NOTE

CURING *CABLEVISION*: PRESCRIBING A FUNCTIONAL SOLUTION TO A TECHNICAL ASTIGMATISM

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ABSTRACT

In a string of recent copyright cases, judges have increasingly adopted a technical approach to copyright law. Rather than evaluating contested technologies based on how the technologies are used, courts have focused their analysis on technical details of implementation. As a consequence, courts have constructed rules that limit technologies not in what they do, but how they do it. In this Article, I argue that courts should evaluate technologies based on functional considerations. I argue that this functional approach is constitutionally, statutorily, and practically preferable to a technical approach. Finally, I show that a functional approach would lead to decisions that are clearer, easier to understand, and better-reasoned.

* Yale Law School, J.D., 2015; Stanford University, B.S. 2012. I would like to thank Rachel Rudinger, Victoria Cundiff, Firas Abuzaid, Molly and Stuart Adler, Philipp Kotlaba, Matt Kemp, and Alex Kasner for their many insightful thoughts and comments.

INTRODUCTION

Judges do not make good engineers. In a string of recent copyright cases, judges across the country have increasingly adopted a technical approach to copyright law. Rather than evaluating contested technologies based on how the technologies are used, courts have focused their analysis on technical details of implementation. As a consequence, courts have constructed rules that focus on form rather than function—rules that limit technologies not in *what* they do, but how they do it. These decisions have encouraged inventions that engineers and commentators have described as "inefficient and convoluted," [1] "Rube Goldbergian," [2] "idiotic," [3] and "monstrously unscalable."[4] From a legal standpoint, they have led to paradoxical and inconsistent judicial holdings. For example, under some courts' interpretation of the Copyright Act, it would be legal to create and store one million identical copies of a television show for general distribution, but illegal to create and store one copy.[5]

In this Article, I argue that courts should evaluate technologies based on how they are used rather than on their underlying implementations. In advancing my argument, I will introduce and evaluate three approaches to copyright law: a pure-technical approach, which evaluates technology based on implementation details, a pure-functional approach, which evaluates technology based on how the technologies are used, and a hybrid approach, which looks to both implementation and usage. Ultimately, I will show that the pure-functional approach is statutorily, constitutionally, and practically preferable.

This paper builds on the current literature in three ways. First,

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[1] Jerry Brito, *How Government Regulations Distort the Television Airwaves*, REASON (Apr. 25, 2013), http://reason.com/archives/2013/04/25/how-government-regulations-distort-the-t [http://perma.cc/9NN2-VZ5B].

[2] Mike Masnick, *How Copyright Has Driven Online Streaming Innovators Insane*, INNOVATION (Aug. 31, 2012), http://www.techdirt.com/blog/innovation/articles/20120830/13260820222/how-copyright-has-driven-online-streaming-innovators-insane.shtml [http://perma.cc/F3VL-EWSV].

[3] Farhad Manjoo, *Don't Root for Aereo, the World's Most Ridiculous Start-up*, PANDODAILY (July 14, 2012), http://pandodaily.com/2012/07/14/dont-root-for-aereo-the-worlds-most-ridiculous-start-up [http://perma.cc/AV45-ZD32]; *see also* James Grimmelmann, *Why Johnny Can't Stream: How Video Copyright Went Insane*, ARSTECHNICA (Aug. 30, 2012), http://arstechnica.com/tech-policy/2012/08/why-johnny-cant-stream-how-video-copyright-went-insane [http://perma.cc/UPE3-RC8Y] (referring to a court-approved technology as "ridiculous").

[4] Manjoo, *supra* note 3.

[5] *See infra* Part I.A, discussing the decision in Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 138 (2d Cir. 2008), *cert. denied*, 557 U.S. 946 (2009).