

Digital Media & Intellectual Property

Nicola Lucchi

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Management of Rights
and Consumer Protection
in a Comparative Analysis



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To Luciano and Mirella

Foreword

This book focuses on intellectual property issues and rights in digital media, their connection with consumer protection, and the limits on freedom of contracts imposed by technological power.

In particular, it analyzes, from a EU and U.S. comparative perspective, the complex issues concerning legal protection, technological measures and new business models associated with the use, distribution, and control of digital media.

The book is based on a research project the author started in 2001 as Visiting Scholar at the University of California at Berkeley, Boalt Hall School of Law, later developed as Visiting Scholar at the University of Texas at Austin, School of Law and concluded as Research Associate at the Dipartimento di Scienze Giuridiche – Sezione di Rovigo of the University of Ferrara and as non residential Fellow of the Center for Internet and Society, Stanford Law School.

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List of Abbreviations

Alb. L.J.	Albany Law Journal of Science & Technology
Alb. L. Rev.	Albany Law Review
Am. J. Comp. L.	American Journal of Comparative Law
Am J. Int'l L.	American Journal of International Law
Am. U. L. Rev.	American University Law Review
Ann. Surv. Int'l & Comp. L.	Annual Survey of International & Comparative Law
Berkeley J. Int'l L.	Berkeley Journal of International Law
Berkeley Tech. L.J.	Berkeley Technology Law Journal
Brook. L. Rev.	Brooklyn Law Review
Brook. J. Int'l L.	Brooklyn Journal of International Law
Buffalo L. Rev.	Buffalo Law Review
B.U. J. Sci. & Tech. L.	Boston University Journal of Science & Technology Law
B.U. L. Rev.	Boston University Law Review
Cal. L. Rev.	California Law Review
Cardozo Arts & Ent. L.J.	Cardozo Arts & Entertainment Law Journal
Cardozo L. Rev.	Cardozo Law Review
Case W. Res.	Case Western Reserve Law Review
Chi.-Kent L. Rev.	Chicago-Kent Law Review
Col. Law	The Colorado Lawer
Colum. J. Eur. L.	Columbia Journal of European Law
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
Colum. L. Rev.	Columbia Law Review
Colum.-VLA J.L. & Arts	Columbia Journal of Law & the Arts
Common Mkt. L. Rev	Common Market Law Review

Comp. Law Rev. Int'l	Computer Law Review International
Contr. e Impr.	Contratto e Impresa
Cornell Int'l L.J.	Cornell International Law Journal
Cornell L. Rev.	Cornell Law Review
Cyber. Law.	Cyberspace Lawyer
Dir. Aut.	Il Diritto di Autore
Duke J. Comp. & Int'l L.	Duke Journal of Comparative & International Law
Duke L.J.	Duke Law Journal
Emory Int'l L. Rev.	Emory International Law Review
Emory L.J.	Emory Law Journal
Ent. L. R.	Entertainment Law Review
Eur. Intell. Prop. Rev.	European Intellectual Property Review
Fla. L. Rev.	Florida Law Review
Fordham Intell. Prop. Media & Ent. L.J.	Fordham Intellectual Property, Media & Entertainment Law Journal
Fordham Int'l L.J.	Fordham International Law Journal
Fordham L. Rev.	Fordham Law Review
Foro it.	Il Foro Italiano
Geo. Mason L. Rev.	George Mason Law Review
Geo. Wash. L. Rev.	George Washington Law Review
Georgetown L.J.	Georgetown Law Journal
Hamline L. Rev.	Hamline Law Review
Harv. Bus. Rev.	Harvard Business Review
Harv. Int'l L.J.	Harvard International Law Journal
Harv. J.L. & Tech	Harvard Journal of Law & Technology
Harv. L. Rev.	Harvard Law Review
Hastings Comm. & Ent. L.J.	Hastings Communications and Entertainment Law Journal
Hastings Int'l & Comp. L. Rev.	Hastings International and Comparative Law Review
Hastings L.J.	Hastings Law Journal
High Tech. L.J.	High Technology Law Journal
Hous. J. Int'l L.	Houston Journal of International Law
Hous. L. Rev.	Houston Law Review
Ind. J. Global Leg. Stud.	Indiana Journal of Global Legal Studies
Info. Comm. & Ethics in Soc'y	Journal of Information, Communication & Ethics in Society
Info. & Mgmt.	Information & Management

Info. Sys. J.	Information Systems Journal
Intell. Prop. Q.	Intellectual Property Quarterly
Int'l Cont. Adv.	International contract advisor
Int'l Digital Media & Arts Ass'n J.	International Digital Media and Arts Association Journal
Int'l Rev. of Indus. Prop. & Copyright L.	International Review of Intellectual Property and Competition Law
J. Copyright Soc'y U.S.A	Journal of the Copyright Society of the U.S.A
J. Inst. Theoretical Econ.	Journal of Institutional and Theoretical Economics
J. Marshall J. Computer & Info. L.	John Marshall Journal of Computer and Information Law
J. Marshall L. Rev.	John Marshall Law Review
J. Pol. Econ.	Journal of Political Economy
Ind. L.J.	Indiana Law Journal
Intell. Prop. L. J.	Journal of Intellectual Property Law
Int J. Law Info Tech.	International Journal of Law & Information Technology
J. Copyright Soc'y U.S.A.	Journal of the Copyright Society of the USA
J.L. & Tech.	Journal of Law and Technology
J. Legal Stud.	Journal of Legal Studies
J. Transnat'l L. & Pol'y	Journal of Transnational Law & Policy
Jurimetrics	Jurimetrics
Law & Contemp. Probs.	Law and Contemporary Problems
Loy. L. Rev.	Loyola Law Review
Loy. L.A. Ent. L.J.	Loyola of Los Angeles Entertainment Law Journal
Loy. L.A. Int'l & Comp. L.J.	Loyola of Los Angeles International and Comparative Law Journal
Loy. L.A. L. Rev.	Loyola of Los Angeles Law Review
Loy. U. Chi. L.J.	Loyola University Chicago Law Journal
Loy. U. Chi. L.J.	Loyola University of Chicago Law Journal
Marq. L. Rev.	Marquette Law Review
Mich. L. Rev.	Michigan Law Review
Minn. L. Rev.	Minnesota Law Review
N.M. L. Rev.	New Mexico Law Review

N.Y.L. Sch. L. Rev.	New York Law School Law Review
N.Y.U. L. Rev.	New York University Law Review
Nw. U. L. Rev.	Northwestern University Law Review
Penn. L. Rev.	Pennsylvania Law Review
Rev. Int'l Pol. Econ.	Review of International Political Economy
Rich. J.L. & Tech.	Richmond Journal of Law and Technology
Riv. Dir. Civ.	Rivista di Diritto Civile
Riv. Dir. Priv.	Rivista di Diritto Privato
Riv. Dir. Ind.	Rivista di Diritto Industriale
Riv. Trim. Dir. e Proc. Civ.	Rivista Trimestrale di Diritto e Procedura Civile
Rutgers Computer & Tech. L.J.	Rutgers Computer and Technology Law Journal
Rutgers L.J.	Rutgers Law Journal
Rutgers L. Rev.	Rutgers Law Review
San Diego L. Rev.	San Diego Law Review
S. Cal. L. Rev.	Southern California Law Review
Stan. J. Int'l L.	Stanford Journal of International Law
Stan. L. Rev.	Stanford Law Review
Stud. Iuris	Studium Iuris
Tex. Int'l L.J.	Texas International Law Journal
Tex. L. Rev.	Texas Law Review
Tex. Tech. L. Rev.	Texas Tech Law Review
Transnat'l L. & Contemp. Probs.	Transnational Law and Contemporary Problems
Tul. J. Int'l & Comp. L.	Tulane Journal of International and Comparative Law
Tul. L. Rev.	Tulane Law Review
UCLA Ent. L. Rev.	UCLA Entertainment Law Review
UCLA L. Rev.	UCLA Law Review
U. Chi. Legal F.	University of Chicago Legal Forum
U. Chi. L. Rev.	University of Chicago Law Review
U. Mich. L. Rev.	University of Michigan Law Review
U. Pa L Rev	University of Pennsylvania Law Review

U.S.F. L. Rev.	University of San Francisco Law Review
U.N.T.S.	United Nations Treaty Series
Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
Vand. L. Rev.	Vanderbilt Law Review
Va. J. Int'l L.	Virginia Journal of International Law
Va. J.L. & Tech.	Virginia Journal of Law and Technology
Va. L. Rev.	Virginia Law Review
W. Comp.	World Competition
Wake Forest L. Rev.	Wake Forest Law Review
Wash. & Lee L. Rev.	Washington & Lee Law Review
Wash. L. Rev.	Washington Law Review
Wis. Int'l L.J.	Wisconsin International Law Journal
Wis. L. Rev.	Wisconsin Law Review
Yale J. Int'l L.	Yale Journal of International Law
Yale J. L. & Tech.	Yale Journal of Law & Technology
Yale L. & Pol'y Rev	Yale Law & Policy Review
Yale L.J.	Yale Law Journal

Introduction

Digital media are a new form of communication, emerging as a result of ongoing technological change, that do not compulsorily require a physical carrier. With the term digital media we refer not only to data storage product types such as CDs, DVDs, USB drives, memory sticks and MP3 players but also to all the other new means of disseminating content through the various new digital technologies.¹ When we speak of digital media we mean “intellectual products made available in digital electronic form, whether operational in computers or other machines capable of reading works in digital form”.² It is in this sense that we will use the term in this book.

Digital media and their innovative transmission technology over the communication network and the Internet, represent means for the development of new approaches on traditional media, economics, culture and law.

Digital media in general, and communication networks in particular, are creating a significantly different context for international industrial and technology development, particularly in the high tech and content goods sectors.

The digital media revolution has resulted in a multitude of products that allow media consumers to become also producers, disrupting the traditional settlement and creating a different range of problems than analog media, such as traditional broadcast radio and television, vinyl records and

¹ According to the definition of the Communication department at the University of Washington, digital media can be defined as any medium that uses digital interactive technologies as the engine for communication. E.g. Video on demand services, interactive television, digital broadcasting systems and internet based content distribution network. See M.C. digital media program. Department of Communication, University of Washington, available at http://www.com.washington.edu/Program/MC/MC_Digital/faq.html.

² See Pamela Samuelson, Digital Media and the Changing Face of Intellectual Property Law, 16 Rutgers Computer and Tech. L.J. 323, 324 (1990). See also in this respect Tony Feldman, An introduction to digital media (1997); Alan Williams, Duncan Calow and Nicholas Higham, Digital Media: Contracts, Rights and Licensing (2nd ed. 1998).

printed books.

The production of digital information and the diffusion of interactive services are phenomena which have totally transformed the conditions of access to knowledge and the way of distribution of content.³ When information is recorded in digital format, also the job of the copier is much easier. The copy of a digital work will be the same in terms of quality as the original because it is the exact copy of a machine readable binary digit code (a series of zeros and ones). The same effect will apply no matter how many generations of copies are created.⁴ Furthermore the speed with which copies may be disseminated is also increased thanks to the power of the Internet.⁵

Within this framework the introduction of digital rights management systems and technological protection measures has completely extended the control of right-holders over their digital content,⁶ contributing to upset the traditional settlement for intellectual property rights.⁷ Owners of the old technology, transnational corporation and policy makers have privatized the access to digital content using a combination of technological and contractual instruments.⁸ When both remedies work together any rights that a consumer may have under copyright law could be replaced by a unilaterally defined contractual term and condition.

The rapidly expanding and changing digital media landscape is even more complex because digital technology allows the combination of vari-

³ See Comm. on Intell. Prop. Rights and the Emerging Info. Infrastructure, National Research Council, *The Digital Dilemma: Intellectual Property in the Information Age*, at ix (2000) [hereinafter *Digital Dilemma*] (discussing the different threats to the intellectual property rules and practice produced by digital technology and describing as a “digital dilemma” the technical, legal, political, economic and sociological issues connected to the advent of digital information).

⁴ For a detailed taxonomy for digital media and their connected problems for regulation of traditional intellectual property regimes see Samuelson, *supra* note 2, at 324; *Id.*, *Digital Media and the Law*, 34 Comm. ACM 23 (1991).

⁵ See Samuelson, *supra* note 4, at 24. *Digital Dilemma*, *supra* note 3, at 32.

⁶ Jaques de Werra, *Access Control or Freedom of Access?*, in *Digital rights management: the end of collecting societies?* 111 (Christoph Beat Graber et al., eds.) (2005).

⁷ Intellectual property is a frequently used term without a particularly concrete definition. In general terms, the expression “intellectual property” can be considered to include anything coming from the working of the human brain: such as ideas, concepts, inventions, stories, songs, etc. However, there is a basic difference between intellectual property and intellectual property rights. See e.g., Ian J. Lloyd, *Information Technology Law* 304 (4th ed. 2004).

⁸ See de Werra, *supra* note 6, at 111.

ous forms of creative expression and promotes the creation of multimedia works combining images, sound, and text in an integrated whole.⁹ However, contrary to what has happened for other informatics goods, we do not have a prescriptive definition of digital media, even if there is some direct legislation to protect them.¹⁰ In particular, the protection offered to them is essentially a combination of the existing regimes of protection for other similar intellectual property works, with a legal framework resulting from a stratification of provisions, directly or indirectly connected to new technology products and digital rights.¹¹

Even so, the increased difficulties of maintaining a balance between the inherently contradictory interests of intellectual property rights-holders and the general public, have stimulated legislative and regulatory interventions at international and national level. In particular, if we look back to the last few years, we can perceive the necessity of a modernization of the traditional instruments for the protection of intellectual property rights, particularly in relation to the new technological scenes. This matter has been characterized by normative interventions in the information society area with special attention to the protection of intellectual works and, in this context, intellectual property rights exceptions and users' rights have become one of the most controversial aspect of intellectual property law.¹²

Basically, the purpose of this book is to analyze the destabilizing effects of the anti-circumvention provisions for technological protection measures and digital rights management systems enacted in the United States in the Digital Millennium Copyright Act (hereinafter: DMCA)¹³ and the similar provisions included in the European Directive 2001/29/EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the In-

⁹ See Irini A. Stamatoudi, *Copyright and Multimedia Products: A Comparative Analysis* 16-19 (2002).

¹⁰ See Olena Dmytrenko and James X. Dempsey, *Copyright & the Internet: Building national legislative frameworks based on international copyright law*, Global Internet Policy Initiative (GIPI) – 4 (Dec. 2004) available at <http://www.internetpolicy.net/practices/20041200copyright.pdf> (illustrating the most important international treaties on copyright and discussing key issues that nations should address in updating their laws to conform to the international framework).

¹¹ See Stamatoudi, *supra* note 9, at 5.

¹² Recently European Union Member States have been forced to modify their systems of exceptions so as to comply with the Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society. See *infra* ch. 2.2. On the point see also generally Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact*, 2005.

¹³ 17 U.S.C. § 1201 (2000).

formation Society (hereinafter: EUCD or European Copyright Directive).¹⁴ In detail, this book will reveal how current American, European and international laws compromise the consumer's capacity to exercise legitimate rights, such as the private use exemption¹⁵ and fair use exception¹⁶, by giving content owners extralegal protection for their works and expanding control over beyond the legal limits.¹⁷ Thus, the legal protection against circumvention of technological protection measures has surreptitiously produced a form of right of access and has designed a framework that rights owners utilize to control the management of content.¹⁸ Specifically, it happens by utilizing those means of protection against the digital piracy of creative material, developed to enable secure distribution and to impede illegal distribution of creative works over digital communication network.

Traditionally, intellectual property owners, have never held an unlimited control over the use of their works: in effect, copyright and related rights are a legal concept that contains several provisions that limit the monopoly control granted to right-holders. If these exclusive rights are transformed into a technological concept, courts no longer will be able to enforce these important limitations on intellectual property rights, and right-holders will be capable to use these extralegal protection measures to expand their control over content arbitrarily.¹⁹ This shift in power has significant implications because it implies an inappropriate delegation of governmental decision making to a non-governmental entity and a consequent privatization of the government's role of promotion of the arts and knowledge in the digital environment²⁰ encouraging, in the public interest, the open flow of information. In order to clarify these and other concerns, different objectives need to be accomplished. Especially, these issues will enable subsequent queries to be considered.

¹⁴ 2001 O.J. (L 167) 10.

¹⁵ The generally recognized exceptions in the EC are e.g.: private use, parody, quotation, use for teaching or scientific purposes and other exceptions for archives and libraries.

¹⁶ In the United States copyright system, it is the most important exception to the right-holder's rights. The fair use exception is codified at 17 U.S.C. § 107 (2000).

¹⁷ See Andrea Ottolia & Dan Welsch, *Mapping the Information Environment: Legal Aspects of Modularization and Digitization*, 6 Yale J. L. & Tech. 174 (2003).

¹⁸ See Matt Jackson, *Using Technology to Circumvent the Law: The DMCA's Push to Privatize Copyright*, 23 Hastings Comm. & Ent. L.J. 607, 608 (2001).

¹⁹ *Id.*

²⁰ See Shubha Ghosh, *Deprivatizing Copyright*, 54 Case W. Res. 387, 395 (2003).

How can intellectual property law operate to reward authors for their works, and to provide incentives for new creations, while not hindering freedom of expression and the free movement of information? How can intellectual property law promote access to culture and the free flow of ideas? How is it possible, in the new digital era, to reduce the number of violations of intellectual property rights and to balance the rights of holders and users? What are the new business models, the recent legal protections, and the technological measures used to deal with the use, distribution, and control of digital media? How can they work?

Some of these questions have yet to find reasonable answers. However, increased consciousness and worldwide debates about these new problems should assist in their solution.²¹ A clearer view of the ongoing legal and technological approaches could also emerge from a comparative analysis of the American and European patterns.²²

²¹ In the last few years there were several international conferences and workshops on these and connected subjects, ACM CCS, Workshop on Digital Rights Management (DRM); DRM 2005 (Washington D.C.); DRM 2004 (Washington D.C.); DRM 2003 (Washington D.C.); DRM 2002 (Washington D.C.); DRM 2001 (Philadelphia); Consumer Communications and Networking Conference (CCNC) 2005; Workshop on Digital Rights Management Impact on Consumer Communications (Las Vegas); Australasian Information Security Workshop (AISW) 2005: Digital Rights Management (Newcastle, Australia); University of Dortmund, Digital Rights Management Conference, 2005, 2002, 2000, (Berlin); International Open Digital Rights Language (ODRL) Workshop: 2005 (Lisbon), 2004 (Vienna); Berkeley Center for Law and Technology (BCLT): The Law and Technology of Digital Rights Management Conference: What Will DRM Technologies Mean for the Future of Information?, 2003 (Berkeley); World Wide Web Consortium (W3C): Workshop on Digital Rights Management, Institut National de Recherche en Informatique et en Automatique (Sophia Antipolis, France).

²² As some commentators have noted, most of the literature on the digital media is ethnocentric, that is, it refers only to the experience of a single country. It “is written in general terms, as though the model that prevailed in that country were universal.” In this framework, comparative analysis can have two functions: (1) concept formation and clarification and (2) evaluation of the role in causal inference. Comparative analysis is also “valuable in social investigation because it sensitizes us to variation and to similarity, and this can contribute powerfully to concept formation and to the refinement of our conceptual apparatus.” Furthermore, it has been underlined how, in media systems, there is a relation between countries with the most-developed media scholarship, including the United States, and countries with less developed traditions of media research. This relation results in a tendency to borrow the literature of other countries – usually the Anglo-American – and to treat that borrowed literature