Content Filtering and Technology Mandates: Technology, Policy and History

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Online piracy debate raises complex technology/public policy issues



Understanding the issues with robust public debate is key

Digital Home Vision: Protection/Interoperability



End to End Content Protection



Content Protection Basics

• Encryption Technology is basic tool

- Content is encrypted at the source
- Technology and "decryption keys" requires rights holder approved license

• License Agreements govern manufacturers

- Grants right to use technology/keys only in "legitimate" devices
- Enforcement, rights, remedies, liabilities

• Laws target Pirates because technology does not work against them!

- Piracy laws, Anti-circumvention (DMCA, etc.)



Protecting Content vs. Policing Consumers

"Protecting"

- Content is encrypted at source
- Devices maintain protection of the specific content.
- Examples:
 - •DVD Content
 - DRM Sourced Content
 - Cable/Satellite Content
 - •Blue-Ray/DVD Content

• Use IP/Technology to Enable a Protected and Productive Digital Market

"Policing"

- Consumer gets clear content
- Device/network/service looks for an invisible mark/content ID and won't play/deliver content
- Examples:
 - •DVRA/Hollings: Screen CGMSD
 •SCD: "Spy-ware" limits coping
 •Blue-Ray-AACS Audio Watermark
 •Filtering Mandates

 Use Technology to Police Consumer in Home and Internet

Recent history...Now repeating in EU

- 1984: **Sony sued over Beta Max:** no secondary liability for products with substantial non-infringing uses
- 1992: Audio Home Recording Act: Filtering type-tech mandate on digital audio recorders passed but failed as market moved
- 1996: **Digital Video Recording Act Proposed:** Tech mandate on all digital devices defeated
 - Voluntary cross-market initiatives flourish, eventually leading to CSS/DVD, HDCP, DTCP, CPPM, CPRM, AACS/BlueRay
- 1998: **DMCA:** Safe Harbors, Anti-circumvention
- 2000: Hollings Bill Proposed: Sweeping tech mandate defeated
- 2005: Grokster: preserved BetaMax with caveat that product not marketed primarily for infringement; spawned numerous US legislative attempts (defeated) to undermine BetaMax

And now....

- EU Telecoms package
- France, UK and other member states considering legislation on anti-piracy
- Litigation in several EU member states

Technical and Public Policy issues with filtering

• Easily defeated with Encryption/scrambling

- Network traffic is already moving to encryption to protect privacy and avoid filters
- "Whack a mole" not commercially/technically reasonable
- Tech mandate immediately "out dated"

• Shifts and creates new liabilities for service and technology providers

- Displaces well developed principles of secondary liability and safe harbors
 (i.e. "mere conduit" in the EU)
- Implementing companies face claims by consumers if over-inclusive and claims by content owners if under-inclusive
 - > Technology cannot clearly distinguish authorized and unauthorized uses

• Cost-Benefit analysis doesn't make sense

- Imposes significant implementation costs, with no commensurate benefit
- Protects one business at the expense of others
- Creates real business issues regarding creation and distribution of goods and services across national boundaries
- Raises a host of other important public policy issues

How to address concerns related to unauthorized P2P file sharing

- **Private agreements** are the best way to foster the development of new consumer offerings and media usages and to protect digital content owner interests
- Filtering obligations and technical mandates imposed to ISPs will not be effective in preventing or reducing unauthorized P2P file sharing, because:
 - There is no "silver bullet' technology to identify or avoid unauthorised P2P
 - Filtering technologies can be easily circumvented
 - Any chosen technology must be constantly updated and no legislative effort can follow that rapid evolution
- Technology mandates will stifle technological innovation
- Presumption of copyright infringement: infringement determinations should be left to Courts and not to ISPs or rights holders

Summary and Conclusions

- Technology has an important role in a digital society, but technology mandates are ineffective
- Technology can help to protect content, in the context of market driven agreements, but government mandates to impose specific technology to fight piracy will not work
- Private agreements promote market driven consumer offerings and media usages that will reduce incentives to acquire unauthorized content
- Understanding the issues with robust public debate is key

Thank You