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Mandatory Labeling for Digital Rights Management: A Least Restrictive Means for Rebalancing Rights Between Content Owners and Consumers

Sean Whaley

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**MANDATORY LABELING FOR DIGITAL RIGHTS
MANAGEMENT: A LEAST RESTRICTIVE MEANS FOR
REBALANCING RIGHTS BETWEEN CONTENT OWNERS
AND CONSUMERS**

*Sean Whaley**

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* J.D. Candidate, Class of 2008, The George Washington University School of Law; B.S., Electrical Engineering & Science, B.S., Comparative Media Studies, Class of 2005, Massachusetts Institute of Technology.

I. INTRODUCTION

In the 1980s, the recording industry began distributing music in digital form through compact discs (under the compact disc digital audio system¹) without any significant copy protection for the sound recordings. This was a double-edged sword, since consumers purchased a staggering amount of compact discs, replacing their old vinyl records with the new digital format and buying new music, but they also engaged in rampant amounts of copyright infringement. Consumers infringed by using software to make digital files of sound recordings from the compact discs (in a process known as “ripping”), then distributing these files to other computers in a connected network.² When extended to its theoretical conclusion, the combination of ripping and distribution of digital files over the Internet meant that only one copy of a CD was necessary to distribute the content to everyone else in the world without cost.

In response, the industry tried to add roadblocks to ebb such widespread piracy by including digital rights management (DRM) services into CDs, limiting how consumers could use the music. By adding digital rights management, the content owner was able to either stop the copying of the file to the hard drive (copy prevention), or stop a file’s distribution or access once it was saved on the hard drive.³

However, the Recording Industry Association of America (RIAA) encountered a problem when it was creating this roadblock. The problem the RIAA and other content owners faced is that technological solutions did not interact well with the contours of the law, specifically copyright law. While laws were usually subject to a wide range of interpretation, stemming from sources such as ambiguous statutory language, or conflicting case law, technical applications usually had bright-line solutions that allow little room for vagueness. In the case of digital media, the technological protection methods (TPMs) used could not accurately reflect the state of copyright law because relationships between the rights holder and the user of the copyrighted work were subject to a substantial

1. The compact disc digital audio (CDDA) system, also known as Red Book, is the standard for audio CDs. Discs that do not follow the specifications of the Red Book are not allowed to use the CDDA logo, as doing so might constitute trademark infringement. See Wikipedia, *Red Book (audio CD standard)*, http://en.wikipedia.org/wiki/Red_Book_%28audio_CD_standard%29 (as of Oct. 15, 2005, 04:31 GMT).

2. Wendy M. Pollack, Note, *Tuning In: The Future of Copyright Protection for Online Music in the Digital Millenium*, 68 *FORDHAM L. REV.* 2445, 2450 (2000).

3. Andrew W. Bagley, Note, *Fair Use Rights in a World of the Broadcast Flag and Digital Rights Management: Do Consumers Have a Chance?*, 18 *U. FLA. J.L. & PUB. POL’Y* 115, 118 (2007).

range of legal interpretation.⁴ Indeed, how could a content owner properly encode a fair-use exception into its rights control system when a judge could not even state a dispositive test for what is considered a fair use of copyright? Due to this, TPMs limited consumer uses of digital content much more than their analog counterparts.⁵ This was first considered an unavoidable, yet necessary, tradeoff for content distribution in digital form. However, critics have seen this as an overprotection of content owners' rights and have sought to reestablish uses traditionally enjoyed by consumers, despite the owners' employment of rights control.⁶

In recent years, Congress has also shown interest in rebalancing the rights of consumers and content owners by introducing bills to limit the effectiveness of DRM services. Proposals like the BALANCE Act,⁷ the Digital Consumer Right to Know Act,⁸ and the Digital Media Consumer Rights Act (DMCRA)⁹ directly attacked the gap between uses allowed under recent DRM services and the actual uses allowed by copyright law. Most of the legislative debate has been focused on proposals that try to carve out fair-use exceptions from the anti-circumvention provisions of the DMCA.¹⁰ The proposed exceptions usually reflected the fair use rights specified in 17 U.S.C. § 107¹¹ and are exemplified in the U.S. Supreme Court's ruling in *Sony v. Universal Studios*,¹² and *Campbell v. Acuff-Rose*.¹³ However, much less attention has been made to proposals that would require specific labeling of products that use DRM methods.¹⁴

4. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576-77 (1994) (discussing the multiple factors courts need to weigh when evaluating fair-use defense on a case-by-case basis).

5. For example, compare TPMs that limit the transfer of digital files between storage devices to the free transfer of physical copies of books and CDs as a result of the first sale doctrine, which limits the how copyright holders can control the second-hand sale of copies. 17 U.S.C. § 109(a) (2000).

6. Pollack, *supra* note 2, at 2452.

7. Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2005, H.R. 4356, 109th Cong. (2005).

8. Digital Consumer Right to Know Act, S. 692, 108th Cong. (2003).

9. Digital Media Consumers' Rights Act of 2005 (DMCRA), H.R. 1201 § 5, 109th Cong. (2005).

10. 17 U.S.C. §§ 1201-05 (2006).

11. 17 U.S.C. § 107 (2006).

12. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442-46 (1984) (allowing devices that had substantial non-infringing uses to be produced despite potential for infringing use).

13. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

14. Compare length of testimony concerning fair-use exception section of the bill (390 hits) to testimony concerning the sections that imposed mandatory labeling (3 hits). *The Digital Media Consumers' Rights Act of 2003: Hearing on H.R. 107 Before the Subcomm. on Commerce, Trade and Consumer Prot. of the H. Comm. on Energy and Commerce*, 108th Cong. (2004).

While the fair-use exception directly attacked the gap between the copyright owners' self-help and the traditional rights of the consumer,¹⁵ the labeling requirement used the Federal Trade Commission's (FTC) power over deceptive acts and practices¹⁶ to force content owners to explain the limitations their DRM imposed. This would enable the consumer to make an informed decision, based on the specific restrictions of a DRM technology. As a result of consumers making logical purchasing decisions, market forces would rebalance the rights of the interested parties, since consumers would be more willing to pay for files that afforded them more rights.

In this Article, I will argue that Congress can best address the inadequacy of DRM services by imposing mandatory labeling requirements on all media that incorporates digital rights management services, which would lower consumer confusion and encourage fair competition. Imposing mandatory labeling requirements is a step beyond current industry practices, which are voluntary and have little standardization for what information to disclose.¹⁷ Given the proper information, consumers would be able to make informed buying decisions on TPM-protected media based on what collateral impact the protections method has on the product. As a result, different DRM services would be in direct competition with each other based upon their level of restriction. In the open market, less restrictive media would become more valuable, and more robust DRM services would emerge that would incorporate freer consumer uses and would accurately reflect the content owners' statutory rights and limitations. As a result, consumer uses and exemptions currently enjoyed outside digital media would be encoded in the DRM, properly rebalancing the relationship between content owners and consumers with minimal governmental intervention and oversight.

In this Article, in Part II, I will detail the legal foundation and reasoning of copyright law that enables the use of DRM by content owners and why these current controls are inadequate for consumers. I will then detail the legal precedents for mandatory labeling requirements in federal consumer protection and unfair competition laws and explain why it is an

15. See Marc Fetscherin, *Evaluating Consumer Acceptance for Protected Digital Content*, in LECTURE NOTES IN COMPUTER SCIENCE NO. 2770, DIGITAL RIGHTS MANAGEMENT: TECHNOLOGICAL ECONOMIC, LEGAL, AND POLITICAL ASPECTS 234, 315 (Eberhard Becker et al. eds., 2003) [hereinafter LECTURE NOTES].

16. See 15 U.S.C. § 45 (2005) (Granting FTC power to prohibit misleading advertisements and labels).

17. See, e.g., Press Release, IFPI, IFPI Announces New Optional Copy Control Symbol for CDs (Sept. 17, 2002) (on file with author) (voluntary guidelines used to denote copy-protected compact discs).

adequate use of the FTC's power to make labeling and disclosure mandatory not only for physical media, but also for more transient digital distributions. Finally, in Part III, I will propose an adequate disclosure technique that evaluates both the immediate and secondary consequences of DRM services and gives the consumer the adequate amount of information to make an informed decision of whether to accept the terms proposed by the content provider.

II. BACKGROUND

A. Copyright Law

Though the rights granted to content providers are outside the limitations of copyright law, they are closely associated with copyright law and the protections afforded in sections 1201-02 grow from the foundation behind the government's justification for giving such a monopoly to individuals for limited periods.

1. Fundamental Purpose of Copyright

The U.S. Constitution includes a provision that protects copyright, a form of monopoly for original creative expressions given to the author for limited periods.¹⁸ The historical intent in granting this limited monopoly was to benefit the public interest in creation and innovation by inducing authors to create original works and share them with the public.¹⁹ Through the grant of a monopoly, authors have a greater incentive to invest time and money to create original works of expression, since the monopoly gives the author legal protection from the risk of unauthorized copying by others.²⁰ This risk comes in the form of a third party copying the author's original work without permission, directly competing without any of the overhead associated with its initial creation.²¹ The risk also includes the

18. Copyright Clause, U.S. CONST. art. I, § 8, cl. 8.

19. *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and the useful Arts.'").

20. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright*, 18 J. LEGAL STUD. 325, 331-32 (1989).

21. *Id.* at 328.

threat of potential consumers using unauthorized copies as substitutes for the original work, denying compensation to the original author.²²

However, Congress also realized that the public benefits from broad access to and usage of copyrighted works. Since benefiting one interest necessarily hinders the other, Congress has tried to sculpt the rights and exclusions associated with the grant of copyright to best balance the adversarial interests of providing a greater incentive for content providers to create with the interest of granting users broad access and use of these works once they are published.²³ Congress also strives to limit the scope and power of the monopoly inherent in copyright to only what is necessary to induce authors to create.²⁴

2. DRM as Incentive to Create Digital Works

In traditional media, owners were able to adjust their prices to account for losses due to unauthorized copying. Authors could compensate for lost potential sales due to unauthorized copies mainly by adjusting for the difference in quality between the authorized publication and the unauthorized copy, in addition to the costs associated with producing the unauthorized copy.²⁵ An example of this practice was indirect appropriability, where the author charged a higher price to her customers, who in turn allowed others to copy the purchased work.²⁶ However, indirect appropriability did not properly allow authors to compensate for the risks of unauthorized copying of digital works.²⁷ Unlike earlier analog forms, many digital files act as perfect substitutes for the original and have little associated physical (e.g., copying and distribution) costs.²⁸ As a

22. See Tobias Bauckhage, *The Basic Economic Theory of Copying*, in LECTURE NOTES, *supra* note 15, at 234 (discussing how an author uses indirect appropriability to account for users in secondary markets).

23. Marc Fetscherin, *Evaluating Consumer Acceptance for Protected Digital Content*, in LECTURE NOTES, *supra* note 15, at 314-15.

24. Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, at 4-6 (1961).

25. Under the Ordover/Willig economic model of copying, the price for the original compared to the price of the unauthorized copy is $P^O < T + P^C$, where the T represents the costs of copying and the difference in quality between the original (O) and the copy (C). When this inequality is satisfied, an individual will prefer the original to the copy. Tobias Bauckhage, *The Basic Economic Theory of Copying*, in LECTURE NOTES, *supra* note 15, at 241-42.

26. *Id.* at 242 (using the example of periodicals that have libraries as their primary purchasers).

27. Marc Fetscherin, *Evaluating Consumer Acceptance for Protected Digital Content*, in LECTURE NOTES, *supra* note 15, at 301-02.

28. *Id.* at 301-02.

result, the only costs a user faced when obtaining an unauthorized copy, compared to buying a legal version, was the risk of penalties associated with copyright infringement.²⁹ Content providers therefore had to price their works below this value (the cost of fines multiplied by the probability of detection). Since the piracy detection rate was so low,³⁰ the price content providers could logically charge would have been so low that there was little reason to risk putting their works in digital form.

In order for content owners to place work in digital form, they needed some protection from potential customers creating unauthorized, perfect copies of their work. Content owners did this by using various access control and rights management techniques that collectively were deemed digital rights management systems.³¹ While these safeguards limited how consumers could use digital files, DRM's main consequence was that it tried to prevent unauthorized copying of digital files. The problem with this form of self-help, however, was that it was still legal to circumvent these systems or create devices to enable circumvention.³² This meant that legal circumvention could have lead to rampant piracy of digital works, since users could circumvent the protection method and distribute unprotected copies. Thus, in order for DRM to be an effective technical protection, there needed to be legal protection for the DRM.

The World Intellectual Property Organization (WIPO) responded to this problem through the enactment of both the Copyright³³ (WCT) and the Performances & Phonogram Treaties³⁴ (WPPT) that specifically required

29. When evaluating the effectiveness of a protection technology, whether a person would buy a digital original work over an unauthorized copy is expressed in the equation $P^O \leq \delta VO_i + \mu f$, where VO_i is the perceived value of the original, δ is the quality difference between the original and the copy, P^O is the price of the original, μ is the probability an individual will be caught pirating and f is the expected fine. As $\delta \rightarrow 0$, the copy acts as a perfect substitute and the price is solely affected by the fine for piracy and the piracy detection rate. *Id.* at 304-05, 307-08.

30. Pollack, *supra* note 2, at 2446.

31. The most prevalent definition for DRM is that it is "software developed to enable secure distribution — and . . . to disable illegal distribution — of paid content over the Web." However, the definition, "DRM covers the description, identification, trading, protecting, monitoring and tracking of all forms of usages over both tangible and intangible assets" better encompasses all forms of control exerted over digital content. Niels Rump, *Definition, Aspects, and Overview*, in LECTURE NOTES, *supra* note 15, at 3-4.

32. See *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255, 262 (5th Cir. 1988) (holding that a company that produced software to help consumers circumvent copy protection and enable legal consumer use was not liable for contributory infringement).

33. WIPO Copyright Treaty art. 11, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 65, 71 (1997) [hereinafter WCT].

34. WIPO Performances and Phonogram Treaty art. 18, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 76, 86 (1997) [hereinafter WPPT].

member nations to adopt an anti-circumvention policy in regards to systems protecting copyrighted works. The United States adhered to the WIPO treaties through the passage of the Digital Millennium Copyright Act (DMCA), which among other things, dictated the relationship between consumers and content owners of digital media.³⁵ Part of the Act's intent was to induce authors to produce digital works by making the circumvention of DRM illegal. This meant that content owners had a viable route to stop unauthorized infringement of digital works, since there were penalties for specifically circumventing protection techniques as well as for copyright infringement.³⁶ This gave consumers greater incentive to buy digital works, since mere circumvention was illegal, making the risk associated with copying higher, as well as hindering the ability of consumers to make unauthorized copies.³⁷

3. Controversy Over DRM Protections

The effectiveness of DRM itself created controversy. Unlike other exclusive rights given to authors under the copyright statute, the anti-circumvention provisions of the DMCA were not constrained by limits and exceptions found in other sections of the copyright statute, such as fair use.³⁸ As a result, content owners had greater control over their digital content than they had over their analog products, as the DRM attached to digital content could dictate in great detail the scope of the consumer's ability to use the media.³⁹ While section 1201(b) included some exceptions that allowed unauthorized circumvention of rights-control protection, § 1201(a)(1) forbade any circumvention of access-control protection.⁴⁰ This had a practical effect of forbidding any circumvention of digital content, since the vast majority of DRM systems used access control as part of its control scheme.⁴¹

35. Anti-Circumvention Provisions of the DMCA, 17 U.S.C. §§ 1201-05 (2006).

36. See, e.g., *Realnetworks, Inc. v. Streambox, Inc.*, 2000 WL 127311, 12 (W.D. Wash. 2000).

37. See 17 U.S.C. §§ 1201(a)(1)(A), (b) (2005).

38. *Universal Studios, Inc. v. Corley*, 273 F.3d 429, 443 (2d Cir. 2001) (“[Section 1201(c)(1)] simply clarifies that the DMCA targets the *circumvention* of digital walls guarding copyrighted material (and trafficking in circumvention tools), but does not concern itself with the *use* of those materials after circumvention has occurred.”).

39. Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. REV. 1095, 1106-10 (2003).

40. MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW §§ 8.36-8.37 (LexisNexis 4th ed., 2005).

41. Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1635 (2001) (If a user has to enter a password every time she needs to view

This resulted in a chilling effect on consumers, since traditional defenses used in response to copyright infringement no longer applied. While courts ruled that consumers are still free to exercise fair use with digital content, the courts also said that consumers were not allowed to pursue the “best use” of copying, meaning that fair use is not a proper defense for circumventing DRM.⁴² This meant that consumers were required to use convoluted methods of copying for fair use, e.g., pointing a camcorder at a television set playing a movie in order to copy a clip. As technology transitions to purely digital distribution, this problem will become more prevalent.

While there was a small controversy over whether this broad interpretation of § 1201(a)(1) was Congress’s actual intent,⁴³ it was the intent of the WIPO treaties (as well as Congress⁴⁴) to grant additional rights to the content owner to compensate for the still-present risk of massive piracy.⁴⁵ These additional rights also gave content providers a solid foundation from which to experiment with new business models shaped for the unique nature of digital products, such as more complex renting systems.⁴⁶

This grant of control to the content owners can potentially lead to multiple versions of the same work with different rights associated with the varying formats. This means that individuals would have the ability to buy digital forms of copyrighted content based on a particular format’s usage rights. For example, depending on one’s incentive, a consumer can now decide between watching a film in the theater, renting by way of a physical disc, downloading a file that functions for a limited time or for limited sessions, streaming of the movie in real time, or purchase through physical disc or download. Each of these distribution models grants different rights to the consumer and each version of the work has a

a work that is only available in access-protected digital format, then every act of reading that work implicates the copyright owner’s control of access).

42. *Corley*, 273 F.3d at 459.

43. *See, e.g., Chamberlain v. Skylink*, 381 F.3d 1178, 1194-200 (Fed. Cir. 2004) (holding that it was not Congress’s intent to have separate scopes for access protection and rights protection technology).

44. Ginsburg, *supra* note 41, at 1631 (“Congress’s focus in the DMCA was not to console copyright owners whose claims to control new devices had already been spurned, but to promote a new exercise of copyright, by *ex ante* adjusting the rules governing the technology in aid of that objective.”).

45. WIPO Copyright Treaty pmb., Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 65, 68 (1997).

46. *See WILLIAM BUHSE & AMÉLIE WETZEL, CREATING A FRAMEWORK FOR BUSINESS MODELS FOR DIGITAL CONTENT—MOBILE MUSIC AS A CASE STUDY, LECTURE SERIES, 271, 271-72 (2003).*

different price based partially on the rights allowed, since consumers are aware of the different versions available to them and made purchasing decisions based on what they were allowed to do with a particular version of a film.⁴⁷

B. Consumer Protection Law

Consumer protection is closely related to another field in intellectual property law, which is the federal protection of trademarks. Stemming from Congress's power to regulate interstate commerce, federal statutes and agencies govern fair trade practices in commerce and can affect the trade practices of content owners without having to change portions of the copyright statute.

1. Misleading Labels

The Federal Trade Commission (FTC) is an independent agency of the federal government whose main purpose is the promotion of consumer protection and the elimination and prevention of anticompetitive practices.⁴⁸ Based on their power in both these areas, the FTC has power to regulate practices that deceive consumers.⁴⁹ As a result, parties that deceive consumers can either face charges for unfair competition (if a rival company is at a competitive disadvantage as a result), or for confusion (if a consumer was harmed based on confusion from a deceiver's product).⁵⁰

The FTC is in charge of enforcing consumer protection statutes, including various statutes requiring mandatory labeling.⁵¹ One of the most relevant in connection with current copyrighted work is the Fair Packaging and Labeling Act,⁵² which authorizes the Commission to make additional regulations when necessary to prevent consumer deception or to facilitate value comparisons with respect to certain criteria.⁵³ As stated in the statute, the purpose behind these regulations is to inform consumers of the actual product they are considering purchasing.⁵⁴ In order to make such a consideration in fair competition, the consumer must be able to make value

47. *Id.* at 286.

48. 15 U.S.C. § 4592 (2005); *see also* *FTC v. Raladam Co.*, 316 U.S. 149, 152 (1942).

49. *Consol. Book Publishers v. FTC*, 53 F.2d 942 (7th Cir. 1931) ("The commission's jurisdiction . . . embrace[s] false and fraudulent advertising, misbranding, and other practices which result in deceiving the public. Such practices injure competitors who do not use them.").

50. 15 U.S.C. §§ 52, 53b (2005).

51. *See* *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922).

52. 15 U.S.C. §§ 1451-61 (2005).

53. 15 U.S.C. § 1454c (2005).

54. 15 U.S.C. § 1451 (2005).

judgments on the product based on important criteria. In terms of mandatory disclosures and labeling:

[T]he Commission may require affirmative disclosures where necessary to prevent deception, and that failure to disclose by mark or label material facts concerning merchandise, which, if known to prospective purchasers, would influence their decisions of whether or not to purchase, is an unfair trade practice violative of § 5 of the Federal Trade Commission Act. . . .⁵⁵

Therefore, the FTC can require mandatory labeling whenever the disclosure is necessary for a prospective purchaser to make a reasonable decision.⁵⁶

2. Application to DRM

Though many consumers understand the difference between piracy and legal copies of content, they are unaware that DRM even exists, much less why DRM is more restrictive than analog versions of copyrighted works.⁵⁷ When making purchases, most consumers expect to enjoy uses they were traditionally afforded; such as making backup copies, playing in their home media players at their leisure, and using portions in other works. However, many DRM schemes do not allow such uses, forcing a consumer to choose between buying another legal version of the work that has broader rights offered to the consumer (if such a version exists), or breaking the law to use the content as they want (through either direct circumvention or use of a version with no usage restrictions).

This non-disclosure of restrictions might amount to deception, especially in the case of copy-protected CDs, where there has been a long history of broad use before the recent implementation of copy protection. As evidenced in complaints, consumers bought the protected discs with the expectation that they would have the ability to play the discs in CD players and computer drives, rip versions of the files to play on their computer or

55. *L. Heller & Son v. FTC*, 191 F.2d 954, 956 (7th Cir. 1951).

56. *In re Cliffdale Assoc.*, 103 F.T.C. 110 (1984) (“the Commission will find an act or practice deceptive if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material.”).

57. Nichole Dufft et al., *Digital Music Usage and DRM, Results from a European Consumer Survey*, at 36 (May 24, 2005), http://www.indicare.org/tiki-download_file.php?fileId=110.

portable media player and make backups of the disc in case it scratched, which regular, unprotected CDs allow.⁵⁸ Only after one had purchased the protected disc did a consumer learn of its limitations. In a pure economic sense, the content provider should offer restricted content at a lower price than unrestricted content, as people are less willing to pay for more restricted use.⁵⁹ By not informing consumers of the copy protection and offering the content at the same price as unrestricted discs, the providers implied that the discs were equivalent when in fact they were not. Based on case law in consumer protection, this amounts to consumer deception.⁶⁰

The comparison between copy-protected discs and unprotected CDs is the most obvious illustration of the need for mandatory labeling. As more content moves into digital form, however, there is less of a basis for consumers' assumption of what uses are allowed and what the DRM actually permits, since the old media might not set a precedent for it.⁶¹ However, a consumer still needs some knowledge of what they are allowed to do with media once purchased so that she can make a proper assessment on what form best fits her needs. Not knowing of these restrictions before purchase hurts both the consumer, who purchased the wrong product based on an unclear assumption of rights, and competitors, who are at a competitive disadvantage because they either sell less restrictive works or fully disclose their restrictions and might seem less attractive in comparison.

58. For example, one consumer filed a complaint against a record company for failure to disclose that the CD would not play automatically on computer CD drives. *See* Press Release, Rothken Law Firm, Fahrenheit Entertainment and Suncomm are Sued for Violating Privacy Rights of California Consumers and for Unfair Business Practices, Sept. 6, 2001, <http://www.techfirm.com/mcrel.pdf>.

59. Fetecherin points out that to properly change the economic model, φ is added to account for the restrictions. This means that the legal work is usually less desirable than the illegal work if it acts as a perfect substitution. If the copy acts as a perfect substitution, consumers will not accept the protected digital content. It is only when the protected content is considered more valuable that the equation $P \leq V_0(\delta - P) + \mu f$ sets the price for consumers to accept the protected digital content. Fetecherin, *Evaluating Consumer Acceptance for Protected Digital Content*, in LECTURE NOTES, *supra* note 15, at 316-19.

60. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 2 (1995).

61. As an example, consumers had a hard time editing video from VHS tapes, setting little precedent for consumers' expected use of digital versions of copyrighted video.

III. ANALYSIS

A. Labeling as the Least Intrusive Method to Regulate Digital Rights Management Systems

There has been great difficulty in striking a proper balance between copyright owners and consumers when redrafting rights and limitations to the anti-circumvention provisions. Given that conundrum, the federal government could exercise its power over trade to help consumers use their purchasing power to encourage content providers to exercise less control over the digital works they distribute.

1. The Problems with Redrafting the Anti-Circumvention Provisions

Many of the proposed bills that change the copyright law are either too specific to properly grant users traditional rights, while others are too broad to encourage owners to publish their works in digital format.⁶² DRM systems do not work in isolation. It is a combination of technology, law, and a business model that makes a DRM system effective.⁶³ The problem with shaping laws that effectively foster DRM is that the technology and business models are in constant flux. Any major change to the legal foundations of technological protection would require drafters to work toward a specific business model and technology. Otherwise, there would be no rational basis for changing the law. While the current legal protection of DRM may seem overly broad, it is necessary because of the instability in the technology and the business models used to distribute digital media.

Any significant change to the scope of exemptions to § 1201 would meet strong resistance from copyright owners because of the still significant risk of mass piracy stemming from the use of the exception.⁶⁴ As evidenced by previous rulemaking sessions, the Librarian of Congress is leery of giving out too many exceptions to section 1201 for this very

62. See, e.g., BALANCE Act of 2005, H.R. 4356, 109th Cong. (2005); DMCRA, H.R. 1201, 109th Cong. (2005); Consumers, Schools, and Libraries Digital Rights Management Awareness Act of 2003, S. 1621, 108th Cong. (2003); FAIR Use Act of 2007, H.R. 1201 110th Cong. (2007).

63. Niels Rump, *Definition, Aspects, and Overview*, in LECTURE NOTES, *supra* note 15, at 3-4.

64. See, e.g., *The Digital Media Consumers' Rights Act of 2003: Hearing on H.R. 107 Before the Subcomm. on Commerce, Trade and Consumer Prot. of the H. Comm. on Energy and Commerce*, 108th Cong. (2004).

reason.⁶⁵ Similarly, making specific fair-use defenses to section 1201 would either be too limited in scope, making them meaningless for most consumers, or overly broad, discouraging content owners from publishing their works in digital form. It would also create confusion between the current fair use defenses (which already require case-by-case analysis⁶⁶), and the “new” fair use defense, creating situations where a user has adequate justification for using the underlying content without having adequate justification for circumventing the technology and would therefore still be liable for illegal circumvention.⁶⁷

The construction of section 1201(b) demonstrates how unstable such sculpting of the scope of the legal protection can be. In its current form, section 1201(b) allows circumvention by conduct, meaning that given adequate justification, an individual can circumvent technologies that restrict use. However, section 1201(b)(1) prohibits the trafficking of devices that enable such circumvention.⁶⁸ This, in effect, limits the scope of the exception to individuals who are capable of hacking through DRM control schemes independent of devices (including software) designed to do so, making the exception so narrow as to be almost negligible. If, however, the scope of the exception was broadened, using DRM to protect content owners’ rights might be moot, since devices used to circumvent the technology would be legal and freely available.

Other proposed schemes require the heavy involvement of a government regulatory regime, similar to those seen in patents and trademarks.⁶⁹ This is undesirable mainly because it would “transform one of the least regulated U.S. industries into a much more regulated one in which inventors might have to seek permission from the government

65. See U.S. Copyright Office, *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 65 Fed. Reg. 64,556, 64,574 (Oct. 27, 2000) (codified as 37 C.F.R. 201); 68 Fed. Reg. 62,011, 62,012 (Oct. 31, 2003) (codified as 37 C.F.R. 201).

66. See U.S. Copyright Office, *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 68 Fed. Reg. 62,011, 62,012 (Oct. 31, 2003) (codified as 37 C.F.R. § 201).

67. If a defendant had justification for the underlying work, but not for circumventing the copy protection, the defendant is precluded from acquiring the digital copy.

68. 17 U.S.C. § 1201 (2006).

69. For example, Mark Stefik suggested using a Digital Property Trust to decide issues of fair use, including royalty rates for fair use. Mark Stefik, *Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing*, 12 BERKELEY TECH. L.J. 137, 156 (1997).

before creating new products.”⁷⁰ This has the potential to limit innovation, both in the development of new copyrightable expressions and new DRM technologies.⁷¹

2. Use of the FTC to Rebalance Rights Given in the Anti-Circumvention Provisions

The use of the FTC’s power to regulate misleading advertisements and labeling is the least restrictive means of adequately ebbing the overreach of DRM technology. As content transitions from analog to digital distribution and playback, consumers still expect the same range of use and control they traditionally enjoyed over their media.⁷² Companies will try to meet consumers’ demands and expectations, delivering content in different ways and with different restrictions attached.⁷³ However, using different distribution methods (and different pricing schemes) only works if consumers understand the differences in their allowed usage before purchase.

While this information is important for the consumer to make a reasoned purchase, it is not necessarily in the best interest of the seller to disclose these restrictions blatantly, since this makes his product less desirable. From a competitive standpoint, nondisclosure would benefit the seller if the consumer assumed that she is gaining more than what she actually purchased. Such practices put both the buyer and the seller’s competitors at a disadvantage because of the confusion over what the buyer is actually acquiring.

Mandatory labeling requirements would force sellers to specify what restrictions are associated with the purchase of a specific digital work. When these restrictions are fully disclosed, the consumer has enough information to make an informed decision on what she needs to buy and at what price. From this, sellers would be able to create more robust business models of content distribution based in part on the consumer’s demands for the scope of usage. This would not only lower confusion that arises from traditional interactions with the media, but would also encourage sellers to make DRM technology that more accurately reflects

70. Declan McCullagh & Milana Homsy, *Leave DRM Alone: A Survey of Legislative Proposals Relating to Digital Rights Management Technology and Their Problems*, 2005 MICH. ST. L. REV. 317, 324 (2005).

71. *Id.*

72. Dufft et al., *supra* note 57, at 25-27.

73. For example, ABC broadcasts its serial drama series in high definition, posts the episodes later on their web site as streaming video, sells low-definition downloads on iTunes, and later sells DVDs for playback in higher definition.

their limitations under current copyright law, since he would be able to sell these “liberated” versions at a higher price.⁷⁴

This method is also desirable because it would only require minimum governmental oversight through the FTC, acting in an area (mandatory labeling) where it already has experience. The FTC is currently charged with enforcing a number of mandatory labeling requirement statutes in other industries. From this experience, it has made procedures and precedent to respond to the changes in the industry.⁷⁵ Through these conduits, it has the capacity to respond to changes in content distribution and can adapt the labeling requirements for each specific business model that incorporates DRM. Since the government regulation is merely on labeling and not the technology itself, the industry is still free to innovate and make new steps in technology without having to seek government approval or comply to overly restrictive requirements of the technology itself; a company merely has to disclose the consequences of the technology once implemented.

B. *How to Properly Evaluate DRM*

In order for a labeling system to be effective, relevant information needs to be displayed to consumers in order for them to make informed decisions. In regards to DRM, these metrics involve immediate issues like restrictions on access, consumer rights, and interoperability, as well as the collateral impact of DRM technology on consumer privacy and anonymity.⁷⁶ These broad areas of information can be broken down into a number of key categories, including personal use and copying, choice and interoperability, permanence, facilitating end-user creativity, and privacy, security and anonymity.⁷⁷

1. Personal Use and Copying

This metric evaluates the extent DRM permits personal uses and copying of content. This mainly comes into play because consumers expect certain capabilities to engage in practices like time and place

74. Dufft et al., *supra* note 57, at 25 (“consumers are willing to pay for more usage rights and device interoperability”).

75. The FTC has power to proceed after the finding of deceptive industry-wide practice through rulemaking. 15 U.S.C. § 57a (2005).

76. OECD, REPORT ON DISCLOSURE ISSUES RELATED TO THE USE OF COPY CONTROL AND DIGITAL RIGHTS MANAGEMENT TECHNOLOGIES 11-12 (2006)

77. CTR. FOR DEMOCRACY & TECH., EVALUATING DRM: BUILDING A MARKETPLACE FOR THE CONVERGENT WORLD 11-20 (Version 1.0 ed. 2006), <http://www.cdt.org/copyright/20060907drm.pdf>.

shifting. While owners' control on consumer use in this area was traditionally limited by the first sale doctrine⁷⁸ and similar statutes, DRM gives owners the capability to specifically monitor and restrict copying and transference.⁷⁹ This metric would mainly evaluate how much sharing the DRM system allows, since some services allow sharing of playlists and specific files permanently or for limited periods, while others place limitations on practices like time or place shifting.

2. Choice and Interoperability

This metric looks into which playback choices are available to the user. This metric might be of the most immediate concern to consumers, as many potential buyers have an expectation that the item that they intend to purchase works for a specific device.⁸⁰ DRM that allows use on a wide variety of devices⁸¹ or is reliable to work on all devices adhering to a specific standard⁸² is generally more valuable than DRM that is more restrictive. This metric would not only indicate which systems are capable of playing the work, but whether conversion of the file to a different format is allowed.

3. Permanence

This metric looks into a number of factors, including how long playback is allowed (indicating whether the sale is for purchase or for rental), if the user is able to make archival copies, and whether the owner has the ability to change the consumer usage rights after purchase. This metric makes the user aware of how long they are allowed to enjoy the work, as well as whether the uses they agree to at purchase are subject to change. This is especially important, since consumers are not traditionally used to having usage rights change (especially if the change is more restrictive) after purchase.

78. 17 U.S.C. § 106 (2005).

79. Transference involves moving the file from one device to another so that only one copy is held at one time. Moving the file from Device A to Device B means automatically deleting the file from Device A.

80. Dufft et al., *supra* note 57, at 23.

81. User has the ability to modify the format to adhere to another DRM scheme, e.g., giving user the ability to change a music file from protected WMV format (protected by Playsforsure), to protected AAC format (protected by FairPlay).

82. For example, a protected DVD that works on all DVD players.

4. Facilitating End-User Creativity

Digital technology gives users a much greater ability to use copyrighted works in their own creations. This metric evaluates whether the technology itself allows consumers to use the files in other programs outside of playback (it does not, however, evaluate whether the artist allows the use of the underlying copyrighted work). Consumer use of the copyrighted work can range from using a screenshot of a movie as wallpaper for their computer or using a song for playback in a home video, to allowing users to modify software applications such as creating new levels for a video game.

5. Privacy, Security, & Anonymity

This metric looks at the collateral impact that DRM has on a user. Because DRM involves a wide range of interaction between the consumer and the content owner, consumers may not know how this interaction plays out after purchase. This metric indicates whether data about the consumer or her usage habits is sent back to the content owner, whether extra software is installed on a device beyond what the user expects,⁸³ whether the DRM would affect the functionality of other devices or software the user currently has, and whether the DRM carries any risk of impairing the security of the user's devices.

While disclosure about a particular DRM technology's effects in all these metrics does not need to be on the label or conspicuously announced before making at the point of purchase, the consumer needs access to information in all these areas before purchase in order to properly evaluate whether to buy media that uses a specific DRM scheme.

C. Proper Disclosure Techniques

There are many industries⁸⁴ and many distribution models that incorporate DRM. Thus, one specific label to be used for all digital content is infeasible, since disclosure would place an improper burden in certain industries. As consumers become accustomed to purchasing digital media, the expectations of where disclosure takes place and what information is presented will also shift, as demands for immediate information will

83. For example, installation of a media player, which a consumer might expect, versus installation of authentication software or software that may pose a security risk. *See Texas v. Sony BMG Music Entm't, Dist. Ct. Travis Co, Tex.*, filed Nov. 21, 2005.

84. In this note, I am mainly discussing the music, film, television, publishing, and software industries, which use different models of distribution.

change as people become more aware of DRM. However, the standard “label” that makes these disclosures on use restrictions should be more analogous to the labels used to disclose the content of food (“Nutrition Facts”) than disclosures used in traditional End User’s License Agreements (EULAs), which consumers have learned to ignore altogether because they are so obtuse.

Considering the categories of metrics used to evaluate DRM, information on metrics that are of immediate impact to the consumer should be presented every time before the consumer can make a purchase.⁸⁵ Most of these metrics are embedded in the content, since they are considered “terms and conditions for the use of the work”⁸⁶ and removal of this information might make the user liable for copyright infringement.⁸⁷ Based on these embedded terms and conditions, the information should be displayed to the consumer in a form that is easy to decipher and evaluate quickly, so consumers are not encouraged to ignore the information. For example, information regarding the interoperability capabilities of a work can be disclosed through the use of standardized symbols for what devices can play the content (much like Microsoft’s Playforsure symbol indicates what devices can play works using that DRM scheme⁸⁸). Other information can be disclosed in a table style (such as whether back-up copies are allowed, how long a work can be viewed, and whether information about the user is sent back to the content owner), while other information might need further elaboration (such as whether user is allowed to use content in other software and whether the terms can change after purchase) and might require disclosure in another easily accessible area directly relating to the point of purchase, such as a link on the web site.

The FTC should accept suggestions from both the affected industries and consumer groups and shape the requirements for labels based on the limitations of the implemented business models and the interests involved. Also, the label should be physically affixed on the package if sold in

85. The All Party Parliamentary Internet Group, a joint group to foster discussion between British Parliament and media industries, recommended that all use restrictions and risks involved with purchase are clearly spelled out at the point of purchase. ALL PARTY PARLIAMENTARY INTEREST GROUP [APIG], “DIGITAL RIGHTS MANAGEMENT”: REPORT OF AN INQUIRY BY THE ALL PARTY INTEREST GROUP, ¶¶ 105, 113 2006 (U.K.), <http://www.apcomms.org.uk/apig/current-activities/apig-inquiry-into-digital-rights-management/DRMreport.pdf>.

86. 17 U.S.C. § 1202c (2005). In order to be covered by the section, the CMI must be conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form.

87. See 17 U.S.C. § 1202(a) (2005). This violation is separate from a violation of § 1201.

88. OECD, *supra* note 76.

physical form (like on a software box or DVD), or a separate click-through window that a user observes before downloading protected content from a web site. While labels used for computer software might not look at all similar to those used for movies, consumers would still have enough information about the rights and restrictions on a piece of digital content to make an informed decision before purchase. Furthermore, consumers will have an expectation that such information is readily available and will demand such disclosures when the content owner does not present them.

IV. CONCLUSION

There is little Congress can do directly to the copyright statute that would successfully limit the scope of the provision without substantially reducing the incentive to publish copyrighted works in digital form. Therefore, the best course of action for Congress to take is to encourage competition between content owners to resolve the imbalance between copyright owners and consumers, and their respective practicable rights and restrictions. Given the proper information, consumers as a whole will use their buying power to influence what technologies will flourish. Consumers will demand technologies that allow freer use and will pay more for works that have less restrictions imposed on them. The best way to expedite this competition between restriction methods would be to require disclosure of exactly what limitations consumers have a choice between, so the consumer would be able to make informed buying decisions before purchase. The FTC should require disclosure both on immediate concerns related to the limitations imposed by DRM, including interoperability, copying, and permanence, as well as secondary concerns, such as security, privacy, and anonymity, as these factors are all material when making a decision on whether to purchase a copyrighted work. Using this matrix, economic forces will effectively rebalance the dichotomy between technological protection methods and traditional rights and uses given in copyright law.