FAIR USE AND DIGITAL RIGHTS MANAGEMENT IN THE LIGHT OF U.S. LAWS

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ABSTRACT

This paper discusses the digital copyright management in the context of Digital Millennium Copyright Act, 1998. The increased ability to copy and distribute information, knowledge, and entertainment in the digitally networked age has provoked a series of responses. In order to gain back control, copyright holders have made use of so-called technological protection measures including, for instance, Digital Rights Management (DRM) schemes—that are aimed at regulating the copying, distribution, and use of and access to digital works through code (“code is law”). The digital right management prevents the unauthorized use of authors’ original work. With the current technological developments in Information Technology, information can be accessed easily. In the wake of the Digital Millennium Copyright Act’s (DMCA) ban on the circumvention of DRM technologies used to control copyrightable works, DRM restrictions are now backed up with the force of law. The object of the paper is to highlight and focus on the violations of Copyright of the digital products widespread and the fair use doctrine in the arena of Digital rights and to discuss how far the legal clauses have been successful to protect and motivate individuals to come up with more creative work and enjoying the commercial benefits out of it.
INTRODUCTION

Digital Rights Management - also known by its initials, DRM. Digital Rights Management is a Technology that creates certain conditions about how some digital products can be used and shared. It was set up as a system for the protection of digital works.¹ Then, Digital Rights Management (DRM) is a system created or designed to protect the unauthorized duplication and illegal distribution of copyrighted digital product. Once the Internet becoming widely used, it was easy for pirates to copy and illegally sell a variety of marketed digital information and products. Therefore, this type of technology and system prevents users from doing things with content that the content providers do not wish them to do. Digital Rights Management (DRM), also sometimes called ECMS, or electronic copyright management systems, are technologies designed to automatically manage rights in relation to information.² This can include preventing copyright works and other information from being accessed or copied without authorization and establishing and enforcing license terms with individuals. DRM is a form of continual protection that protects works and manages rights at all times, no matter where the works are located or who has possession of them. DRM attempts to promote authorized use of a copyright work, in part by precluding the possibility of copyright infringement. DRM systems comprise a number of technological components, which can include encryption, a surveillance mechanism, databases of works, owners and users, license management functionality and Technological Protection Measures (TPMs).³ Digital rights management (DRM) is a commonly used term in a number of professional areas such as, libraries and archives, publishing, media creation and production, information technology etc. Rights provide the legal and moral context for providing managed access to copyright protected resources in ways that protect the creator’s exploitation of his/her work and the privacy of the resource user.⁴

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² Id.

³ Id

LEGAL GENESIS OF DRM

In the pre-digital era, people's ability to Copy Digital Products from the internet was not there. In the 1990s, Due to the advanced technologies, wide availability of desired entertainment products in easily reproducible digital form, increasing computer power and storage capacity, and growing access to the Internet at broadband speeds formed a easy access for people to copy and misappropriate others work. It supplied the conditions for a fundamental unsettling of the incumbent balance between end users’ ability to redistribute copyrighted content and copyright holders’ ability to limit such redistribution.⁵

DRM technology attained widespread use following the advent of the digital age. The prevalence of many different types of copyrightable works in digital form, such as music, movies, literary works, and software, along with the availability of easy-to-use and inexpensive technology enabling replication, distribution, and high-speed Internet access, has resulted in many more potential infringers of copyrighted material. This increase in the number of infringers and cases of infringement has also increased the cost of monitoring and enforcing against intellectual property rights violations. To protect their intellectual property rights in this new climate, many digital content companies now employ technology-based restrictions on use of company-owned content. In doing so, these companies essentially forego established legal remedies and resort to what amounts to "self-help": technological standards created by the content provider to replace or enhance established legal protections.⁶

In describing DRM technologies, Dan L. Burk notes: “Digital technologies carry the capacity to embody highly sophisticated behavioral inscriptions that can accompany copies of a creative work as they are distributed, controlling uses of the work. Consequently, because digital technologies can be scripted to accommodate a variety of user behaviors, such controls can be scripted to incorporate restrictions that might otherwise be the subject matter of a written license."⁷

In other words, DRM technologies, much like licenses, can limit consumers' use of intellectual property. A key distinction between DRM and contractual licenses, therefore, is enforcement. Licenses rely heavily on licensees actually conforming their behavior as agreed under contract, while DRM technologies place real, technological limitations on what users may do to the intellectual property. Moreover, licenses pose added enforcement obstacles since the governing terms may be held unconscionable; may constitute a contract of adhesion, or may be unenforceable under state law.⁸ The absence of potential

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⁵ Supra note 1
⁶ Id.
⁷ Supra note 4
⁸ Id.
contractual liability allows DRM technologies to provide immediate and uniform enforceability with a reduced incidence of litigation, at least until the present scandal.9

A specific example of DRM technology is the Windows Media DRM, which is designed for use with digital audio and video files and live broadcasting over the Internet. According to Microsoft, this technology is available for personal computers, portable devices, and network devices. The software locks digital files with a unique “license key,” and encrypts the files so that it is considerably more difficult to create pirated copies. The assignment of a unique license key makes it possible to associate each instance of the Windows Media Player software with one computer; every time a user wants to play a file, the DRM technology ensures that the user has permission to play that file by checking the user's license key. The technology also protects the audio stream as it travels from the media player software to the computer's sound card (to prevent programs from copying content from the audio stream), and provides ways for content owners to specify different rights for different types of devices. Finally, Windows Media DRM may "control license start times, stop times, and duration" and create purchase, rental, and subscription plans for consumers.

Accordingly, copyright holders took the second step of seeking special legal protections for DRM mechanisms. The World Intellectual Property Organization ("WIPO") adopted treaties that mandated stronger statutory protections for DRM in signatory nations, and Congress responded by enacting the DMCA.10

Article 11 of WIPO Copyright Treaty "Obligations concerning Technological Measures" requires contracting parties to

"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."11

Article 12 of WIPO Copyright Treaty "Obligations concerning Rights Management Information" requires contracting parties to

"provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention: (i) to remove or alter any electronic rights management information without authority; (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works


10 Id.

11 WIPO Copyright Treaty,1996
knowing that electronic rights management information has been removed or altered without authority.\textsuperscript{12}

Federal law provides heavy penalties for copyright infringement. The fear of liability, of course, suffices to deter at least some would-be infringers. DRM technologies attempt to go one step further by making copyright infringement impractical or costly.\textsuperscript{13}

**THE DOCTRINE OF FAIR USE**

The Fair use Doctrine under the copyright Act, 1976 Codified in the Copyright Act of 1976, fair use serves as a defense against claims of copyright infringement. While copyright law gives creators of their works the exclusive right to engage in and to authorize the reproduction, distribution and performance or display of the works, copyright law also allows other individuals to use a copyrighted work without the copyright owner's permission for purposes such as criticism, comment, news reporting, teaching, scholarship or research.\textsuperscript{14} Thus, the Copyright Act serves a balance between the "interests of authors in the control and exploitation of their writings on the one hand, and society's competing interests in the free flow of ideas, information ... on the other hand." And, as legal scholar Jason Cohen noted, "The fair use doctrine helps prevent the copyright owners' exclusive rights from interfering with the Framers' stated purpose of the promotion of learning." However, "there is no bright line test for determining whether any particular use is a 'fair use' or is instead an act of copyright infringement." In the Copyright Act of 1976, Congress established a four-pronged test to determine whether a use of a copyrighted work was a fair use. The test requires a court to examine (1) the purpose and character of the use; (2) the nature of the work; (3) the amount and substantiality of the portion used in proportion to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. In 1994, Supreme Court in Campbell v. Acuff-Rose Music stated that all four factors of the fair use test should be given equal weight.\textsuperscript{15} Under the Copyright Act of 1976, these four prongs provided individuals with a broad and flexible defense against copyright infringement Fair use has repeatedly been invoked to prevent copyright owners from misusing their copyrights in order to stifle legitimate marketplace competition. For example, courts have concluded that intermediate reproductions of software made in the course of reverse engineering can

\textsuperscript{12} Supra note 11
\textsuperscript{13} Id.
\textsuperscript{15} Id.
The fair use doctrine thus operates to limit copyright in order to preserve competition. The fair use doctrine also plays an important role by providing a reservoir of incentives to spur innovation. For example, where the public is permitted to use copyrighted works freely, a powerful incentive arises to develop technologies and services that help the public get the most from media content. Fair use is a limitation and exception to the exclusive right granted by copyright law to the author of a creative work, is a doctrine in United States copyright law that allows limited use of copyrighted material without acquiring permission from the rights holders. Examples of fair use include commentary, criticism, news reporting, research, teaching, library archiving and scholarship. It provides for the legal, non-licensed citation or incorporation of copyrighted material in another author's work under a four-factor balancing test. The term fair use originated in the United States. A similar principle, fair dealing, exists in some other common law jurisdictions. Civil law jurisdictions have other limitations and exceptions to copyright.

The legal concept of "Test copyright" was first ratified by the Kingdom of Great Britain's Statute of Anne of 1709. As room was not made for the authorized reproduction of copyrighted content within this newly formulated statutory right, the courts created a doctrine of "fair abridgment" in Gyles v Wilcox, which eventually evolved into the modern concept of "fair use," that recognized the utility of such actions. The doctrine only existed in the U.S. as common law until it was incorporated into the Copyright Act of 1976, 17 U.S.C. § 107 which reads as “Notwithstanding the provisions of sections 17 U.S.C. § 106 and 17 U.S.C. § 106A, the fair use of a copyrighted work, including such use by reproduction in copies or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

The four factors of analysis for fair use set forth above derive from the classic opinion of Joseph Story in Folsom v. Marsh, 9 F.Cas. 342 (1841), in which the defendant had copied 353 pages from the plaintiff's 12-volume biography of George Washington in order to produce a separate two-volume work of his own. The court rejected the defendant's fair use defense with the following explanation:

A reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to

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16 Supra note 10
17 9 F.Cas. 342 (1841)
criticize, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.

In short, we must often… look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.

Once these factors were codified as guidelines in 17 U.S.C. § 107, they were not rendered exclusive. The section was intended by Congress to restate, but not replace, the prior judge-made law. Courts are still entitled to consider other factors as well.18

Fair use tempers copyright's exclusive rights to serve the purpose of copyright law, which the U.S. Constitution defines as the promotion of "the Progress of Science and useful Arts" (Art. I, § 8, cl. 8). This principle applies particularly well to the case of criticism and also sheds light on various other limitations on copyright's exclusive rights, particularly the *scenes à faire* doctrine.19

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

While the “four factor test” set out in Section 107 of the Copyright Act is widely known (at least in legal circles), the role of fair use in the copyright system is somewhat less settled. Attention to three aspects of fair use “in the real world,” however, is worth considering in some detail here:20

(1) A wide variety of activities depend upon fair use for legitimacy;

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18 United States Copyright Code
20 Id.
(2) The ambiguous, case-by-case nature of the doctrine is central to its role in mediating between new technologies and copyright; and

(3) Fair use has served as a catalyst for innovation.

THE LEGAL BACKING

In the United States, the Digital Millennium Copyright Act ("DMCA") has implemented the treaty provisions regarding the circumvention of some technological barriers to copying intellectual property.

- Circumvention of Access Controls

Section 103 (17 U.S.C Sec. 1201(a)(1)) of the DMCA states:\(^{21}\)

No person shall circumvent a technological measure that effectively controls access to a work protected under this title.

The Act defines what it means in Section 1201(a) (3):\(^{22}\)

(3) As used in this subsection—

(A) to circumvent a technological measure means to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and

Thus, if there is some "technological measure that effectively controls access to a work", it is illegal to circumvent that measure. However, S.1201 creates several exceptions to this rule, and the Library of Congress is empowered to create additional exceptions.\(^{23}\)

DRM TECHNOLOGIES AND INTELLECTUAL PRIVACY

DRM technologies are poised to affect both the spatial and the informational dimensions of intellectual privacy. Both by directly constraining private behaviors related to intellectual consumption and by enabling creation of detailed and permanent records of such

\(^{21}\) Digital Millennium Copyright Act,1998  
\(^{22}\) Id.  
\(^{23}\) Supra 21
consumption, these technologies have the potential to change dramatically the way people experience intellectual goods. Whether they will do so in a way that undermines either set of intellectual privacy values is an important question. To answer it, we must consider each of the general functions that a DRM technology might perform.24

1. Constraint

Some DRM technologies are designed to set and automatically enforce limits on user behavior. For example, a music delivery format might prevent copying, including copying for “space-shifting” purposes, or might restrict the types of devices that can be used for playback. The “content scrambling system” (CSS) algorithm used on DVDs does both of these things, and also implements a “region coding” compatibility system designed to ensure that DVDs intended for use in one geographic region (e.g., North America) cannot be played on equipment sold elsewhere. Technologies that constrain user behavior narrow the zone of freedom traditionally enjoyed for activities in private spaces, and in particular for activities relating to intellectual consumption within those spaces. In so doing, they decrease the level of autonomy that users enjoy with respect to the terms of use and enjoyment of intellectual goods.25 It is hard to argue that a copy-protection device “intrudes on seclusion” in the precise manner contemplated by the Prosserian tort of that name. The tort theory of spatial privacy envisions “seclusion” as physical isolation from human observation. The sort of intrusion cognizable as privacy invasion generally involves direct human agency and at least the possibility of a human observer. Focusing narrowly on “intrusion” or “accessibility” also ignores the complex intersectionality of the privacy concerns implicated by DRM technologies. This approach reduces even the interest in spatial privacy to a primarily informational one, and excludes consideration of the other intellectual privacy values that spatial privacy serves. In particular, as already noted, intellectual privacy resides partly in the ability to exert (a reasonable degree of) control over the physical and temporal circumstances of intellectual consumption within private spaces. This argument has points of commonality with a strand of privacy theory that emphasizes decisional autonomy as the basis for at least some privacy rights. Some philosophers argue that where certain deeply personal activities are concerned, privacy denotes not only a condition of (relative) inaccessibility, but also a zone of noninterference with individual choice.

2. Monitoring

Other DRM technologies are designed to report back to the information provider on the activities of individual users. Such reporting may occur in conjunction with a pay-per-use arrangement for access to the work, or it may occur independently of payment terms. For

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24 Id
25 Supra 22
example, monitoring functionality might be designed to collect data about use of the work that might reveal user preferences for particular types of content. Monitoring also can be used to determine information about related products, such as the presence of non-copy-protected MP3 files on the user’s hard drive or the other computer programs a user is running in conjunction with a licensed program. DRM technologies that monitor user behavior create records of intellectual consumption. Indirectly, then, they create records of intellectual exploration, one of the most personal and private of activities. Much of this record-keeping activity is conducted automatically, without the direct involvement of a human observer or controller, but the fact of automation does not necessarily neutralize the threat to privacy interests. The relevant question, instead, is whether information about intellectual consumption is gathered and stored in a form that is both personally identifiable and potentially accessible to others. If the information exists in such a form, it is subject to disclosure or compelled production. Absent stringent privacy protections (of which more later), the threat of disclosure may chill intellectual exploration, and therefore compromise intellectual privacy interests. DRM monitoring technologies also can have second-order privacy effects. Specifically, data gathered through monitoring can later be used to enervate detailed profiles of users’ revealed intellectual preferences. The information provider can use the resulting profiles to market additional information goods to users, or can sell it to third parties who may use it for a wide variety of other purposes. DRM monitoring technologies do not uniquely enable profiling, or even intellectual profiling; without any information about usage patterns, an information provider can construct a reasonably detailed profile of intellectual preferences and subject matter interests based solely on the information generated by initial purchase records. Nonetheless, the use of data gathered via DRM monitoring to “enhance” existing profiles renders those profiles more comprehensive and thus potentially more invasive from the user’s perspective.

3. Self-Help

Direct restriction protocols can be designed to encode penalties as well as disabilities. For example, a DRM system could be designed to disable access to a work upon detecting an attempt at unauthorized use. Such “self-help” technologies—so named because they are designed to obviate recourse to legal enforcement procedures—might be directed and controlled externally upon detection of the prohibited activity. This type of functionality would need to be implemented in tandem with some sort of monitoring functionality. Self-help technologies also might operate automatically upon internal detection of a triggering activity, without communication with any external system or controller. The extent to which either type of self-help functionality should be permissible as a matter of contract Law has been the subject of an ongoing dispute, but there appear to be no technical barriers to their implementation. DRM self-help technologies present a special case of the constraint problem, and potentially a special case of the monitoring problem as well. The
punitive quality of self-help implicates privacy interests in one way that technologies of direct constraint do not. The identification of a particular consumer as a target for self-help measures entails loss of the relative anonymity formerly enjoyed by that individual as one among many customers. Enforcement, like constraint and monitoring, can be activated without direct human agency; thus, it is conceivable that no human would ever know the specific identities of those singled out.26

ANTI - CIRCUMVENTION

The Act also prohibits the distribution of tools that enable a user to circumvent access controls or controls that protect a right of the copyright holder.

- Anti-circumvention27 refers to laws which prohibit the circumvention of technological barriers for using a digital good in certain ways which the right holders do not wish to allow. Now there arises a clash between fair use and anti-circumvention.28

Fair Use and Circumvention

Critics of the DMCA have often noted the absence of an explicit exception for circumvention to enable fair use. Section 103(c)(1) of the DMCA (17 U.S.C. Sec. 1201 (c)(1) does state that nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title. However, a violation of the anti-circumvention provisions of the DMCA is not itself copyright infringement and therefore it is unclear whether fair use can be raised as a defense in circumvention cases. Courts have come out both ways on the issue. Some have held that the anti-circumvention provisions can only be violated when the circumvention has a connection to copyright infringement.29

Storage Tech. Corp. v. Custom Hardware Engg. & Consulting, Inc., 421 F.3d 1307, 1318-19 (Fed. Cir. 2005) the Federal Circuit held that a copyright holder must show a

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27 Supra note 21
28 Supra note 21
29 Id.
connection to copyright infringement in order to succeed in a claim under the DMCA.  

**Chamberlain Group, Inc. v. Skylink Technologies, Inc. 381 F.3d 1178 (Fed. Cir. 2004)** the court held that distribution of a circumvention device did not violate the anti-circumvention provisions because its use did not lead to any copyright violation.  

**Lexmark International, Inc. v. Static Control Components, Inc., 387 F.3d 522 (6th Cir. 2004)** The computer printer company Lexmark, which had locked its printers using a microcontroller so that only authorized toner cartridges could be used, copyright protection cannot be applied to ideas, but only to particular, creative expressions of ideas. "Lock-out" codes—codes that must be performed in a certain way in order to bypass a security system—are generally considered functional rather than creative, and thus unprotectable.

Thus, the Digital Millennium Copyright Act, 1998 has clear provisions preventing circumventing of digital technologies but at the same time has taken care of the fair use doctrine and so concurrently has come up with anti-circumventing laws as well where court has been applying such provisions and given priority to the Fair Use Doctrine.

**CONCLUSION**

Thus to conclude, the Digital Millennium Copyright Act, 1998 has clear provisions preventing circumventing of digital technologies but at the same time has taken care of the fair use doctrine and so concurrently has come up with anti-circumventing laws as well where court has been applying such provisions and given priority to the Fair Use Doctrine.

The DRM framework as it exists today was created to deal with the production, distribution, and some level of access control over traditional digital content. It focuses more on the compensatory side of digital content as well as distribution. It does not include any provisions for any type of non-traditional digital content. There needs to be an extension to the current DRM model to include any type of digital content that’s not fit into traditional digital content. Besides compensation for content, special attention will have to be paid to end-user created content for the use of the end-user and the assurance that someone should always have access to digital content that they create. It should not happen that a source creator lose, or potentially lose access to digital content that they created. It appears that one of the key factors in the disparity in classification of digital content is its

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30 421 F.3d 1307, 1318-19 (Fed. Cir. 2005)
31 381 F.3d 1178 (Fed. Cir. 2004)
32 387 F.3d 522 (6th Cir. 2004)
origin and who owns what part of the technology that the content was created with. Right now, there seems to be growing issues with people who create the technology to assist end users in creating digital content from analogue based sources are assuming that they have some level of control to that content. These are issues that need to be carefully thought out, modeled, and put into a framework.  

BIBLIOGRAPHY

BOOKS


ONLINE RESOURCES

Research Papers/ Articles


34 Id.


LEGISLATION

1. WIPO Copyright Treaty, 1996
2. Digital Millennium Copyright Act, 1998
3. The Copyright Act, 1976

WEBSITES

1. WWW COPYRIGHT GOV
2. WWW WIPO INT