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Bytes and Bullets

By Lawrence Lessig

Wednesday, November 24, 2004; Page A21

A while back a federal court declared that the manufacturers of the most popular forms of peer-to-peer file-sharing technology are not liable for copyright infringement committed by people using their technology. Congress immediately sprang into action by taking up legislation to reverse the court's ruling. The goal is to make it clear that p2p manufacturers are indeed liable for copyright violations committed with their products. No doubt many hope this will drive the p2p companies out of business.

Technology people across the country are terrified by the idea. They fear that the standard being proposed by this law will force a wide range of technologies to justify themselves in federal court. A recent proposal from the Copyright Office purports to hold manufacturers responsible for "technolog[ies]" that "cause" copyright "infringement," if those technologies (1) rely on infringement for "commercial viability," (2) derive "a predominant portion" of their revenue from infringement and (3) rely on infringement to "attract individuals" to the technology.

I'm a strong opponent of this legislation, but not because I support copyright infringement. The technologies being attacked by this bill have plenty of important uses that have nothing to do with copyright infringement. This legislation would effectively eliminate them.

But there is a silver lining here, and it has to do with, of all things, a very old technology: guns. For if Congress passes this bill, on what principled basis can it then refuse to hold gun manufacturers responsible for the crimes committed with *their* technologies?

The parallels are unavoidable. Like p2p, firearms -- including assault weapons and cop-killing bullets -- cause harm. But also like p2p, guns -- as the NRA and its followers will tell you -- have "non-infringing uses" too. Thus, the gun lobby says, manufacturers should be exempt from responsibility for the crimes their customers commit. Guns don't kill people; people kill people.

But that argument will be much harder to sustain if Congress does to p2p what it has not done to guns. Of course, the same point is true of p2p technologies. It's not Kazaa that infringes Madonna's copyright; people infringe Madonna's copyright.

There are differences, of course, but they don't help the gun lobby's argument. While there is considerable argument over how much harm is really done by p2p file sharing, one thing is certain: No cop was ever killed by Kazaa. No kid ever committed suicide with a p2p device. The harm caused by guns is massive and beyond dispute. More Americans have died of gun-related deaths since President John F. Kennedy was assassinated than in all the wars of the last century.

Gun supporters may argue that the right to bear arms is protected by the Constitution, while the right to commit copyright infringement is not. But no one has a right to murder. At most the Second Amendment means that the abuses of cop-killing crazies shouldn't justify burdening my Second Amendment rights. Yet the same could be said about copyright infringement, given the amendment that

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stands just before the Second. There are many whose First Amendment interest in speaking, and in spreading their speech cheaply and broadly, will be burdened by banning p2p. So why doesn't the First Amendment at least mean what gun lobbyists say the Second means: that the abuse of copyright-killing crazies doesn't justify burdening my First Amendment rights in response?

I hope Congress doesn't harm the most important industry for growth in the United States by acting against p2p. But if it does, I don't see how it can, in all honesty, avoid doing the same with regard to firearms.

The writer is a law professor at Stanford University.

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