

# DRM v. Copyright - Need for Inter/Intra Copyright Balancing

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## I. Interface between Technological Measures and Copyright

ARTICLE 11 of the WCT and Article 18 of the WPPT oblige the contracting parties to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers or producers of phonograms in connection with the exercise of the rights under the WCT, WPPT and the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the right holders concerned or permitted by law. At the Diplomatic Conference, countries did not agree upon the exact definition of “effective” technological measures, “adequate” legal protection or “effective” legal remedies, for copy/access control technology was still premature in 1996<sup>1</sup> and most of the participants had no concrete idea about it. Interestingly, countries, including Japan, concluded and acceded to the treaty well before the actual introduction of the digital lock to the market. Now, only after 5 years from the accession, Japanese consumers encounter “copy-control compact disc” (the first one was published in Japan last year, an album by BoA, a Korean girl singer very popular in Japan) and “DVD player protected by the Copy Generation Management System (CGMS).” As Japanese people have long accustomed to free private copying, which is specifically permitted as a limitation to reproduction right (Article 30 of the Japanese Copyright Law [JCL]), they complain much about inconvenience with the new product. Also, some of the copy-protection technologies temporally adopted are not free from mechanical defects, for instance, played on certain type of PCs, they may cause some hardware malfunction.

Access control, in theory, conflicts with the long established “freedom to access” under traditional copyright regime. Copyright owners may not

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1. Pamela Samuelson, “The U.S. Digital Agenda at WIPO”, 37 *Va. Int'l L.J.* 369 (1997).

prohibit legal purchaser of his book to read it. Reading is not among his copyrights. On the other hand, with an effective access control, now he will be the gatekeeper to any "use" of the work, which might erode the careful balancing designed within copyright system. More exactly, with works equipped with access control, we consumers are pressed to pay extra amount for use of "ideas" or "P.D. works." From users' perspective, protection of copy/access control, if introduced, must preserve the public domain.

Let me confirm though, copyright regime is not the only way to protect digital contents. If you assert every use permitted by copyright law shall be absolutely kept free and not to be subject to any contractual restraint, you may be labelled as a "copyright imperialist." In fact, we have long protected proprietary information by contract, whether the content is copyrightable or not. Trade secret law has existed as "analog lock-up." Besides, copyright holders suffer serious damages caused by free, perfect, digital home recordings, now proliferated by P2P file sharing. For them, copy/access control is, besides the Digital Right Management (DRM), the last resort. For now, as the control technology is unpopular among purchasers, the content industry depends much on levy system, introduced in 1994. Only with payment of slice amount of the price of the MiniDisc player, consumers are free to make private copy as ever. The coverage of the levy is now enlarged to CD-W and DVD. Nonetheless, with advanced protection technology, which might come true with the recent merger of an Israel company by Macrovision, they predict in the near future, copy protection will override levy, for it is unaccountable to collect levy from purchasers of hardware not capable to make digital copy.

In equilibrium, a desirable protection is the one that preserves the users' interest "as much as possible", and assures the content holders' interest "at a certain level." Important to note is, now we must balance not only intra copyright (*user v. author*), but also inter copyright (*copyright limitation v. contract*).

As a result of harsh confrontation between content industries and electronic equipment industries<sup>2</sup>, there remains much to be articulated with article 11 and 18. First, are both circumvention and preparatory acts (manufacturing and trafficking) "adequate" legal protection to be prohibited as "adequate" legal protection? Second, under Article 11 and 18, should equipment industry must adopt destined type of protection technology? Third, are copyright limitations overridden by copy control? How do we design interface between them? Japanese government has acceded both WCT and WPPT recently and revised the JCL in this regard. Let me briefly

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2. Jessica Litman, *Digital Copyright*, 129-39 (2001). Unfortunately, the public voice, including the library communities was not heard by negotiators in Geneva or D.C.

introduce the Japanese experience as an example of treaty implementation, focusing on the above three points.

## II. Japanese twofold protection for copy/access control

The Japanese legislation implementing WIPO new Treaties is characterized with its twofold or patchwork protection system for copy/access control<sup>3</sup>, consisting of the Japanese Anti Unfair Competition Law (JAUCL) and the JCL. The reason for this choice by the Japanese government was not merely a bureaucratic deal between the two concerning ministries, METI (Ministry of Economy and Trade) and Agency for Cultural Affairs for administrating digital content matters. It is rooted in the very nature of legal protection for technological measures.

### A. Copyright Law (JCL)

#### 1. Regulated conduct

First, circumventing an effective copy control might be regulated as a preparatory act for copyright infringement or a kind of “indirect, contributory” wrongdoing. On the other hand, even if a user circumvents an effective access control, he shall not be liable under copyright law, as “accessing” is not an exclusive right. Unlike most European countries and the U.S., the JCL preserves mere access free. In return, the JCL sets forthright to transmitting copyrighted works publicly, the so-called uploading right. It follows from the copy/access dichotomy that the JCL covers only technological measures equipped against infringing of exclusive rights under the JCL (Article 2 paragraph 1 subparagraph 20). Under Article 120 bis of the JCL, those who (i) traffics a device or a program having a sole function for the circumvention of technological protection measures, (ii) as a business, circumvents technological protection measures in response to a request from the public shall be punished by imprisonment for a term not exceeding one year or a fine not exceeding one million Japanese yen. Civil remedies are not affordable under copyright law but unfair competition law, mentioned later in my presentation.

The JCL does not penalize manufacture of the hacking device or end user’s circumvention. Though the Japanese are very serious about implementing the treaty’s obligation, we must be, at the same time, cautious of potential chilling effect resulting from a regulation banning every circumvention. As stated, in 1996, we were not familiar with the

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3. Jacques de Werra, “What is a ‘technological protection measures’ under the WIPO Treaties, the DMCA, the European Union Directives and other national legislations”, prepared for ALAI 2001, New York (available from ALAI website); Naoki Koizumi, “The New or Evolving Access Right, presented at ALAI” 2001, Columbia Law School (to be published).

technological measures, and the government decided to start by “minimum approach”, if necessary, an amendment will be made in the future. So far, we find it too premature to ban an upstream conduct of manufacturing.

## 2. Hardware specification

JCL does not oblige equipment manufacturers to adopt specified technological measures.

## 3. Interface between technological measures and limitations

Before we regulate acts by end users, a careful deliberation must be made to interface the new prohibition and copyright limitations. Article 11 of the WCT and 18 of the WPPT only oblige the member country to protect technological measures that restricts acts “not permitted by law.” In other words, countries need not prohibit users from circumventing technological measures for the purpose of “permitted” use of the copyrighted work. The next question is, does the treaty assume every copyright limitation mandatory? A commentary written by Drs. Reinbothe and Silke v. Lewinski opines article 11 and 18 provide only minimum protection<sup>4</sup>, in other words, contracting countries may freely protect technological measures against circumvention applied to restrict use, exempted by law. In addition, the authors suggest, contracting parties may make exceptions for the benefit of disabled persons or for administrative or judicial proceedings “sacred” and mandatory<sup>5</sup>.

The JCL has solved this intriguing problem only partly. Article 30 (1)(ii) carves out from the private reproduction exemption the case where such reproduction is made by a person who knows that such reproduction becomes possible by the circumvention of technological measures or it ceases to cause obstruction, by such circumvention, to the results of acts deterred by such measures<sup>6</sup>. The rest of the many exemptions explicated in the JCL are untouched, i.e. reproduction in libraries (Article 31), quotations (Article 32), reproduction in school textbooks (Article 33), reproduction in Braille and sound recordings for the blind (Article 37 and 37 bis), non-profit public performances (Article 38), reproduction of Articles on current topics (Article 39), exploitation of political speeches (Article 40), reproduction for judicial/administrative/legislative proceedings (Articles 42 and 42 bis). A possible interpretation of this will be that end users may copy copy-protected contents by circumventing the lock for the above stated purposes.

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4. Reinbothe and Silke v. Lewinski, *The WIPO Treaties 1996*, 146 (2001).

5. *Id.*, at 142.

6. Mr. Mihaly Ficsor, former Assistant Director General of WIPO, admires the Japanese legislation “very laudable”, at least in this respect; see, Ficsor, *The Law of Copyright and the Internet*, 31 (2001).

On the other hand, a very influential former Head of the Copyright Division at the Agency for Cultural Affairs who drafted current JCL, Mr. Moriyuki Kato, once tersely mentioned copyright limitations are only default, in general<sup>7</sup>. An authoritative copyright scholar has written that exemption for private copy, at least, shall be default<sup>8</sup>. He argues copyright law's first priority is protection of authors. I am not of this opinion. Article 1 of the JCL clearly states the law must "seriously consider the fair use of the copyright works as cultural heritages." Copyright limitations shall not be "favor" by the authors, but commons preserved in respect of public interest. A better argument is, therefore, one based on public policy. For example, when limitation for private copying was introduced in 1970's, home copying was exceptional and damage for copyright owners was negligible. Now, with enormous damage made by digital copying and at the same time possibility for right holders to enforce his right to every use by the end users, rationale for preservation for private copying is only dim. In this way, we now illegalise private copy, but only through hacking copy protection. Exemption for owners of legally made copies of computer programs (Article 47 bis of the JCL) has been generally interpreted as default rule<sup>9</sup>.

I am pleased and proud to tell you that under the JCL, distribution right (Articles 26 and 26 bis ) shall exhaust after first sale, domestic or internationally, and the drafter has expressed this rule is mandatory<sup>10</sup>. Last year, after prolonged battle between the copyright owner of video games and used videogame shops, the Japanese Supreme Court decided for the latter<sup>11</sup>. Doctrine of exhaustion has evolved to minimize the adverse effects suffered to product market by copyright's monopoly in content market. In this way, exhaustion is closely related to competition law, which is mandatory.

For limitation between private copy and exhaustion, the Japanese jurisprudence is now on the way of consideration. My tentative view is that limitations for the sake of public policy with high priority shall not be overridden by mere commercial contractual interest. Reproduction for the blind and exploitation of political speeches will be promising candidates for the reserve list. In this regard, recently published report by the Australian Copyright Law Review Committee, which recommends the Australian

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7. Chosakuken Housei 100 Shunen to Kongo no Kadai (Roundtable on Centennial Japanese Copyright Law and its future tasks), Juristo No. 1160, at 27 [Kato].

8. Masao Handa, *Internet Jidai no Chosakuken (Copyright Law in the Internet Era)*, 118 (Maruzen, Tokyo, 2001). (in Japanese).

9. Nobuhiro Nakayama, *Software no Houteki Hogo (Legal Protection for Software)*, 80 (Yuhikaku, Tokyo, 2d ed., 1986). (in Japanese).

10. Chosakuken ho Husei Kyousou Boushi ho Kaisei Kaisetsu, 119 (Yuhikaku, Tokyo, 1999). (in Japanese).

11. The Judgment of the Japanese Supreme Court on April 25, 2002.

Copyright Law shall be revised to declare copyright limitations mandatory, is auspicious<sup>12</sup>.

### ***B. Unfair Competition Law (JAUCL)***

Another vehicle for protection is the Japanese Anti Unfair Competition Law<sup>13</sup>. Essentially, unfair competition law is commercial tort law. Article 2 of the JAUCL lists “unfair competition”, and when a person is or is likely to suffer business interest by unfair competition, he may sue the wrongdoer for injunction and damages. Compared to copyright law, for unfair competition law the result of circumvention of an access and copy control is the same in that both injure the business interest of the content provider in depriving sales or fees. Unfair competition law is, in other words, not property law.

#### ***1. Regulated acts***

This is why the definition of technological measures under the JAUCL is broader than that of under copyright law in including measures that restricts “viewing and listening of images and sounds, running computer programs”, which are beyond exclusive rights of copyright. Article 2 paragraph 1 subparagraph 11 provides for protection against trafficking devices and programs solely to be used for preventing an effective technological measures that restricts the recording, viewing of the content “to specified parties.” This provision is explained to address the problem of unauthorized descrambling of pay-TV services. Besides, article 2 paragraph 1 subparagraph 10 covers technological measures other than those protected under subparagraph 11. Both the cases of copy guard canceller and DeCSS are included here. This kind of divide between measures against every body and those against non-members, is not unaccountable, but admittedly artificial. I had a hard time in explaining our legislation at the ALAI 2001 last June in New York. The JAUCL set forth only civil remedies.

The JAUCL only prohibits trafficking of devices and programs, as with the JCL. Nor manufacturing the devices or the very act of circumventing is regulated. This reflects the minimum approach supported by equipment industry groups and legal scholars, including me, during the drafting process of the bill. It is still premature to decide exactly what kind of control technology shall be protected against which activities.

#### ***2. Hardware specification***

The JAUCL is silent in this regard too.

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12. Copyright Law Review Committee (Australia), *Copyright and Contract* (June 2002).

13. Christopher Heath, *The System of Unfair Competition Prevention in Japan*, 196 (Kluwer International, 2001).

### 3. Exemption

Article 11 paragraph 1 subparagraph 7 provides for an exception which makes lawful to distribute devices used for testing or researching on technological protection measures in order to foster the development of the better technological protection measures. Proposal for exception to reverse engineering was dropped, as content industry opposed.

### III. "Jap"ster case and future of the DRM

Last year, the Tokyo District Court preliminarily enjoined a company called "FileRogue", which, as a business, provided P2P file sharing service very similar to the Napster. The Japanese Copyright Act, in Article 23, provides for "uploading right (right to make copyrighted work transmittable via net). The plaintiff sued the File Rogue, not the end users. The problem with the plaintiff was, end users share musical contents peer to peer, and only the data of music file on the end users' PC was submitted to users via server of the FileRogue. The Tokyo District Court found that the FileRogue, not each end user, uploads the copyrighted content, as far as the company "controls the conduct of the end users by providing software for P2P sharing, and "makes profits" or is likely to make money in the near future from banner advertisement or user fees (for the time being, the service is provided for free, just like the Napster). The authority for this rather artificial law application is a Supreme Court decision on December 25, 1998. That is the case which made the Japanese musical copyright collecting society, JASRAC to ask directly the Karaoke bar, not the customer, for the license fee. In this decision, the Supreme Court told the Karaoke bar is the user of the copyrighted material. What happens if a Karaoke bar often run by Yakuza rejects to pay to the JASRAC ? Don't worry. Another Supreme Court decision on March 2, 2001 found the leasing company of Karaoke equipment, who has not been wary in instructing the Karaoke bar to contract with the JASRAC for Karaoke right, shall be liable as a joint tortfeasor with the reckless Karaoke bar. The latter is related to a recent Supreme Court case, in which an importer of a memory card that alters stories of a copyrighted video game was found liable in inducing the end user to infringe (the decision is not perfectly clear as to who is the infringer, though) the right to integrity of copyrighted works (moral right). In this way, the Japanese case law recently evolved the principle of liability for the one who is not physically using copyrighted works, but in certain way helping the end user and of course making money from it. But, as you all know, copyright law is weak in enforcing a pure P2P. In Japan, several college students have been arrested uploading copyrighted material via WinMX, a system similar to Gnuetella. It seems that this warning was not effective, as the number of users of this system is still mushrooming, they say. So far, no bill or proposal is seriously considered to oblige the hardware

makers to install certain copy guard, or allow the copyright owner to hack the file sharing user's PC and kill the infringing content. I hope the Japanese recording industries constrain themselves and set-up a new business model replacing sales of the tangible CD.