

## **Assessing the Legality of Integrated Works:**

### **The Future of Counter-Voices in a Media Convergent Environment**

Constructing an information environment doesn't involve mere technocratic rulemaking or an understanding of communication technology. Rather it requires the active participation and complicity of many different actors, at all levels of analysis. The type of media and societal discourse we encounter is constantly instantiated by those who ultimately have the power to produce and distribute content --from ISP's to software platform providers to consumers who swap files and information--. This power is legitimated through economic and legal barriers that work to control the productive capacity of individuals to offer and distribute counter voices through media. In light of recent mergers and federal attempts to lessen restrictions on the consolidation of media empires, the stifling of voices should be a serious concern to individuals who value the importance of open communication in a free society.

This paper examines how counter voices are able to effectively distribute content legally through the use of integrated works. Integrated works reference pre-existing works and comment upon them without altering the original content per se. For example, a research paper, which references other texts through hyperlinks is technically an integrated work because it relies upon another's copyrighted material to help make its own unique point. Integrated works have become increasingly sophisticated such that a person browsing the web today may not even realize that a website they are visiting is being modified by ad swapping software running covertly, concurrent applications over

original content. The law is struggling to keep pace with these innovations. I argue that the legality of integrated works is critical to a future in which individuals are empowered to provide counter voices in an environment of media convergence. I detail the legal precedents relating to integrated works in order to delineate the factors that allow them to exist in spite of increased copyright protections. I posit a hypothetical use for such works, through the prism of perceived biases in news coverage and conclude by examining how communication research methodologies will be altered by the widespread adoption and use of integrated works in the future.

### **Meaning Making Through New Technology:**

Communication law and policy serves as an important means of directing collective effort to reproduce the norms and values of a society. They serve as instruments of general praxis that change and reproduce social relations through time and space<sup>1</sup>. If we analyze the issue of new technologies from a consumeristic model, we tend to think in terms of a digital divide; Have's and Have not's. Working from this conceptual starting point it is easy to recognize that large demographic groups are being excluded from the value inherent in being able to utilize the economic potential of new media, such as saving through e-commerce sites or receiving online job skills training.<sup>2</sup>

However, if we think of the digital divide in terms of sender/receiver relations, we see that the Internet is being structured basically the same way that radio, print, and broadcast media were. The law is taking old legal conceptions and trying to make them fit with this new technology, rather than asking how it should be treated differently. By meeting the power expectations of old media, the law is effectively restricting the speech

production capabilities of individuals to re-create subjectivities, through both the means of delivery, and the use of cultural content.<sup>3</sup> This production/reception digital divide is just as dangerous as the lack of access to new technologies, which would allow the copying of dvd's<sup>4</sup> or the swapping of files.<sup>5</sup>

Historically, we have seen that the introduction of new communication technologies has been encouraged by the basic structure of mass media markets to develop high volume, high cost, printing presses and broadcast models, that “effectively change the press from local community media systems to mass scale demand management systems.”<sup>6</sup> When the telegraph came onto the scene, it showed incredible growth early on. After a number of years, individual use dropped precipitously and business use became the driving force for its widespread adoption.<sup>7</sup> This was the result of prohibitive costs for individuals and the ability of businesses to secure favorable terms of use from Western Union.<sup>8</sup> Then as now, there seemed to be in the law, an “institutional complicity to the arrangement of social relations that favored economic power.”<sup>9</sup>

Professor Lessig in a debate with Jack Valenti at the Annenberg School for Communication tried to argue that such institutional complicity and consolidation hurt the aims of copyright law because it diminished opportunities for discussion and speech creation. Lessig saw potential benefit in having common intellectual resources shared and available to all. In his book, *The Future of Ideas (2001)*,<sup>10</sup> Lessig argues that in order to understand a communication system, one needs to divide it among three constituent layers.

The first layer consists of the “physical layer.” This is composed of the computer, wires, and other hardware necessary for a modern communication system to exist. The

second layer is the “logical” or code layer, which includes the software applications that make the hardware function properly and run. This would consist of industry standards, as well as communication platforms such as Windows and Linux. Lastly, there is the “content” layer, which is what the end user is able to view. This content includes things such as mp3 music files, mpeg movies, and digital images. All three layers work in tandem to define a particular communication system. All three layers apply equally to other modern communication systems, such as traditional broadcast media, and the telephone.

As Professor Lessig points out, before the Internet, Communication production was concentrated in the hands of the few.<sup>11</sup> With the Internet, this production could be widespread. However, recent content provider mergers, new intellectual property case law and government extensions of copyright protections have controlled the ability of end-users to become producers of content. Under current conceptions of the law users must seek permission to use or build upon other aspects of our culture. These controls create new barriers to creativity.

Barriers to creativity limit the scope of personal agency. If we think about personal agency in the context of media systems, two competing views emerge. One view, which emerged from theorists of the Frankfurt School, saw mass culture as a way of turning people into automatons, incapable of challenging a materialist, capitalist message.<sup>12</sup> They criticized the press and the broadcasting companies for placing their focus on sending messages.<sup>13</sup>

Many in cultural studies who study media discourse however, see an alternate view. They envision cultural receivers as meaning makers that create “counter-

hegemonic cultural objects,” who are capable of “actively constructing subversive meanings.”<sup>14</sup> Active construction by actors (the actor being the agent/viewer) gives them the ability to transpose schemas.<sup>15</sup> In other words, actors have personal agency to create a culture that speaks to their interests. This culture serves as a “tool kit of resources” whereby actors can become skilled users of culture and the kit can serve as a valuable source of raw assets for the redeployment of meanings.<sup>16</sup>

How can users re-deploy media content when copyright law gives owners the exclusive right to control uses of their works. In fact, copyright law has been strengthened through the granting of longer copyright terms, and protection of digital encryption rights through the passage of the Digital Millennium Copyright Act (DMCA)<sup>17</sup>. Despite these strengthened copyright laws, integrated works continue to be used. Recent advances in technology have made it easy to reference other copyrighted materials. These materials are often available at all times through online websites, so the addition of a link from your document to another site is a convenient means of pointing out information that may be useful to what you are trying to convey. The law has struggled to keep up with this advance in new technology --especially with regard to digital works-- and has yet to rule definitively on the scope of legal uses for integrated works.

### **Three Case Studies of Integrated Works:**

Gator.com, ReplayTV, and Third Voice are three examples of integrated works that operate in this murky legal environment. Together they help to illustrate the issues that underlay the possible uses for integrated works and provide a reasonable background for understanding the future implications of such technology. Gator.com provides a

software application that users can download from the Internet and install onto their computer. The software does a number of things. First, the software remembers the users personal information, including passwords, and automatically fills in forms on e-commerce websites when purchases or on-line sign up information is requested.<sup>18</sup> Second, the software also protects and encrypts the data that is sent by the computer to the online site. Third, the software includes a feature known as offer companion which allows a small price comparison icon to pop up at the moment you are about to make an online purchase. If you click the icon, it will take you to a page where comparison price listings from other retailers are displayed, allowing you to find the cheapest price and purchase it from another site instead. Finally, the software superimposes its own targeted banner ads over the banner ads you would normally have seen when you visited a website.

As swapping is accomplished through an application which finds those targeted html tags advertisers paid to have inserted onto the website html markup, and then swaps them with Gator.com's own advertising clients ads. Rather than pulling the old ad out and replacing it completely, there is a two second time delay, after which the new ad is superimposed over the prior ad. The effect however is the same. The old ad cannot be seen because the page is still loading. For those sites that do not offer ads, the Gator.com program has the ability to insert small pop up ads. The pop ups are designed to match the content that the user is viewing, and serve as a useful purchasing guide.

The Interactive Advertising Bureau filed suit against Gator.com in October 2001, over the offer companion software application. The IAB was angry that many of the advertisers whom their association represented had their ads replaced by the Gator

software, oftentimes by a competitor's ads. They asserted various legal claims including trespass, copyright, and trademark infringement. They claimed that without the permission of the website operators, Gator.com had no authority to modify the content displayed on the sites.

In addition, they contended that the software application was deceptive to consumers, because consumers might believe that the replacement banner ads which were inserted were designed as part of the website. This could pose a significant problem for the website owner. For example if an ad popped up which the consumer found objectionable and then came to associate such objectionable matter with the website itself. The IAB also claimed in their suit that the obscuring of prior banner ads substantially interfered with the contractual relationships between Web publishers and advertisers. This litigation raised the critical question of just who had the legal right to control how consumers would view content on their screens.<sup>19</sup> The question boiled down to whether legal control would be granted to the content provider, the maker of the intermediary software/hardware, or the end-user who viewed the content.

Recently the IAB and Gator.com decided to settle the case, choosing instead to work together to create a method of advertisement targeting that encompasses both the traditional IAB organizations clients as well as the unique targeted ad delivery system of Gator.com. This result poses serious consequences. The legality of this new technology continues to go untested.

Unlike Gator.com, which relied on a software application to create an integrated work, Sonicblue Inc. uses a hardware device to allow individual users to control what content will be received. Sonicblue Inc. is a Santa Clara based company that specializes

in Internet convergence technologies.<sup>20</sup> The company recently purchased Replay TV Inc. Replay TV designs digital video playback and recording devices. Like other digital VCR's such as Tivo and Harmony, Replay TV allows the user to digitally record any television show or movie on a standard computer hard drive and play it back whenever the user wants to.<sup>21</sup> The difference between this product and prior digital VCR's, which has caused much controversy, is that Replay TV will now allow shows to be recorded with the commercials automatically cut out. In addition, Replay TV is designed to have a constant Internet broadband connection, which allows the user to access the library of shows recorded by the set-top box through the web, and to select online, future shows for it to record. Finally, the set-top also allows the user to send shows digitally over the Internet, to other computers or other Replay TV users, which is a similar design function that other methods of online file-swapping or sharing have used.

A "high-powered group of television networks and Hollywood studios" filed suit against Replay TV seeking to bar the company from making video recorders that included the Autoskip commercial and Send Show features.<sup>22</sup> The suit was filed in U.S. District Court in Los Angeles by Viacom International Inc., NBC Inc., Disney Enterprises Inc. and seven affiliated companies, including Disney's ABC Inc. and Viacom's CBS broadcasting Inc., The United Paramount Network and Showtime Networks Inc.<sup>23</sup> Noticeably absent from the suit was Sony, who is a major investor in Replay TV, and who was very successful in its defense of the standard VCR back in the 1980's<sup>24</sup>.

A similar Internet based television replay system was tried once before. David Simon founded a company called RecordTV.com which allowed users to use the Internet

as a virtual VCR by hosting a website which allowed users to request shows to be recorded and then allowed them to return to view the show. Record TV only allowed users to view the content through the site and did not allow them to save the content shown. Twelve motion picture studios filed a lawsuit to shut the site down and were successful in pressuring him to end the enterprise, without having to go to trial.<sup>25</sup>

In the current litigation, the media companies are arguing that ReplayTV machines deprive copyright holders of the fundamental means of generating revenue, and that this technology goes beyond fair use, because cutting commercials is very different from being able to fast forward through them. They are concerned that this new technology will impair the market for their products, because advertising is often the sole revenue source for broadcast programs.<sup>26</sup> It's interesting to note that earlier lawsuits were able to be forestalled when these same companies decided to invest heavily in Tivo and ReplayTV and were able to persuade them to either eliminate or disguise these features. When Soniblue Inc. acquired ReplayTV, the ability of major companies to pressure the manufacturer was eliminated.

The third application that has faced legal scrutiny is Third Voice Software. Third Voice is a computer program that allows users to place comments onto web pages, or highlight text, and create notes on a document. The program allows users to do this to any materials that are online at any time. The software is distributed at no charge through the Internet and can be used through either Internet Explorer or Netscape browsers. Anyone else who is using the program can be allowed to access your comments, because third voice stores the comments in a database and retrieves them whenever someone visits a site. When someone sees a small flag icon, it means that someone has posted a

comment regarding the site's content. The person can click on the icon, and a pop up window will display the comment.

The user can even comment on other comments. There is no modification to the site itself, but rather icons, pop ups and the new content is overlaid over the existing site. In this way, the original content is not modified. The Third Voice software, like some of the other tools I have discussed, doesn't change what you see, but how you see it. This software is another example of an integrated work<sup>27</sup>, which combines elements from protected works, but allows them to be seen according to how the user would like to view them.<sup>28</sup>

Products like Third Voice allow users to serve as both receivers and senders of information. It could become an important way for people to comment and use copyrighted works by allowing Internet users to publicly comment on available content and respond to the comments of others.<sup>29</sup>

### **Legal Analysis:**

Soniblu, ReplayTV, and Third Voice, are examples of devices/applications used to create integrated works that will take on increasing importance as we begin to rely more and more upon digital media to manage our daily lives. We will soon be able to digitally record everything we see and hear and touch and experience. In addition, most events will be captured digitally. Technology will allow us to be tele-present at events and meetings, space-shifting and time-shifting at our leisure to meet the demands of globalization. The law is meeting the demands of globalization by ratifying the notion

that people have the right to time-shift and space-shift to control their communication environments.

The two cases I'm referring to are: *Sony v. Universal Pictures Corp.*<sup>30</sup> and *RIAA v. Diamond Multimedia*.<sup>31</sup> In *Sony*, the court ruled that the sale of VCR's was not copyright infringement because viewers were entitled to record shows and watch them later, a practice known as time-shifting. Similarly, in *RIAA*, the 9<sup>th</sup> circuit found that the sale of the Diamond Rio, a portable gadget which stores music in digital form and plays it back through headphones, was not copyright infringement either. Judge Diarmuid F. O'Scannlain, writing for the unanimous panel, said that the cigarette-pack-sized player "merely makes copies in order to render portable, or 'space-shift,' those files that already reside on a user's hard drive." Such copying, as with time-shifting, "is paradigmatic non-commercial personal use," which is entirely consistent with the copyright law.

There are a number of legal issues and larger social implications involved in allowing individual's to be able to control the time and manner of media reception and distribution. In *Gator.com v. Advertising Industry* case we saw that there were issues relating to ad blocking and shopper comparison applications. The *Gator* litigation is significant in that the legal distinctions made between an Internet environment and a standard media delivery environment will become obsolete once media convergence becomes the norm.

The real question in the *Gator.com* case is whether the user has the right to run software that controls what content they want to see. Is ad blocking legal? Can consumers defend themselves against pervasive merchandising and corporate defined truths? There is really not much case law on the issue. From the standpoint of copyright

law, there does not seem to be much of a claim. There was once a similar service known iCraveTV, which was a Canadian Website which “permitted Canadian broadcasters to view webcasts of free Toronto television signals, claiming that its activities were authorized by the Canadian copyright law’s license for cable television.”<sup>32</sup>

The website however, framed the rebroadcast content with advertising. Copyright holders brought suit because U.S. copyright law reserves the public performance right, i.e. streaming media online, to the copyright holder. “To rebroadcast content in the United States requires the permission of the original broadcaster.”<sup>33</sup> In this case however, there is no re-broadcasting of content, and in addition, commercial advertising is not being added, it is merely being blocked. No copies are being made in the sense that the site is not being filtered through the Gator.com site, but rather is being filtered by the users home computer. Numerous anti-pornography software applications allow this same filtering, and have not as of yet been ruled illegal.

It is true that substituting commercials is materially different than simply blocking them, however in *Paramount Pictures Corporation v. Video Broadcasting Systems, Inc.*,<sup>34</sup> the court found that the defendant’s addition of commercials to the beginning of movies created by Paramount, that it rented out did not create a derivative work. The court found that a videotape with commercials “is not a new version of the motion picture.”<sup>35</sup> So at least in one case, the court recognized that the copyrighted material itself was not being altered, it was simply the viewing environment, either around or preceding it that was changed. It seems obvious that movie companies cannot dictate the context in which we watch their films (i.e. whether it’s a noisy theatre with coke ads on the walls or a dark film noir setting).

The second question we need to ask with regard to integrated works, is whether software applications that reference preexisting works constitute violations of copyright law, by violating the right of the creators to create derivative works. In *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*,<sup>36</sup> Nintendo sued the creators of a device called the Game Genie. The Genie was a video game cartridge that was attached to an original game cartridge. The Game Genie allowed video gamers to modify the number of lives they had, made them invincible, and gave them unlimited time to play rounds. The court in their analysis found in favor of the creators of the Game Genie.

The court reasoned that although the resulting features could be considered to be a derivative work, it was nevertheless fair use for people to modify how they experienced a game, for their own home enjoyment. Since the end users actions involved a non-commercial, non-profit activity, they were entitled to a fair use defense. The court made no distinction between the fact that the Game Genie involved a derivative work fair use defense, and the Sony Betamax case involved a direct copying infringement claim.

If we put these cases together, we see that courts have developed a line of reasoning which recognizes that parties who create and distribute copyrightable work, do not have the right to dictate how end users will experience the content. The Supreme Court most likely would not have ruled differently had VCR's been able to skip commercials entirely back in the 80's. The reason being, was that the court was not troubled by the fact that Betamax purchasers could skip portions of copyrighted works or view the climaxes first. Users are not required to copy entire works when they time shift. If they could record only portions of broadcasts, then why not those portions that they are only interested in seeing --sans commercials.

The only case that challenges the validity of integrated works was *Micro Star v. FormGen, Inc.*<sup>37</sup> That case involved a video game called *Duke Nukem*, which is a war game that involves traveling through different futuristic cities shooting people. The object is to survive essentially as you traverse levels. The game makers allowed users to create their own levels. These levels are displayed on the screen through the interaction of a game engine, the underlying source art library, and the MAP files. The map files are responsible for telling the engine which pictures to pull from the art library. The MAP files describes everything you see but it doesn't contain the art itself, this is merely referenced to pull. *Micro-Star* took a collection of the best user created levels that were available publicly and created a compilation disk and made it available for sale. Not surprisingly they got sued. The 9<sup>th</sup> circuit found that when the application was run, the MAP files created a duplication and thus was an infringing derivative work.

The duplication of MAP files holding may only be applicable to video games however, because game engines are a unique application that references MAP files. It is not clear whether Internet integration devices fall under this same logic because there is no game engine, pulling in a map file and processing it actively within the work. What happens with typical integrated works is that they are either overlays or blockers, not conjunctive programs, as was the case in *Duke Nukem*.

Conjunctivity as opposed to passivity is a confusing distinction similarly made famous in cyberlaw website jurisdiction issues. The real issue is that of the transformation of end users. As Litman (1999) argues, the old paradigm was the delivery of content to consumers and the new paradigm of today is the delivery of eyeballs to advertisers.<sup>38</sup> “We have become the product.”<sup>39</sup> *Gator.com* is a type of “eyeball bandit”

or “eyeball thief” that uses its software to track user movements, make better offers, and learn about what sites are of most interest to users.<sup>40</sup> This part of a larger, growing, and more alarming trend of tracking user activities in order to better target them with advertising.

Many companies offer free e-mail or Internet access in exchange for registering your personal demographic information. In addition, content providing sites, such as The New York Times, require such registration in order to view their materials. How many people bother to read through the posted legal policy statement and realize that they receive ads targeted towards them when they visit and read articles on the The New York Times website?<sup>41</sup> Given the extent to which companies are trying to gather as much data on us as possible it is no wonder advertisers who are replaced by ad swapping software are angry. They paid for information about our viewing habits and thus feel that they have a proprietary interest in what we are allowed to see.

Integrated works tend to alleviate the problem of directed ads because they put more control back in the hands of the end users. From the aforementioned cases several rules of thumb are applicable in determining the legal bounds of intergrated works. First we need to think about who is producing them and what the goals of such works are. It is likely that companies that are in it for a profit will have a harder time maintaining operations. In the first instance, they are more likely to be sued, because no copyright holder wants people to make money off of their products. Secondly, companies that are in it for a profit are more likely to be swallowed up, in order to avoid adverse court rulings when going all the way to litigation.

Three examples of companies swallowing competition to avoid litigation occurred with Ticketmaster, Gator.com, and Replay TV. Ticketmaster bought Tickets.com to avoid having to sue over that companies deep-linking to Ticketmasters' website, which had the effect of avoiding all the ads the company wanted people to see along the way. Gator.com came to an agreement with the IAB, it seems they have decided to pool their resources rather than go to court and get a ruling that says ad blocking software is permissible. Lastly, and most interesting is Replay TV's current collection of plaintiff's who once invested in both Tivo and Replay TV to try to control the market for these digital VCR products until Sonicblue bought them out.

The second generalizable rule, is that technology has a leg up over software in establishing permissibility under copyright law. In this regard, it is crucial that technology be situated within the home. There has been much talk about monitors with Internet connections, where all software and computing applications are run through giant servers on the net. This would be a terrible mistake from a communication law and policy standpoint, given the unique direction copyright law has taken with regards to content control. Without in home technology, individuals would be subject to much greater limitations in speech production. We saw with icraveTV, and MyMp3.com, that content service provider attempts are interpreted to run afoul of copyright everytime they are sued. However, integrated works that are designed to retrieve content during concurrent viewing, which do not make copies and are run through in home software applications are less likely to be shut down, because there is no re-broadcasting nor illegal copying.

### **Conceptualizing the Future Implications of Integrated Works:**

A hypothetical example of how integrated works can be useful to enhancing communication of alternative viewpoints would be through a framing or overlay device. This is what we have been noticing on many 24hr news infotainment channels. The waving American flags in the upper right hand corner, and the constant stream of scrolling ticker news could easily be used to deliver any sort of alt.news messages or user produced commentary to news that was being delivered into their home. This could be done in tandem with a time-shifting device, to avoid any potential copyright liability claims. For example, a software application could be used to automatically recognize the time-shifted program that is about to be played and could then find a website that has critical or enhanced commentary on the program, and then overlay it, providing a more interactive experience. This would enable the user to view a program with running commentary displayed on the screen, with one overlaid frame above the other. This in home use, for non-commercial, non-profit activity is entirely justified and consistent with the spirit of intellectual property law.

How might integrated technology be used to create counter voices in the future? Integrated works could possibility be used to deliver alternate news commentary. On shows like CNN's talkback live, there is a constant scrolling of commentary from CNN viewers. This commentary is mediated by the producers of the show and seen while interviews of guests are taking place. With an Internet overlay device, a television viewer could watch a news show and not only get the dominant point of view, but also that of those ordinarily left out of the media discourse.

When world trade Organization (WTO) protests occurred, there were many complaints that the media coverage of such events were framed as either anarchic or disruptive. Any news show could be captioned, or enhanced with pop ups by protesters interested in correcting the record or reframing the issue. The beauty of the technology is that a broadcast could be recorded, people who would like to comment on the content could do so and post it online for retrieval, and the user who originally recorded it could upon playback receive the commentary from others at the same time.

Adding alternate commentary or clarification could prove particularly useful not only in the field of news but also in the entire field of subtexts. What I mean by this is that many communities have discursive strategies or ways of reading content that allows them to maintain a sense of unique identity or shared otherness.<sup>42</sup> Oftentimes, people who are not a part of this community miss out, or are unaware of alternate readings. For example, movies such as *Mommie Dearest* and *Showgirls*, have camp meanings entirely different from their intended audience. People would be able to plug into this through the “others”<sup>43</sup> enhanced television additions. Like DVD’s that offer on-screen commentary, individuals could offer their own-enhanced content to pre-existing works.

Since television is often considered a passive media, in the sense that people just want to tune out and relax when they watch it,<sup>44</sup> people could incorporate personal preferences through commentary choice yet still maintain passive control. They could do so through virtual agents. A person could answer a series of questions and click on certain types of content options, and the digital VCR could not only record the types of shows that the person would want to watch, but could also look for sites that provided enhanced commentary to be run in real time while the person watched it back. We

already see instances very similar to this with Tivo. This VCR learns from your viewing patterns and tries to help you by recording things it thinks you might like.

Local communities could establish content clubs, and write enhanced commentary for different shows. Church groups could provide moral points of views that parents would want their children to watch when they saw risqué sitcoms. Political organizations could comment on news, providing suggestions for other shows to watch instead. All of this virtual agency, I believe would be permitted through the integration of Internet technology with digital playback devices. There would be no copies made, only simultaneity of viewing, and it would fit in with the legal conception of time and space shifting in the sense that users control their viewing experience, regardless of time broadcast. The analogy to the real world would be watching a program about Terrorism, the screen framed with taped on American flags, and your right wing grandmother providing alternate commentary. The only difference would be that she would also be in everyone else's house --who wants her there-- at the same time, regardless of place and time. If we let the major broadcasters into our home, why shouldn't we allow alternate points of view in as well.

As a network effect this could also prove significant. We know that as more and more people adopt certain types of technology, its value becomes more significant. Some examples of this include the windows operating system, java, and mp3's. If local communities can create content that is widely sought by others as a form of enhanced commentary, than major producers will become cognizant of the network effect and will soon change their content to suit the viewers. This is important because what we have right now are unlimited channels of limited content and what we need is a model with

unlimited content and unlimited channels. However, given the high cost of producing content, due to long standing institutional complicity with the receiver model of business, the only solution is to use the cultural studies approach of redeployment of content. This redeployment is what needs to be embraced in order to enhance societal reflexivity.

One of the things that needs to be considered from a communication theory and research perspective, is just how media effects theories are altered by this type of modified viewing experience. From a general empirical research perspective, it would be much harder to generalize media effects studies, given the individualized nature of the viewing experience. If alternate viewpoints can be seen at the same time, how can studies regarding media violence, sex, or news framing be conducted. The old models simply look at broadcast content, they are reception models of inquiry, that characterize end-users as eyeballs. Interactive and user modified viewing experiences are an entirely new way of thinking about the media.

Peter Vorderer talks about the new media effects implications when he questioned whether interactive media will mean the end of mass communication.<sup>45</sup> He identifies one of the central functions of mass communication as the ability to provide participants with a collective awareness by focusing on selected issues. He maintains that this gives individuals a feeling of belonging, a perception of participation in a common reality that is transmitted. When interactive elements are inserted into the model, when users are given the opportunity to talk back, they realize that what they are seeing is in many respects an illusion and an inaccurate portrayal of what they are experiencing on an individual or local community level.<sup>46</sup>

Vorderer (2000) believes that “the integration function is therefore challenged by the understanding of media users that content is made up.”<sup>47</sup> Complicating the matter further is the apparent conflict between the user wanting to feel part of a community through a mass broadcast model and their need to be addressed as individuals. Some have argued that the old broadcast model was able, by virtue of the lack of an obligation to respond to the media, to allow users to come to their own critical positions about what was seen on the screen. The research on lack of immersion and connection with current interactivity applications was what led some to this conclusion. Drama, suspense, and humor were not as well received when interactivity was inserted into the equation.<sup>48</sup>

Recent studies on Internet connectivity<sup>49</sup> are useful in this regard, because they have questioned the applicability of studies of online user behavior as a function of mere time online. In addition, aggregation of individual user behavior does not mean much in terms of social capital analysis<sup>50</sup>, or cultural effects inquiries. Some useful research on how dual message reception, and how ticker news influences are absorbed or how messages are understood when they are presented both visually and audibly at the same time would be productive as well.

### **Conclusion:**

In an environment of digital transmission, the distinction between banner advertising as opposed to television commercials will become problematic. For example, a set top box could be designed to allow for the downloading of substitute commercials through the Internet and then could be programmed to automatically load them onto the television monitor in lieu of the original ad, in real time and during creative content

transmissions. If we think about this in terms of traditional copyright law, there is the question as to whether this constitutes infringement or some form of unfair competition or whether it is simply a matter of time-shifting and consumer choice. On a more theoretical level, we can conceptualize such technology to mean that individuals have agency to negotiate their media worlds.

Set-Top boxes with open source software, capable of being programmed to find certain types of content or exclude others at the behest of the end-user is a powerful means of re-ordering the power dynamic of media institutions. When seen through the lens of sociological structuration theory a la Giddens, we find that consumers became producers in the sense that they organize viewing content through world sources, delivering a user based bricolage of desire, that makes them just as much producers of content as they are consumers. In this way ordinary consumers can be empowered to produce their subjectivity, i.e. signify.

All of this communication theory hinges of course on the outcome of intellectual property law and policy. Gator ad blocking software and the current Replay TV litigation are important cases because like Napster they will set the benchmark on the legal availability of applications that empower consumer choice. In a cursory search of the lexis-nexus patent archive, I have found three separate types of patents pertaining to devices or methods used to target and substitute commercial advertisements by cable companies, in such a way that the consumer would not even know. The problem of ever growing sophistication in tracking consumer viewing and buying patterns only contributes to terminal materialism and does little to increase subjective awareness on the part of the viewer of media practices. By opening the dialogue to end user production and

offering some creative ways to negotiate speech production without infringing copyright, I have shown that communication theory and the law can work in tandem to help re-order the structural constraints of the current media system.

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<sup>1</sup> See Vincent Mosco, *The Political Economy Of Information* 38 (1996).

<sup>2</sup> J-Y. Jung, J.L. Qui & Y.C. Kim (2001). Internet Connectedness and inequality: Beyond the "divide." *Communication Research* 28: 507-535.

<sup>3</sup> Dean Colby (Winter, 2001) 6 Comm. L. & Pol'y 123. Conceptualizing the "Digital Divide": Closing the "Gap" by Creating a Postmodern Network that Distributes the Productive Power of Speech

<sup>4</sup> Universal City Studios Inc. et al. v. Eric Corley, Second Circuit Court of Appeals. August, 2000.

<sup>5</sup> Metamorphosis Project White Paper (2000). The Globalization of Everyday Life. See Meta Project Website at <http://www.metamorph.org/> (site consulted Dec. 1, 2001).

<sup>6</sup> May, 2000, 52 Fed. Comm. L.J. 561, 9193 words, VIACOM-CBS MERGER: From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access, Yochai Benkler. Citing James R. Beniger, *The Control Revolution: Technological and Economic Origins of the Information Society* (1986). (Beniger is the one who explained most usefully how advertising in mass media was introduced to solve the growing gap between the tremendous growth of productivity in the nineteenth century and the lagging changes in demand patterns.) See also Ithiel de Sola Pool, *Technologies of Freedom* (1984) (describing the rise of mass media).

<sup>7</sup> The Associated Press is the most famous beneficiary of corporate favoritism by Western Union. See Menahem Blondheim, *News Over The Wires* (1994). Western Union itself emerged as the monopoly carrier in part due to its contractual relation with the railroads. Rights-of-way were granted to the railroads from the government, and then the railroads contracted exclusive use of the rights-of-way to Western Union to build its network.

<sup>8</sup> "The Victorian Internet: The Remarkable Story of the Telegraph and the Nineteenth Century's On-Line Pioneers" Tom Standage 2000. See also, See Richard Duboff, *The Rise of Communications Regulation: The Telegraph Industry, 1844-1880*, J. COMM., Summer 1984, at 52, 55. Duboff notes that industry observers of the late 19th century who favored postalization of the telegraph claimed that "8 per cent" of messages were social.

<sup>9</sup> Colby at 138.

<sup>10</sup> *The Future of Ideas*, Lessig (2001) at 23.

<sup>11</sup> *The Future Of Ideas*, Lessig (2001) at 202.

<sup>12</sup> Rubenstein, David. (2001) *Culture, Structure & Agency: Part II Engaging Culture*.

<sup>13</sup> Vorderer, Peter. *Media Entertainment: The Psychology of Its Appeal*. See also generally, Theodore Adorno.

<sup>14</sup> Griswald, Wendy. (1994). *Culture and Societies in a Changing World*. Thousand Oaks, CA: Pine Forge.

<sup>15</sup> Sewell, William H. (1992, July). *A Theory Of Structure: Duality, Agency, and Transformation*.

*American Journal Of Sociology*, 98(1), 1-29.

<sup>16</sup> Swidler, Ann. (1986, April). *Culture In Action: Symbols & Strategies*. *American Sociological Review*, 51, 273-286.

<sup>17</sup> Digital Millenium Copyright Act of 1998 (H.R. 2281)

<sup>18</sup> This is otherwise known as a "digital wallet".

<sup>19</sup> <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A16746-2001Aug29> (Website Consulted 11/30/01)

<sup>20</sup> Michael Singer, *Networks Drop Lawsuit Against Sonicblue Dual Deck VCR*.

[http://siliconvalley.Internet.com/news/article/0,2198,3531\\_929601.html](http://siliconvalley.Internet.com/news/article/0,2198,3531_929601.html) (Website Consulted 11/30/01)

<sup>21</sup> Dave Wilson, *A More Instant Replay for your TV*, <http://www.latimes.com/technology/la-000086826nov01.story> (Website Consulted 11/30/01)

<sup>22</sup> Jon Healy, *Networks, Studios, File Suit Against ReplayTV, Sonicblue*, Los Angeles Times <http://latimes.com/business/custom/cotown/la-000086744Nov01.story?coll=la-headlines> (website visited 12/1/01)

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- <sup>23</sup> *Id.* Showtime, Disney and NBC all were investors in ReplayTV before it was acquired in 2001 by Sonicblue. Sonicblue also owns Diamond Multimedia, the maker of the popular Rio portable mp3 player.
- <sup>24</sup> *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)
- <sup>25</sup> Littman, Jessica. *Digital Copyright* Prometheus Books New York 2001 at 162, citing *MGM Studios v. RecordTV.com*, No. CV-DO-06443 (C.D. Cal.).
- <sup>26</sup> *The National Law Journal*, November 19, 2001. Byline: Michael Ravnitzky.
- <sup>27</sup> Loren, Lydia Pallas (Spring, 2000) 4 *J. Small & Emerging Bus. L.* 57. *The Changing Nature Of Derivative Works In The Face Of New Technologies*
- <sup>28</sup> See *Third Voice* <<http://www.thirdvoice.com>> (website consulted Dec. 1, 2001)
- <sup>29</sup> Loren (2000)
- <sup>30</sup> *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)
- <sup>31</sup> *Recording Industry Association of America*, 180 F. 3d. 1072 (1999)
- <sup>32</sup> Littman, at 162, citing Steven Bonisteel, *iCraveTV Settlement Leaves Legal Issues Open*, *Newsbytes*, February 29, 2000 at URL: <http://www.bizreport.com/news/2000/02/20000229-9.htm>
- <sup>33</sup> Lessig, Lawrence. (2001) *The Future Of Ideas: The Fate of Commons in a Connected World.* at 191.
- <sup>34</sup> 724 F. Supp. 808 (D. Kan. 1989)
- <sup>35</sup> *Id.* at 821.
- <sup>36</sup> 964 F. 2d 965 (9<sup>th</sup> Cir. 1992)
- <sup>37</sup> 154 F. 3d 1107 (9<sup>th</sup> Cir. 1998).
- <sup>38</sup> Littman, Jessica. (1999) 108 *Yale L.J.* 1717, at 1733. *Symposium: Breakfast with Batman: The Public Interest in the Advertising Age.*
- <sup>39</sup> *Id.*
- <sup>40</sup> See Joanne Helperin, *One Last Chance To Snare a Customer*, *Business 2.0 Online Magazine*, March 2001 <http://www.business2.com/articles/mag/0,,14601,FF.html> (website visited 12/1/01).
- <sup>41</sup> See *The New York Times* on the Web: *Privacy Information Statement* (visited Dec. 1, 2001) <http://nytimes.com/subscribe/help/privacy.html> "Statistical Analysis and Banner Advertising: The New York Times on the Web may perform statistical analyses of user behavior in order to measure interest in the various areas of our site (for product development purposes) and to inform advertisers as to how many consumers have seen or "clicked" their advertising banners. We also use demographic and preference information to allow advertising banners on our Web site to be targeted, in aggregate, to the users for whom they are most pertinent. This means that users see advertising that is most likely to interest them, and advertisers send their messages to people who are most likely to be receptive, improving both the viewer's experience and the effectiveness of the ads. In this statistical analyses and banner advertisement targeting, we will disclose information to third parties only in aggregate form. Personal information about you as an individual subscriber will not be provided to any third party without your consent, except under the circumstances described in Compliance with Legal Process below.
- <sup>42</sup> F. Williams, S. Strover & A. Grant. *Social Aspects of New Media Technologies*. In J. Bryant & D. Zillman (eds.) 1994. *Media Effects: Advances in Theory & Research*. Hillsdale, N.J: Earlbaum.
- <sup>43</sup> Other in this sense refers to the subaltern or those that would normally not have a voice in the media system.
- <sup>44</sup> Salomon, G. (1984). Television is "easy" and print is "tough": The differential investment of mental effort in learning as a function of perceptions and attributions. *Journal of Educational Psychology*, 76, 647-658.
- <sup>45</sup> Zillman & Vorderer (2000). *Media Entertainment: The Psychology of It's Appeal*.
- <sup>46</sup> *Id.*
- <sup>47</sup> *Id.* At 28-29.
- <sup>48</sup> *Media Entertainment* (2000) Chapter 4 Peter Vorderer & Sylvia Knobloch
- <sup>49</sup> J. Flanagan & M.J. Metzger (2001). *Internet Use in the contemporary media environment*. *Human Communication Research*, 27: 153-181.
- <sup>50</sup> P. Moy, D. Scheufele, & R. Holbert (1999). *Television use and social capital: Testing Putnam's time displacement hypothesis*. *Mass Communication & Society* 2: 27-45.