Is 'Transitional Fair Use' The Wave Of The Future?

Written By Rick Ellis, Monday, November 28th, 2004

When HBO’s “Six Feet Under” returns in 2005, it won’t just be the end of a long-running hit series. It may also be a turning point for TV viewers who are in the habit of recording shows to watch weeks or even months later.

Sources at two different cable companies have told AllYourTV.com that discussions have begun which may lead to a restriction of use for fans of several popular television shows.

The discussions are reportedly in very early stages, and the details are still very vague. But this is what I can confirm at this date.

A middle-level executive at Time Warner has approached several cable companies and broached the idea of restricting the ability of customers who use those company’s Digital Video Recorders to record several popular Time Warner TV programs.

The term being used by the executive is “transitional fair use,” and the scenario laid out goes roughly along these lines:

Viewers would be able to record an episode with their DVR, but there would be a time limit on how long it would be available for viewing. The executive was pushing for an expiration date that coincided with the premiere of the next episode. The consensus of the cable executive was that it needed to be between 2-4 weeks.

Regardless, the episode would then be unavailable until they are offered as part of a “video on demand” package. There would also be restrictions on recording episodes via VOD, with the Time Warner executive pushing for the ability to completely prevent recording the VOD presentations. Cable executives argue that this restriction prevents time-shifting and limits the revenue upside for both parties.

Once again, the episodes would be unavailable until they were offered again on cable, at a date that closely matched the release of the DVD box set.

While I have been unable to get any of the parties to publicly comment on the talks, several sources have confirmed the informal talks. It’s difficult to know how serious the discussions will be, but it is known that several studios have been eyeing a restriction on the availability of viewers to record video-on-demand and pay-per-view titles.

There is certainly no legal reason to prevent studios or networks from pursuing this ‘transitional copyright’ approach to TV viewing. But it’s difficult for me to see just how it serves the needs of the viewer or the producers. It seems to be a punitive approach to the problem of illegal file-sharing. And it seems doomed to failure in the long term.