

DIGITAL RIGHTS MANAGEMENT: WHOSE RIGHTS ARE BEING MANAGED?

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James V. DeLong -- Senior Fellow, Project on Technology & Innovation
Competitive Enterprise Institute -- 1001 Connecticut Ave., NW - Suite 1250
Washington, DC 20036 -- (202) 331-1010 TEL (202) 331-0640 FAX
jdelong@cei.org www.cei.org

The Dilemma: We want varying things from the copyright system:

- Just compensation to producers and financiers of intellectual property.
- A rich menu of content, which will exist only if creators have incentives to produce.
- Consumer capability to access information and entertainment via a variety of devices, and transfer it freely among them.
- Ease of use for these devices.
- Low prices and low transaction costs.
- Scope for parody, satire, and other riffs.
- A flourishing public domain of widely available works.
- An open system that avoids monopolies over either content or delivery.
- Minimal reliance on “fine tuning” (a.k.a. “meddling”) and maximum emphasis on contractual arrangements, market incentives, individual action, and laws that reflect general principles rather than political clout.

These desiderata are not entirely consistent with each other. Sensible policy must recognize that none can triumph completely. Trade-offs are inevitable.

Current State of Debate: Different values are represented by different interests. Unfortunately, in the process of debating each interest tends to assert its value as an absolute, to the exclusion of the others.

Long-Term Solutions. Ultimate solutions must combine three elements: Technological protection; legal rules and their enforcement; and economic incentive structures. Solutions must also recognize the distinctions between existing works, such as CDs and DVDs, which cannot be copy-protected, and works that will be created in the future, which can be.

However, the proper mix of the elements is incalculable at present because we do not have a good fix on the technological possibilities or on the possible business models. Two examples:

- The success or failure of efforts to create watermarks that cannot easily be broken will have crucial effects on the menus of possibilities.
- The development of an effective system of micropayments will broaden the economic options.

Immediate Strategies. Recognize that:

- The old medical rule applies: “First of all, do no harm.”
- Old concepts must be rethought in the light of new technologies. Example: the scope of “fair use” is largely a product of the high transaction costs of getting permissions. As these costs come down, the scope of fair use should be rethought. Many academics who want existing fair use cast in stone have another agenda – hostility to intellectual property rights in general.
- The current turmoil *does not* create a pressing need for Congressional action. The turmoil is a result of the high degree of technical and economic uncertainty. Markets deal well with such situations. Legislatures do not. The markets are indeed working, and Congress should let them operate. Legislation is not necessary.