

# DOES DIGITAL RIGHT MANAGEMENT SYSTEMS (DRMS) THREATEN PRIVACY RIGHT?

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## Introduction

It is likely to believe that the intellectual property rights and privacy rights have been working separately even if they have been created in the same era and same background. Nonetheless, the legislation currently promulgated to protect intellectual property has inevitably practical impact on the privacy right<sup>1</sup> of information users. Lately, the developments in Digital Right Management Systems (DRMS) are about to strike the considerable tension between the enforcement of intellectual property rights and the maintenance of consumer privacy.

Certainly, this tension has not yet triggered off the differences between the fundamental characteristics of intellectual property and that of privacy. Rather, what the tension brings the stakeholders is that how DRMS can be friendly to the privacy right of the users in accessing information.

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<sup>1</sup> Privacy has many connotations—control over information, access to one's person and property, and the right to be left alone have all been included under this rubric. Privacy is often seen as a necessary condition for keeping personal and public lives separate, for individuals being treated fairly by governments and in the marketplace, and for guaranteeing spaces where individuals can think and discuss their views without interference or censure.



## Interrelation between Intellectual Property Rights and Privacy Rights

Fundamentally, intellectual property rights and privacy rights share a great deal in their respective origins and agenda.<sup>2</sup> There is a rational principle to acknowledge that both rights have grown and developed by doctrines on personality rights.<sup>3</sup> This growth and development process has involved some potential interrelation of the interests appeared between these two rights: "...notions of intellectual property have helped to develop privacy rights, and notions of privacy have helped to develop intellectual property rights...".<sup>4</sup> Not only existed in the principle, this interrelation also existed in practice. Copyright regime, for instance, provides privacy interests of the copyright right holder by restricting the ability of third parties to reproduce or distribute which can causes the conflict of the copyright holder's normal exploitation to his/her copyright works. Furthermore, in weighing the balance of the stakeholders' interests, the copyright regimes provide the private use exemption in order to "...help to prevent copyright impinging unduly upon the private sphere of information consumers. At the same time, privacy rights in the form of data protection law aid copyright by limiting the registration and

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<sup>2</sup> Lee A. Bygrave, *Digital Rights Management and Privacy —Legal Aspects in the European Union*, Norwegian Research Centre for Computers and Law, University of Oslo, [http://www.folk.uio.no/lee/publications/DRM\\_privacy.pdf](http://www.folk.uio.no/lee/publications/DRM_privacy.pdf), (10 July 2009)

<sup>3</sup> Ibid.

<sup>4</sup> Lee A. Bygrave, *Digital Rights Management and Privacy —Legal Aspects in the European Union*, Norwegian Research Centre for Computers and Law, University of Oslo, [http://www.folk.uio.no/lee/publications/DRM\\_privacy.pdf](http://www.folk.uio.no/lee/publications/DRM_privacy.pdf), (10 July 2009)



dissemination of personal data that might subsequently be used in breach of copyright".<sup>5</sup>

Undoubtedly, there are some interesting distinctions between these two rights. First, while copyright protects the copyright holder's property rights in the work or intellectual creation, privacy rights protect the interests of the person(s) who may be the subject(s) of the work or intellectual creation. Privacy rights are implicated by the nature of the materials and how they may wish to use such materials.<sup>6</sup> Secondly, while copyright is a private protected right under the copyright law, with statutorily described fair use defenses against charges of copyright infringement, privacy rights are not the subject of private law. Thirdly, while fair use is a defense to copyright infringement, fair use is not a defense to claims of violation of privacy rights. Privacy rights are the subject of state laws. Lastly, while privacy right generally ends when the individual dies, intellectual property rights associated with the commercial value connected with an individual's name, image or voice may continue.<sup>7</sup>

### **Intellectual Property Rights in Digital Age**

In cyberspace, information and communications flow unimpeded across national borders by the global communications medium. The right holders of intellectual property assets hardly control the widespread distribution of their

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<sup>5</sup> Ian R. Kerr & Jane Bailey, *The Implications of Digital Rights Management or Privacy and Freedom of Expression*, Journal of Information, Communication & Ethics in Society, Vol. 2, 2004, Troubador Publishing Ltd., pp 8-89

<sup>6</sup> Library of Congress, *Privacy and Publicity Rights*, January-02-2003 <http://memory.loc.gov/ammem/copothr.html>, (10 July 2009)

<sup>7</sup> Library of Congress, *Privacy and Publicity Rights*, January-02-2003 <http://memory.loc.gov/ammem/copothr.html>, (10 July 2009)



assets across nation borders. The rapid of technological change poses a risk to their individual privacy to possess their exclusive rights of their creations.

To manage intellectual property rights in a networked information environment, three intertwined questions are raised to find the answers: How should private intellectual property rights be managed? What public rights to information access should be protected? And how can the right users protect digital right management when it comes in conflict with their interests in accessing information? These three questions are in consideration amongst the stakeholders who directly get involved with this private right. Intellectual property regimes have become the context for rethinking fundamental concepts like property, free speech, and equity in an information society. It is timely to consider whether copyright law, which is designed to protect existing private property, is too narrow and technical a context for such a social policy debate.<sup>8</sup>

Regarding the Educom Review entitled Copyright and Fair Use in the Digital Age: Q&A with Peter Lyman, the scope and nature of traditional copyright mechanism is addressed whether it can be stretched to include or whether digital right management should be limited to protect copyright, or whether it needs to invent new intellectual property mechanisms and cultures.<sup>9</sup> Mr. Lyman was of his opinion about the reflection of network information environment on copyright that, "Copyright has become the focus because the first significant commercial use of the network may be the distribution of digitized versions of printed texts. This is important if the information

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<sup>8</sup> Educom Review Staff, Copyright and Fair Use in the Digital Age: Q&A with Peter Lyman, Volume 30, Number 1, January/February 1995 <http://net.educause.edu/apps/er/review/reviewarticles/30132.html>, (10 July 2009)

<sup>9</sup> Educom Review Staff, Copyright and Fair Use in the Digital Age: Q&A with Peter Lyman, Volume 30, Number 1, January/February 1995 <http://net.educause.edu/apps/er/review/reviewarticles/30132.html>, (10 July 2009)



highway lowers storage and transportation costs for publishers and provides increased access to information and education for people located anywhere in the world. But more efficient transportation of printed texts is not more important than the revolutionary uses of the network, such as multimedia or new kinds of digital texts which cannot be duplicated in print, or the use of interactive communication for distance learning or collaborative teaching and learning.”<sup>10</sup>

According to Mr. Lyman’s opinion, in extending the industrial concept of copying to digital environments, fair use of copyrighted materials should be adopted to network multimedia communication in principle. However, the practical problem of enforcement raises the question whether fair use is an adequate mechanism to protect networked intellectual property.

### **Impact of Utilization of DRMS on Intellectual Works**

Intellectual property law nominally grants consumers the right to make “fair use” of intellectual works. When the intellectual works namely copyright work is distributed in digital form, technological protection mechanisms are created as a practical matter to prevent some uses of the work that the law would recognize as fair.

In benefiting the right holder’s interests in the digital era, Digital Right Management System (DRMS) are deployed to forbid unauthorized use by allowing only certain types of access to, or uses of the underlying copyrighted work. Undoubtedly, DRMS are playing an important role to secure the interests of the right holder of intellectual property rights. Regarding this, DRMS will provide the high potential to facilitate an unprecedented degree of

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<sup>10</sup> Ibid.



surveillance of consumers' reading, listening, viewing and browsing habits.<sup>11</sup> Recently, DRM has broadened its scope from content protection to description, identification, trading, protection, monitoring and tracking of rights for tangible or intangible assets in various electronic commerce systems.

DRMS is a systematic approach to intellectual property protection for digital media that can be used by the right holders or stakeholders of intellectual works in order to restrict the usage of digital devices such as serial numbers, codes, passwords, or keyfiles. The purpose of DRMS is to prevent unauthorized redistribution of digital media and restrict the ways consumers can reproduce the copyrighted works they have purchased. DRMS are continuously developed in response to the rapid increase of Internet infringement.

In other words, DRM technologies are aimed at increasing the kinds and/or scope of control that rights-holders can assert over their intellectual property assets. In the sense of intellectual property regimes, to ban on the circumvention of DRM technologies used to control copyrighted works is agreeable. It is simply said that DRM restrictions are now backed up with the force of law. Accordingly, it seems to believe that copyright owners now have the ability to write their own intellectual property regime in computer code, secure in the knowledge that the intellectual property regimes in most countries will back the regime with the force of law.

While the concern of the right holder for preventing their exclusive rights from being infringed can be coped by DRMS, the concern of the users for accessing intellectual works for non-commercial purpose, which is legitimate

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<sup>11</sup> Eberhard Becker, *Digital Rights Management: Technological, Economic, Legal and Political Aspects*, Springer, 2003, pp 418



privacy right, can be coped by the fair use exemptions. The point to be considered here is that the deployment of DRMS possibly causes a curtailment of consumers' ability to engage in lawful fair uses of digital copyrighted works. Not surprisingly, in light of these technological developments, DRMS may be used by copyright owners to erode capabilities that had previously been permitted to the public by copyright law under the "fair use" doctrine.

Due to the broad scope of the Copyright Regimes, namely, the US Copyright Act 1976, the Thai Copyright Act 1994, and the Australian Copyright Act 1968, copyright would intrude into everyday life in innumerable ways. Certainly, the right users believe that the intruding activities are not arisen from the fair use doctrine and other exceptions.<sup>12</sup> This is because the scholars and lawmakers still insist that the fair use exception<sup>13</sup> is an important instrument to operate "...as a "safety valve" not just for free expression, but also to mediate the tension between copyright and new technologies".<sup>14</sup> 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.

In spite of being as a safety valve, many right holders claim that the fair use exceptions leave them the questions how much such reproduction is deemed as fair. The flexible and broad scope of fair use exceptions then can rise up the

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<sup>12</sup> Lohmann V. F., Fair Use and Digital Rights Management: Preliminary Thoughts on the (Irreconcilable?) Tension between Them [http://w2.eff.org/IP/DRM/fair\\_use\\_and\\_drm.html](http://w2.eff.org/IP/DRM/fair_use_and_drm.html), (10 July 2009)

<sup>13</sup> Fair use is an exception to copyright that allows limited use of copyrighted material without requiring permission from the rights holders, such as use for research or study.

<sup>14</sup> Erickson, J.S. Fair Use, DRM, and Trusted Computing. *Communications of the ACM*, 46(4). (April 2003), pp. 34-39



introduction of DRMS.<sup>15</sup> This technical approaches provide practical system that would probably be simultaneously too permissive and too restrictive to the right users.<sup>16</sup>

There are arguments considered the limited accessibility arisen from utilizing DRMS to prevent unauthorized use of intellectual creations- does DRMS threaten the privacy right of the right user in gaining access to the fruits of creative endeavor? Is the private use or fair use diminished by DRMS? Sometimes, these arguments call up a two-side sword of the adoption of DRMS in the information society. As more as intellectual contents are created and distributed in digital forms, the importance and the real purpose of fair use doctrine, which opens the way for the users to obtain access to intellectual works without the right holders' permission if such access is done for non-commercial purpose, are shrunk in its value. The risk of a shrinking domain for fair use has left some questions for the users whether DRMS may impinge the end user freedoms to enter into information environment. It is generally accepted that although DRM technologies have enabled publishers to enforce access policies that not only disallow copyright infringement, it also prevent lawful fair use of copyrighted works, or even implement use constraints on non-copyrighted works that they distribute.

Several right holders pointed out that fair use doctrine is suitable to be adopted in the analogue world, as reproduction and distribution of intellectual works in the form of printed material for the purpose of fair use are acceptably

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<sup>15</sup> Felten, E.W. A Skeptical View of DRM and Fair Use. *Communications of the ACM*, 46(4). (April 2003), pp. 57-59.

<sup>16</sup> Sobel, L.S. DRM as an Enabler of Business Models: ISPs as Digital Retailers. *Berkeley Technology Law Journal*, 18(2). (Spring 2003), pp. 667-695.



agreeable from the right holders.<sup>17</sup> This is because there was the less number of intellectual property infringements occurred from the misappropriation of fair use.<sup>18</sup> As a result, the sophisticated protection mechanism of intellectual creations was not yet necessary to be created to handle such infringement. When, however the intellectual works are spread out worldwide in the digital forms, infringement of intellectual works especially copyrighted works has been dramatically increasing. Plenty of reasonable reasons are addressed to find solution to control such infringement problem. First and foremost reason supported the increase of copyright infringement is the inappropriate application of fair use doctrine in the copyrighted works. Lee A Bygrave, the author of “Digital Rights Management and Privacy-Legal Aspects in the European Union” is of the opinion that,<sup>19</sup> “The fair use doctrine as it exists in traditional copyright law, accordingly, protects users’ rights to make *unauthorized, uncompensated, and effectively anonymous* copies of a copyrighted work for purposes such as those given in the statute.” “...much of the difficulty with implementing the fair use doctrine in the digital domain revolves around the problematic representation of these features of traditional fair use law through DRM.”

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<sup>17</sup> Eberhard Becker, *Digital Rights Management: Technological, Economic, Legal and Political Aspects*, Springer, 2003, pp. 419-420

<sup>18</sup> National Technical Information Service, United States, *Intellectual Property Rights in an Age of Electronics and Information*, U.S. Government Printing Office, 1986, pp 196-197

<sup>19</sup> Lee A. Bygrave, *Digital Rights Management and Privacy —Legal Aspects in the European Union*, Norwegian Research Centre for Computers and Law, University of Oslo, [http://www.folk.uio.no/lee/publications/DRM\\_privacy.pdf](http://www.folk.uio.no/lee/publications/DRM_privacy.pdf), (10 July 2009)



According to this opinion, to limit fair use via DRMS is a sensible option for the right holders to control the access of their copyright works in this digital environment. However, legal scholars brought forward their arguments on the disagreement of an attempt to provide technological protection for fair use rights as they may bring out unexpected directions.<sup>20</sup> Fair use doctrine must exist in the digital age since it is one of the fundamental and vital rights, particularly its application in developing and least developed countries where fair use doctrine is helpful to educate their people. DRMS may reduce the relationship between what the law permits and what technology enables.<sup>21</sup>

The adoption of DRMS should not destroy the domain of privacy right and interests of consumers. The necessity of DRMS development should be carefully considered if it limits any means of the user to appreciate intellectual works. These two rights: intellectual property rights and privacy rights are beneficial to human's life. While copyright regimes facilitate user the fair use doctrine to cut out the exclusive rights of the right holders, privacy right contributes to the application of fair use rights-freedom of lawfully exercising fair use rights. Right holder is not empowered to authorize or reject a fair use whereas the user excused from any requirement to pay the right holder in order to exercise fair use rights. Thus, in the event where the right holders create their privacy protection schemes in forms of DRMS, the privacy right of consumers to access intellectual works should not be disvalued as well.

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<sup>20</sup> Erickson, J.S. *Fair Use. DRM, and Trusted Computing*, Communications of the ACM, 46(4), April 2003, pp. 34-39

<sup>21</sup> *Digital rights management and the process of fair use*, Harvard Journal of Law & Technology, (1 September 2006), [http://goliath.ecnext.com/coms2/gi\\_0198-560283/Digital-rights-management-and-the.html](http://goliath.ecnext.com/coms2/gi_0198-560283/Digital-rights-management-and-the.html) (10 July 2009)



## Fair Use Exceptions VS Circumvention of DRMS

In harmonizing heterogeneous national practices, the European Union Copyright Directive (EU CD) and the legal framework in the US, have set the balance between conflicting interests of copyright owners and users of content products in digital environments. The legislation has been created to criminalize infringements on copy protection or circumvention of DRM systems on digital content. However, private use or fair use exceptions that allow the right to use a copyrighted work without a license from the rights holder is included both in the EUCD and in the US code of law.

Notwithstanding, there are some concerns whether fair use or private use exceptions can be achieved at all without the circumvention of DRM systems.<sup>22</sup> Rather than treating fair use or private as a defence to copyright infringement, as in the United States or Thailand, the national law in most European countries provides a list of circumstances where the author is not allowed to enforce his or her rights. In most countries the following exceptions are recognized: private copy or other private use, parody, quotation, use of a work for scientific or teaching purposes, news reporting, library privileges, and the administration of justice and public policy needs.<sup>23</sup> While, in European Union, DRMS implementing fair use are well in line with the EUCD requiring “voluntary measures taken by right holders, as long as the exceptions of each national law in question are properly addressed, the US the

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<sup>22</sup> Dusollier, S. *Fair Use by Design in the European Copyright Directive of 2001: An Empty Promise. "Fair Use by Design?" Workshop at the 12th Conference on Computers Freedom & Piracy, San Francisco, CA, USA, 2002, p12.*

<sup>23</sup> Ibid.



legally permitted types of fair use cannot be transformed into technical systems operating without human intervention.<sup>24</sup>

In the right holder's perspective on the application of fair use exception, the value of automating the bulk of fair use decisions would reduce the cost of rights transactions. This, in turn, would enable governments and other organizations to implement systems providing access to content to the people on fair use basis. To support the use of DRMS in their copyrighted materials not only can control the access and limit the reproduction of copyrighted works, the increased use of DRMS content also will eventually have a positive impact on their revenue as the right users who would like to make use of their works must obtain the license from them.

## Conclusion

Although, DRMS are useful to prevent the right holders from piracy, there are some uncertainties of the development of DRMS whether or not they encroach on privacy rights of the users to access information. Legitimate right holders are entitled to be legally protected under the intellectual property law and in the meantime the privacy and autonomy of information consumer rights should be respected under the same law too.

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<sup>24</sup> Erickson, J.S. Fair Use, DRM, and Trusted Computing. *Communications of the ACM*, 46(4). (April 2003), pp. 34-39.