

From Copyright to Digital Rights —The War Over Fair Use

By Leo B. Willner, Ph.D. and R. Gregory Kalsow

If you ever need to enliven a cocktail party conversation in the presence of someone from the media, the entertainment or the high tech world, simply choose a position on Digital Rights Management (DRM) and expect an animated response. It seems that on this subject, as with few others in politics and business today, opinions abound and confusion reigns supreme with the expert and the novice alike. What on earth is the problem with DRM anyway, and why so much controversy? On the surface, it would appear to be a self-contained and consistent body of legalities whose practice naturally arises out of established copyright

statute, precedent and common law as applied to the digital world. If this were indeed so, the owners of intellectual property would feel amply protected and would have little to fear from the machinations and convolutions of the digital age. With all the DRM wrangling going on and with so much political posturing afoot, all is not well in digital paradise.

Yes, lots of trouble is brewing in the US courts and in the halls of Congress on copyright and DRM, and that is a big part of what is stirring the intellectual property

pot. It appears that DRM is not quite as easy a topic as it would seem. For nearby, lurking in the murky waters of long established public mores, is that little bit of common law known as 'fair use'. The practice of fair usage established long ago a precedent that entitles the limited private use by individuals of copyrighted intellectual property within restricted rules and circumstances. If not, how else could public libraries allow you to take out copyrighted books, or how would copy centers such as Kinko's even exist?

Herein, we journey into the mysterious land of shadowy arguments that support or seek

to erode the individual's right of fair use. We do so in order to view the terrain, seek out the context and look for a moral compass for ourselves and, perhaps, for a true believer or skeptic passing by — also to seek out 'fairness'.

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DIGITAL TROUBLE IN MEDIA LAND

Over the past twenty years, we have witnessed a number of high tech challenges to the equilibrium established years ago between copyright protection and the fair use by private individuals of copyrighted materials. The purpose of fair use is to allow limited

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Monthly
Featured Article



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availability, copying and distribution rights of copyrighted materials to individuals as they live their personal lives. The 1982 lawsuit pitting Sony versus Universal Studios on the use of the VCR to copy TV fare was one such epic case. The movie people were up in arms; surely the VCR was an 'enemy' and a major threat to their very survival. Sony won the case for the VCR in 1984, yet the sky did not fall on the entertainment business. Jack Valenti, the Hollywood pit bull lawyer representing the Motion Picture Association of America, the MPAA, has never forgotten or perhaps even forgiven the loss.

As a consequence of this victory of technology and individual rights over entrenched brain-locked narcissistic Hollywood opinion, the VCR quickly became one of the most popular pieces of consumer electronics gear of all time. Surprisingly, the VCR turned out to be a boon and not a bust for the motion picture industry. In fact, it spawned a new industry, the movie rental business. Companies such as Blockbuster and other video rental houses created a major new industry with revenues in the US alone now exceeding 10 billion dollars per year. As a result of allowing fair use of the VCR in the home, the movie business was further blessed, instead of harmed, as Jack Valenti and the MPAA had warned. The imagination-starved litigious gnomes of Hollywood demonstrated their infamous Midas touch, as they were once again enriched by the very technologies they had cursed. Can you just imagine allowing 'talking' pictures — in the 1920s? Can we trust these people with the minds of our children?

Recently, Napster came along like a wild winter storm blowing fiercely to challenge

the existing paradigm of the music industry. It wreaked much havoc for a year or so as it tumbled along, then lost its footing and was gone. So all should be well again with intellectual property secure and fully protected, right? Well, not so fast and not so easy. The combination of valuable content encoded as digital information plus the PC and the Internet make for a powerful potion with which to threaten the business interests and toxify the well of public opinion on DRM. Complicating the problem are powerful new digital entertainment technologies that promise to all but replace the VCR. Examples are digital video recorders (DVRs) that capture TV programs effortlessly and without tape, recordable versions of DVD, the most successful consumer electronics product of all time, and various forms of on-demand

programming such as video-on-demand (VOD). These technologies make for a major new imbalance between the means the public can employ to gain access and fair use, and the ability of business to continue to conduct its affairs under what it considers to be reasonable terms

and conditions. Imagine us believing that the on-demand, time-shifting and fair usage questions were settled between Hollywood and the consumer electronics manufacturers nearly two decades ago. Not on your life.

Once again the MPAA and its minions are alarmed and up in arms — nothing new here. They and their lawyers, PACs and PR firms are petitioning and propagandizing the public and the legal institutions to put a stop to all but very limited DVR features. They wish to codify limitations on the new abilities of the public to use combinations of new technologies such as the DVR, the DVD recorder and On-Demand TV systems to

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copy, view and perhaps retransmit intellectual property with greater efficiency and convenience. Jack Valenti and the MPAA have every right to be fearful, as there are many in the public who mistakenly believe that technology not only enables new capabilities with digital media but also — somehow — confers the right to do as one wishes with any material that is captured 'out of the ether'.

Of course, the unbridled use of other people's copyrighted and patented materials are frequently in violation of the statutes and principles that guide patent, trademark and copyright law. Nonetheless, when it comes to information in the digital age, the new technologies are very powerful indeed and they threaten the very nature of the civil society. Privacy of every kind is under threat from snooping via intelligent electronic agents of various sorts. Even the sanctity of the home is under attack. The 9/11 disaster has led to greater powers for the state that often limit the rights and the privacy of the public.

When it comes to the entertainment, communication and computing industries, there are indeed some troubling questions concerning what is right, what is just and what is appropriate in context with our democracy, its public institutions and the functioning of the free marketplace. Copyright and DRM is but one such key issue. Yet, it is a current conundrum whose resolution may weigh heavily on the future regulation of new information technologies. It is a somewhat confusing new world out there where extreme opinions abound while the forces of reason clash with the many self-serving business interests and equally selfish hedonistic life-styles of some members of the public; and of course the rascals of Hollywood. Bring on the clowns!

THE CORPORATE STATE VERSUS THE CITIZEN CUSTOMER

One might expect that long established mores guiding the private use of copyrighted words and pictures would not cause much of a problem. Not so, as a major conflict led by the MPAA on one side and the Consumer Electronics Association, the CEA, on the other, is well underway as we have just illustrated.

Artists and intellectual property owners are rightfully worried that they are being continually robbed of their assets. All the while, private citizens, while attempting to exercise established usage rights over copyrighted materials, are being challenged by the government and the courts as violators of the rules of fair play. So the

battle is joined, and everyone appears to be the loser. In reality, it is a field day for any real thieves in the woodwork, as the digital industry and its customers are preoccupied in a struggle with one another. As is so often the case with the workings of Adam Smith's free market, when

lawyers are allowed to define the rules of the road, they trend toward excess, confusion, complexity and stonewalling. It can amount to lots of talk, perhaps some heat, surely much expense and only a little light. Shakespeare warned us about lawyers, and he may have had a point.

Any good businessman can attest to the fact that commercial success — especially with consumer products — is generally nurtured by a growing involvement of its customers with a company's products and services. Cost, price and logistics play their usual role, but it is the customer and his or her interest and involvement that act to catalyze the process and herald in success and profit. Not the opposite. In that sense, the overall media

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industry should benefit from a growing interest and involvement by its customer, the American home, in its new digital offerings. Instead, in order to protect its property, the content owners sometimes feel obliged to withhold their products and services. As an example, the Hollywood barons now withhold many first run movies from their digital TV and Internet customers because they have reason to believe that, when electronic copying and retransmission is really easy to do, the consumer cannot be trusted not to steal.

How utterly backwards it all seems when technology acts to give with one hand and steal with the other — an Alice in Wonderland situation, and what is one to do? Call in the clowns (e.g., the lawyers, lobbyists and sycophants) and see what circumlocutions, obfuscations, convolutions and rat nesting are really possible.

THE FAIR IN 'FAIR USE'

Along with the attorneys, we too may tend to overlook the simple straightforward aspects of DRM, and concentrate instead on the arcane elements and unlikely scenarios that makeup the uncommon fringe elements of the subject. The American icon and political raconteur Will Rogers would have loved the DRM controversy. He reveled at any opportunity to make fun of his government and its behavior when dealing self-righteously with subjects such as this one. He would collect entertaining stories about the misguided and sometime nefarious behavior of the lawyers and politicians caught up in the train of events. Yet, if Will Rogers were still alive today, he would surely have little difficulty understanding and then explaining to the rest of us 'boobs' the proper meaning and employment of fair usage — probably no difficulty all.

It seems that the trouble with fair usage lies in the very fact that selfish and shortsighted parties on both sides of the controversy are focused on finding ways to extract the fair out of 'fair usage'. They simply want to succeed in the practice of being unfair regarding the exercise of fair usage. These libertarians and their right wing counterparts seek to undermine the very idea of copyright as coded in the US Constitution.

Copyrights are meant to be limited rights. They are instituted within our system of governance primarily for the benefit of the public, not mainly for the aggrandizement or enrichment of copyrighters. Copyright is intended as a limited means of enabling the owners of intellectual property to seek compensation for their work to help foster the creation of further materials of interest and value to the public. Copyright is certainly not there simply to protect the already excessive privilege of the Hollywood corporate state. It was instituted by the founding fathers for the public good. Why is that so difficult to understand?

"Then, let the real pirates and thieves be caught and hung by the yardarm!"

Yet, the lessons of the marketplace strongly suggest that the owners and distributors of valuable content often, as was the case with the VCR, benefit greatly from the private fair use of their material. Average citizens continue to enjoy the privilege of access granted via the time tested 'fair use' provision of copyright., when those who own the means to prevent access allow legal fair use in a manner that is indeed fair to all honest parties. Then, let the real pirates and thieves be caught and hung by the yardarm! Damn them for messing up a valuable system that nurtures business and enriches the consumer experience.

THE 'PIRATES' OF CYBERSPACE

As with privacy rights, the very fact that an outside party has electronic access to private information or materials, intended for limited use by others operating within the rules of copyright, does not imply a right or a license to do as one may wish with other people's property. Whether we call such behavior snooping or stealing or cheating, depends on the case and the particular circumstance. Most people seem to have a reasonable sense of the degree to which they have a right to the intellectual property of others.

With digitized content, this issue is of even greater concern, because digitally encoded materials do not obey any natural 'sunset law' or aging process that degrades natural physical objects over time. By way of example, an analog record of text, image or sound will ultimately degrade as the physical state of its material, be it plastic, metal or mineral, ages or is reproduced. That is the way of all real substances in the natural world. Not so with 'objects' in cyberspace where the term eternal has a more definitive meaning. For as long as the sequence of codes representing the intellectual property is preserved, a perfect reproduction of such a piece of audio, video, text or software can be recreated, essentially forever. In contrast, every new analog VCR copy of a video is degraded somewhat from its parent and results in an even lower grade of quality in its progeny. Then it ages.

Also, the means of reproducing large numbers of perfect copies and distributing them to ones friends or acquaintances face similar 'real world' limitations and costs. Sure, you can take the book out of the library and make 100 copies of *The Sum of All Fears*

by Tom Clancy. But it would be a costly exercise that requires a considerable effort, involving time and inconvenience, which ultimately results in a less appealing book than the original. Why bother, when at a reasonable price, anyone who wishes to can buy a commercial copy of Clancy's book at most any bookstore? [The concept of 'reasonable pricing' seems to elude the 'profit optimizers' of Hollywood, as they continue to gouge the consumer \$19.95 for a first release DVD that costs less to manufacture and distribute than the \$15.95 VHS tape. Perhaps the potent combination of a pay-per-view movie (PPV) from digital satellite or digital cable, of pristine quality, stored on a recordable DVD will snap their heads around when prerecorded DVD sales begin to decline, due to their pricing. — Ed.]

If not the consumer, then are there real bona fide pirates in cyberspace? You bet there are. It appears that much of the effort to limit the illegal copying for resale of software, music, books and videos in the Orient has failed to date. Apparently a great mass of illegal material is sold or distributed throughout much of the world, and little can be done about it without the full cooperation of China and other governments. So the intellectual property owners must indeed be protected from the pirates. However, that has very little to do with fair use, its legality or the need to limit or regulate it.

It is preposterous to suggest illicit behavior and call the average citizen a crook, simply because they copy a video and send it over the Internet to a friend. As Gary Shapiro, President of the CEA, and others have pointed out, the change of meaning that has willfully and perhaps even maliciously occurred in the language used to describe fair use is outrageous. The words

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in use have somehow migrated from the ‘accessing’ of copyrighted materials, to the act of ‘duplicating’ them, then to making a ‘copy’, and finally have been transmuted into the criminal act of ‘piracy’. How outrageous is that? We can probably agree that in most cases, when private use is involved and no commercial interest plays a role, the term ‘piracy’ is a bit too much. It is way over the top, as it were. Such a use of transfer propaganda with regard to the fair use of copyrighted materials is completely inappropriate and cannot be tolerated. Hang the language miscreants by the yardarm as well.

Somewhere away from ‘piracy’ on the one hand, and ‘docile media–manipulated–behavior’ on the other, lies normal ‘fair use’ by individuals of intellectual property. The great majority of those who engage in such practice are not miscreants, thieves or their fellow travelers, and certainly not felons or pirates. Jack Valenti, the strident advocate of the MPAA, has gone much too far in media circles and in Washington painting ordinary Americans as thieves of intellectual property. He is far off the mark on this one. Neither is what he suggests as a solution, namely the elimination of fair use, a reasonable course of action for the nation to follow on DRM. His paranoia on this subject has blinded him to what is reasonable in this Jeffersonian democracy.

It may be hard for an old ‘Cold Warrior’ such as Valenti, who dates back to the arm–twisting era of the Johnson Administration, to behave civilly when he believes his PAC dollars have already granted him the upper hand in Washington. Also — as in no fool like an old fool — these Hollywood folks are unlikely to realize that limiting fair use by consumers will not benefit but hurt the motion picture industry in the long run.

Perhaps we can shine the light of reason onto their dark souls. Are we exaggerating when we note that these are the very folks who on a daily basis, gratuitously promote profanity, obscenity and the depiction of violence onto our popular culture in order to earn an extra dollar?

Yet, under our judicial system all parties are equal under the law and have a right to have their interests protected. Therefore, Hollywood should have whatever copyright and DRM are necessary to ensure their intellectual property. Most of all, we must also remember to protect the public and its fair use rights from these, at times, unsavory characters.

IN THE EYE OF THE BEHOLDER

There are numerous valid points of view that need to be considered in order to find common ground on the basis of which to resolve the DRM controversy. Herein, for the purpose of motivating you, the reader, to examine the subject a bit further, we only touch on the primary interest of each of the following parties:

“...transfer propaganda with regard to the fair use of copyrighted materials is completely inappropriate...”

THE MARKET — The marketplace for intellectual property can only remain healthy and vibrant if it continues to attract an abundance of talent. Therefore, the copyright protection afforded content creators and content owners is an essential part of making the system work for everyone. Those who enjoy digital entertainment are acting in self–interest when they back strong DRM safeguards that still allow fair use.

THE COURTS — There are constitutional issues involved and intertwined within DRM and copyright. Therefore, the courts are obliged to weigh–

in to resolve the controversy and provide clear guidelines as to fair use, and the rest.

THE CONSUMER — Contrary to some popular opinion, it is the consumer that benefits most of all when the entertainment industry is profitable and able to fund and nurture the creation of exciting new content for the public to enjoy. Without copyright, DRM and the protection they afford, entertainment, as we know it, in the form of videos, CDs, DVDs and the like, would be greatly diminished in quantity and quality. Therefore, within reasonable guidelines as to what constitutes fair use, the consumers should favor strong DRM practices.

THE MEDIA — The folks in the media need an attentive and satisfied audience in order to perpetuate their own existence. They are therefore obliged to support fair use by all manners that are technically feasible, and to also help ensure that good content is available. This is a necessary condition, if they are to successfully nurture new forms of media and its technologies, so as to keep their world evergreen, prosperous and growing.

SERVICE PROVIDERS — The power to do harm and to violate fair use resides in large part with the various service providers. It is they who can use technology to circumvent the many consumer benefits of using DVD-R, VOD, DVR and the rest. If, in a misguided attempt to protect their commercial interests, they attempt to block the effective use of these technologies to improve the consumer experience, it is the service providers who in the long term may come to regret any such shortsighted behavior on their part. Beware of these gatekeepers.

ENTERTAINMENT NETWORKS —

The entertainment networks are on the horns of a dilemma. For it is they, as much as anyone else, who are threatened by the paradigm shifts these new technologies empower. Networks mostly utilize a rigid schedule of shows to lock-in their viewership, and fix their advertising and other revenues via the performance they achieve thereby. A variety of on-demand viewing options such as VOD and subscription VOD (SVOD), and any and all time shifting and digital copying of content utilizing DVR and DVD-R, portend significant change to their game.

THE CONTENT OWNERS —

The TV content creators and owners tend to abide by an antiquated set of values and ideals, which evolved out of the 'linear' broadcast TV experience. It was this linear TV and its associated analog technologies such as the VCR, with its tape that degrades over time, and the analog cable headend systems delivering average picture and sound quality, that molded much of their philosophy on the subject. Thus, these folks may have a mistaken sense of what is right, proper and entitled. In the TV world, where the gatekeepers —

"...content creators and owners tend to abide by an antiquated set of values and ideals..."

such as content owners — abound, there has always been a sense that might makes right. Along with sufficient DRM and copyrights, their ideals must now be remolded and rebalanced against the needs and rights of the public to have fair use. Can these guys be trusted?

THE ADVERTISING AGENCIES —

These folks have profited greatly from linear TV and its ability to control the viewing behavior of the public. The forced non-elective forms of advertising prevalent in linear TV allowed them to prosper greatly. It will be difficult for the ad agencies to

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reframe their business models to conform to an on-demand TV world. However, they will, as they are very clever, and at times even wise — so they will change and continue to prosper. You can bet on these guys. The answer for them lies in the creation of attractive new forms

of elective TV advertising.

ADVERTISERS — The advertisers will learn to adjust their advertising campaigns so as to meet their ongoing need to influence the public. They must continue to advertise on TV in order to impact the views and behavior of the public toward their products and services. This is a necessity in order to generate business growth and raise profits. Therefore, these folks can be expected to adjust quickly to new media forms, including the effect of DRM systems on their ability to successfully advertise in a world where DVR and recordable DVD are pervasive in the American home.

THE CONSUMER ELECTRONICS INDUSTRY — New technologies are the catalyst that empowers the rapid growth of this industry. Consequently, it is only natural for the CEA, the industry association, to support almost unlimited consumer rights over copyrights. They want DRM to be focused on transactional matters, but not to interfere with the ability of consumers to access and do as they please with any content they are able to capture electronically. They want to sell more boxes. In all fairness to this industry, they are the ones who innovated much of the change that has resulted in great growth and profit

for the entertainment industry, while providing the public with an ever-improving experience. Bless their entrepreneurial hearts. That being said, are they being fair on the matter of fair use?

Certainly each of these parties has a necessary even an important role to play and needs a real say in this matter. They all have a major stake in the copyright and DRM game and in the resolution of the outstanding issues and controversies including what is appropriate for fair use.

It is our belief that new technologies will generally help to grow the entertainment business and bring it to new heights of power, prestige and wealth. All the while as it moves forward, it may be dragging its unreconciled old media Luddites up the many slippery slopes of change. In the meantime, hang the thieves and spare the citizens, not the other way around. Where, therefore, are the clowns?

[In addition to the courtrooms, you will find them in the Silicon Valley, Washington DC, Madison Avenue, and dare we say it: Hollywood. —Ed.]



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