Fall 2007

Access To the Celestial Multiplex

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FALL 2007, 17 MEDIA L. & POL'Y

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by
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INTRODUCTION

Paul Goldstein[43] coined the term "Celestial Jukebox" in 1994:

> The metaphor that best describes the possibilities of the future is the celestial jukebox, a technology-packed satellite orbiting thousands of miles above Earth, awaiting a subscriber's order – like a nickel in the old jukebox, and the punch of a button – to connect him to any number of selections from a vast storehouse via a home or office receiver that combines the power of a television set, radio, CD player, VCR, telephone, fax and personal computer.

Today's subject – broadband video – is a subset of the celestial jukebox that we might call the "celestial multiplex," a theater in the sky that contains, not twelve or twenty-four, but thousands of videos available at a click.

I deal here with two aspects of the celestial multiplex, both of which concern access. First, the fear of illegal access to content (stigmatized by content owners as "piracy") threatens to limit the amount of and kinds of content available from the multiplex. Second, universal access to the multiplex requires that entrance and enjoyment be available to people with blindness and other disabilities.

I
"PIRACY"

At every conference of this sort I keep a running tally of the number of mentions of "piracy." This conference was well below average, and many mentions were carefully air-quoted. This is in great contrast to a record-setting conference last year when the parties in the Grokster litigation used "piracy" or a variant in almost every sentence. [44]

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[43] PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 199 (1994).

[44] Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

As the universal use of "piracy" to describe downloads that content owners object to shows, the content owners have won the vocabulary war. A Google search for "Internet piracy" yields over three hundred thousand hits, whereas a search for "Internet copyright infringement" yields less than one thousand. So unthinking is the use of the term that even "The Ethicist" in The New York Times, when asked "Is it piracy if you take your laptop into a library and download CDs or copy movies from its DVD collection?" answers with an analysis of copyright infringement and fair use without even questioning the use of "piracy." [1]

The proper answer to The Ethicist's question is: "No, it's not piracy, but it might be copyright infringement." Every year a law student asks me to supervise an independent study paper on "Internet piracy." My response is: "There's piracy on the Internet? Hadn't you better study admiralty and maritime law before embarking?" When the student changes the query to "copyright infringement," it marks the start of an objective analysis. As early in the Internet era as 1998, Rosemary Coombe noted that we had reached a point where "every reading of a digital text on the information highway is deemed a theft." [2] Soon theft became piracy.

This is more than sloppiness. In law, as in society, characterizing a thing gets you a good way toward deciding whether it's wrong, and, if so, what's the proper remedy. Piracy involves parrots, barrels of grog, the Jolly Roger, boarding parties of knaves with long hair, scars, eyepatches, hooks for hands, pegs for legs and other disabilities, sabers, screams, growls of "Ar-r-r!" and victims called "Matey" as they walk the plank.

The punishment for piracy is hanging from the yardarm, drawing and quartering, the varlets' heads displayed on pikes as a warning. [3]

"Copyright infringement," on the other hand, is more akin to trespass, involving intellectual instead of physical property. Once you start talking about trespass, you leave the realm of rum, rape and rampage, and punishments of torture and death, and start talking about injunctions,

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[1] Randy Cohen, *Copyright Wrongs*, N.Y. TIMES MAGAZINE, Oct 8, 2006

[2] ROSEMARY COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW 285 (Stanley Fish & Frederic Jameson eds., Duke University Press, 1998).

[3] *See* Mark A. Lemley, Book Note, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 896 (1997) ("'[I]nfringement' may be a morally neutral term, but 'theft' is clearly wrong, and courts are more likely to be inclined to punish the latter."), *cited in* Peter Johnson, *Can You Quote Donald Duck?: Intellectual Property in Cyberculture*, 13 YALE J. L. & HUMAN. 451, 456 (2001).

easements and licenses, as more and more content owners are finally beginning to do, usually out of the others' earshot. The huge lawsuit between Grokster and copyright owners, viewed dispassionately, is less about throttling evildoers and more about who gets to dictate the terms of whatever license emerges from the dispute. Another difference between piracy and infringement is that piracy can be eradicated and infringement cannot.

Removing piracy from the copyright vocabulary also invites more flexible descriptions of the supposed problem and more imaginative and realistic solutions. The contention of the music companies, faced with Napster, Grokster and the like, has been to assert that these file-sharing systems threaten CD sales. This remains unproven, however, in the equivocal surveys the music industry has proffered.[4]

Further, attributing loss of CD sales entirely to file-sharing ignores other causes. First, the advent of CDs required the world's listeners to replace their LP music collection with CDs. Once that was accomplished (shortly before Napster appeared) a drop-off in CD sales was inevitable. Second, music-download services allow downloads of songs as well as complete CDs. The music industry's insistence on the 10-20 track LP, then the 10-20 track CD as the basic unit of sale proved hard-headed and intransigent. It was not that the file-sharers objected to paying for CDs, it was that they objected to paying for CDs, when what they wanted were songs. The recording industry responded by offering extremely limited and complicated song-downloading services, whose failure the industry flaunted as a demonstration that people will not pay for songs. The advent of iTunes, however, proved the industry wrong and belied the supposed truism that people will not pay for something they can get for free. The fading of file-sharing services owes less to industry lawsuits than to iTunes.

Now we hear similar fears from the movie industry about unauthorized downloads destroying their products. Those fears are likely to be as groundless as the music industry's if the industry can craft a more flexible response to the problem than a string of lawsuits.

Alternatively, as Bob Dylan reportedly said when told everyone was getting free music from Napster, "Well, why not? It ain't worth nothin' anyway."

[4] *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1016-17 (9th Cir. 2001).

II
ACCESSIBILITY

Accessibility to people with disabilities is an often-ignored topic in the online world, and it is likely to be equally ignored by the celestial multiplex. This is too bad. As World Wide Web inventor Tim Berners-Lee has pointed out, "The power of the Web is its universality. Access by everyone regardless of disability is an essential aspect."[5] To encourage such universality, the Web Accessibility Initiative (WAI) of the World Wide Web Consortium (W3C), under the direction of Berners-Lee, has published guidelines for Website accessibility[6] for people with disabilities, including blindness and other visual disabilities, motor limitations, hearing difficulties and cognitive disabilities.

Examples of accessibility features include:[7]

- Keyboard equivalents for mouse commands;
- Text-to-speech capability;
- Adequately labeled and/or descriptive text equivalents for non-text elements such as images;
- Non-color equivalents for information conveyed with color;
- Identifiable row and column headers for data tables;
- Assistance for completing on-line forms;
- Allowing users to extend the time for timed-response functions;
- Avoiding "streaming" content techniques for conveying material information;
- Where input of letters or numbers (which may not be depicted as text) is required to set up an account, an easy telephone alternative for account formation.

Accessibility of government and federally supported websites is

[5] Web Accessibility Initiative, http://www.w3.org/WAI/ (last visited Nov. 30, 2007).
[6] *Id.*; *see also* Specific Barriers to Web Access, http://www.accessweb.ucla.edu/dis-web.htm#blind (last visited Nov. 30, 2007); Accessible Webpage Design: Resources, http://library.uwsp.edu/aschmetz/accessible/pub_resources.htm (last visited Nov. 30, 2007).
[7] *See id.*

clearly mandated under statute and regulation.[8] However, when a website or other online content stream is owned by a private entity, legal compulsions to make it accessible are less clear. Although the New York State Attorney General,[9] the Connecticut Attorney General,[10] and, more recently, the New York City Bar Association[11] have forcefully argued that such accessibility is required, other commentators and some courts disagree.[12]

Disability access to the celestial multiplex is more complicated than to websites, because it is unclear how the multiplex should be categorized legally. Is it a "telecommunications service"? An "information service"? Or something in between? The answer is important, because federal law requires that a "manufacturer of telecommunications equipment" and a "provider of telecommunications service" must make its equipment and service "accessible to and usable by individuals with disabilities, if readily achievable."[13] This law was designed in an era when "accessible" was relatively simple – phone amplifiers and signal lights for the hard of hearing, Braille dialpads for blind people, TTY telephones – but things are more complicated in the celestial multiplex era. Must manufacturers, for instance, make cellphones accessible by providing text-to-speech capability for blind people?[14]

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[8] *See* Rehabilitation Act of 1973 § 508, 29 U.S.C. § 794d (2000) (requiring that the federal government and companies with federal government contracts make their Websites accessible); *see also* Americans with Disabilities Act, Title II, 42 U.S.C. §§12131 *et seq.* (2000) (and court cases construing it, *e.g.*, Martin v. Metropolitan Atlanta Rapid Tranit Auth., 225 F. Supp. 2d 1362 (N.D. Ga. 2002)) (mandating that the Websites of state and local governments, and other entities receiving federal funding, provide services through accessible Websites).

[9] *See, e.g.*, *In the Matter of Priceline.com Inc.*, Attorney General of the State of New York Internet Bureau (April 4, 2004), *available at* http://www.icdri.org/News/Priceline%20AOD.pdf.

[10] *See, e.g.*, Press Release, Connecticut Attorney General's Office, (April 17, 2000), *available at* http://www.ct.gov/ag/cwp/view.asp?A=1775&Q=283012 (last visited Nov. 30, 2007) (describing a 2000 settlement with the Connecticut Attorney General in which the tax-filing services HDVest, Intuit, H&R Block and Gilman & Ciocia agreed to make their Websites accessible).

[11] Association of the Bar of the City of New York, *Website Access for People with Disabilities* (2006), *available at* http://www.nycbar.org/pdf/report/Website_Accessibility.pdf.

[12] *See id.* § 4.

[13] 47 U.S.C. § 255.

[14] In 2003, for instance, Dr. Bonnie O'Day, who has low vision, brought a § 255 complaint against Verizon and Audiovox, alleging that cellphones made by Audiovox and provided by Verizon were inaccessible. Audiovox and Verizon both have settled and announced plans to provide accessible cell phones, and the formal complaint was dismissed without a finding of liability. *See* In the Matter of Dr. Bonnie O'Day v. Audiovox Commc'n Corp., 19 F.C.C. Rcd. 14 (2004).

By limiting the reach of Section 255 to "telecommunications," Congress may have inadvertently confined the accessibility requirement to an ever-narrowing field of products and services. The current trend is for the FCC to move advanced Internet services from the "telecommunications" basket into the "information services" basket. This is now true of broadband services (cable modems and DSL service) and VoIP telephony. In the broadband field, the move to "information service" was necessary in order to prevent differential regulation (DSL as telephony, cable modem as information service) for services that are functionally equivalent.[15] In VoIP telephony, the move was necessary in order to remove the new service from threatened differential regulation by fifty state public service commissions.[16] But what the redefinition also did – potentially, if not in fact – was to immunize these advanced services from the accessibility requirement of Section 255.[17]

A further weakness in Section 255 is the "if readily achievable" standard, which is far less stringent than the "undue burden" standard of the Americans with Disabilities Act. A proposed amendment to the Communications Act, still only in draft form and unlikely to be introduced soon, would remedy some of these shortcomings. The bill, titled Access by Persons with Disabilities, would add a new Section 404[18] providing, among other things:

- Manufacturers of broadband and VoIP equipment must make such equipment accessible;

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[15] Nat'l Cable and Telecomm. Ass'n v. Brand X Internet Serv., 125 S. Ct. 2688 (2005); Press Release, FCC, FCC Eliminates Mandated Sharing Requirements on Incumbents' Wireline Broadband Internet Access Service (Aug. 5, 2005) (on file with author).

[16] Press Release, FCC, FCC Finds that Vonage not Subject to Patchwork of State Regulations Governing Telephone Companies, FCC News Release (Nov. 9, 2004) (on file with author).

[17] The FCC, however, has not insisted on a narrow definition of "telecommunications" in its rulemakings under § 255. It has, for instance, extended the requirement of accessibility to providers of "voicemail or interactive menu service," which the FCC defines as "information services." *See Access to Voicemail and Interactive Menu Serv. and Equip. by People with Disabilities*, 47 C.F.R. § 7.1. The FCC, however, has declined "to extend accessibility obligations to any other information services [including] e-mail, electronic information services, and web pages," explaining that these are "alternative ways to receive information which can also be received over the phone using telecommunications service. In contrast, inaccessible and unusable voicemail and interactive menus operate in a manner that can render the telecommunications service itself inaccessible and unusable." *Access to Telecomm. Serv., Telecomm. Equip. and Customer Premises Equip. by Pers. with Disabilities*, F.C.C. Final Rule, 64 F.R. 63235 ¶ 57 (1999).

[18] http://www.afb.org/Section.asp?SectionID=3&TopicID=238&Document ID=2991.

- Broadband and VoIP service providers must make their services accessible;

- Replacing "readily achievable" with the higher "undue burden" standard.

CONCLUSION

The celestial multiplex has great possibilities, but creators of it must ensure that content is available without fear of "piracy" and that inaccessibility of broadband content does not create a new "broadband divide" that ignores people with disabilities.