Fair Use
CFP Proposal/Abstract

Reconciling DRM and Fair Use: Preserving Future Fair Uses?

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Digital rights management technology vendors have frequently expressed frustration with the criticism that their technologies undermine fair use (and its close copyright cousins, like first sale and term expiration). Some DRM vendors argue that the preservation of fair use is simply not their problem, and contend that the blame for fair use's demise properly belongs with Congress for enacting the DMCA's anticircumvention provisions. The more accommodating DRM vendors, however, have responded with efforts to build support for certain fair uses into their technologies (e.g., limited personal copying and file portability).

But can DRM technologies ever adequately accommodate fair use? The problem is especially vexing once you recognize that "fair use" has changed over time, and that it is vital that it continue to be able to evolve over time. When the problem is viewed in this light, it becomes clear that many DRM vendors are asking precisely the wrong question. The approach should not be "tell me what fair use requires, and I'll build it in" but rather "how can I build something that permits a variety of as-yet unknown uses, so that courts can decide whether those future uses are fair."

In other words, the ambiguity of the fair use doctrine is not a bug, but a crucial feature. If DRM systems are to preserve fair use, they must somehow preserve its ambiguity, its ability to evolve and embrace as yet unrealized uses of copyrighted works. A consideration of technologies past, present and future, and their collisions with the fair use doctrine, illustrates the virtues of ambiguity in the fair use context.

The Past: the VCR

In 1979, Universal City Studios and the Walt Disney Company, both major motion picture studios, sued Sony, seeking to have every Betamax VCR in America impounded as a tool of piracy. In their view, there were virtually no noninfringing uses of the VCR, since home taping of television was thought to violate the copyright owner's exclusive right of reproduction. The Supreme Court in 1984 disagreed, ruling that home taping of television programs for later viewing ("time-shifting") is a fair use.

Two aspects of the Betamax case are important for our purposes. First, it should be stressed that the Supreme Court's ruling on fair use was in some ways a fundamental re-imagining of the fair use doctrine. Most copyright scholars at the time felt that home taping should not constitute fair use. In particular, it was unprecedented for a court to find a use to be fair where (1) the copyist reproduced the entirety of a work and (2) did so for a purely consumptive, nontransformative purpose. So, had you considered the shape of the fair use doctrine in 1979, you would probably have concluded that time-shifting was not a fair use. The Supreme Court in 1984 *evolved the doctrine* in response to the new possibilities created by the VCR.

Second, if copyright owners had been able to impose DRM technology on the VCR in 1979, the Supreme Court would have been denied the opportunity to evolve fair use. While the state of DRM technology was more primitive in 1979, DRM was not unheard of. MCA, for example, was developing "DiscoVision," an early optical laserdisc format. One of its chief attractions, from MCA's point of view, was its inability to record. In addition, during the Betamax case, the motion picture studios argued to the court that Sony should build a sensor into every VCR that would detect "no copy" signals that would be embedded into television broadcasts, thereby enabling copyright owners to mark their movies as "not for copying." Had either of these DRM solutions been adopted, the Supreme Court would have been denied the opportunity to address how the fair use doctrine should be understood in light of home video recording technology. Time-shifting would have presumably remained under the exclusive control of copyright owners.

The Present: MP3 and Ditto.com

More recent examples reinforce the importance of permitting fair use to evolve in response to new technologies. The development of PC technology and the MP3 music format has given music fans a wide variety of new capabilities. As a result, electronics manufacturers have begun offering new categories of music products, including MP3 jukeboxes, home music servers, and Internet radio receivers. Each of these technologies, however, depends upon copying digital music, an activity that, unless considered fair use, would infringe copyright.

The Internet has similarly spawned innovative services that have called on courts to evolve fair use jurisprudence. For example, copyright litigation recently erupted over Ditto.com, a search engine that catalogs photographs and other images that can be found on the Internet. Prior court decisions regarding fair use provided only ambiguous guidance. A district court in Los Angeles ultimately concluded that this activity should be considered a fair use.

The precise scope of fair use in connection with digital music technology, or online search engines, remains unsettled. But had DRM technologies blocked these unauthorized experiments from arising in the first place, the opportunity to further develop the fair use doctrine would never have presented themselves. The public would never have had the benefit of these new technological capabilities.

The Future: HDTV (and Occam)

With these earlier examples in mind, we can better understand the threat that DRM technologies pose to the future of fair use. If fair use is to continue to evolve, to create space for innovation and new uses of copyrighted works, DRM technologies must somehow accommodate the ambiguity of fair use. After all, we won't know what kinds of uses might be fair unless the public has the opportunity to experiment with new technologies. If, on the other hand, innovators and consumers are presumptively barred from experimenting without copyright owner authorization, fair use will become increasingly irrelevant. After all, how useful is a right to time shift analog television in a world where all broadcasts are digital and protected by DRM technologies?

This is not a hypothetical question. Industry standards groups are currently drafting mandatory DRM systems for digital broadcast television. While these systems may attempt to preserve time-shifting as defined by the Supreme Court in the 1984 Betamax decision, they fail to protect the *future* fair uses that will be made possible by digital television. What those fair

uses might be is difficult to imagine, just as time-shifting was difficult to imagine in the era before VCRs. Nevertheless, unless DRM technologies make room for these future fair uses, fair use will have lost much of its ability to protect the public's side of the copyright bargain.