Rethinking Technology Neutrality: Copyright's Case for Discrimination

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The 1976 Copyright Act adopted the principle of technology neutrality, liberating the default subject matter and scope provisions from specific technologies. Congress thereby sought to future-proof copyright law, to facilitate greater doctrinal equivalence, and spare itself from constant demands to revise the law. But technology neutrality has failed to perform as expected. Congress has seen the need almost annually to amend the 1976 Act with technology-specific revisions; courts continue to reach disparate conclusions on similar technologies; and judges have felt required to rein in the law's per se dominion over new technologies by expanding use-specific exceptions. This Article is the first to explain why. Using copyright law as a case study, I identify three flaws that make technology neutrality not only suboptimal but often self-defeating. First, judges applying the 1976 Act to new technologies often experience a problem of perspective - that is, adjudicative resolution hinges on whether the locus of inquiry is the technological design or the technological output. Divergent perspectives result in incongruent treatment of functionally similar technologies. Second, legislators often cannot accurately predict whether and to what extent a law should regulate a new technology until that technology and its nature and capabilities are known. Because laws drafted to account for unforeseen technologies are, in fact, drawn with known technologies in mind, they are prone to poor tailoring. This is the problem of prediction. And, finally, technology neutrality amplifies a general challenge of jurisprudence - the problem of the penumbra-and thereby undermines the goals of future-proofing and equivalence. This conceptual rethinking leads to the conclusion that *ex ante* application of a law to all future technologies is often undesirable and, regardless, unachievable. As Congress embarks on the fifth major overhaul of the U.S copyright system, I argue, counterintuitively, that technology specificity, rather than neutrality, can be designed to better serve the goals of technology neutrality. I also discuss the implications for other technology-neutral legal regimes, including patent, privacy, and telecommunications.

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