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Lawrence Lessig: End the war on sharing

By Lawrence Lessig

Published: June 19 2002 19:50 | Last Updated: June 19 2002 19:50



This is third article in a fortnightly series, the New economy policy forum, in which four leading US academics debate the regulatory and legal issues generated by - and also shaping - the high-tech industries. [Click here](#) to learn more about the contributors, or [here](#) for a more detailed explanation of how the forum works.

The copyright wars took an unexpected turn last week when an academic seen as an ally by the music industry proved to be more of an academic than it wished. Stan Liebowitz, an economist at the University of Texas, released a report, sponsored by the libertarian Cato Institute, predicting that file-sharing technologies would have a substantially negative impact on the music industry. As people "shared" content, he wrote, they would be less likely to buy content.

And thus services such as Napster were properly targeted by policymakers as potential destroyers of the industry.

Last week, Prof Liebowitz said that he had had second thoughts. Critics of file-sharing technology say that more music is being "shared" now than during the height of Napster's existence. Prof Liebowitz cites statistics from Webnoize, an online provider of digital music industry news and research, suggesting that music equivalent to five times the number of CDs sold each year was being traded online for free. And with close to 30 per cent of the households that own computers also owning CD-writers, this massive transfer of content should be have a devastating effect on music sales.

But that is the problem. It has not. As Prof Liebowitz told Salon writer Damien Cave, file-sharing systems "should be causing a lot of harm. But we're not seeing it." During the period that downloads were five times total sales, sales of CDs dropped by about 5 per cent. That drop is itself probably explained more by the recession than by any direct link to file-sharing.

Thus the puzzle: if file-sharing is such a significant threat to the music industry, why is it not having any significant effect on the music industry? And if it is not such a threat, does it justify, as Jack Valenti called it, the industry's "terrorist war" on file-sharers (or, in other words, our children)?

Prof Liebowitz deserves credit for teaching the world something about what an academic should be. A strong defender of Microsoft during the antitrust trial, he is no stranger to contentious policy debates but his loyalty is not to partisans. His job, as he describes it, is "to let the data tell ... what's actually happening." And when the data say something different from the party line, the academic should do as Prof Liebowitz did: speak the truth even if that means changing your mind.

But Prof Liebowitz's data reveal something more, even if he would not say it. The policy debate about online music has been between those who would use the law to stop "sharing" and those who would use the law to assure compensation for artists whose work has been shared. Regulators in the first camp believe courts should shut file-sharing technologies down and legislators should mandate technology to control sharing; regulators in the second camp believe legislators should enact compulsory licences to guarantee that file-sharing systems pay for the content distributed across them. Technologists such as Intel have strongly opposed the effort to regulate technology (as Craig Barrett, Intel chief executive, puts it, to track Mr Valenti's "terrorists" would require building the police state into every computer). File-sharing companies such as Napster have supported the effort to enact compulsory licences.

The advantage of the compulsory licence for existing, unprotected content is that there would be no need to monitor every transfer on a computer. Random samples would be enough to show who should be paid what. And because any competitor would have the right to get access to the content, a compulsory licence would fuel competition in technologies for distributing, and eventually producing, new content. Moreover, if such a rule were limited to content that has already been produced in an unprotected (meaning easily shared) form, it would have no effect on incentives, save the incentive to develop effective technologies to protect newly released content.

Prof Liebowitz's data show just how valuable such a rule would have been - to artists, at least, if not the record companies that are defending themselves against new forms of competition. If, instead of turning our children into "terrorists" by waging a massive judicial and legislative campaign against "sharing", legislators had

enacted a compulsory licensing regime three years ago, then today a significant proportion of that "sharing" would be taking place within systems that collected revenue for the artists. If just a fraction of the music downloaded last year had been within the compulsory regime, then musicians would have been better off than they are now, and the downloaders would have been doing nothing wrong.

Lobbyists such as Jack Valenti do not seem to care much about the real economics affecting artists. For him, this battle is about basic morality - about the souls of our children as they are tempted into the corruption of "sharing". File-sharing, Valenti says, is "just theft". As we have zero-tolerance for theft, or drugs, or terrorism, so too we should have zero-tolerance for "sharing".

But every new technology for distributing content has been met with the same extremist claim. The piano roll was the "theft" of sheet music; cable TV was the "theft" of broadcast TV; the VCR was the "theft" (Mr Valenti called it "the Boston Strangler") of American film. Yet these technologies were not banished by courts or legislatures in their time. Instead, the law was rebalanced to take into account the potential of the new technology and the need to ensure that artists get paid.

That is just what should be happening now. Guided by the integrity of scholars such as Prof Liebowitz, policymakers should focus on where the real good can be done. Instead of demonising our children, they should enact laws that ensure payment for artists while pushing innovators to develop better, cheaper, more competitive ways to get access to content.

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