

Access Control : Hindrance to Information Dissemination ?

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1. Introduction

Digital environments provide copyright owners with an opportunity to expand their marketing channels. At the same time, however, copyright owners are exposed to online copyright piracy because copyright works may be easily reproduced without losing their quality, or distributed widely and fast all around the world. As a result, copyright owners tend to apply technological measures to effectively prevent or restrain the infringement of copyrights. It was WCT(WIPO Copyright Treaty) and the WPPT(WIPO Performances and Phonograms Treaty) in 1996 that the concept of technological measures first appeared internationally. Since technological measures themselves may easily be circumvented, the legislature has helped copyright owners by prohibiting the circumvention. The WCT provides that contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures.

2. What TPMs and access control?

Technological Protection Measures(TPMs) are divided into two categories: technological measures that control access to works(access control); and ones that protect copyright(copy control). While implementing the WCT, the DMCA and the European Directive on Copyright created a new and unprecedented right, which is the right to control access to copyrighted works. Under the U.S. Copyright Act, “no person shall circumvent a technological measure that effectively controls access to a work”. Korea’s copyright law also prohibits the circumvention of technological measures for access control. Since one who circumvents technological measures for access control is subject to civil and criminal sanctions(Sec. 1203 & 1204), the provision on access control effectively grants copyright owners with exclusive right. Just as the unauthorized reproduction of works is prohibited, the unauthorized access to works is prohibited. Now copyright owners have tri-tier weapons against copyright piracy: exclusive rights; anti-circumvention provisions; and technological measures themselves applied. The access right granted through the anti-circumvention provisions means “the right to control the manner in which members of the public apprehend the work.”[1] While the anti-circumvention provisions including one on access control were designed to strengthen copyright protection by regulating conduct which traditionally has fallen outside the regulatory sphere of intellectual property law, it may have an impact on the dissemination of information.

3. Impact of access control

Access control may both beneficial and adverse effects on the dissemination of information. First, access control provides protection to copyright owners because prohibited use such as reproduction or distribution is prevented unless works are accessed at first. Access control plays the role of the speed bumper under environments where copyrighted works are easily reproduced and distributed. Thus access control is a powerful weapon for right holders against digital piracy, and this in turn will give them greater incentives to create works, providing more works to a society and benefiting the general public. Second, access control may reduce transaction costs for the distribution of copyrighted works. Distribution of works online has become the main channel of distribution, and access control makes it possible to distribute works through such as pay-per-view. The availability of works online could practically eliminate the costs of physically seeking out the desired work for most consumers[2], and access control makes it possible for copyright owners to license and distribute works efficiently. Third, access control may facilitate the use of more works by the public. Quite differently from the distribution of works offline, access control allows copyright owners to charge automatically for the use of works online and to provide works with a lower price. Consumers are able to use more works conveniently and copyright owners would provide more works at a lower price. Fourth, one of the biggest advantage of access control is price differentiation. Like other DRM tools, access control “allows a better price differentiation by permitting the rights holder to tailor their products and the prices to the individual needs of the users[3].” The price of works is decided depending upon their kind and amount supplied and demanded in the market. The price for the unlimited use of works would be higher than that for their one-time reproduction. Through access control, copyright owners may differentiate prices depending upon every kind of factors affecting the price of the work. For example, consumers may easily purchase just one chapter or article they like instead of a whole book which they may hesitate to purchase, making them get more information.

While access control may be essential in the digital environments, it has been argued to prevent the dissemination of information. Access control may be analogized to a fence[4]. Suppose a homeowner built a fence because he or

she was plagued by pedestrians walked on the sidewalk and sometimes even on his grass. Suppose further the owner built the fence across the public sidewalk in front of the home. Pedestrians began using foot stools to step over the fence and the sidewalk. Congress passed the bill prohibiting the act of crossing over the fence and the carriage or use of stools to cross the fence. Now pedestrians cannot use the public sidewalk. Now apply the analogy to access control. A home owner is a copyright holder, pedestrians are the general public, the grass is a copyrighted work, the fence is technological measure for access control, the sidewalk is works in the public domain, crossing over the fence is circumvention, and the bill is anti-circumvention provisions. If pedestrians crossed the property line and stayed over the grass, the homeowner may bring suits against them. However, pedestrians could freely use the public sidewalk before the fence was built. Works in the public domain such as those whose copyright terms have expired are freely available to the public. Now someone digitizes a public domain work and makes it available on the internet, but allows access to the work only to the those who pay. While it is freely available to the public before access control technological measures are applied, the availability of the digitized public domain work is limited, hindering the wide dissemination of information.

The limited exceptions to anti-circumvention aggravates the concerns raised by access control: exemption for nonprofit libraries, archives, and educational institutions; law enforcement, intelligence, and other government activities; reverse engineering; encryption research; exceptions regarding minors; protection of personally identifying information; security testing according to U.S. and Korea's Copyright Act. In addition, some exceptions are allowed through the rulemaking process in each three year. Those exceptions, however, are quite different from those to exclusive copyright. In particular, the fair use doctrine does not apply to the circumvention of technological measures for access control. US court has made clear that the legislation on copyright is completely different from that on technological measures, and thus, limitations and exceptions to copyright infringement are also different from those for the circumvention of technological measures. While it is allowed to quote one paragraph from a book, it is not to circumvent access control technologies even if one intends to quote the paragraph, or reproduce under the fair use doctrine. Fair use would be greatly compromised by the technological measures. Although access control may be important in digital economy, it may greatly compromise the dissemination of works. Under the US copyright regime, fair use is not an exception to the circumvention of technological measures. The US copyright regime is expected to expand more widely through FTAs which incorporate access control because US has made efforts to negotiate FTAs with its trading partners. Almost all of the bilateral free trade agreements the US has concluded include a provision banning the circumvention of technological measures for access control. The United States would not change its position to exclude the fair use exceptions from anti-circumvention.

4. Conclusion

In order to prevent the current situation from getting worse, this paper argues that the rulemaking process needs to be better utilized in a country which adopted the access control regime. The rulemaking process is designed to designate certain classes of works as exempt from the prohibition against circumvention of technological measures that control access to copyrighted works. In 2012, the US Copyright Office designated several classes of copyrighted works such as Literary works distributed electronically to permit blind and other persons with print disabilities to use screen readers and other assistive technologies[5]. While the designation is effective only for three years, it is necessary to designate appropriate categories of works which would be adversely affected by access control.

5. References

- [1] Jane C. Ginsburg, "From Having Copies to Experiencing Works: The Development of An Access Right in U.S. Copyright Law", *Journal of the Copyright Society of the USA*, Vol. 50, 2003, pp. 113-120.
- [2] Justin Graham, "Preserving the Aftermarket in Copyrighted Works: Adapting the First Sale Doctrine to the Emerging Technological Landscape", *Stanford Technology Law Review*, July, 2002, pp. 1-31.
- [3] Peter K. Yu, *Anticircumvention and Anti-anticircumvention*, *Denver University Law Review*, Vol. 84, 2006, pp. 13-77.
- [4] Yochai Benkler, "Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain", *New York University Law Review*, Vol. 74, No. 2, 1999. pp.354-446.
- [5] Federal Register Notice Containing Librarian's Determination and Final Rule(Oct 26, 2012).