Availability of Works, Choice for Consumers, Confidence in Markets

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The debate of the issues of private copying, levies, and the dissemination of copies over the Internet can get highly theoretical especially in a knowledgeable and academically oriented group like this. I think it is critical to keep in mind as we go through two days of discussions what our ultimate goals are in our joint endeavor of promoting copyright.

I would articulate those goals as follows: (1) wide availability of creative works on-line with the authorization and fair remuneration of the rights holders; (2) a wide range of choice for consumers as to delivery mechanisms, formats and prices; and (3) at the same time, confidence in these on-line markets so that consumers, rights holders and intermediaries can all be assured of security and of quality.

If we start from these goals, the next question becomes how best to achieve them given the current reality that we face. In my view, the best – if not the only – way to achieve the goals I have articulated is an effective deployment of reasonable digital rights management systems, combined with the use of other techniques to limit piracy. I think this approach is compatible with international standards, including the famous "three-step test"; it limits the need for the reliance on levies and leads to the best market results for consumers.

The problem we are all dealing with in one way or another is how to get there from here. And there is an inherent time gap involved. The development of DRM solutions and their effective deployment does not happen overnight. And it does not happen simply by closing one's eyes and wishing for it. It requires a very complex interaction of technology, business negotiations and possible government facilitation, none of which is speedy. I might add: it is not purely within the control of any one sector, including the copyright industry. It requires tremendous cross-industry cooperation. And finally, as Alessandra Silvestro pointed out this morning: there is no "one size fits all" solution. There is no magic technology that will work for everything. Meanwhile, while we are working on all of these challenges, the dissemination and copying of works without authorization on the Internet continues at tremendous volume and speed. Of course, almost all of it – at this point in time – is illegal.

We have at the same time an existing structure of enforcement, and a structure of collection and payment mechanisms in place.

So, how do we get from the present to the bright future? We do need to rely on the existing structures while we are in this period of transition, and yet at the same time try to move toward a new one as quickly as possible. This, of course, is not so easy.

Now I will turn to the specifics and to some theory. Because I am the only American on the panel, and one of the two of the non-Europeans, I talk about the perspective of US law, to say something a little bit different from what you hear during the rest of the afternoon.

Under US law, there are several exclusive rights implicated by on-line copying and dissemination: the reproduction right, which covers both temporary copies and permanent copies; the distribution right – which in the United States is our version of the making available right provided for by the WIPO treaties, or at least our main source of the making available right; and, in some circumstances and to some extent, the public performance right, especially when you are talking about streaming models. If a use is not authorized, then the question becomes the extent to which existing exceptions either do or should apply, whether new ones are needed, or whether we should consider a compulsory license or remuneration right as an alternative. Obviously, any exception as applied must meet the "three-step test".

So, what do we have today in US law? There are a number of exceptions that apply to on-line copying and distribution. There are various compulsory licenses in the statute, particularly in the music area, dealing with web-casting, subscription services and the complicated title of "digital phonorecord delivery". All of these licenses are essentially business-enabling licenses. They are not something that consumers can use in making copies at home. There are also some exceptions for non-profit entities. There are exceptions for libraries and for educational institutions, for example to use in inter-library loans or distance education. But again, these are not exceptions that consumers use.

The closest parallel to a private copying exception in US law is the Audio Home Recording Act. The Audio Home Recording Act is in certain ways very similar to a system of private copying exceptions and levies, but in some ways, it is different. It doesn't say that consumer home-copying of music is not an infringement, but it says that suits cannot be brought against it. At the same time, the Act incorporates a levy on certain digital devices and supports and contains a digital rights management element: the "Serial Copy Management System". This restricts the ability to make more than one copy of an original. However, the Act has a number of limitations. It does not apply to computers, and has not been very economically significant because of that limitation. So, it is not directly applicable to the kind of copying and distribution that I am talking about now, and has not been seen as a model to be expanded in that arena.

Finally we come to fair use which in the United States is a very broad catch-all provision. It potentially applies to all types of works and all exclusive rights. Let me speak about a few aspects of the fair use defense that are worth stressing. First of all, it is a defense, not an affirmative right. Consumers do not have the right to make fair use. I think that it is an important point to make in the light of recent claims in the United States Congress that there are rights to fair use and in light of recent litigation in France. Fair use also involves a balancing of factors rather than bright lines. Thus, it is very difficult for any lawyer to give advice to a client whether something is or is not fair use. You cannot say that, as long as the use is at home, it is private and it meets the following criteria, you are fine. You can say: the courts have generally held this type of thing to be permissible. As a result, fair use can be either more restrictive or more permissive than private copy exceptions, depending on the circumstances.

Also, if a use qualifies as a fair use, it is completely exempted and there is no requirement of any payment or levy. Finally, it is important to note that fair use is clearly within the limits of the three-step test because it is a fundamentally similar concept by definition. It requires weighing all the facts and all the circumstances, it involves certain special cases and it similarly focuses on the degree of harm to the right holder and the degree of interference with normal utilization.

Now let us speak about fair use as applied to on-line copying and dissemination. In theory, fair use is fully available because it is completely technology-neutral. However, when you are talking about the type of copying that is generally going on on-line today, fair use is likely to apply only in limited circumstances, for a number of reasons. In most cases, the copying is not what the courts have called "transformative" use. It is rather consumers' wishing to enjoy an entire work for their own pleasure – the use that Jane Ginsburg has called "consumptive" use. The works that are being used are by and large highly creative and entertainment products and they are entire works, not portions of works. Finally, when it comes to the most important factor, which is the effect on the value of the work or the market for the work, you have consumers who are avoiding paying the normal price that they would pay to get access or to own a copy. In the case of peer-to-peer services in particular, we are talking about not just copying but also dissemination, distribution. And there, the harm to the market is quite obvious and quite great. So, the vast majority of the peer-to-peer uses are obviously not fair use and are infringements under US law; and the courts have no trouble so concluding.

When might fair use apply in the on-line copying situation? Under the Sony-Betamax case, time-shifting of over the air broadcast television programs was held to be fair use. How does that apply to on-line services? It is not entirely

clear, because when you are talking about on-demand services, you do not have the same concept of time. There is no particular time when people are meant to see the protected material; by the very nature of such services, you can see or hear the material whenever you want.

What else could be fair use? A temporary reproduction made in the course of an authorized performance with streaming services. The Copyright Office of the United States has opined that "yes, those kinds of copies would qualify as fair use". The interesting situation that no court has yet ruled on involves what some are calling "space-shifting" or "place-shifting". There are three elements that might lead to a favorable response by a court: one is that the consumer has paid for access – and not just temporary access but permanent access – so it is not just that access is lawful but the consumer is entitled to keep a copy of the work; the second is that the copy is made for convenience purposes in another location, for example, the person's car or office; and the third element is that it is private and not being shared further. We will see how the courts deal with this situation. It goes a bit beyond the time-shifting rational, but this may be an area where a court might find an argument to be colorable if not convincing.

I want to say a few words about the relationship of these kinds of exceptions and digital rights management. It is important to note, in the light of all the theoretical debates, that in fact copyright owners have shown themselves willing to permit more consumer copying than technically would qualify as fair use under the statute. Either they are willing to refrain from enforcing rights in some situations or they have gone so far as to build consumer freedoms that go beyond fair use into DRM-technology and into the licenses that depend on that technology. In a number of circumstances, such licenses and such technology may, for example, permit the making of a single copy where fair use would not permit it, or even multiple copies in some circumstances. The key to that willingness is the scope of the access that is authorized. The consumer's ability to make a copy without any time limits, even if it is purely private, must involve a situation where the consumer has already obtained authorized access to a permanent copy. We are not talking about, for example, a pay-per-view movie. Otherwise, you end up destroying the ability to provide market alternatives of access to works for a shorter term and less extensive use at a lower price; you do not get as many options and as many variables.

Now, why are copyright owners willing to be so generous? They are in a consumer business; it is necessary to satisfy consumers' desires, and to market works in appealing ways in order to succeed in that business.

There is a tremendous amount of experimentation going on today as to what DRM will in fact be acceptable to consumers. It has to be not overly draconian, it has to be transparent enough so that it does not feel burdensome and annoy-

ing, and it has to work with a light touch. But at the same time, it has to be enough to avoid too much damage. There are a number of different models emerging and competing today. In the music area, there are a number of services in the United States, Music-net and Press-play, iTunes which has gotten a lot of press, and BMG's newly-announced format where the digital rights management will allow up to three copies to be made, songs to be loaded on portable music players, and copies to be e-mailed to friends that will last for ten days, but will restrict the use so that it will not be possible to upload the music on to peer-to-peer systems.

Does this mean that there should be no concerns about the effect of DRM on permitted uses? Not necessarily. It is not enough for copyright owners just to say "trust us"; the appropriate answer is "trust but verify". What I mean by this is the kind of solution that both the US and the EU have adopted; where there is some mechanism for government oversight of how DRM is deployed, in order to ensure the continuation of permitted uses. Such a mechanism lets market evolve and go through the necessary period of experimentation and adjustment. And it actually has a positive substantive impact because it gives a strong incentive to rights holders to use appropriate DRM. They are fully aware that, if they go too far, they could lose their protection against circumvention.

I conclude with the question of how to deal with those uses that continue to be unauthorized and not excused by "fair use". Obviously, the biggest threat for music and soon for movies is the use of peer-to-peer systems. In that area, so far, we have been following an approach which includes education, not just about what the law says but about some of the disadvantages and risks in using peer-to-peer systems. These systems cause major problems in terms of security, in terms of quality and even giving children access to pornography without realizing that this is what they will be downloading. Legal action, bringing lawsuits as appropriate, may also contribute to education. It has been very interesting to follow the press reports that have focused on parents talking to their children about what the law says. Universities are now running programs for incoming students to explain copyright implications to them. I have even seen press reports that say there is general public support for suing individuals who are major uploaders on the peer-to-peer networks.

A further and very important point is that there are now legitimate alternatives that use DRM, which are beginning to blossom and can provide security and quality. Some in the US have said that this is all pointless, that DRM solutions can never succeed and, therefore, we should adopt a levy-system instead, where the model would be unrestricted use of content on the Internet with no control but with remuneration for rights holders obtained through levies imposed on

service providers. For example, you would pay five dollars a month and then the content on the Internet would be like water from a tap that you can turn on and off at will.

I will close by saying that I am optimistic about the future in this area and that I think that this proposed solution of a levy system raises more problems than it solves. First of all, it essentially gives up on copyright and the whole concept of the creator's control and choice. Second, it would result in less valuable content available through narrower choices for consumers, whereas DRM enables the existence of much more flexible business models. Third, it is more burdensome on different types of intermediaries, whether consumer electronics or technology companies. And, fourth, it still raises the rough justice issue, because it takes away the ability to determine market preferences with greater refinement and will inevitably lead to much greater government involvement in the process.