

Chapter 11

The Private Copy Issue: Piracy, Copyright and Consumers' Rights

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ABSTRACT

Digital copyrights involve a combination of technology and law that seek to provide full control of the work by the rightholder. Managing rights over digital copyrighted contents through the use of consumers' technological protection measures may however jeopardize some freedoms that copyright law has traditionally recognized, such as the private copy. In the present chapter, the author describes the conflict between the exclusive right to the exploitation of the work and the private copy issue; how modern copyright obstructs private copying and recent proposals regarding the conciliation between rightholders' and consumers' interests.

DIGITAL COPYRIGHT MANAGEMENT AND CONSUMERS CONCERNS

It is today unquestionable that, in a digital environment, technology and law are complementary realities. Nevertheless, sometimes, technology allows uses that may override individuals' rights and protected interests. The relationship between digital copyright and consumers' rights is precisely one of the fields where both the expressed complementarity and conflict can be clearly perceived.

In fact, the emergence of digital technology, principally the Internet, has created the possibility of a free and global flow of informational contents that was reflected in the metaphor of the information highway. Soon, the economic facet of this inter-relational digital structure was revealed and online markets and e-commerce were developed. However, informational cybermarkets present some problems concerning the immaterial and intellectual nature of its products (for example, music, movies, digital books or software).

Immaterial goods are public, non-rivalled and non-excludable goods. In fact, the consumption of an informational good by one person doesn't

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exclude the possibility of consumption by others and, without regulation no one can be excluded from using the good. These characteristics are emphasized in the digital world as the positive externalities created by the free flow of copyrighted content information which may result in a disadvantage for content creators and rightholders. That is the general justification for public legal regulation of the intellectual creations' market where intellectual property law is presented as an instrument that can be used to create scarcity, since it gives the holders the economic exclusive rights of the works' exploitation, excluding others from using it without proper authorization.

Nevertheless, considering the global geographical distribution of Internet users, the differences between intellectual property national legislations and the merely reactive judicial enforcement mechanisms, holders felt that law, by itself, was no longer sufficient to ensure their rights and to protect their economically legitimate interests.

For that reason, the answer to the problems left to rightholders by technology was sought in technology itself: as Clark (1996) stated, the answer to the machine seemed to be in the machine (p. 139). In fact, one of the main characteristics of modern copyright law is the interplay between legal and consumers technological protection measures (TPM), such as steganography, encryption or electronic agents. TPM may not be mere defensive electronic fences. Indeed, digital rights management (DRM) systems based on the combination of different TPM allow rightholders to potentially control all the utilizations of digital copyrighted works, including, *inter alia*, access to contents or even to some personal data of the users.

The idea of a technological perfect control (Lessig, 2006, p. 183) of digital contents made some rightholders think that they could dismiss or to underrate copyright law's protection. Combining TPM and contracts, they unilaterally set the conditions for end users to access protected contents.

As Guibault and Helberger (2005) state,

“DRM systems [...] create an environment in which various types of use, including copying, are only practically possible in compliance with the terms set by the right holders. Therefore, they usually do not deny access but rather manage access to content by combining technical measures with a payment mechanism. DRM-based business models ensure that consumers pay for actual use of content, and that the content is protected and cannot be accessed by unauthorized users” (p. 9).

Moreover, normally, consumers of digital works don't have the means or the power to bargain; they can only accept or decline the terms of the end user license agreement that is presented to them on a “take-it-or-leave-it” basis. Code and contract seemed to be a perfect combination to ensure holders' interests and to enable the management of protected works in even stronger terms than copyright law did. In fact, if copyright law traditionally represented a compromise between holders' and collective interests as a means to promote cultural, artistic and scientific creation, this privatization of copyright (McManis, 1999) could make holders escape from free usages that reflected public interests, like the ones recognized in the cases of fair use, in the USA, or the copyright exemptions recognized by European legislations. Nevertheless, reality showed that the use of TPM and DRM did not stop copyright infringements and illegal file-sharing, especially through peer-to-peer (P2P) networks, as circumvention mechanisms were developed.

Because of that, copyright law was recovered and adapted. To fully protect holders' self help and private enforcement systems, copyright law was completed with provisions prohibiting the use and the creation of circumvention mechanisms.

The Digital Millennium Copyright Act, in the USA, and the Directive 2001/29/EC of the European Parliament and of the Council of May

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