

# Private Use as Fair Use: Is it Fair?

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## Abstract

The age of digital technology has introduced new complications into the issues of fair and private use of copyrighted material. In fact, the question of private use of another's work has been transformed from a side issue in intellectual property jurisprudence into the very center of intellectual property discussions about rights and privileges in a networked world. This paper will explore the nuanced difference between fair and private use as articulated in the US and the European Copyright Laws. Part One will explain the legal use and meaning of fair use and its justifications. We maintain that it is almost impossible to resolve the issue of the fair/private use's legal nature, if one has not previously resolved *copyright's* legal nature. Legal resolution of such conflicts, as we shall demonstrate, follows different rules, and the messages sent to users and authors vary greatly depending on the jurisdiction. Part Two will examine the issue of Private Use as Fair Use by Design. We will look at the impact of Digital Rights Management on fair use and explore if the nature of private use as fair use has changed because we are dealing with the protection of digital content. We will show that protecting digital works by code, via various digital rights management schemes is shrinking the public domain of information and restricting private use as fair use.

**Keywords:** copyright, digital rights management, DMCA, European Copyright Directive, fair use, private use

## Introduction

The age of digital technology has introduced new complications into the issues of fair and private use of copyrighted material. In fact, the question of private use of another's work has been transformed from a side issue in intellectual property jurisprudence into the very center of intellectual property discussions about rights and privileges in a networked world. This paper will explore the nuanced difference between fair and private use as articulated in the US and the European Copyright Laws. Part One will explain the legal use and meaning of fair use and its justifications. We maintain that it is almost impossible to resolve the issue of the fair/private use's legal nature, if one has not previously resolved *copyright's* legal nature. Legal resolution of such conflicts, as we shall demonstrate, follows different rules, and the messages sent to users and authors vary greatly depending on the jurisdiction. Part Two will examine the issue of Private Use as Fair Use by Design. We will look at the impact of Digital Rights Management on fair use and explore the following questions: Is it "fair" as in "just to all parties"; and 2) is it "fair" because it conforms to the fair use legal concept represented in the law? We will show that protecting digital works by code, via various digital rights management

schemes is shrinking the public domain of information and restricting private use as fair use.

### **1. Private Use As Fair Use: Comparative Legal Perspective**

Fair use is, generally, the US term for what English law calls fair dealing (with another's protected work). Private use in US law is a sub-set of fair use. European law does not employ a general term such as fair use, but enlists a series of copyright limitations, one of which is private use (of another's work without permission). In the US, fair use means that every user, author or publisher may make limited use of another person's copyrighted work, without permission, for purposes such as criticism, comment, news, reporting, teaching, scholarship and research<sup>1</sup>. Fair use is also referred to as a privilege to use the copyrighted material of others in a reasonable manner without their consent. In fact, the variety of situations and combinations of circumstances that can arise in particular cases is endless<sup>2</sup>. Fair use presupposes good faith and fair dealing<sup>3</sup>. The courts are free to decide on a case-by-case basis (after the fact) whether a particular use is fair or not; this freedom, although subject to restraints such as the need to take into account specific factors, has led to considerable confusion in the application of the doctrine<sup>4</sup>. Adding, logically, to this confusion is that fair use is a mixed question of law and fact<sup>5</sup>; i.e., the resolution of whether a particular use is, or is not fair, presupposes, the determination of, for example: how much of the work was used (10%? 20%?), whether the purpose of the copier was commercial and whether the text that was 'fairly' or 'unfairly' used, under the exception, is a scientific text or not. These are questions of fact and open to a judge's interpretation.

As fair use is an open limitation to copyright, where a series of circumstances (such as classroom photocopies etc) justify its application, private use in American law also comes under this general term. It sounds controversial that *a defense* of private use exists at all; after all, one usually buys a book for her private use. This use may mean that one can make photocopies of a legally possessed book, in order to read it, for example, not only in the office, but also at home. One may also loan the book to a friend. Such acts have never fallen within the copyright owner's domain of control, not only because the control is impossible (for clearly practical reasons), but also because the control is, in principle, undesirable. The constitutional foundation supporting this use is naturally, the right to privacy<sup>6</sup>. In order to fully participate in the intellectual life and development of

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<sup>1</sup> The statutory provision on fair use is embodied in Section 107 of the Copyright Act of 1976, provides that, notwithstanding the provisions of § 106 giving a copyright owner the exclusive right to reproduce the copyrighted work and to prepare derivative works based on the copyrighted work, the fair use of a copyrighted work for purposes such as comment and news reporting is not an infringement of copyright. Section 107 further provides that in determining whether the use was fair, the factors to be considered shall include: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect on the potential market for or value of the copyrighted work.

<sup>2</sup> See HR Rep. No. 94-1476, 94<sup>th</sup> Cong., 2d Sess. 53 (1976), pp. 65-66 (the 1976 Copyright Act's House Report).

<sup>3</sup> *Schulman*, Fair Use and the Revision of the Copyright Act, 53 Iowa Law Rev. 832, 1968.

<sup>4</sup> Leading to remarks as this one: 'fair use is the most troublesome issue in the whole of copyright', *Dellar v. Samuel Goldwyn Inc.*, 104 F. 2d 661, 662 (end Cir. 1939).

<sup>5</sup> *Pacific & Southern Co. v. Duncan*, 744 F.2d 1490, 1495, n. 8 (CA11 1984). Where the district court has found facts sufficient to evaluate each of the statutory factors, an appellate court "need not remand for further factfinding . . . [but] may conclude as a matter of law that [the challenged use] [does] not qualify as a fair use of the copyrighted work." *Id.*, at 1495.

<sup>6</sup> Although this has not been stated in the courts' opinions (see for example, *Sony Corporation v. Universal City Studios, Inc.*, 480 F. Supp. 429 (CD Cal. 1979) and in commentators' texts with comparable clarity. See *Ginsburg J. & Gabiac Y.*, Private Copying in the Digital Environment, in *Kabel J.J.C. & Mom G.J.H.M.* (eds.), *Intellectual Property and Information Law – Essays in Honor of Herman Cohen Jehoram*, The Hague, Kluwer law International, 1998, Information Law Series.

one's personality,<sup>7</sup> one must be free to enjoy a lawfully acquired book in these sorts of ways, which do not harm the interests of the copyright owner. Thus understood, it comes as no surprise that there was no 'real' jurisprudence, or concern about private use until very recently, that is, until works became digital. It was considered fair.

### 1.1 Legal Rules: Historical Background

The legal rules controlling private use today generally derive from a series of legal sources: the Berne Convention<sup>8</sup> (1896), the Rome Convention<sup>9</sup> (1961), the WIPO Copyright Treaty<sup>10</sup> (international law), the European Copyright Directive 2001/29/EC (EUCD, European law)<sup>11</sup>, the 1976 US Copyright Act and the Digital Millennium Copyright Act (DMCA, US statutes)<sup>12</sup>.

The Berne Convention does not refer explicitly to private use as an exception to copyright; rather, private use falls within the well-known Berne Convention 'three-steps' rule that reproduction in special cases, which does not conflict with a normal exploitation of the work nor unreasonably prejudices the legitimate interests of the author may be allowed by member states (art. 9,2). The Rome Convention<sup>13</sup> refers to private use in Art. 15(1)a, which provides that any contracting state may provide in its domestic legislation an exception for private use.

The 1996 WIPO Copyright Treaty allows contracting parties the latitude to provide limitations (such as private copying) in Art 10(1), in cases that do not conflict with the normal exploitation of the work or unreasonably prejudice the legitimate interests of the author; it is quite easy to detect that here the Treaty merely repeats the three-steps test of the Berne Convention. The contracting parties may also extend exceptions and limitations acceptable under the Berne Convention into the digital network environment and devise new exceptions and limitations appropriate in the digital environment<sup>14</sup>. Article 11 required all signatory nations to provide legal protection to copyright owners against those who circumvent technological measures to gain access to content not authorized by the author<sup>15</sup>. As we will see, this had a significant impact on the development of the DMCA of 1998.

In the US, the 1976 Copyright Act does not refer to an exception favoring private use. One can only allege the defense of private use as a subset of the general exception of fair use-in this case; private use is factored into the fair use analysis. Fair use was a judicial limitation to copyright, which in 1976, was added to the Copyright statute. The DMCA, which was enacted in 1998, enlists a series of exceptions to copyright and again, does not provide for a private use exception as such; it stipulates, though, in par. 1201 (c) (1) that

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<sup>7</sup> Guibault L., Copyright Limitations and Contracts, An Analysis of the Contractual Overridability of limitations on Copyright, 2002, Kluwer Law International, p.48.

<sup>8</sup> Berne Convention for the protection of Literary and Artistic Works 1896, last revision at Paris, 1971.

<sup>9</sup> The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961.

<sup>10</sup> Adopted December 20, 1996, S. Treaty Doc. No. 10517, 36 I.L.M. 65, available at <http://www.wipo.org/treaties/en/ip/wct/index.html>, accessed October 2<sup>nd</sup>, 2006.

<sup>11</sup> Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ L 167/10 (22 June 2001).

<sup>12</sup> The 1996 WIPO Treaty updates the Berne Convention and other previous WIPO Treaties and requires that WIPO members enact national legislation, implementing its rules; the same is true, for EU members, in relation to the EUCD. The DMCA was implemented in the United States along with the WIPO Treaty in 1998.

<sup>13</sup> Available at [http://www.wipo.int/treaties/en/ip/rome/pdf/trtdocs\\_wo024.pdf](http://www.wipo.int/treaties/en/ip/rome/pdf/trtdocs_wo024.pdf), last access October 2<sup>nd</sup>, 2006.

<sup>14</sup> See analysis in Kim S., The Reinforcement of International Copyright for the Digital Age, 16 Intell.Prop.J., 93 (2002), p. 100.

<sup>15</sup> See WIPO Copyright Treaty, [http://www.wipo.int/treaties/en/ip/wct/trtdocs\\_wo033.html](http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html)

fair use is not affected by its provisions, so it could be reasonable to assume that private use, as a subset of fair use, remains theoretically unaffected. When a work, however, is digital and protected by anti-circumvention technology, then it is illegal to circumvent it, irrespective of whether the use aimed at is private use as fair use: a defense of copyright infringement is not a defense to anti-circumvention prohibitions and one may well be privileged (entitled?<sup>16</sup>) to make a private copy of a digital work, but not practically nor legally allowed to break the digital fence and acquire it.

The European Copyright Directive 2001/29/EC (EUCD, European law) refers explicitly to private use: Art. 5(2) b may seem to protect private use, leaving its regulation to the discretion of the contracting states, as in the past. Recital 38 of this Treaty states that the States are to introduce or continue remuneration systems and that due account should be taken of the differences between analog private copying and the greater economic impact digital private copying is likely to have. However, there are some major differences: a.) the limitation adds that the private use must not be related to commercial ends b.) the limitation refers only to reproduction and not to communication and c.) fair compensation is stipulated for this private use. That Art. 6 of the Directive, (the member states may introduce a limitation of copyright for reproductions in any medium by a natural person for private use for non-commercial ends) must also be observed, means that when a digital work is protected with technological measures, then the application of the exception can become problematic. Most European nations have taken advantage of the Directive's mandate and have implemented an exception for private use. What is the legal nature of the exception/limitation of private use? There certainly is a discrepancy in legal terminology used in the texts on copyright and its exceptions. What a user is allowed to do with another's work without authorization has been called a limitation, exception, exemption, justification, defense, *sui generis* defense<sup>17</sup>, privilege, interest-even a right as strong as copyright<sup>18</sup>. We will examine the implications of these terms.

## 1.2 Legal Terminology

What a user is allowed to do with another's work without authorization has been called a limitation, exception, exemption, justification, defense, *sui generis* defense<sup>19</sup>, privilege, interest-even a right as strong and equal to its sister, copyright<sup>20</sup>. Still, what one learns as a first year law student is that legal terms matter; a privilege is not the same as an exception. To state it more clearly, when fair use is an excuse, then copyright infringement is primarily an illegal act; one bears the burden of proof that this act was fair to escape liability<sup>21</sup>. But when fair use, or private use for the purposes of this paper, is *itself* the exercise of a right, then we have right v. right-which also may present versions such as constitutional/human right v. legal right or even, constitutional human right v. constitutional human right. One could also imagine yet another situation, where *copyright*

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<sup>16</sup> The way one should state this depends on the legal nature of fair use/private use exception, see onwards.

<sup>17</sup> See Joyce C., Patry W., Leaffer M. & Jaszi P., Copyright Law, fourth edition, 1998, p. 715, who in the same page refer to fair use as a privilege, an affirmative defense and a limitation. '...(Fair use is...) an equitable rule of reason...no real definition of the concept has ever emerged..', id. p. 716.

<sup>18</sup> Copyright has also been described not only as a constitutional (this is clear in the US) right, but also as a monopoly limited in time, a property right, a right having a moral dimension (apart from the property one, in Europe), a privilege etc.

<sup>19</sup> See Joyce C. *et al.*, id., p. 715, who in the same page refer to fair use as a privilege, an affirmative defense and a limitation. '...(Fair use is...) an equitable rule of reason...no real definition of the concept has ever emerged..', id. p. 716.

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<sup>21</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590, 114 S.Ct. 1164, 1177 (1994).

is, conversely, a privilege, as the expression of a monopoly granted by the State (and we certainly have seen copyright described extensively as both a privilege and a state monopoly) and where the users' (society as a whole) legal relationship with (foreign) works is a right. Indeed, it is almost impossible to resolve the issue of the fair/private use's legal nature, if one has not previously resolved *copyright's* legal nature. Legal resolution of such conflicts follows different rules and the message sent to users and authors is also different.

Looking at the way fair use/exceptions to copyright has been legislatively drafted in the US and in the EU, we see the following situation: In the US, fair use, a judicially crafted concept, became in 1976 part of the copyright statutory law (Copyright Revision Act of 1976, 17 U.S.C. sec. 107) and is properly characterized as 'one of the most important and well-established limitations on the exclusive right of copyright owners'<sup>22</sup>. The US Supreme Court in 1985 declared<sup>23</sup> that fair use was traditionally defined as a privilege in others than the owner of copyright to use the copyrighted material in a reasonable manner without his/her consent. Later on, with the US Digital Millennium Copyright Act of 1998, fair use is mentioned as (in theory) not changed by its provisions, as described above<sup>24</sup>; therefore, it did not alter (again, in theory) in any way the legal nature of fair use in the US. On the other hand, because one may not, after the enactment of DMCA, circumvent technological protection of a work and gain access to it, irrespective of whether the use he/she is intending to make of that work is fair, legal theory has concluded that this had the effect of in practice, altering the legal nature of fair use, in relation to digital works protected by DRM and in fact, eroding it. In the EU, the European Copyright Directive may be interpreted as imposing a duty on copyright holders not to make non-infringing access to their works impossible (Art. 6, 4). In fact, Member States are obliged, if copyright-holders do not take relevant voluntary measures, to make available exceptions and limitations-and the means of benefiting from them. This is why today, some speak of a newly created duty, on the part of the copyright holders and for the first time in copyright history, to ensure by themselves the private use of their works by the users. But, it is too early to determine whether this is a true interpretation of the Directive. In any case, the Directive throughout its text contains the term 'exception/limitation' to copyright, so there can be no doubt that the legal model used is copyright (as a right) and private (or other) use, as an exception.

Legal texts have not dealt with the details of this matter until very lately; it arose with great clarity in France with the well-known Mullholland Drive case<sup>25</sup>. A buyer of a DVD who discovered that he was unable to copy a DVD for personal use, because it was electronically copy protected, sued alleging that under the French Copyright Act, he had a right to copy for private use and that this right was breached. He lost the case in the District Court, where no *right* to personal copying was recognized; the Appeals Court reversed<sup>26</sup> and declared that consumers may indeed not have a right to private copying, but the private copying exception is not at the free disposal of DVD producers and

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<sup>22</sup> H.R.Rep. No 94-1476 (on the Copyright Act of 1976), pp. 65-66.

<sup>23</sup> *Harper & Row, Publishers, Inc. v. Naton Enterprises*, 471 U.S. 539, 105 S.Ct. 2218,

<sup>24</sup> See previous page.

<sup>25</sup> Tribunal Paris (2004): Tribunal de grand instance de Paris 3ème chambre, 2ème section, Stéphane P., UFC Que Choisir/Société Films Alain Sarde et, Jugement du 30 avril 2004, available at <http://www.legalis.net>.

<sup>26</sup> Court of Appeals, Paris (2005): Cour d' Appel de Paris, 4ème chambre, section B, arrêt du 22 avril 2005, Stéphane P., UFC Que Choisir/Universal Pictures Video France et autres, available at <http://www.legalis.net>.

distributors: complete electronic copy blocking is illegal. Private copying acquired yet another quality (as if all the above were not enough): it became, under the decision, a legitimate *expectation* of the consumer, an expectation, which, under consumer law, ought to be protected as such. On a fast track, after reported excessive lobbying by the DVD producers etc, the French Supreme Court reversed<sup>27</sup> the Appeals Court decision. There is no right to private copying, so there is no right to damages because the consumer was unable to take advantage of an exception rendered irrelevant due to code<sup>28</sup>; and there is no legitimate expectation to be protected.

## 1.2 Justifications of Private/Fair Use

Perhaps it is impossible to resolve the question of copyright v. fair/private use balance without returning to the main questions: why copyright? Copyright has been seen as an essential tool supporting the idea that works will be produced, because authors need the incentives to produce them; another view is that copyright is a natural right of the author. From a strictly utilitarian position, copyright is an economic property right and fair/private use *was* necessary in the past, only because the transaction costs of asking permission to use parts of the work were prohibitive. Scholarly and academic communities depend on fair use.

How can fair use be justified when the content is digital? Free access to content like reading a book is not the same as free use of content. If I read/buy an e-book on line, I make a copy every time I access it. So the question arises, do I consider this free access to content or do I need a justification for fair use? In this instance, I am accessing the content. If I then put a copy of this book on my laptop to take into my class, then I am involving my right to fair use. The issue of fair use of proprietary digital content captured the world's attention with development of peer to peer networks that gave users the ability to download digital content at will<sup>29</sup>. This caused both the legal and technological communities to begin to reexamine what in fact could be deemed private use as free use.

Digital content also refers to software. Richard Stallman of the Free Software Foundation (FSF) says "Most free software licenses are based on copyright law, and for good reason: Copyright law is much more uniform among countries than contract law, which is the other possible choice. There's another reason not to use contract law: It would require every distributor to get a user's formal assent to the contract before providing a copy".<sup>30</sup> Stallman has asserted that the purpose of copyright and its legitimacy are tied to the public good. He sees the social value of an individual modifying and sharing a program as more important than the author's intellectual property rights, and, therefore advocates that software should be free. The Free Software movement and Open Source movement have both embraced this view to varying degrees. Larry Lessig has expanded the ease of fair use on the Web with his Creative Commons License<sup>31</sup>. In the case of proprietary digital content, copyright owners have turned to

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<sup>27</sup> Civ.1e, 28 February 2006, case n°05-15.824 and 05-16.002.

<sup>28</sup> This situation looks like the perfect example of what Lawrence Lessig explains in detail in his book *Code and Other Laws of Cyberspace*, Basic Books, 2000.

<sup>29</sup> Grodzinsky F. & Tavani H., P2P Networks and the *Verizon v. RIAA* Case: Implications for Personal Privacy and Intellectual Property, *Ethics and Information Technology*, 2006, vol. 7, n., pp. 243 – 250.

<sup>30</sup> Stallman R., Don't Let ' Intellectual Property' Twist your ethos, 2006, <http://www.gnu.org/philosophy/no-ip-ethos.html>.

<sup>31</sup> For a simple description of this, see *Lessig L.*, available at <http://creativecommons.org/weblog/entry/5661>.

Digital Rights Management (DRM) to protect their works. In the next section we will examine the impact of Digital Rights Management on private use as fair use.

## **2. Fair Use By Design**

In this section, we will focus on two aspects of private use as fair use in digital media by examining the design of DRM technology. First, we will examine DRM schemes to see if and how they implement fair use. Next we will look at DRM from the perspectives of the copyright holder and user and ask the question “Is it fair?” Lastly we will examine if DRM schemes of the future will foster private use as fair use.

### **2.1 Current DRM technology**

Digital Rights Management technology builds a digital fence around a piece of copyrighted content allowing only certain authorized access or use. This technology, in effect, prevents private use as fair use for the user if his/her use does not fall under the prescribed authorizations. In the US, according to the DMCA, it is illegal to circumvent this technology for any reason, so the user has no legal recourse except to abandon his/her attempt to use the protected content. Current DRM schemes tip the balance in favor of the copyright owner who has a say in just who and how his/her content may be used. For that reason, DRM has become an obstacle to private use as fair use because it limits the user’s freedom, by allowing private interests to define the parameters of the law. If we draw the analogy to the offline world, the concept of what constitutes fair use has been left deliberately vague. In the US, it is only decided that a use is not “fair”, if it is challenged in court where a judge decides based in part on the following:

- 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.<sup>32</sup>

The problematic question for DRM developers is how can DRM mimic the open-endedness of the fair use doctrine while still offering some protection to copyright owners? (I.e., how can we build technology that, in effect mimics the intent of the law, which is to balance protection for copyright owners with the rights of users: the right to access anonymously for private use)?

Some of the biggest proponents of DRM technologies: Sony, BMG, Universal and EMI and Warner, control the distribution of 70% of the world’s music and have a vested interest in strict DRM.<sup>33</sup> Yet, many DRM schemes in the past have met with limited

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<sup>32</sup> *Copyright Law Of The United States Of America And Related Laws Contained In Title 17 Of The United States Code, Section 107.(1976)*, <http://www.copyright.gov/title17/92chap1.html#107>..

<sup>33</sup> Jobs S., Thoughts on Music, 2007, available at <http://www.applied.com/hotnews/thoughtsonmusic/>..



success. Sony's attempt to embed DRM in audio CD's was met with public dissatisfaction when users could no longer play their CD's on their existing hardware. Some of the CD's actually damaged computer systems. The 'rootkit fiasco' as it was called, left users' computers vulnerable to attack.<sup>34</sup> Some programmers such as Jon Johansen, became famous for enforcing fair use by breaking DRM schemes. He broke the encryption system for DVD's (DeCSS), and he continues to plague DRM advocates as he writes software to bypass newer DRM schemes.

It is beyond the scope of this paper to examine the subtleties of various DRM models. According to Armstrong they fall into two broad general classes based on where authorization to digital content is located<sup>35</sup>: 1) those that hardcode permissions into the digital content or metadata that accompanies it and whose permissions are evaluated at the local level. For example, CSS technology that protects DVD's and only allows them to be played on a licensed DVD player; or, music purchased on the iTunes store that can only be played on an iPod because it is protected by FairPlay, Apple's DRM technology; (We will see how this model does build in some attempt at fair use.) 2) those that require requests to use content that fall outside the norm be referred to a remote authority that may or may not grant the request giving the user the tools to unlock the protected content. Newer models, which we will examine in section 2.3, are a hybrid of these two approaches.

## 2.2 Private Use as Fair Use: Is it fair in DRM?

The normative question "Is it fair?" presupposes a definition of the adjective fair that contextualizes its use in "fair use". According to the dictionary, a thing is fair if it is:

Just to all parties; equitable: a compromise that is fair to both factions.

*Just* stresses conformity with what is legally or ethically right or proper.<sup>36</sup>

Having already discussed the differences in the fair use exceptions and limitations in laws of the US and EU, we would defer to Tyrvainen's more general definition in this section, that states '*fair use* as a general concept... [denotes]... the legally protected right of people to use content based on exceptions and limitations of copyright laws in general, ...'<sup>37</sup> The question "Is it fair" as it is implemented in DRM systems, according to our definition, then breaks down into two parts. 1) Is it "fair" as in "just to all parties"; and 2) is it "fair" because it conforms to the fair use legal concept represented in the law.

In order to answer the first part, we need to examine what the stakeholders have to gain or lose by various implementations of DRM. The primary stakeholders are obviously users, copyright owners and DRM developers. However, other stakeholders also include big business, distribution agencies, the government, and anyone else that could be used as an authorizing body: ISP's, Library of Congress, etc. who have a vested interest in DRM schemes. How can we maintain the precarious balance that would be fair to all parties? For users in DRM systems, there must be anonymity of access to preserve privacy, and

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<sup>34</sup> Armstrong T. K. , Digital Rights Management and the Process of Fair Use, 20 Harvard Journal of Law and Technology, 49, 61 (2006), electronic copy <http://ssrn.com/abstract=885371>.

<sup>35</sup> See Armstrong T.K., id., for a full discussion of the architecture of these models.

<sup>36</sup> Available at <http://www.thefreedictionary.com/fair>.

<sup>37</sup> Tyrvainen P., Concepts and a Design for Fair Use and Privacy in DRM, D-Lib Magazine, February 2005, vol. 11, n. 2, available at <http://www.dlib.org/dlib/february05/tyrvainen/02tyrvainen.html>.



freedom to use content without authorization or demand for compensation.<sup>38</sup> These three aspects would most mimic the offline world and fulfill user expectations. Currently, DRM systems are not fair to users. They prevent some or all of these conditions. The burden on users in the fairness equation is that fair use should truly be private use without abuse. For copyright owners, fair would be non-abuse, i.e., for uses other than private use, they are justly compensated for their work. In addition, there would be enforceable legal liability for abuse and if these fail, technologies that could prevent abuse. Currently, DRM technologies, which are protected under the anti-circumvention clause of the DMCA, make it fair for copyright owners, but at the expense of users. So we have two mutually exclusive conditions. Owners of digital content want to protect their proprietary works. This is ironic, at least in the music industry, where regular CD's are not protected content at all. We hypothesize that it is the enormity of the scope of music distribution that elicits fear. This fear is not totally unfounded as evidenced by the Peer-to-Peer file sharing schemes for distributing digital content. Up until this point it has been music, but as network bandwidths and speeds increase, so does the potential for distribution of video, games and other digital content.

The answer to question two (is it "fair" because it conforms to the fair use legal concept represented in the law) is no for the US and maybe for the EUCD. In the US, as we have stated, the enforcement of the DMCA that does not list fair use as an exception or allow circumvention for fair use overrides the intent of the fair use clause of the Copyright Act. The newly introduced (February 28, 2007) FAIR USE ACT by US Representatives Boucher and Doolittle would allow users to circumvent DRM to make limited copies of works for reviews, news reporting, teaching and research.<sup>39</sup> In proposing this act Boucher said, 'The DMCA dramatically tilted the copyright balance toward complete copyright protection at the expense of the public's right to fair use.' This bill is being fought by the RIAA that fears that this Act will open the door to legal hacking to obtain digital content. In the case of most European countries, however, the law provides 'a list of circumstances where the author is not allowed to enforce his or her rights'. These exceptions include among others, private copy or other private use.<sup>40</sup> So it actually appears to favor fair use by design by not putting the user in the position of having to circumvent technology to exercise his/her right to the exception. However, the ECUD leaves the enactment of the safeguarding the exceptions of the users who legitimately have access to the work (have purchased or legitimately acquired it) to the rights holders. So, if a rights holder is working with a developer of DRM, it is their responsibility as a team to build in a means to enforce the exception allowed by law. Member states are required to pick up the burden if the rights holders do not. Severine Dusollier states

It ...[EUCD]...allows States to address the merits of the measures taken by the rights holders before considering its intervention. Would any measure, even a minimal one, free the State from its legislative duty to safeguard the public interest? If it did, too much unrestrained power would go to the authors and other rights holders of the copyrighted work.<sup>41</sup>

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<sup>38</sup> See *Armstrong T.K.*, id., 87.

<sup>39</sup> Available at <http://www.techshout.com/legal/2007/01/introduction-of-fair-use-act-by-congress-causes-opposition-from-riaa>.

<sup>40</sup> *Tyrvaenen P.*, id., p. 2.

<sup>41</sup> *Dusollier S.*, Fair Use By Design in the European Copyright Directive of 2001, *Communications of the ACM*, vol. 46, no. 4, p. 53, April 2003.

So it would seem that the law would support those who circumvent technologies that prohibit these exceptions. Not exactly. Because the law supports the exercise of the user rights to access and the DRM developer's burden to enforce that right, it assumes that circumvention will not be necessary. Therefore, 'as a consequence, article 6(4) does not exempt the act of circumvention or the trafficking in circumvention devices.'<sup>42</sup> Furthermore, the EUCD protects the rights' owners by allowing that contractual relationships or technical designs should not hamper fair compensation 'insofar as permitted by law'. In effect, what this does is allow each DRM developer to create contract models that subvert fair use. In this model, users have to be authorized to use their exception. Once again, this violates the right of users to be anonymous in their exercise of private use. Dusolier explains

The fair use that might be produced by this particular process would be a poor substitute for the legal defense of fair use or, in Europe, to copyright exceptions, reflecting, after a democratic and public process, the proper consideration and balance of the interests of all members of society, as well as of society as a whole.<sup>43</sup>

Why are DRM technologies not fair according to the law? In XrML, for example, copyright owners are the final arbiters of what can or cannot be done with their digital content. Using Rights Expression Languages (REL), they can build in permissions under specific user licenses that are locally enforced (on the user's system), and when a user attempts an action it is checked against those permitted. Any use not specifically enumerated is denied because it is not built into the system.<sup>44</sup> Fair use is not a default right of users in this system in part because the limitations of the technology do not allow the representation of the four criteria of the fair use clause.<sup>45</sup> We are governing by code, not by law.

Another DRM architecture requires that a user contact a remote authority for permission to unlock the content. Remote servers use network connections to allow locally installed media players access to the released content. This could be an unfair advantage for those with good connectivity and a disadvantage to users who have little or none. Remote authorization, at this stage, at least, requires the user device to be identifiable, breaching the zone of privacy afforded by law. In addition, who would be the deciding authority? To be fair, it would have to be someone other than the copyright holder. On the positive side, using heuristic algorithms, these programs may be able to be developed with more sophistication and an eye to preserving user privacy (see Section 2.3). XACML and Copymart are attempts at this type of DRM.<sup>46</sup>

Armstrong, among others, has suggested that a hybrid approach to DRM architecture is necessary in order to preserve private use. A successful model would have to find a way,

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<sup>42</sup> Dusollier S., id., p. 53.

<sup>43</sup> Dusollier S., id., p. 55.

<sup>44</sup> Armstrong T.K., id., p. 71 "because DRM prevents users from engaging in any uses not expressed *ex ante* in the grant, '[I]f fair use privileges and other legitimate interests of information users cannot be expressed in an REL, such interests simply do not exist within the system.'", (see footnote n. 100).

<sup>45</sup> For more information on the technical limitations of DRM see Felten E., A Skeptical View of DRM and Fair Use, *Communications of the ACM*, vol. 46, No. 3, April 2003.

<sup>46</sup> See Armstrong T.K., id., pp. 76-77.

among other things, to preserve private use as fair use allowing for spontaneity of use and preservation of user anonymity. Armstrong suggests that this approach could build in pre-authorized user permissions that would be enforced locally; in addition, uses not covered could then be authorized through a licensing authority via remote access. The developer would have to address how to enforce the privacy of the user who may need remote access and how to design a fair authorization authority. Models by Burk and Cohen, and Tyrvaenen have attempted to address these issues. Fox and LaMacchia suggest that in order for DRM developers to take up this challenge, they would need to be ‘protected from charges of contributory infringement with respect to any action grounded in the safe harbor rights’.<sup>47</sup> Fairplay, the iTunes DRM model attempts to invoke a limited concept of private use. In negotiating with the big four music distributors, Apple had to guarantee that its system would not be breached or risk losing its rights to distribute music. To balance this restriction against private use, Fairplay permits users to play DRM protected music sold through the iTunes store on up to 5 computers and all iPods.<sup>48</sup> The issue of a distribution monopoly is beyond the scope of this paper, but Apple fears that by opening up its DRM algorithm to others, it loses the ability to protect its music, which would cause it to lose its distribution rights. On April 3, 2007, EMI, one of the big four announced that it will sell its music without DRM on the iTunes music store. Non-DRM formatted music will cost slightly more than the \$0.99 cents DRM version. This will pave the way for others to follow suit.<sup>49</sup> This will be no great loss for the big four as under 3% of all music played on iPods is purchased from iTunes and therefore protected with DRM.<sup>50</sup>

### Concluding Remarks

It is clear from the above analysis that fair use, for the US and the copyright exceptions, for the EU, are severely threatened by the new DRM technologies. The rules prohibiting the circumvention of these technologies, even where the intended use is fair, or even when the user seeks to take advantage of a copyright exception, complete a rather grim picture of the future for the users’ rights to access works when these works happen to be digital.

It seems that no other way to restore legality exists, in respect to fair use, than to explicitly allow circumvention in fair use cases by the implementation, for example, of such bills as the 2007 bill by Representatives Boucher and Doolittle. The stern opposition by the copyright holders, and the RIAA, may have been expected; not only does no one particularly like to lose an already granted right, but people tend to fight for rights that they cannot even prove they really need (e.g. database publishers in the US have been pressing for the imposition of a new *sui generis* right to their products, even if the US database market is flourishing and no evidence of illegal database copying has been offered).

We should also note that in the couple ‘author-user’, we probably should substitute ‘publisher/information- broker/database producer’ etc. for ‘author’. This would give us a

<sup>47</sup> Fox B. & LaMacchia B., Encouraging Recognition of Fair Uses in DRM Systems, Communications of the ACM, vol. 46, No. 4, April, 2003, p. 62.

<sup>48</sup> Jobs S., Thoughts on Music, 2007, see <http://www.apple.com/hotnews/thoughtsonmusic/>, p. 1.

<sup>49</sup> Felten E., EMI to sell DRM-Free Music, 2007, available at <http://www.freedom-to-tinker.com>

<sup>50</sup> Jobs S., id., p.2.

much clearer idea of the realities of copyright laws. Copyright owners today, as in the past, are only very rarely the true creators of works (authors, for example); usually, the author grants the copyright to the publisher under a contract. This means that copyright holders are very powerful entities, and against them, users do not have any real chance to negotiate terms of use. It follows that when we discuss what is 'fair', we should know exactly to which parties this 'fair' is relevant.

The subtle way that the European Union chose to move very far away from what private use and copyright exceptions are is not immediately obvious. The EU model, as enforced in Art. 6(4)(1) of the Copyright Directive, is clearly not what it purports to be. It may seem to, but it does not really impose a duty on the part of copyright owners to implement private use. On the contrary: a) it does not only legalize the regulation of fair use/private use, exceptions etc. through private agreements with the users but b) it legalizes this regulation as the default, as a priority over what has been the law for more than 200 years: that the state is obliged, through statutory exceptions, to protect societal interests in accessing creative works-digital or not. And the Directive offers the impression that a duty upon authors, to ensure the public's fair use interests, is newly and importantly created, but what it really does is to grant to publishers the power to eliminate statutory copyright exceptions via private 'agreements' with totally powerless and certainly disorganized EU users. For that reason, the EUCD may be, in fact, a much more harmful instrument than the DMCA.

Irrespective of the strong criticism against DRM systems, they are certainly not going to vanish. What we need to do is find ways to alleviate, as much as possible, their negative consequences toward the rights of users. Instead of pressing for a total ban of DRM systems, we need to investigate more thoroughly the newly proposed hybrid models that combine DRM and external permission of fair use. What is obvious from the start is that copyright lawyers, first amendment lawyers and information scientists have to work together in order to devise a system where code and law are in harmony. Perhaps another process is also necessary: an effort to persuade copyright holders not only that the interests of the public are paramount and should be protected, but also that this protection would be in their own interests. This is so because exercising their own fair use rights will afford them access to a greater pool of works from which to create their own copyrightable material. Selling expensive information products and works at monopoly prices, while buyers have in effect no fair/private rights whatsoever may be not only harmful to users but, in the long term, perhaps even more harmful to the sellers themselves.

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