

Copyright in Flight Content for Profit at Greater Risk

By Leo B. Willner, Ph.D. with R. Gregory Kalsow
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As the French like to say, the more things are different the more they are unchanged! To illustrate the point in the technology sector, the folks who helped extend copyright to seventy years like Disney and the MPAA are at it in force once again. It seems they are after the technology companies whose innovative machines and services enable the legal and illegal copying and distribution of copyrighted material. Their strategy is to punish these outfits along with their customers in order to get at some illusive copyright violators. Indeed they look to imbalance copyright law jurisprudence by turning its essential balance and fairness on its head. For example, after a rash of lawsuits, threats and intimidations honest librarians and researchers now have reason to fear the worst, namely that access to vital materials will be restricted or even denied. As the MGM vs Grokster case now before the US Supreme Court demonstrates, the idea is to punish the technology houses and service providers in order to attack the copy fraud criminals who use their technology. Alice in Wonderland never baked a better upside

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down cake. As the legal briefs multiply and their convoluted arguments spin on, the whole point of copyright as a benefit to society in a free market economy is getting lost. Those who attack the means to copy and distribute content seem

not to be overly concerned that the US Constitution in its wisdom looked to energize the creative spirit of innovators for the benefit of the public at large by providing for limited copyrights.

This brings to mind others who have embraced a litany or two in their day and, like barnacles on the hull of a ship, held on against the tide of change. Say the legalistic Greeks who preceded Plato and

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Aristotle and gained notoriety by endless argument on legal minutia and granular detail to the exclusion of practical reality. Or the monks and theologians of the Middle Ages who looked for answers in endless debate while often ignoring the visible evidence of the real world around them, like the fact that the earth is round and circles the sun. The lesson in our case is that copyright cannot work for the long term benefit of all concerned unless it coexists with a reasonable degree of basic Fair Use access by those who by reason and by right need to make a few copies. As an example, a limited amount of access can help publicize a book, a movie or a TV show. Another example is the common need to make one or two copies of a CD or DVD one has purchased at full price, so it can be taken along in a mobile home, van, or vacation spot or to archive its content as a valued item for backup or future use. In terms of business practice, the music industry has profited when consumers were forced to buy a CD or cassette a second time when one got lost or damaged — at full price. The current issue is whether the same folks should now be allowed to use new technology to prepare a copy for backup or later use — of a copyrighted item they already purchased at full price. Here some rights owners and their lawyers have offered a sideways argument or two that alleges that no one really purchased the CD in the first place only a limited license for its use. This argument overlooks the history and practice of copyright as a limited right not a property right, whose primary value is the betterment of the public good. All of that fuels the controversy regarding the use of technology by honest folks.

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A generation ago the VCR was also challenged in a similar fashion in the famous 1984 Betamax case. The argument then and now is that limited private copying for private use was nonetheless a threat to the economic well being of the owners of copyrighted content. In reality, the VCR (and also the Xerox machine), when examined from the perspective of copy history, turned out to be of great economic benefit to the public, as well as to the content owners and copyright holders. Now some reactionary forces are at it again as though they missed the lesson the last time around. When it comes to new technology what is best in most cases is to allow the positive as well as the negative factors of a technology and its deployment to fully emerge over time. That is without feathering the engine or curtailing its use. Just look at the story of the Internet, the iPod or the DVD player and now VoIP — the latter being defended by Michael Powell

the recently retired commissioner of the FCC and many others. As is often the case the defensive posture of some who appear to be overly cautious can cause real problems in a world of rapid change. These folks wish to avoid the difficulties attendant with new technology — more than they seek value out of the new systems. Alas, such an approach — as with such transforming change as stem cell research and modern electronics — often retards progress.

In counterpoint, as the tragic Thalidomide drug scandal with its crippling effect on the German

population amply demonstrated, caution in the advancement of technology is mandatory. All the while, in the midst of the present technological revolution, can the society afford to put the reactionary agenda ahead of a cautious yet intrepid way forward? Heaven forbid if that should happen in the cure for Aids, SARS, Ebola and all the rest. Still the reality of a Vioxx is reason enough to motivate many of us to be a bit restrictive in the rapid release for general use of some advanced technologies. In the area of non-steroid anti-inflammatory drugs the FDA demonstrated that those it is intended to regulate often restrict its methods. Can this worrisome situation also apply to an FCC whose 'must carry' ruling against the TV broadcasters last month suggests a similar lack of overall balance? Copyright practice today is a bit like that. New machines, new systems and new ways of copying do indeed threaten the business models that are based on and require a degree of copyright protection. Yet the public good is still the best measuring stick by which to gauge what should and what should not be allowed — as opposed to endless legal and political wrangling.

Do the interests of the corporate state and of innovators require robust ongoing protection? Of course they do. Should the copyright violators in China and elsewhere be made to walk the plank? Absolutely. Yet fair and reasonable access to copyrighted information and other copyrighted items is also important, as its loss can derail much future growth and progress. The mantra must be to stop the violators

without punishing the technology houses in the process; or else the very means used to do so will ultimately boomerang against the content houses and media houses. The media business requires openness and freedom of speech while an unbridled content police may head in the opposite direction.

One key factor that at times gets overlooked in the fine points of copyright discourse is the belief of some content creators and copyright holders that they are free to maximize their profit even when it damages the public good. That is incorrect as there is no substantive basis either in law or business practice for such a point of view. Following such an incorrect Laissez Faire ideology some business folks may come to believe that maximizing profit is their right within the limited right that is copyright. That idea is misguided, as no such right exists.

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When government grants a limited right to an individual or an organization, that right has to be balanced against the needs, the rights and the requirements of others. In that sense do the Mickey Mouse and Donald Duck icons get protected primarily for the

profit of Disney or for the benefit of the children of the world? There, in graphic relief for all to view, is the confusion that underlies much of the today's wrangling including the desire by some for more unlimited and unbridled copyright protection.

As to the best way to capture copyright criminals, law enforcement does indeed have the challenge of finding the best way to snare the crooks; and it should do so

while sparing the rest of us. Indeed the judges of the Supreme Court are troubled whenever the innocent are at times made to pay part of the price for the crimes of the guilty. In the US the criminal justice system spends upwards of eighty thousand dollars per year to hold convicted capital criminals for years on end, just to give them a very broad right of appeal prior to execution. That in a country unable to provide a minimal living standard for many sick, old or otherwise helpless widows, orphans and war veterans. That suggests that great care is meant to be taken prior to punishing anyone but the guilty. Yet to get at some who violate copyright law Hollywood wants to punish the entire society and limit its ability to use advanced technologies. Part of the underlying argument Hollywood uses in this approach is that there implicitly exists a right on the part of copyright holders to maximize their profit, even if it damages the overall public good. That of course is inappropriate as copyright is not a property right at all (even though it is carelessly labeled a form of intellectual property) but a limited right whose purpose is to benefit the public good first and foremost.

Once the idea of a fair but not unlimited profit for content creators is accepted, copyright can also protect the rights and interests of the public — in a balanced overall scenario. In this situation it is understood that (alas) some criminals will indeed make illegal copies and get away with it. Others will for a time find ways to distribute copyrighted content in illegal ways and profit from the process. Over time such market driven offense and the

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defense will dance its little dance as elements of technology and creativity interplay. All the while the public is protected and it's Fair Use right honored. In this model the innovators will still be rewarded, although a maximum reward may not be practical or even possible. New content will be created, the public will get value and those who engage in its development will earn a living. Over time the back door weaknesses that allow some illegal copying and distribution of protected content will be closed one by one. That is the sensible and fair way forward as opposed to any draconian use of state power that can do damage to the public interest.

Unfortunately that may not be the end of the story as even more powerful information technology may soon allow the means of infringement to go further — and such means are already on their way. Within such a development we are likely to see the violation of copyright and other rights begin to interplay with espionage, snooping and the loss of privacy. For it is one thing to steal someone else's copyrighted material as a finished product, it is quite something else to steal it before it even has the opportunity to reach the light of day, i.e. in its nescient developmental stages. Thus as technology moves forward inexorably we will need to protect private thought, however expressed, more than we do today including such things as casual writings and even the partially articulated ideas of people. As any concepts they may contain and their expression are in many cases not yet fully developed or even articulated, they cannot be readily protected by copyright, as we know it. Therefore, preventing any and all

electronic invasions of private musings, including PC documents and electronic communications is needed to protect private mindworks and art. For want of a better way of naming such formal legal protection for privately expressed thought we may for now call it Mindrights.

What is required is an expanded view of the rights of individuals that can help protect their privately expressed concepts and communications — those meant only for friends and colleagues. In electronic snooping and copying we have the harbinger of a ‘1984’ in the making. In such a world the state as well as some criminal elements are empowered to subvert the ‘documents’ of the population at large on the basis of electronic access to their private works and communications. Worse still is that evolving concepts and ideas will no longer be held in private during their incubation, as they may be stolen away. Here the implementation of new technology may soon overtake day-to-day reality. Of course this has been tried before, for example the Nazis once believed they could penetrate the persona of persons — by the use of their neo-scientific handwriting analysis techniques. Such foolishness is now being replaced by valid technology that can in fact really spy upon private conversations, notes and electronic communications of people, and do so from afar. This is an evolving scenario whose full impact may reach us sooner than later. In such a world, copyright protection no matter how well intended or administered will not be enough.

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In time when it is possible to easily listen in on other people’s conversations, or to access their private writings, how can the public be protected and its innovations such as the creation of valuable content be preserved? And what is fair use when others can take away intellectual material held in private ahead of the innovator’s ability to seek out a profitable commercial use? If essential parts of (say) an incomplete Tom Clancy novel can be stolen before it is even completed, how can its creation be protected for the public? In an insecure networked cyberworld none of this is far from reality, even today. Further, advanced listening, viewing and other spying devices and other means to

(say) reconstitute what is an electronic ‘ghost’ on a deleted and discarded PC disc or hard drive are already at hand. Is copyright protection in such a world enough? Indeed in the third world, especially in China, the business of stealing everything from DVD and CD content to the Rolex brand is part of everyday commerce. As technology continues to progress even more insidious forms of stealing intellectual property will become possible. At that time or before copyrights will need to be supplemented by robust mindrights.

Just imagine if DOS had been stolen from Bill Gates before it was even published and he had made his deal with IBM, would CPM have become the operating system for the early PC? Access to other peoples private writings, like to someone else’s incomplete unpublished manuscript, would undermine the whole economic business of content creation and development. Lawsuits would follow the daily course of business even more than

today and legal expenses would grow even further. In the meantime the creative forces would be greatly discouraged and the quality of content would falter. Of course Hollywood is already a lawyer's paradise as many already lay claim to other people's ideas as their own ex post facto. With further advances in electronics we can only expect the problem to get worse. Therefore new legal protection will be needed — as in rigorous Mindrights.

It is said that two of the greatest geniuses of the 17th Century, Newton and Leibniz, each invented the mathematical method known as the calculus. As they lived in what would then have been a world apart, England and Germany, most scholars believe their discoveries were fully independent of one another. As time passed the methods they developed became an indispensable part of modern science and technology. No copyrights or other rights were at play, just the flow of an evolving technically enabled commercial world. Indeed no one will ever know the whole story. In today's world such a situation would be far less likely to occur, as information flows over the Internet cross–continents in mere seconds to make such a separation far more unlikely. Is that good or is it bad, or just a lower level of collegiate cooperation — one can argue the case both ways. One thing for sure is that the commingling of ideas can at times have negative as well as positive effects. It is said that if Newton had any idea of the complexity of General Relativity, his theory of gravity would not even have been discovered at that time. Indeed Newton kept his writings in a desk drawer

for years on end before showing them to anyone. Yet his Mindrights were preserved for posterity by the natural protection afforded by the limited technology of the day.

There you have it. If collaboration is the better way forward that leads to greater progress than a new model based on collective knowledge will indeed yield superior results. If, however, the creative process works better at times when a lone artist is left to agonize and incubate his or her ideas in solitude, then the old way may still yield the better content. In either case copyright is a very important part of a process that motivates innovation in an economically viable way. In a similar manner future mindrights may need similar legal protection.

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As to the Grokster case, it is hard to suppose that these folks are totally innocent, indeed we may doubt that they are. Nonetheless, as long as such Peer–to–Peer copying and transmission have other broad and useful purposes that benefit society, the fact that some abuse or misuse the technology is no basis for banning its use. Otherwise every kitchen knife would be outlawed at a dangerous tool in the hand of maniacs, instead of its true value as a useful kitchen utensil. A free market society must often deal with dangerous materials and processes, which it may regulate without abolishing.

Building Win–Win TV Advertising That Keeps Advertisers Happy

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Inertia is a generally a good thing; indeed without it the world as we know it might spin out of control. Yet inertia can at times drag what is no longer best in class forward into the future in ways that block true progress. The current 30–second spot TV advertising paradigm is like that and we all know it — don't you agree? What with TiVo, VOD and other 'trick play' time shifting methodology becoming the way of the TV world, how could it be otherwise? Better ad targeting as in Spotlight and Visible World technology can help, but viewers by the millions are still going to skip more and more ads than ever! In the meantime, with big ad revenues on the line, many an executive may still be trying to avoid these realities. Thus some confusion in boardrooms prevails as TV advertising continues to deploy lengthy advertising pods of six or even eight 30–second segments in train. At the NCTA 2005 in San Francisco last week we learned that by 2006 there will be 20 million DVRs and a similar number of VOD systems in play in the USA alone. Thus a continuation of such TV advertising methods looks futile, and advertising effectiveness seems to be heading for a nosedive. All the while the wiser advertisers are trying to work out how to disintermediate their message and branding offerings from TV by going more and more to the Internet and other alternate media. Herein we propose a simple and better approach to deploying TV advertising for you to consider.

Out in the real world nothing has changed, as advertisers need effective advertising more than ever. Indeed if they have to they will learn to pay a great deal more for TV advertising, if only it can once again get their branding message out to the public in a way that gets attention. Indeed as time–shifting has made the current version of TV advertising far less efficient at delivering its message it follows that TV advertising cost must go up quite a bit to somehow compensate with better methods and technology. In this case higher cost will relate to more creative approaches involving complex methodology and advanced systems for enabling far more effective ad insertion and personalization. It is of importance that advertisers, ad agencies, ad buyers, networks, service providers and tech houses recognize the new paradigm. With new technology at hand the TV viewer will no longer abide the old down your throat push forms of TV advertising unless the message is truly on point. On point for an ad means that the viewer immediately recognizes the ad as relevant to his or her interest or need. To do so the demographic fit of the ad to the viewer must be just right for the advertiser and for the viewer. Here a good deal of personalization of the ad message can be of real help, and a degree of interactivity such as telescoping into further layers of detail can be useful. That said, none of this can work if the viewer is caught in an out–of–context viewing discontinuity and turns away prior to

noticing the ads' relevance, personalization and value. Thus it is also of great importance that the ad message be interlaced into the programming in a way that maintains a high degree of context continuity. That is to say that the point of insertion of each ad must be selected in a manner that preserves a degree of context. For example a bathing suit ad that follows a poolside scene has a better chance of capturing the attention of some viewers. Similarly a Motrin ad nicely placed after a disturbing disagreement in a TV drama may catch a few eyeballs. Or a Goodyear tire commercial following a pit-row segment at the Indianapolis 500 may do the trick. In counterpoint, a commercial for Revlon makeup in the middle of the Fox 24 action drama is more likely to annoy than to attract viewers. Context does matter, especially to anyone able to fast-forward from an unwanted distraction, as in out-of-context commercials.

On point advertising also creates a need to utilize demographic filters that select just the right audience for each message. This translates into a need to employ channels and programming in ways that bring a high degree of relevance and context to the commercial message at its point of sale. Once again more and better technology is required. Sorting out the viewing population in large metropolitan areas by zip code, area code and similar methods can help to target ethnic and other segmented populations in ways that work. Without violating consumer privacy, methods that use benign knowledge of a person's preferences such as for an SUV versus a convertible car can also be of help. Here such methods as those used by Comcast Spotlight can be of great help.

All the while, the old tried and true ways of attracting passive viewers into watching an ad by startling them with noise or action scenes into paying attention cannot work any longer. Indeed in the presence of time shifting and other ways to skip the ad, the by noise or shock alerted viewers just click away on their remote controls. These days the better way to get the attention of the viewer is to segment subliminally into something of interest that has some relevance, context and visible value. Of course the majority of people will still turn away from the ad as they do when they turn the pages of their Newsweek, Fortune or Playboy magazine. But that is as it should be in what is becoming a 'pull' advertising model wherein the viewer is allowed to notice something and elect to give attention, or to turn away. However, in order to 'segment subliminally' into anything context and continuity is often the key.

In general bringing a broad based point of view to a new advertising paradigm along with some improved enabling methodology is the key to solving the TV advertising challenge. The main factors to consider are:

- 1) Relevance of the Ad Message.
- 2) In-Context Ad Insertion.
- 3) Suitable Demographic Profiles.
- 4) Personalization and Interactivity.

Of course these factors interplay in various ways and are not independent of one another. Neither are they mutually exclusive or collectively exhaustive of the elements that interplay in an ad working effectively. For example, conditions in the living room obviously also play a critical role in making the branding impression or in selling a specific product or service.

At the most basic level an in-context advertising and relevancy based system or CRS should consist of an easy to deploy scale or metric as in:

Value of an ad = Relevance + Context + Demographic + Personalization

Abbreviated as: $V = R + C + D + P$

Where the values are:

Relevance = {R | where R = 0,1 or 2 when relevance is poor, average or good}

Context = {C | where C = 0,1 or 2 for a poor, average or a good context fit}

Demographic = {D | where D = 0,1 or 2 for poor, average or good demographics}

Personalization = {P | where P = 0,1 or 2 for zero, some or a high degree of P}

(Note: The nomenclature has been changed and simplified from previous versions)

For convenience and as a way to keep the value V between 0 and 2 (with 1 as average) and to weigh the individual factors according to their importance we can rewrite the recipe as:

$$V = a.R + b.C + c.D + d.P$$

Where the weights used are: $a + b + c + d = 1.0$

Herein $V = 0$ represents placing an ad place with a poor demographic fit and lack of relevance, while making no attempt to match the ad context with that of the show and with no degree of personalization in use. Why should anyone pay for such an ad? This advertisement is a straight shot in the dark, with little hope of creating value. If you watch TV most any time you will see that the great majority of TV advertising falls into this category, it is mostly a zero. On the other hand a $V = 8$ would signify that all four factors come into play at their high level. This would mean that an advertiser should prize it highly and be willing to pay a premium for its placement. Here we have good demographics with a high degree of relevance to the viewer, with the ad inserted at the right point in the programming and sufficiently personalized to make an impact on its audience. Such a situation is rare indeed even on the Internet. Today it is mostly a case of targeting the audience in terms of demographics, as that is what gets most of the attention.

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A great deal more development work and field-testing of ad personalization is needed to establish how to use it to enhance viewer interest. The same can be said of in-context advertising (INCA) and to understand and apply demographics and relevance to branding and advertising. What is certain is that viewers tune out when they lose interest due to a lack of relevance and context (bound together) with what is on the screen. But how much of this is required to minimize the viewer fast-forwarding the ad will still need to be determined. In permission-based advertising any push must be very light handed indeed while pull must be driven by relevance and context that ensures interest and attention. An attempt by the industry to work toward achieving a truly practical and useful context relevancy system or CRS can go a long way to re-enabling the TV advertising model to work effectively for the advertiser. Without annoying or frustrating the viewer high valued ads are able to successfully get their message across. So why not address this challenge head on by bringing relevance and in-context advertising formally into the electronic media advertising space with a CRS metric?

For the purpose of seeing how this approach could result in a viable system, it might be useful to ponder how a CRS metric could be employed to improve TV advertising efficiency. Also how such a valuation of an ad might help to set its commercial price. One non-disruptive approach would be to leave the current pricing model or CPM (cost per thousand) for an ad in a show as is; then downstream adjust it via its CRS at the point of usage, i.e. modify its final value based on context, relevancy and personalization. In that way the advertiser and media buyer get greater value as the CPM is altered based on the degree of adherence of the network to the context and relevancy level of the actual viewing situation. Initially, especially during a trial period, this adjustment of the CPM could be kept small. Later on, as experience begins to train buyers to use this tool with skill, the adjustment can be increased. To set the wheels in motion will take the capabilities of one major advertiser or industry group. It will also require participation from a media service provider such as a cable or satellite company, a network, a technology house, an advertising agency, and one or two others. Working in community a CRS project could within a short period do much to influence how TV advertising is managed and priced in various sectors including the Internet. The net upshot may well be to increase the value of advertising to such a degree that it counterbalances the loss of efficiency caused by the rapid rise of such new technologies as the DVD, the DVR and On Demand. If so, it will be the advertisers who gain the most, while a grateful public learns to appreciate the value of advertising as a good in its world. As to its impact on the economy, as advertising becomes more effective everyone is sure to benefit.

As with any major change in the business situation, it is only natural that some may want to hold back a little while hoping that the old ways will prevail — if they just pray enough. In this case it will not pay to delay too long as advertisers are paying more and more to get less and less. As to the effort required to put something like a CRS metric into practice, there is no better time than now to start the experimentation.

The beauty of this approach is that something of value comes to the advertiser right away. Indeed, from the start, a train of events is set into motion that begins to address the present difficulties in practical terms concerning relevance and context. In contrast, standing frozen while watching a ‘tsunami’ hit advertising is just poor for business. Make no mistake about it; the TiVo-like capabilities of DVR, DVD, OD and similar systems will be a devastating blow to TV advertising unless steps are taken to rebalance the system closer to the desire of the advertiser and also the viewer. It is up to everyone to join in to bring greater relevance and context to TV advertising so that viewers will watch the ads and so that advertisers get real value for their money once again.

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(Leo Willner and Greg Kalsow contributed to this issue. In order to discuss any of these points with the authors, please e-mail them at: leo@cmsderfler.com and greg@cmsderfler.com)

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