

Although I appreciate Professor Lessig's very generous description of my behaviour, there are several points I need to make so as to clarify where I agree and where I disagree with Professor Lessig. I am also interested in plugging my new book, and instead of slyly working it into the post, let me just suggest that readers consider purchasing "Rethinking the Network Economy" due in September from Amacom books.

As I stated in the Salon interview, recent evidence on CD sales and MP3 downloads has caused me to question whether the downloading of MP3s will turn out to be harmful to record producers. [Note that the figures given by Professor Lessig are for US CD sales versus worldwide MP3 downloads, so the illicit market is not so much larger than the legitimate market as it might seem in his telling]. It could still turn out that downloading is seriously harmful to record producers, but the evidence so far doesn't seem consistent with that conclusion.

I can not, however, agree with some claims made by Professor Lessig in the middle of his article. He states: "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."

I think this is somewhat too short a list of possible positions. As I argued in the Cato paper referenced by Professor Lessig, digital rights management (DRM) would seem to be able to solve these problems without regulators of any sort. If digital rights management worked as advertised, most file sharing would be minimized, since it would be difficult to make copies of protected files. Instead of regulations, private market participants could choose DRM technology, or they could ignore it. Certainly, one does not need to have legislators mandate technology controls—a loathsome possibility whose only adherents seem to be the politicians sponsoring the measure. If DRM were chosen, it would provide additional revenues to sellers as consumers made greater use of the copyrighted good.

Consumers could be allowed to use their purchases as they saw fit, although they might have to pay for the privilege. Consumers would have to be willing to make such payments, or producers could not collect any revenues. No one can force consumers to purchase DRM protected CDs if they find the restrictions too burdensome. As in other markets, producers will give consumers what they want (as measured by their willingness to pay), since that is the key to generating profits. This fact seems to be lost in much of the current heated discussion

This is not to say that compulsory licensing might not make sense under some circumstances. But it is far from a panacea. The 'random samples' that would be used to determine payouts would be imperfect at measuring either the size or intensity of demand for any particular MP3 file. More to the point, Professor Lessig does not tell us where the compulsory license payments are to come from. It would require either that peer-to-peer file sharing systems charge users for downloads, or generate funds in other ways. It was never clear what Napster's business model was, or if it could have earned any but trivial revenues. The less centralized peer-to-peer systems would seem even less likely candidates for generating license fees. Providing copyright holders with some percentage of a zero-size pot would do them little good. Although Professor Lessig doesn't spell it out, the generation of non-trivial payments might very well have to come from a somewhat different source, such as a tax on blank CDRs. This would unfairly burden those making copies of non-copyrighted materials with a tax they don't deserve.

Still, I am in agreement that we do not want to criminalize our children. Professor Lessig seems to hold out the possibility of DRM for new works when he states that the compulsory license might just be for old, unprotected works. That might be a viable temporary mechanism. Of course, if it turns out that current MP3 downloading is not harming CD sales, we might just want to forget the past and get on with the production of new copyrighted works, which always make up the large bulk of purchases anyway.