P2P Video and the Public Policy Challenge

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Conflict and Accommodation in the P2P Video Market

Copyright remains a central ‘business model’ for recovering the first copy costs of producing video information goods.

The essence of my remarks is that history has endowed us with a system that cannot be re-tailored without creating major losses for incumbent interests.

The consequence of this rigidity is the likelihood of sustained insurrection and civil disobedience that will, over time, produce a new set of accommodations.

My remarks are therefore addressed at reducing casualties rather than making a smooth transition to a well-defined new order.

The Familiar Argument and the Essentialist Doctrine

Low marginal costs of (re)production are incompatible with the incentives to create new content.

This requires an abridgement of the social welfare principles of economic exchange (that prices should reflect the marginal costs of production).

The copyright law represents an international social convention giving information creators nearly complete control of the reproduction and dissemination of their works.

This control is limited by ‘own use’ and ‘excerpting for review’ provisions given to users – users are not given the right to re-use the information if such re-use ‘interferes’ with or ‘prejudices’ the commercial interests of the creator.

Re-use is also constrained because its exercise may distort or debase the artistic expression and hence the person of the information creator (droit morale). Hence, in a US context, ‘refusal to deal’ remains acceptable practice.

This doctrine may be called the ‘essentialist’ doctrine of copyright. It constitutes raptams of the current system that are under siege by P2P practice.

An Economic Viewpoint

As with any social institution (norms, rules including law, or standard) one may question the social welfare effects of the institution – in the case of copyright monopoly creates deadweight loss (the exclusion of willing buyers at prices above the costs of production) and a transfer of wealth from consumers to producers as well as an incentive to create.

An appropriate economic analysis is based on social welfare and does not employ assumptions about the ‘natural rights’ of creators.

Copyright provides a ‘creation incentive’ – to finance first copy costs, take risks that no audience exists and promote the work. The resulting increase in supply and competition between suppliers is presumed to outweigh the deadweight social losses from monopoly.

Conflict Between Essentialist Doctrine and Economics

The essentialist and economic positions are only reconcilable to the extent that alternative means of organising the market are less effective than the grant of a monopoly right to information producers.

One alternative to the current copyright system – the social funding of information creation (as we do with science) – is not seen as viable because of an unwillingness to regulate what information is produced or to allocate from a common resource pool the highly skewed distribution of returns the current system generates.

A second alternative, dramatically altering the life of copyright protection is an example of reducing the inventive incentive in order to increase social welfare. Unfortunately, copyright life has become so long that major changes (that would make video of contemporary rather than historical interest) are, at present, nearly unthinkable.

Reasons for Inflexibility in the Current System

1. The history of production and distribution of video content has created a large asset base which stands to be devalued by almost any change in copyright law and hence the current essentialist doctrine will be vociferously defended.

2. The distribution of returns from the current system is highly skewed, providing a concentration of economic and political power capable of resisting change.

3. The variety of mechanisms available in the current system for sustaining economic returns are diverse – further reinforcing the position of incumbents and their desire to preserve the current system
   Price discrimination
   Pricing freedom
   Refusal to deal limiting competitive entry
   Restrictions on re-use restricting competitive entry

4. Mobilising communities that would stand to gain from an alternative system is difficult given the variety of these communities’ interests
### The Mass Media Market Production/Consumption System

The ineffectiveness in the current system arise from the elevation of the fixed costs of video production and promotion due to:

1. Audiences accustomed to techniques in video production similar to those in cinema (US values are very discernible to Europeans)
2. The promotional costs of the 'star making' machinery used in differentiating product and justifying other investments
3. The costs of promoting specific platforms (series, special events, etc.)
4. The costs of negotiating the distribution arrangements over the life cycle of a particular project

None of these incentives is significantly altered by the availability of P2P!

What P2P does provide is better access for smaller scale projects and projects with different production values - but the producers of these projects are less likely to be able to engage the commercial machinery needed for revenue generation.

### P2P as a Lending/Rental Library (2)

Accompanying the 'open' and 'outlaw' parts of the library, 'sections' of the library based upon DRM technologies will emerge with the problems of player compatibility and authorisation costs.

One possible accommodation between the 'open' and 'proprietary' sections of the library is tolerance of (infringing) lower quality reproduction with DRM-protected 'premium' content.

A second possibility is continuing conflict with the stated aims of DRM – but this will be very difficult to sustain and deepen the conflict and should be avoided.

A third possibility is acceleration of the rate of technological change in DRM that might serve to 'crowd out' much of the infringing material (e.g. replay-limited files).

These possibilities are not mutually exclusive. They are, in fact, the basis for the strategies that information content producers will adopt in competing for audience.

### P2P as a Library Architecture

At present P2P video is engaged in creating a 'library' of video offerings. The size of this library is relatively unconstrained since only a few dozen individuals with a keen interest in a particular subject – say the Austin City Limits PBS television series – are necessary to create a 'section' with the complete contents of this series.

There are unlikely to be significant limits in the number of 'sections' for which enthusiasts will emerge.

All of these sections can be drawn together using P2P indexing technologies. Some may be unstable as the result of copyright owner actions.

The extent of copyright enforcement action will be a stimulus to expand 'open' territories – content that is not copyright, venues of distribution immune to copyright infringement claims, and copyright material released for promotional and other purposes.

Copyright enforcement will also create outlaw 'clubs' behind 'virtual doors' in which infringing content is exchanged.

### Conclusions and Policy Implications (1)

1. The conflict between 'essentialist' doctrine and alternative viewpoints will continue.

The legal system will continue to be burdened by litigation directed at infringing parties and the incentives to harass and selectively pursue infringers with the aim of raising these rivals' costs will continue. The responses of the legal system to such demands will be an important signal of (changing) public sympathies for the essentialist doctrine.

2. DRM techniques that provide users with greater scope of control over the re-use and recombination of content as well as enhanced portability will be an attractive strategy for some producers.

Endorsement of competing DRM standards will allow a balance to be struck between producer and user interests. Endorsement of one or a small number of standards that translate the essentialist model will only sustain and deepen the conflict and should be avoided.

Example: In the US, it is very difficult to acquire multi-region DVD players. Very few single region DVD players are sold in Europe.

### Conclusions and Policy Implications (2)

3. The incentives provided by 'open' sections in the global P2P library will encourage the growth of new production by enthusiasts and those accumulating reputation.

Public policies should permit the growth of alternative contractual forms such as creative commons licensing or other systems that provide well-defined rights concerning re-use.

4. Copyright exemptions for the use of audiovisual content for educational and other non-profit uses should be re-considered.

This proposal contradicts essentialist doctrine and will be very difficult to adopt. A 'side-payment' such as the Non-Commercial Use Levy (NUL) suggested by Neil Netanel (Harvard Journal of Law and Technology 17(1), Fall, 2003) may enlist further support. However, it may be necessary to create a 'premium' content regime in which a copyright owner continues to have the ability to pursue remedies under the essentialist doctrine. While 'second best,' this would create further competition while offering a new business model for those not producing 'blockbuster' content.

### Conclusions and Policy Implications (3)

5. The academic community can provide some guidance regarding the balance between cultural expression and commercial values.

Policy making processes should make provision for hearing all stakeholders including various forms of activism in support of cultural expression and diversity. University administrative decision-making should be subject to the same debates, particularly in publicly funded institutions. This is part of a larger debate about the role of universities in society set off by the Bayh-Dole Act and the growth of university technology licensing offices.

6. The prospects are very dim for a 'final solution' resolving the conflicts between supporters of the essentialist doctrine and opponents. Policymakers should be pragmatic, focussing on demonstrated harm and take into consideration that the copyright system is not only a system of property rights but also an attempt to create an appropriate set of incentives for improving social welfare.