

# Issue Analysis: Fair Use

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## 1.0 Introduction

### 1.1 Background

Fair use is a right that effects everyone in America, and yet it is intensely ambiguous. The Electronic Frontier Foundation (n/d) defines fair use as “a limitation on the exclusive rights of copyright holders” (EFF, Fair Use). The US Code defines the factors that determine fair use to include “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work” (17 USC § 107). There is no measurable limit to an amount of intellectual property that can be used without permission; it is ultimately decided by a judge. The free dissemination of information in libraries would not be possible without it, and yet, as of 1998, it stands threatened by the Digital Millennium Copyright Act and mounting corporate influence on copyright law.

The Digital Millennium Copyright law was enacted in 1998, after being signed by President Clinton (H.R. 2281, 105th Cong., 1998). It is made up of two treaties drawn up by the World Intellectual Property Organization (WIPO). The act was designed to update the current copyright law with applications to digital media. Some important specifications of this law include:

- Prohibition against breaking intellectual property (IP) safeguards
- Exemptions from such prohibition
- Prohibition against creating tools or providing services to break IP safeguards
- Reverse engineering of lawfully obtained software is allowed in the case that it is used for interoperability between applications

Intellectual property safeguards include digital rights management (DRM) technologies, such as those used in formatting most iTunes songs and DVD anti-piracy technologies, and regional releases, which are most applicable to electronic games and DVDs as many are not usable in conjunction with a player from different region or country.

### 1.2 Perspective

As a graduate student in library and information science at Syracuse University, I firmly believe that free public libraries are one of the most important institutions that support democracy in America. In a democracy, everyone deserves the right to free unbiased information, and, in this country, information is protected by copyright law because it is viewed as intellectual property.

I am a supporter of the Creative Commons Organization, an organization which supports the creation of new information as IP with varying degrees of limitations on users' rights depending on the preferences of the creator (Creative, n/d.). Creative Commons legally solves the problem of the existing restricting copyright law by supporting the creation of new IP by inspiration while maintaining the rights of the original copyright holder. In this way, Creative Commons licenses support both parties, the creator and the consumer.

I am also a supporter of the Open Source Initiative, an organization dedicated to the development of free standardized software (Open, n/d).

Like the Electronic Frontier Foundation (EFF), I believe that “DRM technologies do nothing to stop copyright pirates, but instead end up interfering with fans' lawful use of music, movies, and other copyrighted works” (EFF, DRM, n/d). All the music I listen to is legally obtained, and most of it is downloaded using iTunes. I find it frustrating that I cannot listen to a song I legally purchased on a different computer than the one I downloaded it on unless I enter my username and password. When I was younger, I used to use Napster and KaZaA, downloading copies of songs for free before it was illegal. These applications did not stop me from legally purchasing music, too, as I found I was able to broaden my musical horizons through free samples of music found on the internet.

In America, too often the makers of the intellectual property are protected far more than the consumers of said IP. Extremism is not the answer, either way. There has to be a balance between the rights of the consumer and those of the creator. Additionally, there has to be exceptions — promoting innovation and scholarship.

I do see the benefit to protecting IP, also. As Thomas G. Field Jr. (2006) explains, “safeguarding these property rights [in every country] fosters economic growth, provides incentives for technological innovation, and attracts investment that will create new jobs and opportunities for all their citizens.” Though I see the benefit to protecting IP, I am also concerned that the American government has paid too much attention to the large corporate copyright holders and too little attention to the consumers and users of said copyrighted material.

### **1.3 Issue Questions**

The issues this paper focuses on are:

- Q1. Should the prohibition in the Digital Millennium Copyright Act against breaking intellectual property safeguards be modified?
- Q2. How can the intellectual property community protect their intellectual property without the DMCA safeguards?
- Q3. Is there a need to legitimate digital rights management mechanisms for protecting intellectual property?
- Q4. Is there a need for legal and technological protection mechanisms that are uniform internationally?

## **2.0 Q1. Should the prohibition in the Digital Millennium Copyright Act against breaking intellectual property safeguards be modified?**

### **2.1 Background**

There are many organizations and individuals on both sides of this argument. Some might think that the DMCA is fine the way it is, others believe it should be modified to limit the consumer to a greater degree, others believe it should be modified to reflect the rights of the consumer.

Some organizations advocating the rights of the consumer and/or user include the American Library Association (ALA), the Electronic Frontier Foundation (EFF), the

Fair Use Project at Stanford University, and the Free Expression Policy Project at the Brennan Center for Justice at NYU School of Law.

Since the passing of the Digital Millennium Copyright Act, there have been several bills proposed in congress to amend it. Representative Rick Boucher of Virginia introduced the Freedom and Innovation Revitalizing US Entrepreneurship (FAIR USE) Act on February 27, 2007 (H.R. 1201, 110th Cong., 2007). This bill was proposed to amend the DMCA “to promote innovation, to encourage the introduction of new technology, to enhance library preservation efforts, and to protect the fair use rights of consumers, and for other purposes.” The last major action on the bill was nearly a year ago, in March 2007.

In contrast, there have been several bills introduced to strengthen the DMCA safeguards. These include:

- The Intellectual Property Enforcement Act of 2007, introduced on November 7, 2007, would create a special unit of the FBI to work on crimes related to IP, to train members of the FBI on investigating such crimes, providing ten million dollars each to both the director of the FBI and the Attorney General, the forfeiture of property made, used to facilitate, or derived from a copyrighted work, among other amendments (S. 2317, 110th Cong., 2007).
- The Intellectual Property Rights Enforcement Act, introduced on February 7, 2007, would establish an Intellectual Property Enforcement Network (IPEN), repealing the establishment of the National Intellectual Property Law Enforcement Coordination Council, establishing policies, implementing policies, and creating an international task force (S. 522, 110th Cong., 2007).
- The Platform Equality and Remedies for Rights Holders in Music (PERFORM) Act of 2007, introduced on January 11, 2007, would aim to “harmonize rate setting standards for copyright licenses... by organizations that most clearly represent the fair market value of the rights licensed” (S. 256, 110th Cong., 2007).

These amendments seem to have snowballed since the DMCA, calling attention to every kind of intellectual property out there. Some of the aforementioned bills are very much tailored to specific kinds of IP: music, design, and inventions (patent).

## **2.2 Recommendations**

Marjorie Heins and Tricia Beckles (2005) of the Brennan Center for Justice at NYU School of Law found that “the 1998 Digital Millennium Copyright Act (the DMCA) is being used by copyright owners to pressure Internet service providers to take down material from their servers on the mere assertion that it is infringing, with no legal judgment and no consideration of fair use.” Authors such as J.K. Rowling are demanding more control over their copyright than they should be allowed due to fair use limitations, in the case of Warner Bros. Entertainment and J.K. Rowling v. RDR Books. Joe Nocera (2008) of the New York Times says “[J.K. Rowling] is essentially claiming that the decision to publish — or even to allow — a Harry Potter encyclopedia is hers alone, since after all, the characters in her books came out of her head. They are her intellectual property. And in her view, no one else can use them without her permission.” Nocera explains that if Rowling wins the case against the publisher, the “fair use” exceptions to copyright law will be limited even further than they already are.

Matthew Schruers (2008) explains that “fair use industries represent one sixth of the economy, nearly one-fifth of economy growth.” He states that threats to fair use include “anti-circumvention statutes, international asymmetries, filtering, statutory damages, consumer deception, [and] ‘bottom-feeder’ litigation.” To keep fair use ambiguous and unprotected or to decrease what is currently considered fair use would be detrimental to the American economy. The economy reaps the benefit not only from the licensing of works, but from their fair use, as well.

The prohibition in the Digital Millennium Copyright Act against breaking intellectual property safeguards should be modified to protect fair use. It has been shown to benefit the economy, and it encourages the creation of new works. Education, research, the library as an institution, and the general dissemination of free information would not be possible without it. These are all important aspects of American culture, perhaps the most important, as they enrich the lives of all citizens. Fair use should be defined in concrete terms, continually readdressed in order to keep up with technological change. The longer fair use is left as an ambiguous term in the American legal system, the more limited it will become.

### **3.0 Q2. How can the intellectual property community protect their intellectual property without the DMCA safeguards?**

#### **3.1 Background**

Creative Commons is a not-for-profit organization that was founded in 2001 by Lawrence Lessig, based on a preexisting similar project by the Free Software Foundation called GNU General Public License (Creative, History, n/d). This organization offers various licenses for IP within the spectrum, “all rights reserved — and the public domain — no rights reserved” (Creative, About, n/d). Through this organization, owners of IP can specify their preferences for the license: whether or not to allow commercial use, modifications to the work (options are yes; yes, as long as other share alike; or no), and the location of the jurisdiction of the license (Creative, Choose, n/d). There are also specific licenses designed for specific types of IP, e.g. Public Domain, Sampling Plus, Founder’s Copyright, CC-GNU GPL, CC-GNU LGPL, BSD, Wiki, and Music Sharing (Creative, Choose, n/d). Creative Commons also has derivative organizations such as Science Commons, iCommons, ccLearn, ccLabs, and ccMixer (Creative, Choose, n/d). Owners can decide if and how attribution must be assigned, whether or not commercial use is allowed, if spin-off works are allowed, and if people must also allow derivative works when people make derivative works (share alike) (Creative, About, n/d).

#### **3.2 Recommendations**

Creative Commons allows creators to explicitly state their preferences through the type of license they have assigned to their works. The organization’s website also offers explanations on each type of license and each part thereof. Through this organization, creators of intellectual property can protect their work, while also allowing users to use it for inspiration if they wish.

The culture of the organization also promotes fair use of work, which provides a unique balanced solution to the copyright issue. End-users and copyright holders alike are considered through the use of the organization's services.

#### **4.0 Q3. Is there a need to legitimate digital rights management mechanisms for protecting intellectual property?**

##### **4.1 Background**

Digital rights management mechanisms have been scrutinized by consumers. They are used in DVDs, software programs, and music files (i.e. iTunes). Many argue that these mechanisms are unfair toward consumers, since they take away many possible uses for legal copy owners, such as creating usable back-ups (preservation), skipping commercials (on DVDs), or reverse engineering of software for reasons other than interoperability.

##### **4.2 Recommendations**

Martin, et al. (2002) explain that "many in [research and education] consider that commercial DRM solutions tip the balance between the rights owner and the user too much in favor of the rights owner, undermining fair use and the first sale doctrine in the process — two critical and cherished principles in [research and education]. There is also concern that some DRM implementations compromise the privacy of the user." Federated Digital Rights Management offers a solution that "builds on existing technologies and standards with the aim of enabling institutions to manage their local content and make that content globally accessible" (Martin, et al., 2002).

Legally, there should be protection made for the fair use. There are no limits to the anti-circumvention measures rights owners can take, but there should be protections to copy owners. Fair use, as undefined as it seems to be, is neglected, and often people are wrongly sued for their fair use of material.

As aforementioned, the Freedom and Innovation Revitalizing US Entrepreneurship (FAIR USE) Act was introduced to Congress on February 27, 2007 (H.R. 1201, 110th Cong., 2007). Despite the good ideas this act presents, it has been sitting in committee for a long time without any real replacement.

#### **5.0 Q4. Is there a need for legal and technological protection mechanisms that are uniform internationally?**

##### **5.1 Background**

The World Intellectual Property Organization (WIPO) was established in 1967 to protect intellectual property throughout the world. There are currently 184 countries who participate in the organization, over ninety percent of the countries in the world (World, n/d). Despite the efforts of international organizations, people of the world still continue to have different perceptions on intellectual property.

One example of these differences in the cultural perception of intellectual property is apparent in China. Though intellectual property rights have strengthened in China since it became a member of the World Trade Organization (WTO), the country

still faces many issues relating to the rights of intellectual property owners. According to the International Trade Administration, "on average, 20 percent of all consumer products in the Chinese market are counterfeit. If a product sells, it is likely to be illegally duplicated. U.S. companies are not alone, as pirates and counterfeiters target both foreign and domestic companies." The administration points out several reasons for this problem, including "China's reliance on administrative instead of criminal measures to combat IPR infringements, corruption and local protectionism at the provincial levels, limited resources and training available to enforcement officials, and lack of public education regarding the economic and social impact of counterfeiting and piracy." Though these reasons are surely viable, the administration fails to point out the obvious, but important, truth: that the Chinese culture views intellectual property differently.

## **5.2 Recommendations**

A commonly accepted framework for social psychology is Maslow's hierarchy of needs. This theory presents the various necessities and desires of the individual human in groups according to which comes first. At the bottom, the most basic needs are physiological. These needs include air, food, shelter, and water. Once these needs are met, human beings can look to the second layer of needs. The second layer is safety: security of body, employment, resources, morality, family, health, and property. The next layer is love or belonging, the fourth is esteem, and the final layer, which can only be reached once all the rest are reached, is self-actualization.

There is a need for legal and technological protection mechanisms that are uniform internationally, but it cannot be expected until the countries of the world are at a far more equal ground than they are at now. It is unfair and naive of governments of developed nations to expect citizens of impoverished countries to care about and respect the idea of intellectual property. As Maslow's hierarchy of needs suggests, people need food in their stomach and a safe place to live before they can start being concerned with intellectual property.

## **6.0 Conclusion**

There has been a lot of legislation since the passing of the Digital Millennium Copyright Act in 1998. However, since the market for technology moves much faster than the government, the laws have not adequately kept up with it. Laws are proposed and sent to committee, where they seem to die. Progress is not made as fast as it should be.

Culture and economics play a huge part in international intellectual property concerns. In order for people to value intellectual property as such, individuals must be able to address that philosophical level, which they can only do if their basic needs are met. In many countries, the basic needs of individuals are not.

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