

The Pacific Neighborhood Consortium (PNC)  
Annual Conference and Joint Meetings, November 8, 2003

**Content Management Session**

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***The Emerging New Intellectual  
Property Rights Architecture:  
Online Content, Digital Right  
Management Systems and the  
Future of Fair Use***

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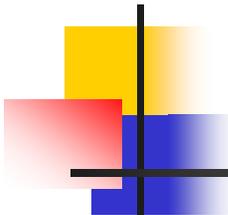
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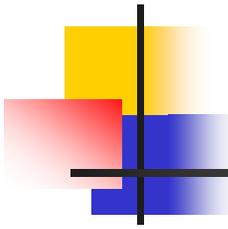
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# Introduction

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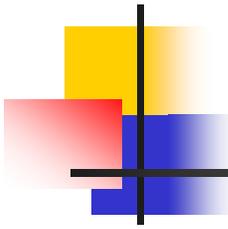
- What have digital technologies made possible?
- What is the apprehension of copyright industries resulting from the digital technology boom? Their responses?
- What promise has the digital right management (DRM) systems given to us?
- The rise of DRM-related legislations and their impact
- The future of fair use under the DRM regime



# What digital technologies have made possible

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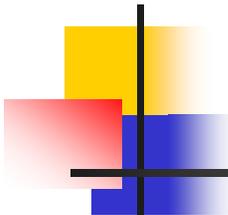
- The combination of digitization and new telecommunication media gives the public an interactive means of obtaining copyrighted works on demand
- The combination of digital technology and the Internet exacerbates many of the problems of international copyright protection
- Digital technology makes it possible to monitor, record, and restrict what people look at, listen to, read, and hear



# The apprehension of copyright industries and their responses

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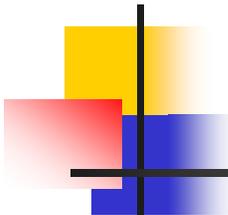
- The sharing and trade of unauthorized information goods will put copyright industries in danger
- Together with technology experts, the copyright industries have developed secure packaging and delivery software designed to prevent purchasers and third parties from making unauthorized uses of digital works; DRM is one of them.
- They have lobbied globally for special legal protections for these technological management systems



# The Promise of DRM (I)

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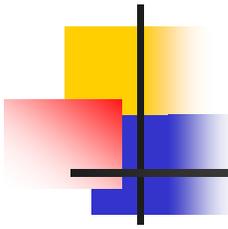
- DRMs vary greatly in terms of sophistication, security protection, and versatility
- Ranging from simple password systems to sophisticated systems that can manage many future uses of a digital work long after it has been obtained from the copyright owner
- DRMs prevent people from making any use of an information product beyond that which the copyright owner has authorized
- DRMs can act as a self-enforcement mechanism. Developers of DRMs envision that these programs will be able to structure the entire package of rights the content owner wishes to allow the user, and that they will be able to “negotiate” with the user’s computer to arrive at an “agreement” about the package and its price



# DRM-related Legislation and their impacts

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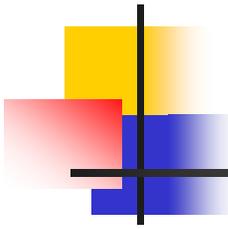
- Lobby activities from copyright industries
- Laying the international framework: WIPO Copyright Treaty & WIPO Performances and Phonograms Treaty
- Article 11 & Article 12 of WIPO Copyright Treaty
- The Digital Millennium Copyright Act (DMCA) of 1998 of U.S. and similar legislations
- The essence and impact of the DMCA-like legislations



# Controversies surrounding DRMs

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- DRMs would result in more digital products being available to more people at lower costs than ever before?
- The increase in control DRMs brings to us will allow copyright owners to appropriate far more protection than copyright law now provide?
- Permitting the use of trusted systems will upset the delicate balance between ownership rights and public access created by the law of copyright?
- The Future of Fair Use in Danger?
- More?

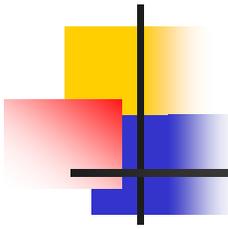


# The functions of and the role played by fair use in copyright (I)

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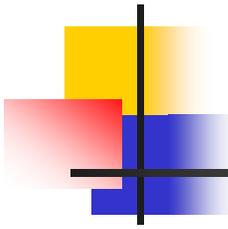
- The Functions of Fair Use in Copyright : Safety valve; A device capable of correcting market failure; adapting copyright to new technologies, etc.
- I imagine a world without fair use: Living in a world controlled solely by contract regime
- The fair use doctrine operates as a “safety valve” not just for free expression, but also to mediate the tension between copyright and new technologies
- Fair use has repeatedly been invoked to prevent copyright owners from misusing their copyrights in order to stifle legitimate marketplace competition

# The functions of and the role played by fair use in copyright (II)



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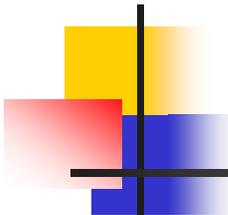
- The fair use doctrine plays an important role by providing a reservoir of incentives to spur innovation. Ex. The innovations surrounding VCR; The MP3 industry & iPod
- No precise definition for fair use– “fair use” has changed over time, and that it is vital that it continues to be able to evolve
- The ambiguity of the fair use doctrine is not a bug, but a crucial feature



# The War Between DRMs & Fair Use (I)

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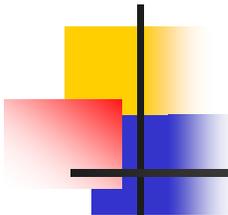
- DRMs--Copyright holders might prefer a world in which the rights granted under statute or asserted via license became self-enforcing
- However, as trusted systems may be used to prevent access to digital content without the permission of the content owner, access might be conditioned upon payment or ANY kinds of terms of usage for the protected content



# The War Between DRMs & Fair Use (II)

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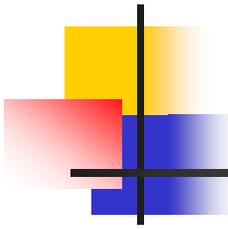
- DRM itself could be designed in the way that the terms of use or payment are embedded as constraints upon the degree of access
- Contingent or alternative terms could be programmed into the system, allowing a single access for a certain fee, or unlimited access for a higher fee
- Access could be revoked automatically, or by remote command, if payments are not made in a timely fashion



# The War Between DRMs & Fair Use (III)

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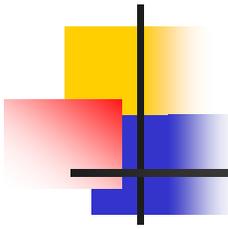
- The development of DRMs powerfully demonstrates the ability of technology to regulate behavior
- Since technical standards are within the control of the designer and so confer the designer the power to govern behavior with regard to that system
- The technical standards effectively become a new method for governing use of the technology and essentially a type of law once constraints on behavior are built into the technical standards governing a technology



# Implications of the War (I)

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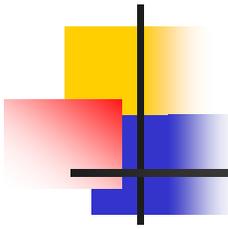
- Where technological constraints substitute for legal constraints, control over the design of information rights is shifted into the hands of private parties, who may or may not honor the public policies that animate public access doctrines such as fair use. Copyright owners can effectively write their own version of intellectual property statute in computer code.
- DMCA-like legislations effectively grants rubber-stamp approval to such private legislation
- Consider the recent development of online music—the experiment conducted by whom?



# Implications of the War (II)

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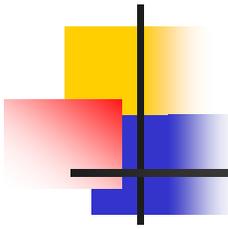
- It seems unlikely that any existing trusted system technologies will be able to accommodate the full range of fair use--whether some quantum of fair use should be sacrificed in order to stem the disruption caused by new technologies to existing media company business models. Or, should the public be required to give up some measure of fair use in order to solve the copyright infringement problem?
- Copyright law represents a bargain between the public and copyright owners. What do trusted system technologies and the legal mandates that support them offer the public?



# Implications of the War (III)

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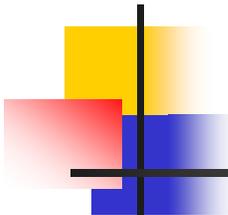
- Creative content can proliferate even in the face of widespread infringement?
- Widespread adoption of DRMs will result in more products and lower prices for consumers?
- Some skepticism in order: First, so far DRMs that enable price discrimination have had only limited success in the marketplace, Second, there is reason to question whether truly competitive price discrimination is likely to occur in the marketplace for copyrighted works. As a matter of fact, many copyright industries show a high degree of concentration, giving rise to market distortions that may swamp the desirable aspects of price discrimination.



# Implications of the War IV

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- DRM technologies backed by laws like the DMCA threaten to undermine fair use in a number of ways.
- An erosion of fair use in favor of DRMs comes with a lot of potential costs: a reduction in freedom of expression, a reduction in innovation, a reduction in innovation, an erosion of privacy, the “freezing” of fair use, undermining archives, libraries, and others who store and preserve our cultural heritage, lessened competition, etc.
- As the legal regimes governing trusted systems around the world have been increasingly designed to effectively sanction the use of private code to write the public law of fair use out of existence, it is time for us to reconsider whether the inclusion in the DMCA language reaffirming fair use is simply an empty promise.



# Conclusion

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- Do DRM technologies, backed by government mandates, represent a good bargain for the public?
- In the digital age, DRM technology is not policy neutral but highly policy-charged. How trusted systems and the law interact over the next decade depends on decisions made in the near future by us.
- It is worthwhile to design the law in a fashion that shifts technological development in a direction that balances the incentive structure of copyright protection with copyright's concern for the public domain and for the legitimate fair use.
- To restore the balance in copyright regime, a new legislation that allows lawful acquirer of copyrighted material to circumvent technical measures if necessary to make non-infringing uses of the work is indispensable.