Running head: THE COMPROMISED COMPROMISE

The Compromised Compromise

Robert McKercher

University of Arizona

IRLS 504

July, 7, 2009

Abstract

Libraries operate according to compromise standards that respect copyright but allow fundamental activities like circulation of materials. The digital revolution presented new challenges for copyright owners who responded with digital rights management technology. DRM and effective lobbying of lawmakers have created a paradigm in which intellectual property owners control not only copying and distribution but access to information as well. The library profession must assert its rights and the rights of its patrons to restore proper balance to the compromise.

The Compromised Compromise

Modern librarianship has always involved a balance between the competing interests of intellectual freedom and intellectual property. In simplistic terms, libraries want free access to information for everyone and intellectual property owners want everyone to pay them for access (McCord-Hoffman 2001)**.** Reasonable exemptions to the law created a working compromise that allows for basic library functions while respecting copyright. In the 21st century, that compromise has been compromised by digital rights management (DRM) systems employed by owners of intellectual property. Aggressive application of DRM threatens to make irrelevant those copyright law exemptions upon which libraries rely. To restore the balance libraries need to continue exploring alternatives to traditional publishing, assert their rights, and advocate for legislative change.

Digitization changed the world. Databases replaced storage rooms filled with files. Researchers separated by an ocean share data via the Internet. Libraries operate more cheaply and more efficiently by digitizing collections and providing electronic access to materials. The same digital revolution that promised a future of nearly free, open access to information created new concerns about easy, unmonitored copyright infringement. Those concerns led to the development of DRM as a tool to protect the rights of intellectual property.

> The Online Dictionary for Library and Information Science defines DRM as "a system of information technology components (hardware and software) and services designed to distribute and control the rights to intellectual property created or produced in digital form for distribution online or via other digital media in conjunction with corresponding law, policy, and business models" **(ODLIS retrieved July 6, 2009).**

In simpler language, DRM is technology that allows access to digital information only to authorized users, and once the information has been accessed controls copying and distribution.

The intentions of DRM as a digital solution to a digital problem are reasonable. Copyright law reserves to the author the exclusive rights to reproduce, distribute, and create derivative works (Crews 2006)**.** In the networked digital world a file can be downloaded, printed, and distributed, often anonymously. Without the ability to hold violators of copyright accountable, the law's protections become meaningless. Intellectual property owners should be able to protect their rights, and they should be able to employ the tools they deem best for the job.

No library encourages copyright violation. Just as commitments to intellectual freedom and patron confidentiality are part of the American Library Association's Code of Ethics, so too is the respect for intellectual property rights (ALA.org retrieved July 4, 2009). Because some fundamental library activities could be considered copyright infringement, the law contains exemptions that allow them. Sections 107, 108, and 109(a) of the U.S. Copyright Act provide respectively for fair use, library copying, and the right of first-sale (Crews 2006)**.** If a library limits the amount of the work used and uses it for a non-commercial purpose that doesn't harm the value of the original work, the library can employ fair use as a legal defense. The library copying exemption allows libraries to copy works for specific purposes such as preservation, research, or interlibrary loan. The first-sale doctrine established the right of an owner of a legally acquired copy of intellectual property to give away, sell, or loan it. Using these exemptions libraries can circulate books, which could be considered distribution, and allow patrons to download digital resources or photocopy pages from a journal, which could infringe on the exclusive right to copy. All of these functions provide access to information; they all promote

intellectual freedom; and they are all legal. Libraries' concerns with DRM arise from its application to prevent legal use of copyrighted material.

While the intent of DRM may not be to trample libraries' rights or suppress intellectual freedom, its unintended consequence may be just that. Clifford Lynch, executive director of the Coalition for Networked Information, asserts that DRM really should be called digital restriction management because it makes sure you don't do certain things with digital information (Lynch et al. 2005). Not only can DRM prevent copying and distribution, it can restrict use to certain circumstances, and it can prevent basic access. Whatever the forbidden activity, the measures to prevent it are written into the computer code. The code is written to the intellectual property owner's specifications, is part of the digital resource, and doesn't distinguish between infringement and protected use (Russell 2003). If DRM protection prevents a certain activity, the user will be unable to engage in it even if he or she has the legal right to do so.

For example, DRM suppresses the established fair use right to make copies in alternative formats for the visually impaired. More than half of eBook titles on the market are unavailable for use with the common screen reader, and they are locked by DRM technology (ALA.org Digital Rights Management and Accessibility retrieved June 30, 2009) Without the ability to access the file, copy it, and convert it to a format compatible with a screen reader, the visually impaired are denied the information. The issue is further complicated by lawmakers' sympathies with intellectual property owners' requests for greater protection of their rights. The Digital Millennium Copyright Act made illegal the circumvention of technological measures that prevent restricted use of a digital file (Franklin 2003). Subsequently, the courts have established exemptions to DMCA that allow circumvention for things like preservation and making alternative format copies for the visually impaired, but under DMCA the creation and

distribution of technologies needed to circumvent DRM remains illegal (McCord-Hoffman 2001). Even legally allowed circumvention requires a conscious decision and the technical ability to do so. It is still a barrier to access.

The insidious implications of DRM reside in the technologies' power to withhold access to information unless the intellectual property owners' demands are met. A typical type of DRM is a click-wrap or shrink-wrap license that requires the user to agree to terms without the opportunity to negotiate (McCord-Hoffman 2001). In some cases, the user must agree to relinquish rights to otherwise legal uses of the content simply to be allowed access to it.

Universal Music Group's Blue Matter venture allowed copying of digital music files but barred the transfer of ownership to another party. Music retailers allowed files to be downloaded only in formats readable by their subscription media player. Timed-out copies are inoperable after a certain number of plays or after a certain length of time (Lynch et al. 2005). In each of these examples the licensing agreement imposed on the user a forfeiture of rights as a condition for access to the files' contents. The music retailers made the right to private exhibition dependent on paying a subscription free. Timed-out copies prevent the exercise of the right of first sale. The combination of DRM and licensing agreements replaces copyright law with a contract between the user and the intellectual property owner (Russell 2003). While a commercial entity's motivation behind these restrictions may be purely financial, the suppression of other people's rights is collateral damage from the use of DRM to promote a business model.

As both consumers of digital resources and professionals dedicated to providing information access, librarians feel the squeeze of DRM. Because DRM filters basic access to information, the utility of fair use is dependent on the information's availability rather than the nature of the transformative use of the work (Lynch et al. 2005). DRM effectively renders fair

use irrelevant, because it requires the copyright holder's permission to use the information prior to granting access.

To mitigate the burdens of commercial licenses, libraries have begun to employ alternative methods to build their digital collections. Public domain items seem an obvious alternative. However the length of copyright protection – the life of the author plus 70 years - (Crews 2006) means public domain resources will be old. Age may not matter for literature or a scientific discipline in which facts remain constant, but in scholarship currency equals relevancy. Other alternatives include open access resources and institutional repositories. Open access initiatives collect preprints of scholarly articles for free access (Yiotis 2005), but they are still uncommon. Institutional repositories began as an attempt to mitigate subscription costs created by the monopoly of scholarly journals. They centralize and preserve the intellectual capital of an institution like a college or university in a digital archive. Because the institution controls the repository's content it can set the conditions of accessibility and use. That control combined with standardized metadata, interoperability, and global networking creates an environment with few if any barriers to access (Crow 2002). However, the impact of institutional repositories is limited. The archive is only as valuable as its contents, and its content is limited to what members of the institution and its consortia partners choose to publish.

So while libraries have some options, their real responsibility is advocacy. Libraries' practices should assert their rights (McCord-Hoffman 2001). Passivity will only prompt commercial entities to further expand their interpretation of copyright. Libraries and their professional organizations must continue to lobby lawmakers to reform overreaching legislation and bar oppressive applications of DRM. Libraries must use their influence to negotiate licensing terms that allow access and protect fair use. Finally, by participating in the development of good

DRM (Russell 2003) libraries can preserve their rights, protect their patrons' privacy, and promote intellectual freedom.

At the moment intellectual property owners have the power. They unilaterally program DRM and make mandatory the acceptance of licensing agreement terms as a condition of access to information. DRM circumvents the exemptions to copyright law upon which libraries rely to operate. Further, DRM access restrictions turn copyright upside down. In the print world the burden of proof rested with the copyright holder to prove infringement. In the DRM world the burden of proof has shifted to the user who must prove legal intentions before being allowed to access to information. A new paradigm has emerged which has transformed access to information from a right into a privilege granted by the largess of copyright holders. Libraries have a singular responsibility to resist that paradigm shift and champion the restoration of the compromise between intellectual property and intellectual freedom that respect everyone's rights.

References

ALA.org Code of Ethics (2009) retrieved July 4, 2009 from http://www.ala.org/ala/aboutala/offices/oif/statementspols/codeofethics/codeethics.cfm.

ALA.org Digital Rights Management and Accessibility **(**2009**)** retrieved June 30, 2009 from http://www.ala.org/ala/aboutala/offices/oitp/emailtutorials/accessibilitya/10.cfm.

Crews, K. (2006) Copyright Law for Librarians and Educators: Creative Strategies and Practical Solutions. Chicago, IL: American Library Association.

Crow, R. (2002) The Case for Institutional Repositories: a SPARC Positiion Paper. *ARL* 223 pp. 1-4. Retrieved June 29, 2009 from http://www.arl.org/newsltr/223/instrepo.html.

Franklin, J. (2003) Digital Millennium Copyright Act of 1998. Encyclopedia of Library and InformationScience 1:1 pp. 907-915. Retrieved July 6, 2009 from http://www.informaworld.com.ezproxy1.library.arizona.edu/smpp/content~db=all~content=a713531990.

Lynch, C. et al. (2005) Proceedings from the Center for Intellectual Property and Copyright '05: *Colleges, Code, and Copyright*. Chicago, IL: Association of College Research Libraries.

McCord-Hoffman, G. (2001) Copyright in Cyberspace: Questions and Answers for Librarians. New York, NY: Neal-Schuman.

Online Dictionary for Library and Information Science. Retrieved July 6, 2009 from http://lu.com/odlis/odlis_d.cfm.

Russell, C. (2003) Fair Use Under Fire Library Journal 128(13) pp. 32-34. Retrieved June 28, 2009 from http://www.lexisnexis.com.ezproxy1.library.arizona.edu/us/1nacademic/search/homesubmitForm.do.

Yiotis, K. (2005) The Open Access Initiative: a new paradigm for scholarly communications. *Information Technology and Libraries* 24(4) pp. 157-162. Retrieved June 28, 2009 from http://web.ebscohost.com.ezproxy1.library.arizona.edu/ehost/detail?vid=3&hid=102&sid=4e11b21a-49e1-457c-ad48-ed3d3bbfab3d%40sessionmgr102&bdata=JnNpdGU9ZWhvc3QtbGl2ZQ%3d%3d#db=a9h&AN=19283047.