

The Moving Picture



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TWO DECADES AGO, CRIES OF “I Want My MTV!” ushered in a revolutionary era of entertainment content. In the future, when the history of today’s new media revolution is written, the defining motto just might be “I Want My USBTV!”

The concept of USBTV was introduced at this January’s Consumer Electronics Show in Las Vegas. Its developer is SanDisk Corporation, the leading manufacturer of digital memory cards and flash drives. Seeking to grow beyond a mere provider of memory devices, SanDisk is betting much on USBTV, its entry into the world of new media and entertainment content.

USBTV seeks to overcome a major stumbling block for the new media revolution: consumers do not like to watch television programs and movies on computer monitors. We will sit for short video clips online, but not for full-episode

television shows and certainly not feature length motion pictures. Making matters worse, it is a cumbersome path for users to make it through the last “ten feet,” *i.e.*, to download video files from the Internet and transfer files into a format (such as DVD) and device playable on home television sets.

Enter USBTV with a proposed solution: use flash drives (which are small and mobile) as the storage and mobility devices for entertainment content. SanDisk’s developing technology would allow users to “drag and drop” digital content from the USB port of a PC onto a flash drive, and then play that content on full-size television sets. For this purpose, SanDisk will be unveiling later this year a small flash memory-enabled media player (about the size of an iPod Nano) that can plug directly with televisions. The result is what SanDisk describes as “Drag, Drop, Plug and Play” capability for users. Flash drives could even be sold with pre-loaded content (think: pick up the latest episode of “Desperate Housewives” on a flash drive!) SanDisk is seeking to form an industry-wide consortium to support USBTV as a viable content delivery platform.

USBTV is the next evolution of space-shifting for entertainment content. The concept of space-shifting originates from time-shifting and days of the VCR. In the late 1970’s and early 1980s, content owners fought with VCR manufacturers about whether VCR technology facilitated unlawful copying of content by consumers. That battle culminated in the U.S. Supreme Court’s seminal 1984 *Sony Betamax* copyright decision, which found

(among other things) that VCR technology made fair use of copyrighted works by allowing consumers to merely shift the time at which they viewed television content. Long after the VCR was the new media revolution of its day, time-shifting has recently gained renewed significance with the rise of digital video recorders, such as TiVO and more recently, Cablevision’s new (and hotly contested) remote storage DVR.

Since then, the term “space-shifting” was coined to describe technologies that allow consumers to shift where—as opposed to when—they enjoy content. As the new media world evolves, I believe it is space-shifting—more so than time-shifting—that will rise in importance. That’s because new media consumers want two things: mobility and usability. With today’s wireless and broadband-connected world, users demand entertainment programming wherever they want it, and on whatever device they want to enjoy it. Thus, mobility is key. Even more important is usability: new entertainment technologies must be easy and quick to use if they are to succeed. The one-two punch of mobility and usability expectations make space-shifting the next important frontier for not just technology, but also for copyright law. Content owners and technology providers need to empower consumers to easily move entertainment content between source, storage and playing devices. Simultaneously, intellectual property lawyers and their clients need to carefully analyze the copyright protection, licensing, and fair use implications of space-shifting.

USBTV is not alone in the space-

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shifting frontier. The Slingbox DVR system allows consumers to record content from home settop boxes, but direct that programming to other spaces for viewing. For example, Slingbox users can watch the recorded content in another location via Internet broadband connection, or on a mobile device such as the Palm Treo 700w (using the "SlingPlayer" mobile software application). WiFi technology allows users of portable game devices (such the Nintendo DS) to wirelessly download games and other content from retail kiosks located anywhere. Even more recently, in February 2007, TiVo and Amazon announced the "Amazon Unbox on TiVo" service, allowing consumers to buy and download movies and TV programs from the Internet directly to their TiVo DVRs—rather than to personal computers. Much like USBTv, the Unbox system seeks to cut out awkward interim steps for consumers, and allow programming to be delivered directly from Internet download to a device playable on television. Only time will tell whether USBTv, Amazon' Unbox on TiVo or any similar system is successful, but one message is clear: an effective, space-shifting technology will be integral to new media success for both content owners and technology providers.

So what does this all mean for the world of intellectual property? I have three predictions.

First, technology providers will increasingly become part of the entertainment world. Two decades ago, the thought of a memory device manufacturer such as Sandisk breaking into entertainment would have elicited laughter in Hollywood. Today, technology is critical to the delivery of entertainment content, and the ability of content owners to find new revenue streams. The rise of space-shifting makes that even more true. But it's not so easy to become part of the famed entertainment establishment. Technology providers—many of whom are novices to

Hollywood—must quickly learn the ropes of the entertainment industry, as they race to license top programming from key content owners. Meanwhile, content owners will have a host of space-shifting technologies from which to choose for distributing their programming. They should choose technology partners wisely, in order to maximize revenue without diluting their brand value and consumer loyalty.

Second, more balanced digital rights management systems should be implemented. DRM systems are of course important for copyright holders to control and protect their rights. In a world where consumers can digitally shift content from place to place, between storage devices and playing devices, copyright holders will face even greater piracy risks. At first reflex, copyright holders may seek even more vigilant DRM schemes for content delivered via space-shifting technologies. But stringent DRM systems often limit the capability for content to be operable on different playing devices, which is anathema to consumers. Remember, consumers want both mobility and usability—which DRM software often inhibits. In the space-shifting frontier, it will be even more critical for content owners, technology providers and consumers to find a comfortable DRM balance that satisfies everyone's interests.

Third, fair use will be the key legal battleground in the space-shifting frontier. Some purveyors of space-shifting technology (such as Sandisk and Amazon) plan to obtain licenses to store and distribute content, but there will undoubtedly be others who do not. Naturally, motion picture studios, television networks and other copyright holders need to protect their turf and will not tolerate unauthorized use of their content on space-shifting media. The likely result will be precedent-setting courtroom wars over whether, and to what extent, space-shifting technologies make a fair use of copyrighted works.

Ultimately, it will be consumers—with their preferences—who write the history of what space-shifting technologies succeed. Will consumers cry out for USBTv, as they did for MTV two decades ago? Only time will tell, but stay tuned. It's a fascinating time to be involved in new media. With the rest of the entertainment industry, I am watching closely to see how the new media frontier space shifts before our very eyes. ☺

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Obviousness

CONTINUED FROM PAGE 24

Endnotes

1. U.S. patent No: 6,237,565 B1, column 1, lines 47–53.
2. *Id.* at column 2, lines 2–5.
3. *Teleflex Inc. v. KSR Int'l Co.*, 298 F Supp.2d 582 (E.D. Mich. 2003).
4. *Teleflex, Inc and Technology Holding Company v. KSR International, Co.*, 119 Fed. Appx. 282; Slip op. 04-1152, (Fed. Cir. January 6, 2005).
5. 35 U.S.C. § 103; see *Graham v. John Deere Co.*, 383 U.S. 1, 14, 86 S.Ct. 684, 15 L.Ed.2d 545 (1996).
6. See *Graham*, 383 U.S. at 17–18.
7. See *Tec Air, Inc. v. Denso Mfg, Mich. Inc.* 192 F.2d 1353, 1359-1360 (Fed. Cir. 1999); *Pro-Mold & Tool Co. v. Great Lakes Plastics, Inc.* 75 F.3d 1568, 1572 (Fed. Cir. 1996).

SEE *Obviousness* PAGE 35