"Fair Use Friendly DRM?"

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DRAFT ONLY!!!!

Determination of "fair use" is beyond the current capabilities of DRM systems, although some legal scholars[1] seem to argue that it shouldn't be. For designers of these systems, this is a tall order.

Despite recurring court decisions beginning with *Folsom v. Marsh*[2] in 1841, "Fair Use", has not yet emerged as a precise concept. In fact, the Supreme Court, *in Harper & Row, Publishers, Inc.v. Nation Enterprises* (1985), cautioned:

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"[S]ince the doctrine is an equitable rule of reason, no generally
applicable definition is possible, and each case raising the question
must be decided on its own facts."
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Section 107 of the Copyright Act of 1976 does cite four now-famous factors for judges to consider in determining whether a particular use is fair. Presumably, the designer of a DRM system could apply artificial intelligence to the problem and separate fair from the unfair. A brief review of case law, however, illustrates the enormity of this undertaking:

Holding

	Fair Use	**No Fair Use**
Purpose of Use	• Campbell v. Acuff Rose Music (commercial song) • Triangle Publishing v. Knight Ridder (commercial TV guide)	• Basic Books Inc. v. Kinko's Graphics Corp. (college classes) • Marcus v. Rowley (cooking class)
Nature of Work	• The Wind Done Gone (novel)	• Veeck v. SBCCI (government building code)
Amount and Substantiality of Use	• Kelly v. Arriba Soft (entirety of images) • Video-Cinema Films v. CNN (clips of Mitchum used in obituary)	• LA News Service v. KCAL TV (clip of LA riot footage) • Roy Export v. CBS (clips of Chaplin used in obituary)

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[1] Bechtold Stefan, Fair Use by Design or By Law, to appear at "Designing for Fair Use" workshop, April 16, 2002, http://www.jura.uni-tuebingen.de/~s-bes1/drm/fair_use_by_design.pdf

[2] Folsom v. Marsh, *9 F. Cas 342, 348 (no. 4,901) (CCD Mass. 1841)*

Copyright law is littered with examples where context, market impact, and even the intent of the actors made the difference between fair and unfair use determinations *where the quantifiable aspects of the alleged infringement were substantially the same*[3]. "Fair use" is judicial in nature, and many lawyers argue that it must remain that way. Others disagree.

Critics of DRM systems who admit that "fair use" is a fuzzy notion indict their designers for ducking the issue entirely. Most interactive DRM systems, in contrast to simple encryption schemes ("*lockware* which is invisible and enforceable"[4]) require that the consumer first execute a customized license which is cryptographically bound to the digital goods before delivery. At the time of access, the license terms are evaluated and enforced, and a unique copy of the digital goods is created. There is nothing in this process that even comes in contact with copyright law; it's a simple contract, the terms of which are *a priori* determined by the copyright holder. The DRM system is the functional equivalent of the slot scanner in a grocery store; it just processes labels.

This means, though, that DRM systems look exclusively to the copyright holder (i.e. the labeler) to specify the terms of use – and this is the crux of the problem. As the Supreme Court points out in *Sony Corporation of America v. Universal City Studios* (1984):

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"[Copyright] protection has never accorded the copyright owner complete
control over all possible uses of his work."
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If a copyright holder refuses to provide in its license for any digital fair use of his work, a DRM system will enforce the license that reflects this position. There is no "override" mechanism that can kick in when a license is so limited. Of course, this wouldn't entirely prohibit fair use of the work; it just prevents the ability to make a form of *digital* fair use[5]. Digital fair use is, of course, the central issue here.

If it can be done, then, the challenge from the technical community to the legal community is to give us simple but rigid legal guidelines from which we can create commercially- viable, "fair use friendly" DRM systems. This dare isn't new. In an Atlantic Monthly Roundtable in 1998, Mark Stefik, the acknowledged father of DRM, states:

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"Fair-use licenses are intended to preserve some of the socially useful
limitations on an author's rights in copyright law, while addressing
the greater risks of unauthorized copying and distribution. I invite
Lessig and others to think through the change in relative risks in the
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[3] Stim, Richard, Copyright Law, pps 48 – 58.
[4] Springman, Chris, "Lockware": The Promise and Peril of Hollywood's Intellectual Property Strategy for the Digital Age, FindLaw's Legal Commentary, January 3, 2002,
[5] As the Second Circuit noted in *Universal City v. Reimerdes* (DeCSS) case, there are alternative means to make fair use excerpts of, say, DVDs, such as by pointing a camcorder at a TV screen and recording portions of movies.

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digital medium and to come up with fair-use proposals of their own that
address the balance of interests of stakeholders.⁶"
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Chris Sprigman, in January of this year[7], proposes that "if we can arrive – possibly
through legislation – at a set of boundary lines that separate 'fair' from 'unfair' uses, then
those boundaries could be written into DRM systems…"   Perhaps Larry Lessig's
"Creative Commons[8]" is an attempt to do exactly that by offering copyright holders free,
"fair use friendly" licenses in code?

"Rights language-based systems"[9] have always anticipated flexible use of content
applications by incorporating verbs like "loan" and "extract" and special classes of
principals (licensees) such as "law professor."   There is also no lack of Internet standard,
secure protocols with which users could justify fair use exceptions directly with rights
holders or with a clearinghouse. *The technical reality is that interactive DRM systems
would not have to be stretched into new, unnatural forms to accommodate digital fair
use.*

The tools to create these systems are already in place. All that's missing are the licenses
in machine-interpretable form, and copyright holders to adopt them. When these come
together, it shouldn't take long to evaluate whether "fair use friendly DRM" is attention-
grabbing research or an actual sea change in copyright law. The acid test will simply be
"what kind of content did it attract?"

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[6] Stefik, Mark, Round Three Concluding Remarks, Atlantic Unbound, Atlantic Monthly, posted September
29, 1998.
[7] Springman
[8] SFGate, http://www.sfgate.com/cgi-bin/article.cgi?file=/gate/archive/2002/02/11/creatcom.DTL

[9] ContentGuard, eXtensible rights Markup Language (XrML) 2.0 Specification eXtensible rights Markup
Language (XrML) 2.0 Specification, November 2001