

It seems clear to me that both the digital transition and the development and sale of internet-enabled digital television reception equipment is only at a very early stage. As such, it seems very unlikely that anyone (even a theoretical economist) could definitively answer this question at this time. In particular, in light of the content industry's historic reluctance to adopt new technologies (see *Betamax*²), whatever answers the content industry provides should be viewed very skeptically.

“... To what extent ...[would the lack of a broadcast flag] delay or prevent the DTV transition? ... threaten the viability of over-the-air television?” (NPRM, ¶3)

Pardon me for being blunt, but this seems to be hyperbole in the extreme. The stated objectives of the Broadcast Flag³ are to prevent legally-recorded content from being redistributed via the internet. As you may recall, one of the claims of the doomsayers during the *Betamax* litigation was that consumer video recorders would cause the demise of broadcast television. Now, nearly 20 years later, we hear the same doom saying prognostications about the next new threat.

Clearly, the VCR caused neither the demise of the movie theater nor the demise of broadcast television. The fact that content is now digital does not alter basic economics: if there is a market, there will be products. It stretches the imagination to think that citizens of the United States will watch so much less television (for any reason) that it could cause the demise of over-the-air television.

“...should mandate that consumer electronics devices recognize and give effect to the ATSC flag ...” (NPRM ¶6)

It seems clear that in order for the Broadcast Flag to be effective, it must be mandated. Unfortunately, this mandate must include a much larger category of devices than just “consumer electronics devices”. Such a mandate, to be effective, must include nearly

² *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

³ Final Report of the Co-Chairs of the Broadcast Protection Discussion Subgroup to the Copy Protection Technical Working Group (June 3, 2002) (“BPDG Final Report”).

every electronics device available for sale (computers, computer components, televisions, television receivers) as well as television receivers that are available for free (e.g., software defined radio software).

As I've mentioned above, I am not a lawyer. However, I do not believe that the FCC has statutory authority to make such a wide-ranging mandate.

"... whether to require the use of specific copy protection technologies ..."
(NPRM ¶7)

"... we seek comment on the impact ... on consumers." (NPRM, ¶9)

Please see Section III (below) for a general argument against such requirements.

III. The Copyright Bargain

The Copyright Act codifies a social bargain whereby society grants to rights holders a limited exclusive right to distribution of their creative works in exchange for the societal benefits of the creation of such works. The limits include a limited time of exclusivity and limits on the exclusivity of distribution. In particular, certain distribution of content by persons other than the rights holder, while unauthorized, is not infringing because it is a Fair Use.

The Broadcast Flag (and, in fact, any digital system for limiting consumer's use of content) is necessarily arbitrary – content is either allowed to be copied, redistributed, recorded, etc., or it is not. This determination is made once and for all by the way the content is marked or encoded, without any 'wiggle room'. The technology does not (and can not) take into account the purpose and character of the allowed or disallowed use, nor the affect on the marketplace of the allowed or disallowed use.

The Fair Use test⁴, the process and criteria for judging whether an unauthorized use of a copyrighted work is a Fair Use, is codified as a set of "... factors to be consid-

⁴ 17 USC 1.107

ered ...”⁵. The only way to determine if an unauthorized use is infringing is a legal proceeding where the Fair Use tests are argued and a court judges whether such a use was a Fair Use.

Digital Rights Management systems, even micro baby systems like the Broadcast Flag, if they are effective, necessarily prohibit any instance of a specific rights-holder-prohibited use. However, some use of a work is infringing, but some are not (even if the only difference between the two cases is the intent of the user).

In fact, a Digital Rights Management (DRM) system of any sort that maintains the long-standing copyright bargain must include a “Judge On A Chip” – it must be able to make real-time determinations as to whether a specific use (which is marked as prohibited by the DRM system) is, in fact, a Fair Use and therefore allowed. Such a determination must include “the effect of the use upon the potential market for or value of the copyrighted work”.⁶ Clearly this is not achievable.

Moreover, even though this is not achievable, the only DRM schemes that should be allowed (let alone mandated) are those that do not alter the Copyright Bargain.

Therefore, mandatory adoption of such a DRM system *necessarily and fundamentally alters the Copyright Bargain*. Even if such a change is desirable (which I maintain is not), it would have to be made by an act of Congress – not by FCC regulation.

IV. Conclusions

Any adoption of a system like the proposed Broadcast Flag or other DRM systems fundamentally alters the applicability of the Copyright Act to the lives of ordinary Americans. The application of DRM schemes are a violation of the social contract that created copyrights.

⁵ *ibid*

⁶ 17 USC 1.107(4)

Even if a Broadcast Flag or other DRM scheme is desirable, it seems well beyond the authority granted to the FCC to modify the Copyright Act.

Therefore, I respectfully urge the Commission to decline to issue rules that benefit copyright owners at the expense of the public.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Naomi Mazzeo". The signature is written in dark ink on a white background.

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