

# THE FCC AND CONGRESS SHOULD CONSIDER CONSUMER RIGHTS WHEN MAKING THE TRANSITION TO DTV

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*This ibrief discusses the copyright issue surrounding the transition into Digital Television. It proposes that the Federal Communications Commission should balance the copyright interests of all parties involved in the DTV transition. Creators of informative and entertaining works must be rewarded with incentives to create further works. Such incentives necessarily involve copyright protection for these content holders. Just as the rights of content holders should be protected, the public's right to access information and to freely express ideas needs to remain protected. Copyright laws, specifically the fair use doctrine, must be allowed to stand firm while maintaining flexibility in order to advance with media technology.*

## INTRODUCTION

¶1 In the early 1990s, the advent of digital technology allowed for the simple duplication and distribution of various forms of information, such as software programs and audio files. File sharing via the Internet raised concerns of rampant piracy and intellectual property infringement, causing content providers, such as the music industry, to fear for the survival of their business models, as well as their overall existence. In an effort to continue their traditional business methods, the music industry waged a battle over copyright protection against a group that previously fueled the music industry, the consumers. As the clash raged on, Hollywood insiders and the fearful broadcasting industry watched as the music industry and digital pirates fought over digital audio content. However, as the prospect of Digital Television (“DTV”) became a reality, television broadcasters entered into debate so as to avoid the substantial losses that the music industry previously suffered at the hands of digital pirates. Television broadcasters and content holders have entered the debate by voicing their disapproval of home digital recording in the halls of Congress and the Federal Communications Commission (“FCC”).

¶2 Many players in this debate possess different desires as they begin the broadcasting battle. These players include Congress and the FCC who wish to free occupied spectrum, the movie industry and other content providers who desire newer and more stringent copyright laws, technology manufacturers who wish to sell more home electronics, and consumers who wish to protect traditional legal norms. Just as the traditional business models of the music industry have been impeded by copyright infringement and piracy, copyright issues impede the transition into the DTV era. All the players must reach an agreement in order to progress the digital transition. To realize

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this goal, the voice of all parties must be heard, and a balance must be struck by the FCC. Commissioners should listen to the arguments and keep them in mind when enacting new mandates to protect creative material in the digital medium. For example, copyright holders see the current direction of the DTV revolution creating a real danger of infringement, while consumers see the transition to DTV as potentially eroding their fair use rights and access to material.<sup>2</sup> Both copyright holders and consumers, however, will agree that the underlying issue concerns the dilemma of preventing illegal broadcast copying while still allowing legitimate copying for “personal and non-commercial use.”<sup>3</sup>

### **DIGITAL PROVIDERS NEED COPYRIGHT INFRINGEMENT PROTECTION**

¶3 The transition into the digital era has allowed for unauthorized and rampant duplication and distribution of information and works, but copyright law must stand firm and protect the interests of those that introduce works into society, such as television content providers and broadcasters. Content providers appropriately rely on existing copyright law to maintain and encourage the production of informative and entertaining broadcasts. Since the introduction of the printing press, copyright law has maintained creative and economic incentives for artists and writers.<sup>4</sup> American copyright law today exists in the statutory form of the Copyright Act of 1976.<sup>5</sup> The Copyright Act states that copyright protection exists in “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated.”<sup>6</sup> Exclusive rights of copyright holders include the right to reproduction, derivative works, distribution, public performances, and public display.<sup>7</sup> In relation to broadcasting, owners of copyrights in television programs enjoy the exclusive right to “publicly perform” those programs and to license others to do so.<sup>8</sup> Content providers must be afforded this limited protection so that they may facilitate the creation of more works, works that benefit the entire public. In addition to the Copyright Act, owners of copyrights also rely on the concept of secondary liability, discussed below, in order to establish liability for non-infringers that facilitate or allow infringement by others. For example, rather than seeking copyright remedies from individuals unlawfully downloading music files, the music industry and music copyright holders successfully shut down the Napster website by invoking secondary liability on the grounds that Napster allowed individuals to unlawfully swap copyrighted material on Napster’s Internet service.<sup>9</sup>

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<sup>2</sup> Will Safer, *Industry Leaders Ready Digital Content Copyright Plan*, TWICE, Apr. 26, 2002, available at [http://www.twice.com/index.asp?layout=story\\_stocks&articleid=CA214943](http://www.twice.com/index.asp?layout=story_stocks&articleid=CA214943).

<sup>3</sup> See Copyright Act of 1976, 17 U.S.C. § 107 (2002).

<sup>4</sup> Aaron A. Hurowitz, *Copyrights in the New Millennium: Is the Case Against ReplayTV a New Betamax for the Digital Age?*, 11 COMM'LAW CONSP'CTUS 145, 148 (2003).

<sup>5</sup> 17 U.S.C. §§ 101-122 (2002).

<sup>6</sup> § 102(a).

<sup>7</sup> § 106.

<sup>8</sup> *Id.*; see also *CBS Broad., Inc. v. Echostar Communications Co.*, 265 F.3d 1193, 1201 (11th Cir. 2001).

<sup>9</sup> *A & M Records, Inc. v. Napster*, 239 F.3d 1004 (9th Cir. 2001).

## CONSUMER RIGHTS IN THE DIGITAL ERA

¶4 Just as content providers must rely on copyright laws to protect their interests and to encourage overall creativity, consumers must also be allowed to retain their rights. One of these rights is “fair use,” which allows individuals to copy and distribute copyrighted works without infringement liability. After a plaintiff establishes an infringement of an exclusive right, the defendant may raise the defense of fair use. The Copyright Act of 1976 provides a four-pronged test to determine whether use of a copyrighted work falls under the doctrine of fair use. The test requires courts to examine (1) the purpose and character of the use; (2) the nature of the work; (3) the amount and substantiality of the portion used in proportion to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>10</sup> By reviewing the four prongs with equal weight, the Copyright Act provides individuals with a broad and flexible defense against copyright liability.<sup>11</sup> Courts utilize the fair use doctrine when awarding infringement remedies for a usage stifle the “very creativity which that law is designed to foster.”<sup>12</sup>

### Fair Use and Copying Television

¶5 The American public relies on the fair use doctrine as a basis for their rights as consumers. The application of the fair use doctrine as applied to recording broadcasts finds its origins in *Sony Corp. of America v. Universal City Studios* (“Betamax decision”). In this decision, the Supreme Court reaffirmed the notion that not all unauthorized uses of a copyrighted work constitute infringement.<sup>13</sup> The Court found that recording television programs with a videocassette recorder (“VCR”) for personal use constituted a non-commercial and nonprofit activity that had very minimal impact on the market.<sup>14</sup> Although the Betamax decision primarily involved contributory liability against Sony Corporation, an electronics manufacturer, and not the consuming public, the decision provided the foundation of fair use in the recording of analog television broadcasts with VCRs. Just as the American consumer relies on the fair use doctrine to record analog television programs, the FCC should afford the American consumer with the opportunity to digitally record digital broadcasts and use those recordings in non-commercial and non-profit manners.

¶6 The FCC’s familiarity with copyright policy issues date back to the late 1960s and the birth of cable television. The rise of cable necessarily involved the importation of broadcast signals from other markets. Similar to the current sentiments concerning DTV, broadcasters opposed cable retransmission of their programming on the claim of unfair competition. In essence, broadcasters and Hollywood studios felt that cable robbed them of control

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<sup>10</sup> See 17 U.S.C. § 107 (1994); see also *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 (1985).

<sup>11</sup> *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

<sup>12</sup> William Sloan Coats, Vickie L. Freeman & David K. Bourdreau, *Hot Issues in Copyright and Trademark Licensing*, 20 No.2 COMPUTER & INTERNET LAW 16, 19 (2003); *Harper & Row*, 471 U.S. at 550 (quoting *Iowa State Univ. Research Found. Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980)).

<sup>13</sup> *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 456 (1984).

<sup>14</sup> *Id.* at 449.

and compensation. In *Fortnightly Corporation v. United Artists Television, Inc.*, Hollywood studios claimed that cable retransmission of broadcast signals infringed upon the studio's copyrights.<sup>15</sup> The studios filed suit against the cable companies, but the Supreme Court did not find violation of copyrights.<sup>16</sup> When the Supreme Court found no copyright violation, the broadcasters returned to the FCC.<sup>17</sup> The FCC possesses the power to implement regulations and policy under Title I of the Communications Act of 1934 ("Communications Act"). The Communications Act provides "reasonably ancillary" jurisdiction over numerous telecommunications issues.<sup>18</sup> The FCC heard the complaints of the broadcasters and then promulgated a rule allowing cable system operators within thirty-five miles of a top one hundred market to carry commercial distant signals only if they obtained permission to retransmit.<sup>19</sup> Furthermore, permission was to be obtained on a program-by-program basis.<sup>20</sup> In essence, the FCC attempted to rectify the problem of unfair competition with its proposal for retransmission consent. Additionally, the Communications Act grants the FCC the authority to "perform any and all acts, makes such rules and regulations, and issues such orders not inconsistent with this Act, as may be necessary in the execution of its functions."<sup>21</sup> Recognizing that the FCC holds the authority to deal with telecommunications matters involving the DTV transition, the FCC should keep in mind that consumer rights, as established by the fair use doctrine, must coincide with the property rights and copyright of content providers.<sup>22</sup>

## CONVERTING TO DTV IS APPROPRIATE

¶7 The area of United States telecommunications took progressive steps towards DTV in the early 1980s when various members of the telecommunication industry worked together to develop the blue print for the DTV system in the United States. The FCC then approved the resulting specifications for the incorporation of integrated and stand-alone set-top TV models.<sup>23</sup> Since then, considerable efforts have been made to facilitate the transition from analog to DTV. In order to understand why the FCC, Congress, broadcasters, consumers, and electronics manufacturers desire the full implementation of digital technology in television, one must compare the differences between the traditional analog systems to the high quality digital system.

¶8 The term "analog" refers to the incorporation of analog propagation (wave form) of analog encoded content.<sup>24</sup> Specifically, analog conveys information by detecting continuous changes in the amplitude or frequency of a radio transmission. Analog encoded content include etchings in sound recordings, videotapes, and the fixation

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<sup>15</sup> 392 U.S. 390, 393 (1968).

<sup>16</sup> *Id.* at 402.

<sup>17</sup> Jonathon Weinberg, *Digital TV, Copy Control, and Public Policy*, 20 CARDOZA ARTS & ENT. L.J. 277, 279 (2002).

<sup>18</sup> See 47 U.S.C. § 154 (1934).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Weinberg, *supra* note 17, at 278.

<sup>23</sup> Stand alone set-top TV sets do not require digital converter boxes. Non-digital TV sets require digital converter boxes to convert the digital signal into analog signals.

<sup>24</sup> Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 105 (2003).

of audiovisual works in films.<sup>25</sup> The industries creating the copyrighted material tightly controlled both the exclusive rights of recording and distributing. A significant reason why audio and visual content industries flourished without hesitation involved the nature of analog: analog contents degrade over time. The analog platform does not allow for easy unauthorized reproduction and distribution of works due to its degenerative nature.<sup>26</sup>

¶9 Another reason why the content industries thrived involved the distributory nature of their works. For example, the film industry controlled the distribution of their works through theater releases. Consumers could only gain access by visiting the ticket booth.<sup>27</sup> This distribution system applied to television as well. Although the VCR slightly modified the system, consumers could only access television programming by tuning into stations. Instead of receiving payment at the ticket booth, broadcasters received payment in the form of advertisement revenue. Even with the VCR, content providers and copyright holders could rely on the technological impediments, such as the degrading nature of the analog platform to prevent unchecked distribution of content. Consumers could reproduce and distribute the copyrighted materials, but quality decreased with each generation's copy. The price of blank media, time required to record, and the risk of copyright enforcement reduced the threat of widespread copyright infringement.<sup>28</sup> Although the popularity of VCRs allowed for the recording of television broadcasts, many owners utilized VCRs to view pre-recorded materials, such as home videos. This created a prosperous secondary market of video rentals and sales.<sup>29</sup> Many consumers relied on video sale and rental because of the diverse range of programming available as compared to television broadcasting. Additionally, consumers embraced video rental and sales because they did not contain the commercials that televised broadcasts did. Consumers viewing a recording of a televised program could push the fast forward button, but many chose to forgo the slight trouble and watch the recorded commercials in addition to the targeted programming.

¶10 The term "digital" refers to the signal consisting of ones and zeros (binary code) used to characterize voice, video or data. Like analog, digital technology provides a vehicle to allow for the representation of information.<sup>30</sup> Unlike analog, digital technology's versatility offers a near perfect platform for storing, duplicating, and distributing content. Users can substantially compress digital information allowing for even greater dissemination of information in a relatively short period of time.<sup>31</sup> The threat of degradation commonly associated with analog does not exist with digital technology. The encoding of works in binary form enables near perfect reproduction in an inexpensive and rapid form. In essence, the transition into digital broadcasting is appropriate because consumers will be able to rely on high quality programming and broadcast formats with images possessing twice the resolution

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 108.

<sup>29</sup> *Id.*

<sup>30</sup> Hurowitz, *supra* note 4, at 146.

<sup>31</sup> *Id.*

of traditional analog broadcasts. The advent of zip drives, CD burners and DVD burners, however, enables users to record and distribute content in a manner that could possibly rival that of broadcasters and content providers.

### **Purpose Of DTV: Reallocating Unused Spectrum For Cellular Spectrum**

¶11 Congress and the FCC support the DTV transition so they may reclaim unused broadcast spectrum. Specifically, the DTV transition will increase efficient use of spectrum, expand consumer choice for video programming, and increase the amount of spectrum available for public safety and other wireless services.<sup>32</sup> Due to the compressibility of digital information, existing broadcast television stations may be able to broadcast within a smaller spectrum allocation. This efficiency model will then allow Congress and the FCC to issue additional licenses and auctions to generate more revenue.<sup>33</sup>

### **The Difficulties Of Converting To Digital**

¶12 The FCC set the date of December 31, 2006 for the end of the transition period.<sup>34</sup> Despite broadcaster's numerous complaints about the early deadline for DTV transition, slow progress has been made. The conversion from analog to DTV requires complete cooperation, but at this point, approximately two-thirds of the nation's commercial television stations missed the May 1, 2002 deadline for commencing digital broadcasts.<sup>35</sup> In order to complete their new DTV facilities, the stations asked the FCC for time extensions. In turn, the FCC proposed sanctions for those stations failing to meet DTV construction schedules.<sup>36</sup> The threat of sanctions has forced more than 450 television stations to deliver DTV broadcasts to approximately 88% of American households.<sup>37</sup> Foremost, the DTV transition exemplifies the difficulties that exist between intellectual property laws and advances in technology. Although the copyright laws of this nation were created to change with the advancement of society and technology, many disagree as to how tightly these laws should control access to material. Access to digital technology results in greater quantity and quality of information for education and entertainment. For this reason, broadcasters challenge the transition into DTV.

¶13 As illustrated by the Napster case, media is susceptible to piracy. Hollywood's concerns of changing to the DTV format stem from the ease of illegally recording and distributing copyrighted digital works via the Internet. Broadcasters have demanded the issue of content protection be resolved before they introduce new and costly

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<sup>32</sup> Congressional directive requires the FCC to reassign the 36 MHz of spectrum now used by UHF-TV channels 60, 61, 62, 65, 66, and 67 for commercial wireless systems and the 24 MHz of spectrum now used by UHF-TV channels 63, 64, 68, and 69 for public safety operations. Richard E. Wiley and Rosemary C. Harold, *Communications law 2002: Changes on the Horizon*, 731 PLI/PAT 239, 312 (2002).

<sup>33</sup> Wiley, *supra* note 32, at 312.

<sup>34</sup> See 47 U.S.C. § 309(j)(14)(B).

<sup>35</sup> Wiley, *supra* note 32, at 312.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

digital programming to the viewing public.<sup>38</sup> Broadcasters want the FCC to implement content protection that may cause unjust government intervention and violate consumer's rights. Fearing this type of infringement on consumer rights, consumers have come together and formed organizations, such as "Digital Consumer," to protect themselves.<sup>39</sup> These consumer advocates contend that digital consumers should enjoy the same fair use and non-commercial home recording rights enjoyed during the analog era. Courts traditionally uphold consumer's rights to make personal copies of copyrighted works,<sup>40</sup> but the transition into DTV raises the dilemma of drawing the line too far away from consumer's rights. All the players must agree as to where to draw the line so as to maintain universal rights to enjoy information.

¶14 The task of drawing the line falls upon the FCC. In order to assist the FCC in this arduous task, the FCC should consider the policy interests and then balance those interests with copyright at one end and the public's right to access information on the other end. Content providers have taken the stance that they will not permit the digital broadcasts of high quality programming unless a digital copy protection scheme exists.<sup>41</sup> Furthermore, many electronics manufacturers cannot lower the price of digital equipment unless market forces, controlled by the consumers, increase the demand for equipment. The reluctance of consumers to purchase DTV receivers and equipment keeps the price of DTV equipment prohibitively high.<sup>42</sup>

### **BETAMAX SHOULD NOT BE OVERRULED**

¶15 If the FCC mandates technological regulatory regimes, not only will the fair use doctrine become eradicated, but also secondary liability and contributory infringement will most likely extend beyond the intentions of the Supreme Court in the Betamax decision. In the Betamax decision, Universal Inc. and Walt Disney Productions, as owners of copyrights of television programs, sued Sony Corporation, the manufacturer of the Betamax video tape recorder, for vicarious infringement liability.<sup>43</sup> The Supreme Court approved the application of vicarious liability for third party copyright infringements.<sup>44</sup> Instead of finding Sony liable as non-infringers allowing for or facilitating infringement by others, the Supreme Court held that the sale of recording equipment would not constitute contributory infringement if "the product is widely used for legitimate, unobjectionable purposes."<sup>45</sup> The Court considered whether the recording device possessed the capability of non-commercial and non-infringing uses and analyzed the practical uses of the device. If a "significant" number of non-infringing uses

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<sup>38</sup> Michael Copps, *Re: In the Matter of Digital Broadcast Copy Protection, Notice of Proposed Rulemaking*, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-225218A2.txt](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-225218A2.txt) (Aug. 8, 2002).

<sup>39</sup> <http://www.digitalconsumer.org>.

<sup>40</sup> *See Sony*, 464 U.S. 417; *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1152 (9th Cir. 1986); *People v. Szarvas*, 142 Cal. App. 3d 511 (Cal. App. 2nd Dist. 1983).

<sup>41</sup> Copps, *supra* note 38.

<sup>42</sup> As of this date, a Sony 32" Flat Screen HDTV Monitor costs \$1,499.99. A Sony 32" flat-screen TV costs roughly half as much as the HDTV. A standard Panasonic 32" TV costs \$479.99. *See e.g.* <http://www.circuitcity.com>.

<sup>43</sup> *Sony*, 464 U.S. at 420.

<sup>44</sup> *Id.* at 439.

<sup>45</sup> *Id.* at 442.

existed, then the device manufacturer will not be liable for vicarious liability.<sup>46</sup> In the Betamax decision, the Court found “significant” non-commercial and non-infringing uses.<sup>47</sup> In summary, consumers are allowed to record a copyrighted broadcast and watch that recorded broadcast at a later time. If the FCC and Congress enact regulations and pass laws requiring technology manufacturers to disallow consumers from recording digital television broadcasts, then secondary liability will engulf and overturn the fair use doctrine to the detriment of the American media consumer.

¶16 New protective measures currently being examined by the FCC include the broadcast flag and Selectable Output Control. The broadcast flag standard blocks the ability of consumer electronics devices to record digital programs and content. The broadcast flag would also prevent consumers from redistributing the digital content over the Internet.<sup>48</sup> Members of the consumer electronics, information technology, movie, cable and broadcasting industries reached an agreement on using broadcast flags in order to protect against illegal copying. Even though the industries arrived at a consensus on the need for flags in general, no agreement was reached on implementation nor enforcement of broadcast flags.<sup>49</sup> Another mechanism of undercutting fair use involves the use of Selectable Output Control (“SOC”). SOC allows content providers to remotely signal home devices. These signals would allow content providers and broadcasters to turn off consumer home interfaces on a program-by-program basis.<sup>50</sup> Specifically, if Congress mandates such technological protections, then the electronics industry will be subject to a more stringent form of secondary liability because not all members of the industry will comply with the technological copyright protection scheme involved with the DTV transition. Smaller and low-end electronics producers will be hesitant to follow the broadcast flag and SOC scheme due to cost and demand issues.<sup>51</sup> In this sense, many consumers will not be able to afford to purchase expensive electronics equipment. These consumers will purchase less expensive equipment from lower-end electronics producers who cannot implement the broadcast flag and SOC scheme because of the high cost of implementation. Forcing electronics manufacturers to incorporate standards such as the broadcast flag and SOC will unduly place the burden of liability on the manufacturers.

¶17 Copyright infringement will certainly occur where consumers utilize electronics equipment not capable of providing broadcast flag or SOC technology. In these situations, broadcast copyright holders will take advantage of the enlargement of secondary liability, as well as the fair use erosion, and bring suits against the manufacturers based on knowledge and direct profiteering.<sup>52</sup> In *Fonovisa, Inc. v. Cherry Auction, Inc.*, the Ninth Circuit held the landlord of a swap meet vicariously liable for contributory infringement because the landlord demonstrated

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 456.

<sup>48</sup> Wiley, *supra* note 32, at 366.

<sup>49</sup> *Id.*

<sup>50</sup> [http://www.hrrc.org/global\\_include/asp/selectable\\_output\\_control.asp](http://www.hrrc.org/global_include/asp/selectable_output_control.asp).

<sup>51</sup> Richard M. Lewis, *Letter Addressed to Chairman Michael Powell Concerning Compliance with DTV Transition*, July 12, 2002, <http://www.fcc.gov/Speeches/Powell/Statements/2002/zenith2powell.pdf>.

<sup>52</sup> *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 263 (9th Cir.1996).

knowledge of widespread copyright infringement activities and the availability of pirated tapes.<sup>53</sup> The court also held the landlord liable because he provided support services to the vendors, such as parking and advertising, thereby contributing to the infringing activities of the vendors.<sup>54</sup> Although the Betamax decision appropriately does away with the issue of a manufacturer's secondary liability for personal recording, the potential for copyright abuse in the area of DTVs will surely invoke more decisions such as *Fonovisa* in the digital media. An on-going case concerning this issue comes out of a California federal district court. In *Paramount Pictures Corporation v. Replay TV, Inc.*, members of the entertainment industry allege that the Replay TV technology enables the widespread recording and distribution of digital files via the Internet.<sup>55</sup> Replay TV allows users of a recording device to view recorded programming while skipping commercials and allows the user to transmit digital copies of the recordings via the Internet. Entertainment industry copyright holders claimed this was an infringement. Users of Replay TV filed a countersuit in August of 2002, claiming that the use of Replay to record and skip commercials falls within the scope of the fair use doctrine.<sup>56</sup> Although the trial court concluded that the representatives of the entertainment industry failed to adduce adequate evidence of any adverse effects on the potential market for the copyrighted works, including lost advertisement revenue, lawsuits involving digital recordings will further test the limits of the fair use doctrine.<sup>57</sup> As *Replay-TV* illustrates, content providers seek to overturn the long-standing protection of consumer rights provided under the Betamax decision. If content providers and copyright holders continue to fight against the Betamax decision, then the fair use doctrine will eventually fall and the rights of consumers to use their digital recordings in personal and non-commercial manners will disappear.

## CONCLUSION

¶18 Content owners will not release high quality programming and entertainment services without assurances that their products will remain secure from copyright infringement. Fortunately, the electronics industry and the content providers are working to resolve this impediment to DTV transition. For example, the cable industry currently supports digital connectors allowing consumers to use their digital equipment and content owner's copy protection.<sup>58</sup> Unfortunately, consumers are being left out of these resolutions. Consumers will not participate in the DTV transition by purchasing costly equipment. Currently, 99.5 percent of non-cable TV households have not integrated digital technology into their existing TV systems.<sup>59</sup> Furthermore, consumers will not be motivated to convert to digital television equipment if exciting high-quality digital content is lacking. This cyclical imbalance will continue to exist unless content providers compromise and allow consumers to retain their fair use rights.

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<sup>53</sup> *Id.* at 264.

<sup>54</sup> *Id.*

<sup>55</sup> *Paramount Pictures Co. v. Replay TV, Inc.*, No. 01-09358 FMC (C.D. Cal. filed 2002), [http://www.eff.org/IP/Video/Paramount\\_v\\_ReplayTV/20011031\\_complaint.html](http://www.eff.org/IP/Video/Paramount_v_ReplayTV/20011031_complaint.html).

<sup>56</sup> *Newmark v. Turner Broad. Network*, 226 F. Supp. 2d 1215, 1219 (C.D. Cal. 2002).

<sup>57</sup> *Id.*

<sup>58</sup> <http://www.ncta.com/legislative/legAffairs.cfm?legRegID=15>.

¶19 The FCC should balance the interests of all parties involved in the DTV transition. Creators of informative and entertaining works must be rewarded with incentives to create such works. Just as the rights of content holders should be protected, the public's right to access information needs to remain protected. Copyright laws, specifically the fair use doctrine, must be allowed to stand firm while maintaining flexibility in order to advance with media technology. In order to maintain this balance, consumers should be allowed to project their voice. Without consumer representation in the discussions and negotiations, decisions made by a few number of companies will not adequately represent the majority of the public. "While fair use rights may be 'baggage' to the entertainment industry, those rights are cherished by citizens and citizens expect Congress to act in their defense," said Joe Kraus, cofounder of the Digital Consumer Organization.<sup>60</sup>

¶20 Protecting intellectual property and recovering unused broadcast spectrum are two important goals of the DTV transition, but government technology mandates will not properly and fairly achieve those goals. Content and technology providers will need to compromise and develop fluid business models so that consumers will be able to maintain their rights. Technological mandates will only inhibit consumers from voluntarily entering into the digital era. On the other hand, consumers need to, and will, learn that the distribution of television broadcasts via the Internet infringe upon the copyrights of the content holders. However, if Congress and the FCC force these mandates, then consumers will turn a blind eye away from the important lessons of copyright infringement. Content providers should compromise by allowing consumers to record television broadcasts. This compromise is not unfamiliar to the content providers because consumers have been recording broadcasts since the Betamax decision. Instead of focusing on the prevention and prohibition of fair use altogether, all the parties involved in the DTV transition should focus on educating the public against the illegality of copyright infringement. Instead of punishing all consumers by prohibiting digital broadcast copying altogether, Congress, the FCC and content providers should maintain existing copyright laws by preventing the unlawful distribution of copyrighted broadcasts. Prohibiting digital broadcast copying by incorporating the broadcast flag and SOC systems will break down the fair use doctrine that society has utilized since the Betamax decision almost twenty years ago. This breakdown will only hinder the learning process. If the fair use rights of consumers become usurped, consumers will become even more resentful of the broadcast industry and will feel no remorse in finding ways to record and distribute digital broadcasts.

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<sup>59</sup> *Id.*

<sup>60</sup> Anne Ju, *Will Digital TV Trample Fair Use? Consumer Advocates Say Customers are being Cut Out of Industry's Piracy Prevention Schemes*, MEDILL NEWS SERVICES, Apr. 29, 2002, available at <http://www.pcworld.com/news/article/0,aid.97464,00.asp>.