at digitale musikkspor innkjøpt til avspilling på en CD klart bør kunne overføres og brukes på en MP3-spiller.

⁵⁸ This principle has a slightly different content in the Norwegian legal tradition than in countries based on the English legal system, like the U.S. In Norway, the word “law” refers to written law, whereas in England

sine lege principle dictates that we narrowly interpret the statutory text. Andenæs writes in *Alminnelig Strafferett*, 5th edition (115), that the text itself and its common understanding is pushed into the foreground. *Nulla poena sine lege* is an important principle because people should be able to read the statutory text and understand what is legal and what is illegal.

When one looks beyond the statutory text, one has the legislative history. For the particular problem at hand, one can find relevant information for interpreting the Intellectual Property Act all along the path, from bill to act. Even the debate in the Storting holds clues to solving what I refer to as the “DVD movies to DivX” problem. In the next section, I will look at each element beginning with the legislative history.

6.3 The Legislative History

The new section 53a in the Intellectual Property Act had a turbulent path from bill to act. The writers of the original draft, the Royal Department of Culture and Church, proposed a slightly different text than what was eventually passed in the Storting. Most significant were the changes made by the Committee, who added the words “commonly perceived” to what was to become the statutory text. The added words shifted the balance of the rule in favor of the consumers at the expense of the rightsholders.

The fact that the Storting, Norway's legislative body, rejected the proposed text in favor of other text is particularly important, because the rejected text contains hints as to what the Storting did not want. Let us take a closer look at those changes.

In the Proposition (119), the Department states that whether or not a piece of playback equipment is relevant must be decided for each individual case⁵⁹. The Departments further states in the Proposition (119) that what is to be considered relevant playback equipment should be understood “relatively restrictively.”⁶⁰

and in the U.S., the word “law” can refer to other sources, like previous cases. For more information about this see Andenæs, J., 2004 *Alminnelig Strafferett*, 5th edition, Universitetsforlaget AS, Oslo (105)

⁵⁹ Hvorvidt et avspillingsutstyr er relevant må vurderes konkret idet enkelte tilfelle

⁶⁰ Hva som utgjør relevant utstyr i lovens forstand bør forstås relativt snevert

On page 38 of the Recommendation, the Committee states that a central element in this decision would be what *expectations the consumer*, with fairness, may have to the playing of the product in question. The committee also states that what should be considered relevant playback equipment in the legal sense should be understood “relatively flexibly.” The words "relatively flexibly" stand in stark contrast to the words “relatively restrictively,” which are the words used by the Department. The Committee bases their view on new technological equipment developing very quickly⁶¹.

The difference between what the Department states in the Proposition and the Recommendation from the Committee is important because it clarifies that the Committee does not want a restrictive interpretation.

The Storting passed the Committee's suggestion, thereby taking a clear stand that they want people to flexibly interpret the term "relevant playback equipment" and not to restrictively interpret it the way the Department suggested.

For the average consumer, the sentiments from the legislative history might be that he would be correct to view his handheld DivX player as “commonly perceived relevant playback equipment” for his DVD movies.

6.4 The Debate in the Storting

One possible problem for the consumer, though, is that the majority who voted in the Storting had different views amongst themselves on what the implications of a flexible interpretation of the term "relevant playback equipment" meant.

In the transcripts⁶² from the debates in the Storting in 2005 page 726, Representative Trond Giske, from the Labor Party, stated that the remarks in the Recommendation

⁶¹ Komiteens flertall ... mener at den raske teknologiske utvikling tilsier at hva som utgjør relevant utstyr i lovens forstand bør forstås relativt fleksibelt. Hvorvidt et avspillingsutstyr er relevant må vurderes konkret i det enkelte tilfelle, og et sentralt moment i denne vurderingen vil være hvilke forventninger til avspilling forbruker med rimelighet kan ha til det aktuelle product.

⁶² The following is mostly paraphrased. For direct quotes please see transcripts from the debate. [Available online] <http://www.stortinget.no/otid/2004/o050604-01.html> [Accessed October 5, 2005]

regarding transferring music from CDs to mp3 players is an exhaustive list. This would mean that remarks only refer to ripping music CDs to the mp3 format.

Representative Magnar Lund Berge, from the Socialist Left Party, states that a broad majority in the Storting wants to limit the exception in Section 53a, third paragraph, with regard to relevant playback equipment to “copying from a CD to an mp3 player and only that” (729, debate transcript). He goes on to say that such access should not include works from, for example, DVDs.

Representative Ulf Erik Knudsen, from the Progress Party⁶³, however, says that a majority of the Storting favors a technologically neutral formulation that can handle different technologies (724, debate transcript). Later in the debate, several of the representatives take Representative Knudsen’s words to mean that the Progress Party, as part of the majority, do not want to limit the exception in Section 53c, third paragraph to only the “CD to mp3” case. Cabinet Minister Valgerd Svarstad Haugland, from the Christian Folk Party⁶⁴, who is also a member of the minority in this case, challenged Representative Knudsen and asked him if he agreed with the exception in Section 53a only applying to mp3 players? Representative Knudsen avoided the question to clarify his statement, referred to what he said earlier, and said that he thought it was wise to have a technologically neutral text (738, debate transcript).

Some representatives want to limit the exception in section 53c, second paragraph to only the “CD to mp3 case.” Others, like Representative Knudsen, want to keep the material content of the exception more open. The text of the debate sends a mixed message that the Storting has no strong unified majority on limiting the exception to the “CD to mp3” case.

6.4.1 The Value of the Debate in the Storting

⁶³ Fremskrittspartiet

⁶⁴ Kristelig folkeparti

Another matter we must consider is what value the debate in the Storting has in determining the material content of the statutory text. In his book, *Rettskildelære*, (5th edition, 75) Torstein Eckhoff states that one should not place much weight on statements made in the debates from a single representative. For instance, in the debate about how a rule in the proposed law should be interpreted, Eckhoff writes that one should put more weight on the writings from the Committee rather than what is said in the debate, because the written word is more thought out than the spoken word.

Eckhoff further states that even more interesting than what the representatives say during the debate itself is how the representatives votes, especially when two opposing propositions are being debated, page 76.

6.4.2 The Opposing Proposition

Those in the minority of the Committee had an opposing suggestion that was technologically specific and limited the exception in Section 53a, third paragraph, 2nd sentence, only to copying music CDs to mp3 players. Cabinet Minister Haugland invited the other representatives to vote for that proposition instead. Her invitation was not heeded by the majority, not even by the representatives from the majority who seemingly favored the limitation.

The representatives had ample opportunity to vote for a proposition that would limit the exception in section 53a, third paragraph, 2nd sentence only to music CD to mp3. But they did not. This sends the signal that the majority did not want this limitation or that they felt it was not necessary.

6.4.3 Conclusion of Legislative History and the Debate in the Storting

The Committee's writings call for a flexible interpretation of the exception in section 53a paragraph 3, 2nd sentence. The debate in the Storting sends a mixed message with regard to limitations to the interpretation of "relevant playback equipment," and according to Eckhoff, the debate itself has little value—the vote being the most important element. The way the representatives voted seems to indicate that the Storting did not want, or could not agree, to limit the exception regarding relevant playback equipment to copying from CDs to mp3s.

From this, one can, at the very least, not rule out that the exception might apply to other formats, too, like the DVD movies to DivX format.

6.5 Statutory Text

Just from reading the text, one finds no hint that it is meant to only apply to music CDs and mp3 players. Anyone reading the statutory text for the first time would not even stop to consider that such a limitation would exist. The text is neutral in terms of technology.

But what is “commonly perceived as relevant playback equipment” for a DVD movie? You can start with the obvious: you must consider DVD players to be “commonly perceived as relevant playback equipment” for DVD movies. When you bring other types of playback devices to the table, deciding what you consider to be commonly perceived as relevant playback equipment becomes more problematic.

6.5.1 Determining Common Perception

The term “commonly perceived” [relevant playback equipment] is a legal term. The term has a certain legal content.

A normal understanding of the phrase would indicate a reference to the public opinion. But how should judges or users decide what the common perception is on a certain item?

One finds little guidance in the legislative history. “Commonly perceived relevant playback equipment” is a legal standard. By legal standard, I mean a term that requires a certain amount of discretionary judgment in its interpretation (Ronald L. Craig, *Norwegian-English Law Dictionary* 1999, 205). The content must be found outside the law. Legal standards usually develop and change over time. The key to assessing legal terms is to find the elements that will weigh in on the final judgment. A number of factors will likely influence the judgment. Below, I will attempt to explore some elements that might be part of the assessment.

6.5.1.1 Polling

Is polling the general public a good source for figuring out what the common perception is? In Norway, people who buy mp3 players (the mp3 generation) expect to be able play their music CDs on them. If one were to ask people from the mp3 generation about what they perceive to be relevant playback equipment for music CDs, many of them will answer that, yes, they perceive that the mp3 player is relevant playback equipment for music CDs. If you were to ask the parents of the mp3 generation and others the same question, the number of people who consider mp3 players to be relevant playback equipment for music CDs may be fewer than those from the mp3 generation.

As one can see, how common something is perceived to be, depends on the population you choose to poll. When the first portable mp3 playing devices were sold, most people still did not view them as relevant playback equipment for music CDs, since most people had not heard of them or had never thought of having a piece of hardware besides their computers on which to play mp3 files. But as portable mp3 players grew in popularity, got smaller, and more user friendly, people's perceptions changed.

A few innovators showed people the advantage of playing their music CDs on portable mp3 players. By nature, the innovators are fewer than the followers. In the advent of mp3 technology, only the innovators, who were few in number, would have considered a portable mp3 player to be relevant playback equipment for music CDs. But with the surging popularity of Apple's iPod and other portable mp3 playing devices, people perceive mp3 players as relevant playback equipment for their music CDs.

Another problem is the legal practicality of polling—the judge cannot leave the courtroom and conduct polls in the streets.

6.5.1.2 Number of Portable DivX Playback Equipment Sold

Should one consider how many portable DivX playback devices sold to be an indicator of if the public commonly perceives it to be relevant playback equipment? If the answer is yes, then we have the situation of when the first few playback devices were sold—the devices were not commonly considered relevant playback equipment, thereby making it illegal for consumers to break the DRMs in order to play protected works on the devices,

whereas, after many more people buy portable DivX players, this perception will change, as the perception that people held regarding portable mp3 players changed.

If one were to consider the number of portable DivX players sold as a relevant gauge for what people consider to be relevant playback equipment, one has the added difficulty of deciding the key number where the perception changes relevancy, that is, how many DivX players must people buy before one may say that they are commonly perceived as relevant playback equipment for DVD movies?

One can easily deduce that if every person on planet Earth owns a portable DivX player containing a ripped DVD movie on it, one can say that the common perception is that the portable DivX player is considered relevant playback equipment for DVD movies. One cannot easily deduce the opposite, as in the case when only one person owns a portable DivX player—our deducing that the device is not commonly perceived as relevant playback equipment for DVD movies is dangerous. One can make the case that the portable DivX player is in its infancy and that few people have heard of it yet, but once the public does begin hearing of portable DivX players, they will consider them to be relevant playback equipment for DVD movies.

One can thus conclude that the number of DivX players sold might be a relevant indicator or measurement when deciding what is commonly perceived as relevant playback equipment when the sales numbers are high. Information gleaned from low sales numbers, on the other hand, may not be very telling.

6.5.1.3 The Rightholders and the Content Industry

The movie makers and the recording companies are responsible for the content of music CDs and movie DVDs, which I will refer to as the content industry.

As the general public's perceptions change, what they consider as relevant playback equipment changes with time and with the popularity of new technologies, which illustrates the difficulties with relying on the public's opinion as measures for what is commonly perceived as relevant playback equipment.

The rightholders have the prerogative to decide how they want to make their works available to the public⁶⁵. Artists may, hence, choose, if they wish, to make their works only available to the public on CDs. At the same time, artists may make it known that they only want people to listen to their works on regular CD players. Should the artists' wishes be relevant for deciding if an mp3 player is relevant playback equipment for those CDs according to the Intellectual Property Act, section 53a, paragraph 2, 2nd sentence? As I stated earlier, the Intellectual Property Act only addresses what private users commonly perceive as relevant playback equipment, not the artists' perceptions, hence, the Intellectual Property Act does not support artists' wishes beyond the effect the statement has on the public opinion.

6.5.1.4 The Hardware Manufacturers

The content industry and the hardware industry, that is, manufacturers of playback devices, are two industries whose interests in the markets may conflict with each other.

The content industry wants to prevent widespread copying and is in general skeptical to new platforms, of which a good example from a couple of decades ago was the cassette-tape player.

The hardware industry wants to sell as many playback devices as possible. More developed platforms tend to mean more users and uses for the equipment they produce. The Sony Walkman and the ghetto blaster brought music out of the living rooms and into the streets. At the same time, the content industry was afraid that people would just freely copy music from LPs to cassette tapes.

The playback equipment manufacturers may also manufacture, promote, and sell playback devices and influence the public to start viewing new devices as relevant playback equipment for music CDs and DVDs.

Some companies like Sony, who are both producing movies and manufacturing playback equipment, have interests in both the content industry and in the hardware industry. In this situation, these companies might be reluctant to push development of new formats and

⁶⁵ Section 2 of the Intellectual Property Act

new playback equipment to protect their interests. Rogue hardware producers with no ties to the content industry have an opportunity to create new playback devices and the opportunity to promote those devices' advantages to the public. For example, Apple, who today is the leading seller of portable mp3 players in the market, originally had no ties to the content industry.

6.5.1.5 What the Stores Sell

So far, we have seen that what the public commonly perceives as relevant playback equipment is difficult to measure. One can deduce that if something is widely popular, the public will view it as relevant playback equipment. More problematic are the cases where the playback device is less popular.

Products sold in regular markets are viewed by the public as legal to buy and legal to use, the common opinion being that if it were not, it would be illegal to sell, especially if the advertised use is illegal.

If regular electronic and data stores sell portable DivX players and advertise them in such a way that gives the impression that people could play their DVD movies on these devices, nobody would think that the portable DivX player was not relevant playback equipment for their DVD movies.

In my opinion what the stores sell is the key element in deciding whether or not a device is commonly perceived as relevant playback equipment for a format. Finding out what the stores sell and advertise is easy to discover, making this an easy variable to handle. This again leads to a manageable rule for what the public considers relevant playback equipment for DVD movies. Of course, it cannot be the only factor, and one must weigh in other considerations as well.

What stores sell might not be the lower limit for what can be considered relevant playback equipment, but it draws closer. Anyone who wants to make the case that a device not sold in the stores is commonly perceived as relevant playback equipment is fighting an uphill battle.

In general, people expect to be able to use the products they buy in accordance with what the device's advertisement says it can do.

Playback devices that are sold in the regular market will likely be perceived as relevant playback equipment by the public. Playback equipment that is not sold in the regular market cannot enjoy that description. What is offered in stores is thus perhaps the best indicator for what is commonly perceived as relevant playback equipment.

6.5.1.6 Changing Opinion in the Population

As we have seen above, the public's opinions can change quickly and can be influenced by a number of factors. The mp3 generation has grown up in the IT revolution, where the way they receive information changes quickly. They are putting behind the physical world of turning the pages of the newspapers and books that they are reading. They are no longer accustomed to changing tapes or records on stereos while listening to music, and they do not tune in to television to watch movies and news broadcasts. Instead, they do all these things in the virtual world on their computers. They expect to be able to do more than just listen to their music CDs, and they expect to be able to do more than just watch their DVD movies. They want to bring music CDs and DVD movies into their worlds without the hassles of all the physical copies.

To the mp3 generation, digital playback equipment has many advantages, and they expect to explore them fully. For instance, when Joe Cool User copies his music and movies onto his digital playback equipment, he does not have to haul the actual music CDs and the actual movie DVDs around with him anymore, taking up costly luggage space. All his movies and music will fit onto one small playing device.

It is likely that the mp3 generation will have an open mind and be open to new ideas when it comes to how and when to listen to music and view movies. This mindset will impact the public's perception on what kind of device is relevant playback equipment. Most likely, they will want to be able to play the works on any kinds of devices with speakers or a plug for headphones.

6.5.1.7 Items on the Drawing Board

Could it be that playback equipment not yet manufactured or designed could be considered relevant playback equipment by the public? Talking about the common perceptions of items that the public has yet to see or hear of seems forced and strange, which is perhaps the reason the statutory text does not seem to support this idea.

The cell phone will serve well to illustrate the problem. If we go back a year or two, no cell phones that could play mp3 files were sold. Yet, it is likely that people will think it a good idea to combine the mp3 player and the cell phone. Today these phones are in production. Microsoft has declared that they see a general merging of the cell phone and the mp3 player in the near future.

Allowing hypothetical devices to be become “commonly perceived relevant playback equipment” based on what people say when confronted with a new idea is perhaps not supported in the statutory text, but it would be a future and development-friendly rule.

6.5.1.8 The Ease of Ripping

The ease of transforming DVD movies to the DivX format could very well affect how people view handheld DivX players. If most of the movie DVDs on the market have a DRM that resists any transformation to a new format, the public might view this as a big drawback. The perceived drawback might then again result in people not viewing the DivX player as relevant playback equipment. Part of the reason of why portable mp3 players have become so popular was the ease of transforming CDs to the mp3 format. By implementing DRMS, the content industry can slow down the development of new playback devices simply by making it very complicated for users to change the format.

6.6 Conclusion

May Joe Cool User legally rip his DVD movies in order to put them in his hand held DivX player?

The legislative history seems to favor a flexible interpretation of what one considers relevant playback equipment. The debate in the Storting sends a mixed signal, but the way the Storting voted indicates that they did not want to limit relevant playback equipment

only to music files and mp3 players. The statutory text itself contains no hint that it was only meant to apply for music and the mp3 case. And as long as people can buy handheld DivX players in regular electronic stores, their common perception will likely be that these players are relevant playback devices for DVD movies.

I conclude that section 53a, paragraph 3, 2nd sentence not only applies to the music CD to mp3 case but also to movie DVDs and portable DivX players.

7 Accessing Downloaded Material using Different Platforms

May people break technological protection systems in order to play a piece of music or watch a movie using a different software program and/or operating system than when they downloaded the works onto their computers?

7.1 Changing Operating Systems

Operating System Scenario: Joe Cool User, who likes all the advantages connected to buying music online, decides that he wants to start buying music from the popular online music store iTunes. The downloaded music ends up on his computer, which happens to run on the operation system Windows XP. As time passes, Joe Cool User decides he no longer wants to run Windows XP on his computer but wants to change to the free operating system Linux. After installing Linux, he discovers that the music he bought online from iTunes will not play with any other software than iTunes. The DRM on the downloaded file from the iTunes Music Store prevents the sound file from being played on any other program⁶⁶. iTunes is also not available for Linux users. It seems now that all of Joe's music is unavailable to him.

7.2 The Statutory Text

Joe decides to consult the law. He reads the statutory text in the Intellectual Property Act, section 53a paragraph 3, second sentence dealing with “relevant playback equipment”.

To find the correct interpretation of the wording in a statutory text, one starts by applying the meaning we imagine an average reader would take it to mean. The phrase “playback equipment” refers to something physical. This could mean that if a song has been downloaded onto a computer, the computer would be considered relevant playback equipment.

If that is the case, Joe can use any program and operating system he wants to view or listen to his movies and music on his computer.

⁶⁶ For a detailed description on how iTunes works see Schollin, K., 2004. ”Virtuell upphovsrätt” Juridisk Tidskrift, nr 1 2004–05, 61-81

7.3 The legislative history

Unknown to Joe Cool User, sentiments in the legislative history might alter the content of the law in section 53a paragraph 3, 2nd sentence.

In the Proposition page 119, the Department suggests that when a music file is bought on demand in a network, the agreement between the user and the provider dictates what should be considered relevant playback equipment. According to the Proposition, the reasoning is that the user can have no legitimate reason to think that he could play the sound file on any other equipment than stipulated in the agreement. The Department concludes that in the case of downloaded music files online the exception for relevant playback equipment is not relevant and not usable.

This would mean that the Department views that the agreement between the user and the provider as the sole element in deciding what is “relevant playback equipment” for the downloaded material.

Note that the Copyright Directive article 6 paragraph 4, 4th subparagraph does not apply to Joe’s situation as it relates to specific user groups and private *copying* and not to private *use*, which is the topic in the Intellectual Property Act section 53a, paragraph 3, 2nd sentence.

7.3.1 Three Problems with the Department’s Interpretation

One problem is that the Department’s idea to limit what is considered relevant playback equipment to the agreement was offered as an example of their understanding of a “relatively restrictive interpretation” of what could constitute “relevant playback equipment.” As I explained earlier, the Committee and the Storting did not agree with the Department that the phrase “relevant playback equipment” should be given a “relatively restrictive interpretation” but rather a “relatively flexible interpretation.” The new way of interpreting the phrase severely limits the value of the example provided by the Department in the Proposition.

The second problem is that the Committee added the term “commonly perceived” to the bill so that the final act read “commonly perceived relevant playback equipment” instead of just “relevant playback equipment,” as it read in the Department’s Proposition. The added term widened the focus and added elements to what might be taken into consideration when determining the legal content of the exception in section 53a, paragraph 3, 2nd sentence.

The third problem is that the statutory text does not support limiting “what is commonly perceived relevant playback equipment” to stipulations in an agreement.

7.4 Problems with Allowing Agreements to Decide what Constitutes “Commonly Perceived Relevant Playback Equipment”

If the agreement dictates what is considered relevant playback equipment for downloaded music and movie files, the legislators have opened themselves up to private lawmaking. Downloaded music and movies are and will be a big market in the future making it unwise for the legislators to leave this area unregulated. The agreement would define what is considered relevant playback equipment. If DRMS mirror the agreement, breaking the agreement means breaking the DRM. Breaking the DRM is, as stated earlier, a criminal offence according to the Intellectual Property Act, section 54.

7.5 Consumer Expectations

Both the Committee and the Department state that a central element in this decision, would be what *expectations the consumer*, with fairness, may have to the playing of the product in question⁶⁷.

Consumer expectations are thus a key element in deciding what is “commonly perceived relevant playback equipment.”

The agreement will influence the expectations the consumers have to the playing or viewing of the material at hand. The agreement, however, should not be the sole element when deciding what constitutes relevant playback equipment as the Department suggests in

⁶⁷ See Proposition p. 119 and Recommendation p. 38.

the Proposition. I refer to what I wrote in section 9.3.1, “The three problems with the Department’s interpretation.”

In my opinion and the way I understand the dynamics between the Proposition and the Recommendation, the agreement may only be one of several elements that might be relevant when considering what constitutes “commonly perceived relevant playback equipment.” What weight the agreement should have in the consideration will depend on the situation and the type of agreement, specifically, if it is a renting or a buying agreement. I will write more about this difference later.

7.6 The Importance of Where and How People Purchase Works

The Department states that the agreement will dictate the expectations buyers might have. They seem to ignore that people always have agreements as bases for all types of purchases of copyrighted works, no matter if buyers purchase works in regular music stores or purchase the music on demand for download on the Internet. The only difference is that the agreement is not in writing.

I seem to find little reason why buying music online for download should be treated any differently than buying a music CD in a regular music store. The expectations buyers have might very well be the same. They want to be able to keep the work as long as they live and play it on the playback device that is convenient for them.

When the Committee stated that they wanted mp3 players to be relevant playback equipment for CDs, they also in reality said that computers are relevant playback equipment for music CDs, too. Nearly all mp3 players today must have a computer to load the music. You cannot just hook the mp3 player up to the CD player. The CD has to be read by the computer and converted to the mp3 file format. Only then can you transfer the file to the mp3 player. The law does not stipulate in what ways or with what programs this transfer should happen. Users are free to choose what programs they want to perform this process. This also means that users are free to choose what program on the computer they want to use to listen to the music.

If users buy the same music online, according to the Proposition, they are limited to the playback equipment stipulated in the agreement. The two situations are imbalanced. If Joe Cool User buys the music on a music CD in a regular store, he can put it on any kind of computer using whatever kind of program he likes. Whereas if he buys the same music online, he might be limited to using the programs and equipment stipulated in the agreement.

If one applies the remarks from the Department about limiting relevant playback equipment to the agreement for music bought online for download, we see that the lawmakers have created a difference for the rights the users have to the work for no apparent reason.

7.7 The Agreement Type and Its Significance

As I explained earlier, one of the attractive features of DRM is its potential as a tool to build new business models (see the Napster example). Although comments about opportunities for new business models utilizing DRM are scarce in the Intellectual Property Act's legislative history, the Recommendation contains only one comment. On page 39, it reads, "... The record industry has for a long time been criticized for not providing a legal alternative for downloading [music] on the Internet. When such alternatives now are being established, [we] should not decide on rules that undermine the legal alternative."

Some business models are more dependent on DRM than others. This especially applies to businesses that rely on providing copyrighted material for a limited period of time or for a certain number of uses.

Breaking DRMS implemented to regulate temporary access would open the works for unlimited use. Allowing users of such online services to break the DRM because they want to access the downloaded work using a different program or computer-operating system would quickly put a stop to that type of online "renting" services.

Such services constitute a legitimate business model. That could mean that in the cases where the agreement is a rental type of agreement, users should be allowed very little

latitude with regard to what expectations they could be said to have outside of the stipulations in the agreement.

When Joe Cool User rents a song from Napster to play at his Tango party the following weekend, he will not have much trouble accepting that he can only play the sound track using the program provided for by Napster. However, when he buys a sound track from iTunes that he pays for one time and expects to keep the rest of his life, he might at some point want to play that song on some other program than iTunes. As time pass, Joe might want to start downloading songs from a website that allows him to listen to the downloaded songs using the operating system Linux. Joe would then really like to retain access to all the music he bought from iTunes without having to have two different computers running on two different operating systems.

For Joe Cool User, the consequences of having rented material on his computer when he decides to change operating systems to Linux are not grave. All he has to do is find another provider that offers music for rent for Linux. He loses nothing (except bandwidth and the time it takes to replace his rented songs). For the songs he bought using iTunes, the story is different. The consequence is that he can no longer access the songs unless he circumvents the DRM.

7.8 Conclusion

We see that providers and users have opposing needs when it comes to legal protection for DRMS and that they are dependant on the types of agreements.

People buying music on demand in network have many similarities with people buying a physical music CDs in the regular music store. Consumers expect to be able to keep the music forever and to play it on several different playback devices, computers, and operating systems. The consumers' justified expectations would result in a wide variety of playback equipment being considered relevant for the purchased material.

The opposite is true for rented material. Consumers can only expect to be able to access the material for a limited period of time or for a certain number of uses. The consequences

for consumers for having to accept a narrow number of playback options are minute. If users do not like the limitations imposed on them by the DRM, they can always move on to a different provider that better suits their needs. On the other hand, the provider's very existence depends on a strong protection for the DRM.

My conclusion is thus two-folded.

In the rented cases, I conclude that people cannot break the DRM in order to play a piece of music or watch a movie using a different software program and/or operating system than when they downloaded the work onto their computers.

For the cases where people have bought the works, I conclude the opposite, that is, I conclude that people may break the DRM in order to play a piece of music or watch a movie using a different software program and/or operating system than when they downloaded the works onto their computers.

8 Conclusion

My thesis is that the Norwegian Intellectual Property Act implemented the Copyright Directive regarding technological protection systems in a sensible way but that the meaning of the law is difficult to access for the users.

In the above analysis I have concluded that the Norwegian Intellectual Property Act reflects the main intentions of the Copyright Directive regarding technological protection systems. Norway has therefore fulfilled its obligations under the EEA agreement.

I have also concluded that the Intellectual Property Act manages to strike a good balance between the rightholders' needs for protecting their DRMS and the consumers' needs to play the works on their own playback equipment. That consumers' interests are subject to strong protection is in accordance with a trend and value in Norwegian legislation to protect the perceived weaker consumers from the perceived stronger providers.

I find that the meaning of the law is difficult to access for the average users. Users cannot simply read the statutory text and have a good idea of their rights, but they must also study the legislative history in-depth, including the debate in the Storting. Even if users were to investigate the law in this way, users' rights are still somewhat unclear. As I see it, Norway needed an act that was easy to understand and made it clear and apparent to the users what rights they have when dealing with digital media. In this respect, the Intellectual Property Act fails.

Writing laws to legally protect technological protection systems is a complex business. My conclusions result from partially analyzing a bigger picture using a few selected key problems. I cannot rule out that one would reach different conclusions if one were to approach this matter with a broader perspective.

Works Cited

- Anonymous, 2005. *Wikipedia* [online]. Available from: <http://www.wikipedia.org> [Accessed July 3, 2005].
- Andenæs, J., 2004 “*Alminnelig Strafferett*”, with 5th edition, Universitetsforlaget AS, Oslo, 105, 115.
- Biddle, P., et al., 2003. “The Darknet and the Future of Content Protection” *In: E. Becker, et. al. eds. Digital Rights Management: Economic Aspects*, Berlin: Springer, 344.
- Boe, E., 1996. *Innføring i juss*, Tano Aschehoug, Oslo, 45-46, 191-193, 237
- Bygrave, L. A., 2003. “Digital Rights Management and Privacy- Legal Aspects in the European Union” *In: E. Becker, et. al. eds. Digital Rights Management: Technological, Economic, Legal and Political Aspects*, Berlin: Springer, 439.
- Craig, R. L., 1999. *Norwegian-English Law Dictionary*, Universitetsforlaget AS, Oslo, page 205.
- Dusollier, S., 2003. “Tipping the Scale in Favor of the Right Holders” *In: E. Becker, et. al. eds. Digital Rights Management: Technological, Economic, Legal and Political Aspects*, Berlin: Springer, 473.
- Eckhoff, T., 2001. *Rettskildelære*, 5th edition by Helgesen, J. E, Universitetsforlaget AS, Oslo, 75.
- Electronic Frontier Foundation “Digital Rights Management: A failure in the developed world, a danger to the developing world” [Available online] http://www.eff.org/IP/DRM/drm_paper.php [accessed October 6, 2005]
- Forslag til lov om endring af ophavsretsloven. (Gennemførelse af infosoc-direktivet, nye aftalelicenser m.v.).* 2002-03 - L 19.
- Friend, I., 2005. “*Apple's iTunes sales hit 50 million*” [online], CNET News.com, Available from: http://news.com.com/2100-1027_3-5173115.html?part=rss&tag=feed&subj=news [Accessed September 28, 2005].
- Ginsburg, Jane C., 2005 "Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the US Experience", Columbia Public Law Research paper No. 05-93 Available online from: <http://ssrn.com/abstract=785945> [Accessed September 30, 2005].
- Gasser, U & Girsberger, M. 2004 “*Transposing the Copyright Directive: Legal Protection of Technological Measures in The EU Member states*”, 10. Available online from <http://cyber.law.harvard.edu/media/eucd> [Accessed October 5, 2005].
- Innstilling til Odelstinget fra familie-, kultur- og administrasjonskomiteen, Number 103 (2004-2005).*

Lejeune, M., 2003. "Protection of Digital Content and DRM Technologies in the USA" In: E. Becker, et. al. eds. *Digital Rights Management: Technological, Economic, Legal and Political Aspects*, Berlin: Springer, 366.

NPD Group 2005, "*iTunes More Popular Than Most Peer-to-Peer File Sharing Services*", , [online] Available from: http://www.npd.com/dynamic/releases/press_050607.html [Accessed September 28, 2005].

Odelsting Proposisjon Number 46 (2004-2005): Om lov om endringer i åndsverkloven m.m.

Reinboth, J., 2003. "Protection of Digital Content and DRM Technologies in the European Union" In: E. Becker, et. al. eds. *Digital Rights Management: Technological, Economic, Legal and Political Aspects*, Berlin: Springer, 408, 411.

Rump N., 2003. "Definition, Aspect and Overview" in E. Becker, et. al. eds. *Digital Rights Management: Technological, Economic, Legal and Political Aspects*, Berlin: Springer, page 3

Schollin, K., 2004. "Virtuell opphovsrätt" *Juridisk Tidsskrift*, nr 1 2004–05, 61-81.

Sejersted, F. et al., 2001. "*EØS-rett*", 6th edition, Universitetsforlaget AS, Oslo. 25, 53,183, 190.

Simons, B., 2003. "The Copyright Wars--- A Computer Scientist's View of Copyright in the U.S." In: E. Becker, et. al. eds. *Digital Rights Management: Technological, Economic, Legal and Political Aspects*, Berlin: Springer, 383, 399.

Skjærvelesland, O.I., 2005. "*Skal granske MP3-loven*", Aftenposten August 6th 2005, page 9, Culture section.

Wagle, A.M. & Ødegaard, M., 1997 "*Opphavsrett i en digital verden*", Cappelen Akademiske Forlag, Oslo, 54, 89.