CHAPTER

10

Internet Television and Copyright Licensing: Balancing Cents and Sensibility

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INTRODUCTION

In a speech delivered in October 2001 to the National Summit on Broadband Deployment in Washington, D.C., the Federal Communications Commission ("FCC") Chairman Michael K. Powell stated:

> Much of what is holding broadband content back is caused by copyright holders trying to protect their goods in a digitized environment (in other words, a perfect reproduction world). Stimulating content creation might involve a re-examination of the copyright laws. Arguably, VCRs would not be widely available today if Universal Studios had won its infringement case against Sony in 1984.[1]

[1]Michael K. Powell, Chairman, Federal Communications Commission, Remarks at the National Summit on Broadband Deployment, Washington, D.C. (Oct. 25, 2001).

Though the Chairman's remarks made no specific recommendations, a possible area for further consideration would be retransmission rights for local television signals that can be captured and re-sent over the Internet.

Internet television would entail a new distribution technology that could enable video content to be transmitted to personal computers or digital set top boxes that interface with the Internet protocols (a.k.a. TCP/IP). It would present greater opportunity for viewer interactivity, user editing, and the personalization of advertising. Internet distribution should not be expected at the outset to transform content greatly, although some niche programming and off-network distribution can reasonably be expected. As had been the case with terrestrial cable in the 1970s, emerging video applications that enhance the distribution of content may "jump start" the base of broadband users, and provide economic support for further investments in high-quality content. This could lead to more complete transformations of content and integration of technology and video product.

Digital and Internet technology can enable the following new capabilities:

Time-shifting: Users may view programs at more convenient times.[2]

Space-shifting: Users may view appealing content in more convenient locations, such as those enabled by wireless technology.[3]

Personalization: Providers may insert personalized ads and provide video material to users that are more tailored to individual tastes, as revealed by online behavior.[4]

Screening: Video providers may strip programs of content unsuitable for children, per the personalized instructions of the receiving home.

Transforming: Providers may "cut and paste" segments from different shows for edited viewing.

Multimedia: Providers may combine different works (e.g., video and music) for simultaneous presentation.[5]

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[2]*See* Roxio Software, *at* http://www.mgisoft.com/products/mgitv/ (last visited Jan. 24, 2002).

[3]*See* WC3 Synchronized Multimedia, *at* http://www.w3.org/AudioVideo/#Background (last visited Jan. 24, 2002) (explaining multimedia combination).

[4]*See* Net Perceptions, *at* http://www.personalization.com (last visited Jan. 24, 2002) (offering a website with commercial services).

[5]*See* WC3 Synchronized Multimedia, *at* http://www.w3.org/AudioVideo/#Background (last visited Jan. 24, 2002) (explaining multimedia combination).

Morphing: Characters and designs may be digitally transformed in creative manners that add new dimensions or ideas to the material.[6]

Archiving: Content may be archived on servers for subsequent viewing.

Repackaging: Content can be represented in different venues; e.g., a web site can combine programs from different sources that have a common theme.

Hyperlinking: Viewers can surf and skip from video content to related links about particular items in the program.[7]

User Communities and Chat Rooms: Users may establish cyberclubs regarding particular content items that most interest them.[8]

Not all broadcast television signals can present fair game for free takings by Internet retransmitters. Evidently, capture and retransmission present a potential danger to copyright owners in broadcast programming. For digital technology, secondary users may make and distribute near-perfect copies of broadcast material. Without proper copyright authorization, Internet technology could then distress program investments, and reduce financial incentives to provide or distribute new content.[9]

To expedite the copyright process, several Internet service providers (including America Online before its acquisition of Time Warner) unsuccessfully lobbied Congress in November, 1999 to grant rights for reuse of television signals, to be compensated via compulsory licensing.[10] If compulsory licensing were enacted, cyber-providers would be able to use, without direct owner authorization, copyrighted program material with

[6]*See* MIT Artificial Intelligence Laboratory, *at* http://www.ai.mit.edu/people/spraxlo/R/superModels.html (last visited Jan. 24, 2002) (illustrating morphing).

[7]*See* LinkBaton, *at* http://my.linkbaton.com (last visited Jan. 24, 2002).

[8]*See* InfoTreks, *Best Chat Room List, at* http://www.infotreks.com/chat.html (last visited Jan. 24, 2002).

[9]These dangers became headline news in February 2000, as a coalition of American television broadcasters successfully enjoined and negotiated the cessation of unauthorized retransmissions by iCraveTV, a Toronto-based Internet company that picked up and retransmitted signals from seventeen American television stations. *See* Dugie Standeford & John T. Aquino, *Internet Broadcasting; U.S. Studios Win Injunction Against iCraveTV*, Internet Newsletter, Feb. 2000, at 3.

[10]*See* Patricia Fusco, *AOL Lobbies for License to Carry Local TV Stations*, *at* http://www.internetnews.com/isp-news/article/0,,8_236121,00.html (last visited Jan. 28, 2002) (stating that statutory permission was to be introduced in the Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501, 1536).

statutory fees determined under the jurisdiction of the U.S. Copyright Office.[11] Internet video providers could then provide access to popular content without having to track down and negotiate deals with copyright owners. Congress held subsequent hearings in June 2000 on the matter.[12]

However, the hearing's subcommittee found that the information requirements for compulsory licensing of Internet retransmissions were inappropriate for the wide diversity of uses and geographic dispersal of the potential viewing community.[13] If compulsory licenses were designed to compensate for potential economic loss, it would be necessary to determine how many original viewers would be lost to a particular retransmission of a program to an Internet audience.[14] Displacement ratios can vary considerably among different applications and geographic regions. Furthermore, any administrative or statutory formula, once established, is likely to be inflexible as economic conditions change.[15]

Rather than mandate compulsory licenses, an alternative strategy would exempt certain limited uses of television programs broadcast over free radio spectrum. This could be made possible through voluntary agreement or, more arguably, by statute.[16] Following imperfectly the three-part fair use paradigm set out by Wendy Gordon,[17] exemptions may

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[11] *See* 17 U.S.C. § 801 (2000).

[12] *See Copyrighted Webcast Programming on the Internet*: *Hearing Before Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary*, 106th Cong. (2000), *available at* http://www.house.gov/judiciary/courts.html (last visited July 8, 2000).

[13] *See id*. at 30. The Committee explained: Our principal concern is the extent to which Internet transmissions of broadcast signals can be controlled geographically. The Internet is a worldwide system with the capability of transmitting, or retransmitting, copyrighted works to hundreds of millions of viewers within seconds. If a compulsory license were created for retransmission of local broadcast signals, it is unclear how the retransmission of those signals could be limited to their local markets. *Id.*

[14] *See Statement of the Register of Copyrights*: *Hearing Before the Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary*, 106th Cong. 47 (2000) (statement of Mary Beth Peters), *available at* http://www.house.gov/judiciary/courts.html (last visited July 8, 2000); *see also* U.S. Copyright Office, A Review of Copyright Licensing: Retransmission of Broadcast Signals 92-100 (1997), *available at* http://www.loc.gov/copyright/reports (last visited Jan. 24, 2002).

[15] *See* Stanley M. Besen et al., *Copyright Liability for Cable Television: Compulsory Licensing and the Coase Theorem*, 21 J.L. & Econ. 67, 68 (1978).

[16] We here take Wendy Gordon's point: "From the point of view of copyright owners …, a system that permitted certain limited uncompensated takings to occur, as long as they did not cause substantial injury, might be preferable to a system in which compensation was guaranteed but only after the fact." Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 Colum. L. Rev. 1600, 1623 (1982).

[17] *See id.* at 1614.

be reasonable when the transactions cost of licensing are high, an important public interest is served, and/or when the sale of advertising or programming is promoted.[18]

COPYRIGHT, FAIR USE, AND ECONOMIC HARM

Copyright is federally protected by the Copyright Act of 1976 ("Copyright Act"), which became fully effective on January 1, 1978.[19] Section 106 established five rights that relate to the protection of video entertainment: (1) the right to reproduce the work; (2) the right to prepare derivative works based on the original; (3) the right to distribute copies of the work; (4) the right to perform the work publicly; and (5) the right to publicly display the work.[20]

Section 107 of the Copyright Act[21] codified the preexisting judicial doctrine of "fair use," which is a "privilege in other than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent.…"[22] Statutory factors to be considered in determining whether the use of a work is "fair" include: (1) the purpose and character of the use (duplicative vs. transformative; commercial vs. non-profit); (2) the nature of the original work (rote vs. creative); (3) the amount and substantiality of the use (partial vs. complete copying); and (4) the effect of the use upon the potential market or value of the work.[23]

More often than not, courts are reluctant to uphold a "fair use" defense when original content is creative, copyright holders are directly harmed, and copying is duplicative, commercial and/or complete. Included in the measure of market harm are foregone direct sales and lost opportunities to license content to users in existing or potential markets.[24] These considerations should affect any balanced discussion on copyright exemptions for retransmitted programs.

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[18] *See id.* at 1601, 1618-21.

[19] 17 U.S.C. § 101 et seq. (2000).

[20] *See id.* § 106(1)–(5).

[21] *See id.* § 107.

[22] Rosemont Enter., Inc. v. Random House, Inc., 366 F.2d 303, 306 (2d. Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (quoting Horace Ball, The Law of Copyright and Literary Property 260 (1944)).

[23] *See* 17 U.S.C. § 107; *see also* Melville B. Nimmer, Cases and Materials on Copyright and Other Aspects of Entertainment Litigation § 13.05 (4th ed. 1991).

[24] *See* Harper & Row, Publ., Inc. v. Nation Enter., 471 U.S. 539, 568-69 (1985); Twin Peaks Prod., Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1377 (2d Cir. 1993); United Tel. Co. of Missouri v. Johnson Publ'g. Co., 855 F.2d 604, 610 (8th Cir. 1988); DC Comics, Inc. v. Reel Fantasy, Inc., 696 F.2d 24, 28 (2d Cir. 1982).

Once regarded to be most important, the fourth criterion provides an immediate opportunity for a segue into economic reasoning.[25] From an economic perspective, a reproduction or transmission of a work, now or in the future, may possibly displace or promote the direct sale of an original work, or interfere with the right of the owner to license its material. The economic importance of displacement and promotion is generally recognized in U.S. copyright law. For example, § 114 of the Copyright Act recognizes that certain digital audio transmissions of sound recordings may promote record sales, and therefore exempts from copyright protection performances on digital broadcast radio.[26] In a similar fashion, § 110 exempts performances of musical compositions that occur within the physical confines of record stores.[27] In negotiations regarding licensing fees for reproductions of musical compositions in digital media, the contending parties recognized that digital downloads may displace original CD sales, and adopted identical fees for licensing secondary reproductions in each.[28]

SIGNAL RETENTION

As a result of two Supreme Court decisions, unedited over-the-air television signals in the U.S. may now be captured and transmitted for reuse by local and distant cable operators, with no need to compensate original station broadcasters.[29] The Court determined that cable operators are not so much broadcasters that engage in public performances of copyrighted programs, as they are passive recipients of material broadcast by others.[30] The basic function of their equipment is little different from that owned by a television viewer.[31] Accordingly, cable operators, "like viewers and unlike broadcasters, do not perform the programs that they re-

[25] *See Harper & Row*, 471 U.S. at 569. The U.S. Supreme Court had characterized the market harm as "undoubtedly the single most important element of fair use." *Id* at 566. However, one subsequent Court decision explored the four together and not in isolation. *See* Campbell v. Acuff Rose Music, Inc., 510 U.S. 569, 576 (1994). This modification was made to consider the transformative nature of parody to a copyrighted song. *See id.* at 570.

[26] *See* 17 U.S.C. § 114(1); *see also* Agee v. Paramount Comm., Inc., 59 F.3d 317, 320 (2d Cir. 1995).

[27] *See* 17 U.S.C. § 110(7).

[28] The compulsory license is established for secondary uses only. *See id.* § 115(1). Songwriters and music publishers retain exclusive copyright for the first recording of a copyrighted work. *See* Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 64 Fed. Reg. 6221, 6226 (1999).

[29] *See* Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394 (1974); Fortnightly Corp. v. United Artists Tel., 392 U.S. 390 (1968).

[30] *See Teleprompter Corp.*, 415 U.S. at 409-10; *Fortnightly*, 392 U.S. at 400.

[31] *See Fortnightly,* 392 U.S. at 399.

ceive and carry."[32] Cable systems were found to extend the viewing area and enlarge audience size.[33]

Subsequent provisions by Congress and the FCC specified protections and compensations for owners of copyrighted content in the original programming.[34] First, cable redelivery of television signals to local audiences was largely exempted from any form of copyright payment.[35] In this instance, Congress recognized that original audiences of such signals are not displaced if their transmission medium is changed from television antenna to cable. For such signals, copyright owners are fully compensated for their works through program fees paid by the broadcaster that maintains an intact viewing audience.

Cable operators who import signals to serve distant audiences must make payment to copyright owners who claim that their works were the subject of secondary transmissions.[36] Copyright owners in retransmitted programs now include movie studios, sports leagues, news providers, religious broadcasters, Canadian stations, and music claimants.[37] Compensation is established through compulsory licenses that are revised from time to time through Copyright Office hearings.[38] Compensation through compulsory royalties is reasonably instituted here to offset revenues that owners might have earned had their content been directly purchased.[39]

Except for the smallest cable systems, licensing fees for distant retransmissions are based on a specified percentage of the subscription and the advertising revenues earned by the cable operator; the appropriate percentage to be paid depends on the number of imported distant sig-

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[32] *Id.* at 401.

[33] *See Teleprompter,* 415 U.S. at 412. The Court explained: By extending the range of viewability of a broadcast program, [cable] systems thus do not interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity or labor.… From the point of view of the copyright holders … the compensation a broadcaster will be willing to pay for the use of copyrighted material will be calculated on the basis of the size of the direct broadcast market augmented by the size of the [cable] market.

[34] *See* 17 U.S.C. § 111(d)(1)(B) (2000).

[35] *See id.* § 111(b)–(c).

[36] *See id.* § 111(d)(3).

[37] *See, e.g.*, Ascertainment of Controversy for the 1998 Cable Royalty Funds, 65 Fed. Reg. 54,077, 54,078 (2000).

[38] *See* 17 U.S.C. § 111(d)(4).

[39] This action was similar to Congressional activity in 1909 that bestowed the first compulsory licenses for the reproduction of sheet music on piano rolls. Congress instituted in the 1909 Copyright Act a compulsory mechanical license for unauthorized reproductions of published sheet music on pianola rolls, which had earlier been cleared of infringement by a 1908 Supreme Court decision that found that the musical compositions on pianola rolls were not directly perceptible in the perforations themselves. *See* White-Smith Pub. Co. v. Apollo Co., 209 U.S. 1 (1908).

nals.[40] The pool of collected monies is paid to competing rights holders based on administrative rules that attempt to determine the relative worth of works.[41]

The FCC has more directly protected distant imports of programs from television networks and producers of syndicated content. It now proscribes distant imports that directly duplicate existing network or syndicated fare that are otherwise available through local broadcasters.[42] If permitted, retransmission would not only deny a licensing opportunity to program owners, but also harm the ratings and advertising revenues of local stations, which may otherwise have attracted the same viewers.

The general paradigm for cable retransmission may have reasonable applicability to the Internet regime. First, Internet retransmissions that largely preserve or enhance viewing audiences can be made exempt from copyright licensing and payments. Second, unlicensed retransmissions that may duplicate programs and displace viewers may pose considerable dangers to the broadcast model, and may require their complete proscription.

MARKET FAILURE AND THE PUBLIC GOOD

Besides the possibility of market harm regarding the loss of unit sales and licensing revenues, we must consider two additional economic factors in the discussion.[43] First, because the transaction costs of licensing are economically prohibitive, certain limited uses of copyrighted material might be made freely transferable.

An economic justification for depriving a copyright owner of his market entitlement exists only when the possibility of consensual bargain has broken down in some way. Only where the desired transfer of resource use is unlikely to take place spontaneously, or where special circumstances such as market flaws impair the market's ordinary ability to serve as a measure of how resources should be allocated, is there an economic need for allowing nonconsensual transfer.[44]

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[40]*See* 17 U.S.C. § 111(d)(1)(B).

[41]*See id.* (d)(1)(D)(4).

[42]Respective FCC rules regarding cable network non-duplication, syndicated exclusivity, and local sports blackout now appear at 47 C.F.R. § 76.92 (2001), 47 C.F.R. § 76.151 (2001), and 47 C.F.R. § 76.67 (2001). In implementing the Satellite Home Viewer Improvement Act, Congress directed the FCC to extend these rules appropriately to the satellite market. *See* 47 U.S.C. § 339(b)(1)(B) (Supp. I 2001). The FCC, on November 2, 2000, released a new Report and Order in this regard. *See In re Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions of Broadcast Signals*, 15 F.C.C.R. 21 (Nov. 2, 2000).

[43]*See* Gordon, *supra* note 16, at 1614.

[44]*Id.* at 1615.

As a second related matter, copyright exemption of certain material is reasonable if the uncompensated transfer provides a social gain.

If market failure is present, the court should determine if the use is more valuable in the defendant's hands or in the hands of the copyright owner.... [F]air use is often found where defendant's use of the work is noncommercial and yields "external benefits," that is, benefits to society that go uncompensated. In the presence of such market failure, the price that the defendant user would offer for use of the work will often understate the real social value of his use. The courts in fair use cases frequently make intuitive estimates of social value.[45]

TRANSACTIONS COSTS

Digital technology allows users to transform and combine broadcast material into new presentations. Combined applications may include the sequencing of two or more video clips, the simultaneous presentation of two copyrighted works (e.g., video and music), or the morphing of characters through digital techniques. Transformation can sometimes occur in an open source base of users who may make sequential adaptations of a work.[46] Licensing requirements in a number of these applications appear highly idiosyncratic to the specific needs of the presentation at hand.

Historically, licensing agencies confined themselves to individual and period-specific applications related to a single work, or a body of related works. For example, the American Society of Authors, Composers, and Publishers has licensed the right to make public performances of musical works in its catalog.[47] The Copyright Clearance Center has licensed the right to make photocopies of copyrighted texts,[48] and the Media Image Resource Alliance has licensed rights for photographs.[49] In the devolution of licensing contracts, businesses and public non-profit organizations (e.g., schools, libraries, religious organizations) were free to negotiate and contract for the right to use copyrighted material. These licenses were often blanket arrangements that allowed unconditional use of a work for a specified period of time.

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[45]*Id.* at 1615–16.

[46]For a good collection of articles on the open source movement, see O'Reilly & Assoc., *at* http://www.oreilly.com/catalog/opensources/book/toc.html (last visited Jan. 24, 2002).

[47]*See* American Society of Composers, Authors and Publishers, *at* http://www.ascap.com (last visited Jan. 24, 2002).

[48]*See* Copyright Clearance Center, Inc., *at* http://www.copyright.com (last visited Jan. 24, 2002).

[49]*See* Media Image Resource Alliance, *at* http://www.mira.com (last visited Jan. 24, 2002) (warehousing stock photos).

It is not clear what kind of administrative domain will prevail for content used in multimedia or combinatorial presentations, where licensees will face the need to contract for the simultaneous use of a number of different works. For large and frequent users in businesses and non-profit public institutions, adaptive licensing mechanisms can be expected to result from the continued efforts and negotiations of related parties determined to spend the time necessary to make the system happen. Here, a constellation of rights organizations will evolve, including consortia, subscription agents, copyright collectives, rights clearance centers, and "one-stop shops."[50] These evolving institutions in intellectual property are the proper focus of the "new institutional economics," which suggests that facilitating market arrangements evolve as the clear need for them becomes recognized.[51]

For small uses, such as noncommercial applications by private associations of citizens, particular uses of copyrighted works may be repeated once or a small number of times. Per use licensing can be expected. It is not clear whether negotiations are practical, whether institutions will evolve, or whether the resulting licensing structure will be adaptive or efficient for such small uses. Transaction costs may be prohibitive to any small user if the appropriate licensing cannot be efficiently provided.[52]

Accordingly, if licensing were required for small uses, the associated costs might dissuade most efforts entirely. In the first place, a number of small users do not earn revenues for the content creators. Moreover, if the content involves multiple participants who simultaneously or sequentially edit works, the team would face the considerable task of assigning the licensing costs to all contributing participants.

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[50]University consortia are teams of libraries that negotiate collectively on behalf of a group of individual members. Subscribing agents are commercial agents who negotiate usage contracts on behalf of one or many licensees. Copyright collectives negotiate contracts on behalf of their rights holders, such as in photo-reproduction or musical performances. Rights clearance centers grant licenses based on individual terms specified by the owner. "One-stop-shops" are a coalition of separate collective management organizations, which offer a centralized source for a number of related rights, such as photos and music, that would be particularly useful in multimedia production. *See* World Intellectual Property Organization, *at* http://www.wipo.org/aboutip/en/about_collective_mngt.html (last visited Jan. 24, 2001)

[51]*See* Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 Cal. L. Rev. 1293, 1294 (1996).

[52]Transactions costs include drafting, negotiating, performance safeguarding, renegotiation, monitoring, and enforcement. *See* Oliver E. Williamson, The Economic Institutions of Capitalism 20–22 (Free Press 1985).

THE PUBLIC GOOD

In awarding radio spectrum to television broadcasters, the government freely bestowed a substantial public asset that has considerably benefited stations, program producers, and advertisers.[53] The justification for such free takings, if any, lay in the capacity for broadcasters to disseminate vital public information, such as news, and provide hours of public interest programming.

Enhanced by personalization and user interactivity, Internet video may eventually enable, in both the U.S. and the world, a wider domain of news, historical, and cultural presentations. This may lead to (1) a wider "community of memory" with heightened historical awareness of important individuals and events;[54] (2) a "shared language" of words and images[55] that transcend all present modes of communication; (3) a heightened awareness of cultural diversity in an evolving communications network;[56] and (4) a character more capable of, and attentive to, actively engaging in the production and transformation of culture.[57] With an eye to provide and disperse information to the citizenry at large, Internet video may serve a considerable role in reaffirming public values, educating the citizenry, and informing healthy public debate.

In facilitating the dispersal of public information, Internet video may present common benefits that all citizens may share, and evidently has aspects of a non-excludable public good. From an economic perspective, free markets may underprovide such public goods as each consumer fails to internalize the gains that others may enjoy as the result of his activity. Collective action is often justified to correct for market failure when goods are public.

The need here for collective action would ideally implicate a social contract negotiated between the public representative (the government) and the private parties that participate in broadcasting and program production. Imagine a starting regime where competing television stations paid for radio spectrum in order to provide an audience base for their respective advertisers. In exchange for free access to the same radio spectrum, television broadcasters and content owners would agree

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[53] *See* R. H. Coase, *The Federal Communications Commission*, 2 J.L. & Econ. 1 (1959).

[54] *See* Robert Neelly Bellah et al., Habits of the Heart 152-54 (Univ. of Cal. Press 1985).

[55] *See* Gerald Dworkin, *Moral Autonomy*, *in* Morals Science and Sociality, 156-61 (H. Tristam Engelhardt, Jr. & Daniel Callahan eds., 1978).

[56] *See* Richard B. Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 Yale L.J. 1537, 1568-81 (1983).

[57] *See* William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 Harv. L. Rev. 1661, 1768 (1988).

to exempt from copyright fees those retransmissions of their programs that serve a clear public purpose. For their part, retransmitters would agree to cede copyright exemptions if broadcasters could demonstrate that viewers of original programming were displaced. If this hypothetical resolution can be envisioned to appeal to all parties, the benefits of ex post collective action, and a mutually accommodative social contract, could be established.[58]

FIRST ROUND EXAMPLES

Below is a list of four possible examples of how over-the-air signals that may reasonably be re-used are exempt from copyright law. These arrangements can be facilitated through voluntary negotiation or, more arguably, statute. They should not be taken as policy recommendations by this author. Rather, each example illustrates a preceding conceptual point from the text above, and is intended to stimulate thought and discussion.

Video Clips

For non-commercial uses by online associations of private citizens, short video segments clipped from over-the-air broadcast programs might reasonably be exempted from copyright protection. For example, sports fans may assemble short clips of their favorite athletes, entertainment fans may be similarly attracted to their favorite performing artist, and study groups may use excerpts from religious or historical programs. To enable multimedia presentation, video clips might be sequenced, modified with new background music, or video "morphed."

With rights to make limited reuse of broadcast material, online communities of Internet users may combine and reformat material in an ongoing manner. The resulting video product may evolve from an open-source process that greatly enhances the democratic culture of the Internet, and draws on the creativity of its participants. Internet video will open content to new influences, expose people to new material, and greatly stimulate human thought and interaction.

Were the free reuse of video clips allowed for short applications, copyright owners could actually benefit from the process in a number of ways. Generally, a video clip of a program is not an appropriate substitute for the entire program from which it was derived. Non-commercial clipping would therefore not displace program audiences, and may actually advertise the show to new viewers previously unaware of its appeal.

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[58] *See id.* at 1727.

Furthermore, a number of protective rules would be established in order to ensure that viewership of the underlying content is promoted.[59] Clips would need to list the details of the original show in order to promote viewership; required data would reasonably include name, local station/network and viewing time of the original series. Takings in a secondary presentation could reasonably be limited in duration, number, and a determined period of time after the broadcast in which they may be used.

Finally, content owners would retain the exclusive right to offer material for commercial and public, non-profit uses. Commercial providers, schools, and libraries can draw on popular fare to create more material, which can be expected to increase the licensing revenues that they pay. Viewers to fan club websites would presumably be more inspired to hyperlink to commercial sites, to the benefit of the performer, the original programmer, and possible advertisers. These hyperlinks would increase traffic and commerce at no additional cost to the business.

News Archiving

The presentation of archived news broadcasts to the population-at-large would disperse important knowledge, increase historical awareness, and enhance voter-based democracy. After a delay of a few days from an original broadcast of a news event, it may be reasonable to permit free retransmissions that may be edited, archived, and reformatted. With rights to re-use news, packagers can enhance original content with related material and/or hyperlinks to other web sites. Independent commentators could then provide video with their own analysis. Key gains for a democratic citizenry may appear in greater depth or diversity of opinions and the historical presentations that a broadcast newsroom would not provide. Commercial applications here may be desirable, in order to provide universities, institutions, and educated publications with the monetary incentives to elevate the medium beyond present levels.

From the vantage of audiences, broadcast news is time-sensitive. Therefore, it is unlikely that viewers will substitute between a current, same-day news story and an archived version of the same news event shown a few days later. If archiving were permitted, repackagers may remove original advertisements, but must credit all original network sources for borrowed material in order to promote the original program. To limit takings to just news clips, subsequent talk analysis, either by anchormen or specialized talk programs, would not be eligible for

[59]The rules here should resemble existing statutory provisions now designed to ensure that compulsory licenses for non-interactive streams of sound recordings will establish protections that promote their sale. *See* 17 U.S.C. § 114(d)(2)(C) (2000).

free retransmission unless they were made the object of parody or direct criticism.[60]

Local Time-Shifting

Since the Supreme Court's decision in Sony Corp. v. Universal City Studios, Inc.,[61] owners of videocassette recorders (VCRs) have had the right to capture television broadcasts for noncommercial use. While broadcast programs had advertising embedded in the original presentation, users had the manual capability to fast forward and bypass commercial messages. The importance of the matter now is greatly heightened, as new digital personalized video recorders (PVRs) are now available that provide automatic capabilities for bypassing commercials and distributing stripped programs over the Internet.[62]

The broadcasting industry could compete against ad-skipping and digital distribution by facilitating Internet-based retransmissions to provide time-shifting of local broadcast programs. Like cable retransmissions, time-shifting of local broadcast programming might qualify for a copyright exemption, provided existing advertisements are not displaced. The size of the viewing audience should be monitored and reported to the original station for the purposes of supporting its advertising ratings. To protect viewership of seasonal and syndicated reruns, retransmissions must be streamed (or downloaded with digital rights management for one protected viewing) and limited to a short subsequent period, such as one week, after the time of the original broadcast.

Internet-based, time-shifting services would offer consumers and broadcasters four key gains. First, with the requirement that commercials be preserved and audience size reported, television stations and programmers may find that Internet-based, time-shifting supports their advertising model better than PVRs or VCRs, which have neither obligation. Second, consumers may save space and avoid the costs of purchasing new equipment. Third, viewers can pay for time-shifting services on a subscription, or a per

[60]Campbell v. Acuff Rose Music, Inc., 510 U.S. 569, 575-76 (1994) (stating the rationale for exempting criticism and parody for copyright protection).

[61]464 U.S. 417 (1984).

[62]In November 2001, Sonicblue launched the ReplayTV 4000 digital video recorder, which will allow users to record programs onto a hard drive and pause live television. Moreover, consumers can skip commercials during playback and distribute programs to other ReplayTV 4000 owners via the Internet. On Oct. 31, ABC, CBS, NBC and their parent companies filed suit, alleging that the device allows consumers to make and distribute copyrighted programs without permission. The suit argues that such devices deprive the networks of revenue and reduce their incentive to produce new shows. *See* News.com, *Sonicblue to Launch DVR, Despite Suit*, *at* http://news.cnet.com/news/0-1006-200-8005769.html (Nov. 28, 2001).

unit basis, that allows greater flexibility in usage; downloads for more extended viewing can be made available for an additional payment. Finally, users will not have to preprogram the service; people may then have the opportunity to retrieve shows they may have forgotten or overlooked.

To protect against duplicate programming, signals could not be retransmitted beyond the local viewing region. Users would be required to enter zip codes, which would be checked against geographic information located on servers at the point-of-presence, where the Internet transport system interconnects with the local telephone exchange. Regionalization of signals can now be enforced with edge control agents that reside on peripheral servers and enable transaction validation, media encryption, and forensic embedding needed for accurate identification.[63]

Accurate audience measurement is also essential. MeasureCast's Streaming Audience Measurement Service now deploys software residing on a broadcaster's server and records its exact number of visits.[64] Data can be paired with demographic information that can be detailed from customer panel surveys. This is preferred to server log-file analysis, where data on servers can be manipulated by any party with access to the file, and where user reports can take up to three months to prepare.[65]

Distant Program Imports

Like cable, Internet retransmitters might disseminate local television signals to distant audiences which otherwise might not be able to receive the program. Even without payment, the commercial gains to the original broadcasters here can be considerable. In a path-breaking business model, Ted Turner sold ad space during TV shows appearing on his local Atlanta station, WTBS, to national advertisers, who were willing to pay considerable amounts of money to reach the wider audience that distant retransmission enabled. After enjoying the benefits of free promotion of his advertisers for nearly twenty years, Turner further profited by converting his popular superstation channel to a cable channel in a sale to Time Warner.

In light of the Supreme Court's decisions in Teleprompter[66] and Fortnightly,[67] we can reasonably expect that Internet providers will be allowed to retransmit over-the-air television signals to distant broadcast regions without paying the original broadcaster. The issue remains whether pro-

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[63] *See* Vidius, *A Service for the Control, Audit, and Protection of Online Media*, *at* http://www.vidius.com (last visited Dec. 7, 2000).

[64] *See* Measurecast, *An Analysis of Streaming Audience Measurement Methods*, *at* http://www.measurecast.com/docs/Audience_Measurement_Methods.pdf (last visited Oct. 22, 2000).

[65] *See id*.

[66] Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394 (1974).

[67] Fortnightly Corp. v. United Artists Tel., 392 U.S. 390 (1968).

gram producers will demand payment for re-use of copyrighted programs. While it is not appropriate to compel owners to give away material for distant imports, some producers might actually choose to grant retransmission authority for selected programs at considerably reduced, or even zero, rates. This is because retransmitters may have the capability to make localized and personalized measurements of audience tastes and characteristics, thereby providing an efficient means of establishing potential audience size in new markets for sales of programs to local cable operations.

CONCLUSION

As more information is learned, initial categorizations may prove erroneous, and the borders that delineate rights and exemptions can then be suitably modified. Reversing Robert Merges' suggestion that exemptions be established after allowing markets some time to take shape, we then establish exemptions to "jump start" the process, but reserve the right to modify or vacate certain allowances if harm can later be demonstrated.[68]

Such a procedure would evidently be incrementalist and experimentalist: restricting considerations, limiting classifications, forsaking quantification, leaving options open, and allowing more information to come to the table in the end. A policy process that moves by incrementally changing specific rules is often preferable to wider hearings and rulemakings that may overtax available administrative channels for gathering information and judging outcomes. Forsaking quantitative measurement and a fully comprehensive menu of choices, we learn which outcomes provide satisfactory short-run results by purposely restricting decisions and limiting the necessary amounts of information. The resulting process is more procedurally, rather than economically, rational but can be sometimes compared favorably with policy that aims for a purported welfare-maximizing optimum.[69] Generally, such incrementalism is particularly applicable to policy-making in the open-ended world of digital technology and its ability to provide significant transformations of copyrighted content.

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[68] *See generally* Robert P. Merges, *Intellectual Property and Costs of Commercial Exchange: A Review Essay*, 93 Mich. L. Rev. 1570 (1995).

[69] *See generally* C. E. Lindblom, *The Science of Muddling Through*, 19 Pub. Admin. Rev. 79 (1959). Lindblom compares *incrementalism* favorably with *rational comprehensive* policy that is elegant but often impractical; rational comprehensive policy tries to consider and weigh all factors, gather all relevant information, measure all relevant quantities, and willingly jump to extreme positions as logically justified. *See id.*