

Digital TV, Copy Control, and Public Policy

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The premise of this symposium is that, in the age of the Internet, copyright and communications law have converged – that one cannot think about one without the other. And so they have. Not too long ago, copyright lawyers and communications lawyers saw one another only rarely. Copyright lawyers concerned themselves with private law, and communications lawyers with public. Copyright lawyers were, somewhat romantically, involved with authors and deal-making; communications lawyers roamed the cold corridors of the Federal Communications Commission (FCC). Communications lawyers were taught to look to the first amendment as their ultimate restraint and policy guide;¹ copyright lawyers lived in a first-amendment-free zone.²

Back then, there was no such thing as an “Internet lawyer.” When the need for such a being arose, copyright and communications lawyers both volunteered with alacrity. The ranks of those trying to understand Internet law and regulation, and to guide clients through its mazes, came to include folks with backgrounds in both fields. Their perspectives were different: Copyright lawyers (it seems to this non-copyright lawyer) tend to view Internet law from a copyright-centric perspective, consciously or unconsciously setting up the vindication of the exclusive rights held by publishers as the foundation of all Internet regulation.³ Communications lawyers, by contrast, are

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¹ See, e.g., *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994).

² See Jessica Litman, *Reforming Information Law in Copyright's Image*, 22 *Dayton L. Rev.* 587 (1997); see also, e.g., Brett McDonnell & Eugene Volokh, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 *Yale L. J.* 2431 (1998).

³ See Litman, *supra* note 2.

public lawyers focusing on government and, more generally, governance. Yet to an increasing extent, both have come to see that, when they wear their “Internet lawyer” hats, they are engaged in public policy. Specifically, they are engaged in information policy: They are working out the rules for what information can be communicated over the Internet, to whom, and on what terms, and what bodies are to be empowered to restrict or condition that movement. To that extent, to the surprise of lawyers in both camps, they are in the same field.

And yet there is another story to tell. After all, it is hardly a new thing for communications-law policymakers to recognize copyright concerns. Communications policymakers first took copyright into account, and constructed copyright substitutes when true copyright protection was unavailable, decades ago. They recognized, long before the Internet, that copyright’s restrictions on copying and dissemination of speech were public policy, and indeed public policy within their sphere. Similarly, it was decades ago that copyright owners first sought to use the tools of communications law to advance their interests. Along the same lines, the anti-circumvention provisions of the Digital Millennium Copyright Act have their roots in the communications-law techniques that HBO used to protect its scrambled satellite feed in the mid-1980s. In that sense, both copyright lawyers and FCC regulators have been doing information policy all along.

I argue in this paper that, in a recent proceeding, FCC policymakers lost sight of the historical relationship between copyright and communications law. In a rulemaking last year on cable distribution of digital television programming,⁴ the FCC declined to recognize that restrictions on consumer copying of broadcast programming pose an information policy issue within its area of concern. It thus failed to come to grips with the public-policy issue that the rulemaking presented.

⁴ Commercial Availability of Navigation Devices, 15 F.C.C.Rcd. 18199 (2000).

In Part One of this paper, I will very briefly describe some of the FCC's involvement with copyright and related concerns in its regulation of cable and satellite-delivered television. In Part Two, I will explain some of the changes in the world of copy control that have taken place since the time of the FCC's initial involvement. And in Part III, I will discuss the FCC's treatment of copy control issues in last year's digital television rulemaking.

I. COPYRIGHT AND COMMUNICATIONS REGULATION

The FCC first took serious notice of copyright in the late 1960s. Cable was getting off the ground in significant part through the carriage of broadcast signals imported from other markets. Opponents of the new medium – broadcasters, unhappy with what they deemed unfair competition, and program production studios, urging that cable retransmission deprived them of control and compensation – developed a two-prong attack. First, broadcasters pressed the FCC to clamp down on this distant-signal retransmission, and the agency did so: it forbade new cable systems to carry distant signals except pursuant to FCC approval or waiver.⁵ Second, a Hollywood studio filed suit against the cable companies, claiming that cable retransmission of

⁵ The Commission's rule barred cable systems in the 100 largest television markets (containing 90% of all television households) from carrying any non-local broadcast signal, unless the Commission found after hearing that such carriage "would be consistent with the public interest," particularly "the establishment and healthy maintenance of television broadcast service in the area." *CATV*, 2 F.C.C.2d 725, 782 (1966); see also *United States v. Southwestern Cable Co.*, 392 U.S. 157, 166-67 (1968). The Commission grandfathered the continued carriage of certain distant signals, 2 F.C.C.2d at 784-85. The hearing process was "unworkable," and provided no relief to cable systems; the agency did, though, grant over a hundred waivers of the requirement in small markets. See *Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television*, 71 F.C.C.2d 632, 650 & n.48 (1979) [hereafter, *Economic Inquiry Report*].

broadcast signals was copyright infringement.⁶ When the Supreme Court found no copyright violation,⁷ the broadcasters returned to the FCC. This time, the agency gave them what they wanted. The Commission would no longer seek to establish, on a case-by-case basis, whether a cable system's distant-signal retransmission would serve the public interest. Instead, it promulgated a new rule under which a cable system operating within 35 miles of a top-100 market could carry commercial distant signals if, and only if, it had the permission – the “retransmission consent” – of the originating station, on a program-by-program basis.⁸

What motivated this shift? Part of the answer lay in the fact that the hearing process was simply not working well. But another part related to the broadcasters' and studios' copyright-based arguments. As the agency later explained, the phrase “unfair competition” had come to be attached in its deliberations to “a set of issues which sounded principally in copyright but to some extent in less well defined notions that it was inequitable for CATV and commercial broadcasting to compete freely when the former did not pay for the programming it re-transmitted.”⁹ The proposal for retransmission consent was “intended to rectify the ‘unfair competition,’” pending “passage of legislation bringing CATV within the copyright laws.”¹⁰ It was “a kind of jerry-built substitute” for the copyright decision the Supreme Court had declined to

⁶ United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177 (S.D.N.Y. 1966), aff'd, 377 F.2d 872 (2d. Cir. 1967), rev'd, 392 U.S. 390 (1968).

⁷ The Court held that cable retransmission did not “perform” a work within the meaning of the 1909 Copyright Act. Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 395-401 (1968).

⁸ CATV, 15 F.C.C.2d 417 (1968); see also Cable Television Report and Order, 36 FCC 2d 143, 148-50, 153 (1972).

⁹ Economic Inquiry Report, supra note 5, at 651.

¹⁰ Id.

hand down.¹¹ Indeed, cable interests later protested that the FCC's action usurped Congress's power to make copyright legislation, because the consent requirement operated "as though a change had been made in the copyright laws."¹²

Of course, that wasn't the end of it. The FCC rulemaking process continued;¹³ at the same time, there were arduous negotiations among broadcasters, cable operators, and program producers over the text of new copyright and communications-law provisions.¹⁴ By 1972, the private and governmental parties reached a deal, which they called the "Consensus Agreement," involving both new copyright legislation and a new, FCC-administered, regulatory structure called "syndicated exclusivity." Syndicated exclusivity, which was repealed in 1980 and reinstated in 1988,¹⁵ was designed to allow suppliers of syndicated programming to sell exclusive rights to a single broadcast station in a given market, without worrying that a cable system in the same market would import a signal including the programming.¹⁶ The FCC, in enacting the new rules, emphasized that without syndicated exclusivity, distant-signal importation would jeopardize "the continued supply of television programming . . . fundamental to the continued functioning of broadcast and cable television alike."¹⁷

¹¹ Broadcasting, Dec. 23, 1968, at 18 (quoted in Jonathan Weinberg, *Broadcasting and the Administrative Process in Japan and the United States*, 39 *Buff. L. Rev.* 615, 696 (1991)).

¹² Cable Television Report and Order, 36 FCC 2d 143, 153 (1972).

¹³ See *id.* at 143-89.

¹⁴ See Jessica Litman, *Copyright Legislation and Technical Change*, 68 *Or. L. Rev.* 275, 330 (1989).

¹⁵ See *Program Exclusivity in the Cable and Broadcast Industries*, 3 F.C.C.Rcd. 5299 (1988), *rev. denied sub nom. United Video v. FCC*, 890 F.2d 1173 (1989); 47 C.F.R. § 76.101.

¹⁶ Cable Television Report and Order, 36 FCC 2d 143 (1972).

¹⁷ *Id.* at 169.

Commissioner Nicholas Johnson dissented. He agreed that copyright holders should be compensated for the use of their products by cable systems.¹⁸ Yet regulations implementing that right, Johnson wrote, need not take the form of exclusivity. They could instead simply require the automatic payment of fees to the copyright holders – although, he added, “I am not convinced that the FCC is the appropriate forum in which such decisions should be made.”¹⁹ FCC Chairman Dean Burch answered that no such compulsory license was politically feasible. Rather, the exclusivity provision – protecting the copyright owner’s rights to control its product and thus its continued ability to produce programming – was at the core of any politically achievable solution.²⁰

The FCC, in short, was no stranger to copyright policy thirty years ago. It recognized that, in making its own brand of information policy for cable television (deciding what information could be communicated over cable, to whom, and on what terms, and what bodies were to be empowered to restrict or condition that movement), it could not ignore copyright owners’ interests in stopping others from reproducing and performing their works without their permission. Quite the contrary: at the core of its agenda was the question to what degree the FCC regulatory structure would promote, or devalue, those interests.

The FCC addressed copyright holders’ interests in a different way, advancing the interest of programmers in “recover[ing] compensation from all those who view their copyrighted product,” in the context of satellite TV signal scrambling.²¹ Initially, cable-television programming providers

¹⁸ Id. at – (Johnson, Comm’r, concurring in part and dissenting in part).

¹⁹ Id.

²⁰ Id. at – (concurring statement of Chairman Burch).

²¹ Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas, 3 F.C.C.Red. 1202, 1204 (1988).

such as HBO had transmitted their signal to cable headends, via satellite, in the clear – any consumer who invested in a home satellite dish could pull in the signal for free. Cable programmers began investigating the possibility of scrambling those signals and in 1984, Congress amended 47 U.S.C. § 605 to make clear that the willful, unauthorized reception and descrambling of such a scrambled signal was a federal crime.²² HBO began scrambling its signal in January 1986.

The FCC applauded the criminalization of unauthorized descrambling. “Property rights in goods and services sold,” it urged, “are an important prerequisite for markets to function well.”²³ Scrambling, by allowing copyright owners to recover compensation from all viewers, promoted both efficiency and equity, and thus served the public interest.²⁴ Unauthorized reception of scrambled programming – a “deplorable and serious” matter – would threaten the very viability of satellite television distribution;²⁵ the Commission recommended that Congress consider beefing up its criminal penalties.²⁶

²² Pub. L. No. 98-549, §§ 5(a), 6(a), 98 Stat. 2802, 2804 (1984). Indeed, the statute continued, even the reception of an *unscrambled* signal was a crime if there was “a marketing system . . . established under which an agent or agents have been lawfully designated for the purpose of authorizing private viewing by individuals,” and the viewer had not received that authorization. See 47 U.S.C. s. 705(b)(2).

²³ Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas, 3 F.C.C.Rcd. 1202, 1204 (1988).

²⁴ Id.

²⁵ Id. at 1206.

²⁶ Id. at 1210. As the DBS industry evolved, the FCC continued to grapple with copyright issues. The Satellite Home Viewer Act of 1988 created a sharply limited copyright license for the transmission of television-station signals via direct broadcast satellite; increased the penalties for consumers’ decoding scrambled programming without authorization; and called upon the FCC to think about imposing syndicated exclusivity rules on satellite transmission. Satellite Home Viewer Act, 102 Stat. 3935, 3949 (1988), 100 Pub. L. 667 §§ 201-07, codified at, inter alia, 17 U.S.C. § 119 & 47 U.S.C. §§ 605 & 612. Over time, it became plain that the narrowness of the copyright license was the factor most sharply limiting satellite TV’s development. Under the 1988 Act, a satellite carrier had a copyright license to distribute network television signals only in the rare situation where the subscriber lived outside the “Grade B” contour of any broadcaster affiliated with that network (and, moreover, had, at least ninety days before, terminated his subscription to any cable system carrying the network’s signal). Id. at § 202 (creating new 127 U.S.C. § 119(a)). This sharply decreased the attractiveness of satellite TV, because it meant that the vast majority of prospective subscribers were legally barred from receiving their most-viewed channels over the satellite; they had could receive all but three of their television

In crucial respect, it's worth noting, the satellite scrambling issue was not a *copyright* problem at all. Nobody asserted that consumers, in decrypting a scrambled signal, were violating the copyright laws; plainly, they were not.²⁷ The programmers' complaint was not that consumers were copying, or publically performing, works to which they already had lawful access. Rather, it was that they were gaining access to the programming in the first instance without the owner's authorization – something the FCC described as simple theft of services (or, adopting the word that the cable industry had come to use, “piracy”).²⁸ Indeed, the scrambling imposed no limitations on the ability of viewers with legal descramblers (and authorized access) to make as many copies as they wanted of the programs.

This distinction between access and copying is a useful one. Access relates to a consumer's initial access to a work; copying relates to his ability to copy, or otherwise to manipulate, a work to which he already has lawful access. The problem the FCC addressed in

channels from the satellite, but had to switch to a rooftop antenna to receive the rest.

The DBS industry, to considerable extent, ignored the limitations placed on it by the copyright law, and signed up subscribers without regard to their legal eligibility. See, e.g., *ABC, Inc. v. Primetime 24 Joint Venture*, 17 F.Supp.2d 467 (M.C.N.C. 1998) (satellite carrier responded to statutory requirement that it not offer network signals to any person residing within the Grade B contour of a network station by informing prospective subscribers that in order to receive service, they must answer “No” to the question whether they could receive an acceptable over-the-air picture from the station, and transcribing their duly proffered responses), *aff'd* in relevant part, 184 F.3d 348 (4th Cir. 1999). When copyright holders sued, and federal courts issued injunctions under which millions of Americans would lose their satellite service, see, e.g., *id.*; *CBS, Inc. v. PrimeTime 24*, 9 F.Supp.2d 1333 (S.D. Fla. 1998), the matter was dumped back before the FCC. That agency, while considering its hands largely tied, recommended to Congress that it consider a variety of changes to the copyright statute. *Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act*, 14 FCC Rcd 2654, 2697-99 (1999). Congress incorporated part of that recommendation into legislation enacted later that year. *Satellite Home Viewer Improvement Act of 1999*, Pub. L. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545.

²⁷ It would have been copyright infringement – an unauthorized “public performance” – for such a consumer to play the decrypted programming in a public place – say, a large restaurant. But the fact of the decryption was irrelevant to that cause of action; it was equally copyright infringement for a paid-up, authorized subscriber to play the programming in such a place. See 47 U.S.C. § 101.

²⁸ *Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas*, 3 F.C.C.Rcd. 1202, 1205 (1988).

connection with signal scrambling, thus, was an access issue. In the days before pay broadcast and cable – that is, before the 1980s – access control wasn't much of an issue for content owners. Copyrighted works were typically embodied in physical objects, such as books; the only way to get access to the underlying media work was to be in possession of the physical object. The laws of personal property provided all of the access control that copyright owners knew how to exploit; their focus, as a result, was on controlling unauthorized *copying*, through which new physical objects could be created. Where media works could be viewed or heard without access to the physical objects (as with broadcast radio or television), copyright owners did not seek to restrict consumers' access directly. Nobody needed permission from a radio broadcaster to listen to radio programming.²⁹

When copyright owners ramped up their interest in access control in the 1980s, the copyright law provided them with no assistance. It spoke only to copying, public performance, public distribution, and the creation of derivative works – not to access simpliciter. Thus, content owners relied on other tools. In the satellite scrambling context, the first tool was technological: Scrambling the signal made it impossible for viewers to get a usable picture using the technology normally available to them. The second was legal: 47 U.S.C. § 605 (a non-copyright statute) made it illegal for users to view the programming even if they were able to descramble it.

II. THE NEW WORLD OF COPY CONTROL

²⁹ But cf. *supra* notes 5-20 and accompanying text (copyright holders did seek to maintain market exclusivity through devices such as retransmission consent and syndicated exclusivity).

HBO's decision to scramble its satellite signal was the precursor to a more extensive transformation of copyright (and related) law. Over the past few years, the nature of copyright law has changed. First, copyright owners became increasingly concerned with access control issues. More and more, media works came to be embodied in streams of electronic bits set to "1" or "0," or in radio waveforms broadcast or transmitted by wire, where the consumer routinely sought to access the work without ever having to own a corresponding physical artifact. Drawing on the lessons of satellite scrambling, publishers looked to technological measures to limit access to the work. This enabled them not only to charge for access, but to do so in new and potentially more lucrative ways – making a movie available for viewing in a consumer's living room, for example, only on a pay-per-view basis.³⁰

Second, copyright owners increasingly came to experiment with technological measures to enforce *copy* control limitations as well. Technological protection measures, after all, have obvious advantages from the perspective of copy control. They are much more effective than mere liability rules in achieving the goal of stopping consumer copying (or other interaction by the consumer with the work). Further, by making it physically impossible to copy a work without the permission of the publisher, they moot the question of whether a particular act of copying is in fact illegal. They thus offer the opportunity to restrict copying beyond the limits prescribed by the copyright law.

Only a few years ago, copyright was pretty much entirely about law. The essential nature of copyright law was to prescribe a set of activities that were actionable – if a company

³⁰ See generally Jonathan Weinberg, Hardware-Based ID, Rights Management, and Trusted Systems, 51 Stan. L. Rev. 1251 (discussing the use of trusted-systems technology to control access to informational works).

engaged in those activities, copyright owners could seek legal remedies against it.³¹ Today, though that traditional aspect of copyright law is still very much with us,³² copyright law increasingly seems to be about technical protection measures.

Congress ratified and accelerated these changes in enacting the Digital Millennium Copyright Act of 1998 (DMCA).³³ The DMCA was designed to enhance publishers' ability to put in place technological measures that restrict access to or copying of, media works except on the publishers' terms. The statute makes it illegal to "descramble a scrambled work, to decrypt an encrypted work," or otherwise to "circumvent" any technological measure a copyright owner has put in place to control access to a work.³⁴ It makes illegal the manufacture or distribution of any technology whose primary purpose is to circumvent a technological measure a copyright owner has put in place to control access to a work.³⁵ Finally, it makes illegal the manufacture or distribution of any technology whose primary purpose is to circumvent a technological measure a copyright owner has put in place to prevent copying, public performance, adaptation or public

³¹ See 17 U.S.C. § 106.

³² See, e.g., *New York Times Co. v. Tasini*, 121 S.Ct. 2381 (2001); *UMG Recordings v. MP3.com*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

³³ Pub. L. No. 105-304, codified in relevant part at 17 U.S.C. § 1201 et seq.

³⁴ See 17 USC 1201(a)(1) (making it illegal "to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner," where the work is protected by copyright and the technological measure, "in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work").

³⁵ See id. § 1201(a)(2) (making it illegal to "manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof," if the technology is primarily designed or produced, or marketed for the purpose of enabling violations of § 102(a)(1)).

distribution of a work.³⁶

Publishers have devised a variety of creative technological means for implementing copy control, and otherwise regulating consumers' interaction with the works to which they've bought access. One important approach was developed by the Motion Picture Association of America (MPAA) and embodied in CSS – the “Content Scramble System” for DVDs.³⁷ When the Hollywood movie studios were getting ready to distribute movies on DVDs, they didn't want to rely solely on the deterrent or moral-suasion value of their claim that it was illegal for consumers to make digital copies of DVD movies.³⁸ Rather, they wanted technological measures ensuring that it would be impossible for consumers to do so. Specifically, they wanted to ensure that all devices that were capable of reading DVDs would incorporate technology making it impossible for a consumer to use that device to make a playable copy of the movie.

A moment's thought will demonstrate the problems they faced in achieving that goal. The Hollywood movie studios don't make DVD players. How were they to ensure that any DVD player made by any third party would necessarily incorporate technology disabling it from making a playable copy? Even if major consumer-electronics manufacturers were willing to build such limitations into their equipment, how could the MPAA ensure that small or upstart manufacturers would do the same?

³⁶ See *id.* § 1201(b) (making it illegal to “manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof” for the purpose of “avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure” where “the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of” rights granted to copyright owners by the copyright law.)

³⁷ See generally Jessica Litman, *Digital Copyright* 151-54 (2001).

³⁸ Indeed, it seems likely that at least some noncommercial home copying of DVDs qualifies as fair use, and is not illegal at all.

The MPAA's solution was ingenious. Its answer was to encrypt – to encode – the movies before placing them on the disks. In approaching the consumer electronics manufacturers, MPAA explained that in order for the movies to be playable, the manufacturers would have to license decoding technology from a body affiliated with the MPAA. As part of those license terms, the manufacturers would have to enter into a variety of agreements governing what their players would be capable of doing.³⁹ Most importantly, the manufacturers would have to agree that any device they built, incorporating the licensed decoding technology, would be incapable of exporting a clean, decoded digital file that could be used to make additional copies.⁴⁰ This approach presented no bar to large-scale piracy – most importantly, it did not prevent would-be pirates from simply duplicating DVDs onto new disks, bit by encrypted bit, without ever bothering to decrypt the file.⁴¹ But it did stop ordinary home users from getting access to clean, “in the clear” digital versions of movies that they could then watch, copy, transmit or manipulate using computers or consumer electronics devices that were not subject to the CSS license.

The only thing with the potential to undermine this copy control was the widespread public distribution of software allowing consumers to decrypt movie DVDs so that they could be played on computers not subject to the CSS license. In late 1999, a teenager in Norway developed just such a program; he called it “DeCSS.”⁴² The program was widely distributed on the Internet,

³⁹ See Litman, *supra* note 37, at 152; *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 309-310 (S.D.N.Y. 2000).

⁴⁰ *Id.* Other license restrictions required manufacturers to disable their DVD players from playing DVDs released in other geographic regions, and from skipping certain commercials.

⁴¹ See email from David R. Guenette (former editor, Emedia Professional) to Dave Farber (Professor, Univ. of Pennsylvania), Jan. 5, 2000, <<http://www.interesting-people.org/200001/0015.html>>.

⁴² *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 311 (S.D.N.Y. 2000).

and the studios then moved to assert their rights under the DMCA. They sought injunctions against anyone who posted, or who linked to, the DeCSS code; when one organization responded by selling protest T-shirts displaying the code, the DVD Copy Control Association (which administered the CSS license) sought an injunction against that.⁴³ The Southern District of New York held, in *Universal City Studios v. Reimerdes*, that for a publisher even to link to a third-party web site containing a copy of the DeCSS code should be enjoined as a violation of the DMCA.⁴⁴

III. COPY CONTROL AND DIGITAL TV

What, you may ask, has all this got to do with the FCC? Consider a form of copy control currently planned for a medium squarely within FCC jurisdiction: digital television, received by consumers via their cable systems. At the outset of the FCC's ill-starred effort to roll out digital TV, MPAA and other content owners made it clear that they were troubled by the prospect of a consumer's hooking up some sort of player/recorder to his TV, the same way we hook up VCRs today, and exporting clean digital copies of movies and TV programming.⁴⁵ Traditional copyright law says that consumers are allowed to make such copies up to the limits of fair use.⁴⁶ But MPAA

⁴³ DVD Copy Control Ass'n v. McLaughlin, Case No. CV 786804 (Super. Santa Clara, CA). That lawsuit was brought under trade secrecy law, not under the DMCA. See Litman, supra n. 37, at 163-64 n. 3.

⁴⁴ 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

⁴⁵ MPAA initially approached the matter as one of technical standards to be resolved in industry fora, with minimal public input; it worked with the Copy Protection Technical Standards Working Group, an industry working group addressing the matter in context of standards for the design of digital set-top boxes, to find a CSS-like solution. Its comments, once the FCC (in July 1998) requested public discussion of the matter, can be found at <http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=2152610001>.

⁴⁶ See *Sony v. Universal City Studios*, 464 U.S. 417 (1984) (finding that consumers had a fair use privilege to make copies of analog television programming for time-shifting purposes).

sought a technical solution, so that it would not be bound by the substantive and enforcement limitations of statutory copyright law. The solution it came up with exactly paralleled the CSS plan it had already used for DVDs.

The FCC in 1998 had ordered a new cable-box architecture, in which a digital cable converter box's "ancillary" functions – channel tuning, remote control, video program guide access, etc. – are separated from its access control technology, whose purpose is to prevent the consumer from viewing programming she hasn't paid for.⁴⁷ Digital boxes providing the ancillary functions are produced by consumer-electronics manufacturers and sold in a competitive market, rather than being supplied by cable operators to subscribers as part of the subscription. The cable operators, for their part, provide the descrambling (access control) technology as a plug-in module for the third-party cable boxes. In order to watch scrambled programming, the consumer must insert a security module provided by the cable operator into her third-party cable box.⁴⁸

In order for these markets to operate, though, there must be a standard interface between the security module and the cable box (or other device receiving the security module, such as a cable-ready TV or VCR) . That interface was developed, with the FCC's blessing, by CableLabs, a joint venture that serves as the research arm of the cable industry.⁴⁹ The interface

⁴⁷ Commercial Availability of Navigation Devices, 13 F.C.C.Rcd. 14775 (1998), on reconsider., 14 F.C.C.Rcd. 7596 (1999), review denied sub nom. General Instrument Corp. v. FCC, 213 F.3d 724 (D.C. Cir. 2000).

⁴⁸ Cable operators have been required to make the modular security components available separately, allowing consumers to buy third-party cable boxes, since July 1, 2000. Cable operators may continue to offer integrated boxes to consumers who wish to buy them until January 1, 2005. See *id.* at 14778-79. The FCC is reconsidering the latter deadline. Commercial Availability of Navigation Devices, 15 F.C.C.Rcd. 18199, 18202-03 (2000).

⁴⁹ See Commercial Availability of Navigation Devices, 13 F.C.C.Rcd. at 14806; Commercial Availability of Navigation Devices, 15 F.C.C.Rcd. at 18201-02.

includes an encryption feature known as DFAST (Dynamic Feedback Arrangement Scrambling Technique). The gist of the DFAST technology is this: Imagine that a set-top box receives a scrambled HBO signal. It passes that signal to the security module, which checks whether the subscriber is authorized to get HBO, and, if so, unscrambles it. It then *rescrambles* it, purely for the duration of the signal's trip back to the set-top box, and the set-top box finally removes the new scrambling using technology it has licensed from CableLabs.⁵⁰ That license, however, comes with certain conditions.

The license provides that digital programming will be marked with instructions from the content provider to allow zero, one or unlimited copies of the particular work. If the work is marked as "copy never," the licensed device must be designed to prevent any copying, recording or storage of the work in digital form.⁵¹ The device cannot export the work even in standard-definition analog form capable of being recorded, copied or stored, without first adding a Macrovision signal designed to make the image dark and unpleasant to watch.⁵² Finally, if a viewer chooses to watch "copy never" digital programming in high definition analog form, the device must have the capability to degrade the image so that it cannot even be *viewed* except in lower-definition form.⁵³ The rules are the same for work marked as "copy once," except that the licensed product may have the capability to make a single copy, but even there the copy must be

⁵⁰ Commercial Availability of Navigation Devices, 15 F.C.C.Rcd. at 18205 & n.35.

⁵¹ See POD Host License Agreement, ex. C, sec. 3 (attached to letter from Richard R. Green, President, CableLabs, to Magalie Salas, Secretary, FCC, Dec. 15, 2000) (on file with author). Further, it must be robustly engineered to prevent user hacking that would defeat the anti-copying technology. See id. ex. B.

⁵² See id. ex. C, sec. 2.2.

⁵³ See id. ex. C, sec. 2.3.

viewable only on that device and incapable of being exported to any other player.⁵⁴

Circuit City protested that the DFAST license was inconsistent with FCC rules. The agency's cable-box architecture rules, it urged, forbade the cable operators from using contracts or licenses to limit the features that a set-top box might offer (so long as it did not defeat access controls).⁵⁵ Further, it argued, the restrictions in the DFAST license impinged on consumers' ability to engage in engage in "fair use" copying of TV and cable programming.⁵⁶ After all, the impact of the DFAST license is that programmers will have total control of whether viewers can make home copies (even analog copies) of any television programming. That's far different from the status quo, in which consumers can freely and legally make home copies of analog programming for noncommercial purposes.⁵⁷

The FCC, with only brief discussion, rejected Circuit City's claim. Nothing in its cable-box architecture rules or its earlier decisions, the agency said, was inconsistent with a CableLabs requirement that a set-top box or cable-ready TV contain copy-protection technology. The FCC noted an MPAA statement that content owners would not impose copy limitations on retransmitted broadcast programs, and planned to set basic and extended cable programming as "copy once"; the agency characterized those intentions as consistent with "reasonable home recording."⁵⁸ But it emphasized that its decision did not rest on those facts, and that it was not holding MPAA to its

⁵⁴ See *id.* ex. C, sec. 3.5.

⁵⁵ See Commercial Availability of Navigation Devices, 15 F.C.C.Rcd. 8776, 8784-85 (2000); Commercial Availability of Navigation Devices, 15 F.C.C.Rcd. 18199, 18205-06 (2000).

⁵⁶ See Commercial Availability of Navigation Devices, 15 F.C.C.Rcd. 18199, 18207-08, 18211 (2000).

⁵⁷ *Sony v. Universal City Studios*, 464 U.S. 417 (1984). It's also different from the technological solution Congress endorsed in the Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237, codified at 17 U.S.C. §§ 1001-1010, under which consumers can make an unlimited number of first-generation copies using digital recording devices, but cannot make second-generation copies.

⁵⁸ See Commercial Availability of Navigation Devices, 15 F.C.C.Rcd. 18199, 18210-11 & n.67 (2000).

representation.⁵⁹ Even if copy limitations were more extensive, the cable-box architecture rules would pose no bar.

The FCC declined to scrutinize particular details of the DFAST license that Circuit City had highlighted; such attention would be inappropriate, it explained, because the license terms were not yet final.⁶⁰ The agency continued, though, that in a future proceeding it would invalidate a license term only on the ground that it violated “a specific navigation devices rule.”⁶¹ Since the agency had already announced that the only possibly relevant existing rule posed no bar, this closed off any meaningful ground of attack. The FCC had no existing rule relating to copy-protection issues, and it saw no argument that it would be appropriate for it to promulgate one.

The FCC opinion treats copy protection as purely a matter for private ordering. The terms on which programming is to be made available, from the FCC’s perspective, is something to be resolved by negotiations among content owners, cable companies and consumer electronics manufacturers; the agency was forced to issue a ruling only because the negotiating parties were unable to agree. The agency did not regard the scope of permissible consumer copying, within a larger regulatory framework government had put in place, as raising a public-policy issue. There was no suggestion, as in earlier cases where the FCC had seen program copying or redistribution as raising communications-policy issues, that here too the FCC needed to consider the extent to which the regulatory structure promoted or restricted consumer reproduction of the programs they received.

One might argue that this decision should be distinguished from earlier cases in which the

⁵⁹ Id. at 18211.

⁶⁰ Id.

⁶¹ Id. at 18211 n.71.

FCC gave close scrutiny to copy control matters: In the earlier cases, content owners complained that others were accessing or reproducing their works in ways that were not, or should not be, not permitted by ruling law. In this case, by contrast, content owners are locking up their works so as to exercise greater control than the law offers them. In the earlier cases, content owners were able to raise the specter that they would cease producing works altogether, or would abandon the distribution channel, if they were not able to control access to and reproduction of their works. Here, consumers – who are the ones most injured by the technological restrictions – make no comparable claim.

Yet both cases address key elements of what used to be seen as the copyright-law balance. Historically, in debating the extent of the rights that law should give to the creators of media works, there was general agreement that creators should have some exclusive rights but not others.⁶² It was good public policy, for example, for creators to have the exclusive rights (subject to exceptions) to make copies and distribute a work publicly; that legal rule encouraged the creation of still more works. But it was good public policy as well that the scope of copyrightable subject-matter should be limited, that members of the public should be able to engage in limited copying that fell within the “fair use” exception, and that a publisher should have no control over the physical object in which a work is embodied, once that work left its hands (so that copyright law gives the publisher no control, say, over whether a buyer re-sells a book after reading it, or over how many times the book can be read).⁶³ The MPAA’s plan for digital television will upset that balance, to the detriment of the public interest. It is not only the invasion of copyright owners’ rights that poses a public-policy problem; it is the undue expansion of those rights as well.

⁶² See generally Litman, *supra* note 37, at 77-88.

⁶³ See Litman, *supra* note 2.

The FCC's answer to these concerns was terse: "We note," it wrote in its opinion, "that nothing in our decision is intended to alter 'fair use' under existing law."⁶⁴ Yet this misses the point. To be sure, the new digital-television architecture does not change the copyright law, rendering consumer copying a violation of that law. Rather, it renders it unlawful for consumer-electronics manufacturers to produce devices that can make the (legal) copies. But the upshot is the same: the traditional protections for noncommercial home use, historically a concern of the copyright law, are wiped away.

It may be that the FCC was sympathetic to the copyright owners' concerns here because it saw merit in a claim made by Time Warner that home copying was tantamount to theft. Statutory law, Time Warner noted, forbade the Commission from promulgating rules that would impede cable operators' legal rights "to prevent theft of services."⁶⁵ Further, FCC rules were explicit that they should not be construed to authorize "equipment that would violate . . . any . . . provision of law intended to preclude the unauthorized reception of [cable] service."⁶⁶ It appears that Time Warner suggested that unapproved copying amounted to "theft of services" and "unauthorized reception"; on that basis, it continued, the law not only permitted but indeed *required* the agency to approve mechanisms for requiring copy protection in set-top boxes and similar devices.⁶⁷

One sentence in the FCC's opinion can be read to suggest agreement with this argument. The agency indicates opaquely, in a footnote, that the validity of the license requiring that copy-protection technology be incorporated into the set-top box derived from the FCC's prohibition of

⁶⁴ Commercial Availability of Navigation Devices, 15 F.C.C.Rcd. 18199, 18211 n.70 (2000).

⁶⁵ 47 U.S.C. § 629(b).

⁶⁶ 47 C.F.R. § 76.1209.

⁶⁷ Commercial Availability of Navigation Devices, 15 F.C.C.Rcd. 18199, 18206-07 (2000).

on equipment facilitating unauthorized reception of service.⁶⁸ The statement may simply be ill-considered, not reflecting the agency's views. If it does, though, it reflects a fundamental error, confusing access controls with copy controls.

The theft of services to which the statute and regulations refer is the sort of unauthorized access to programming addressed by HBO's satellite signal scrambling and section 605.⁶⁹ The FCC's current cable set-top box architecture is explicitly designed to incorporate access controls to prevent that theft; those controls are located in the cable companies' plug-in modules. The copying that DFAST technology addresses, on the other hand, is done by consumers who have already paid for access to the service. The issue there is not access but copying. Indeed, it is copying that for the most part does *not* appear to violate copyright – or any other – law. There is no suggestion in the FCC's opinion that those copies are illegal.

The essence of Time Warner's argument is that for a consumer to own a television set capable of copying a movie off the air is the moral equivalent of her in fact copying the movie, which is in turn the equivalent of her copying the movie and transferring it to many other people for them to watch without paying, which is in turn the equivalent of those people hacking into HBO so as to receive the program service without paying, which is illegal. Yet it can hardly be that any technology giving the consumer some control over the reproduction and uses of a work, including the ability to make legal fair-use copies, is the moral equivalent of theft. On the contrary, traditional copyright law deliberately reserved some control over media works to the consuming public, just as it granted other exclusive rights to publishers. Far from theft, it is the balance we have struck.

⁶⁸ Id. at 18211 n.66.

⁶⁹ See supra notes 21-28 and accompanying text.

CONCLUSION

Beginning in the late 1960s, the FCC enacted regulations designed to address copyright concerns, and to plug perceived gaps in the copyright laws. In making information policy for cable television, it could not ignore copyright owners' interests in stopping others from reproducing and performing their works without their permission. At the heart of its agenda, rather, was the question to what degree the FCC regulatory structure would promote, or devalue, those interests. Later on, in the mid 1980s, the FCC addressed content holders' interests in a different way, seeking to vindicate the interests of cable programmers in recovering compensation from all those who viewed their product. In that case, when copyright owners sought to impose direct controls on unauthorized viewing of their programming, the copyright law was no aid to them. Rather, they relied on technological protections supplemented by communications-law prohibitions.

In recent years, content owners have increasingly adopted technological measures to enforce both access and copy controls. The proposed copy-control plan for digital television (modeled closely on the MPAA's encryption of DVD movies), is one such measure. As such, it implicates information-policy concerns traditionally subsumed within communications law. The new digital-television architecture, to be sure, does not change the formal law governing consumers' behavior. But by rendering it unlawful for consumer-electronics manufacturers to produce devices that can make legal copies of broadcast programming, it drastically alters what consumers can do. U.S. information policy has traditionally given the consumer some control over the reproduction and uses of a work, including the ability to make legal fair-use copies. Here as in the past, the FCC should have recognized that restrictions on program copying and redistribution implicate important

policy issues within its jurisdiction.