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Hollywood v. Silicon Valley: Make New Code, Not War

By Lawrence Lessig

There's a civil war brewing in my state of California. It is again a war between the Silicon Valley-based IT industry in the North and Hollywood content and entertainment producers in the South. Silicon Valley has become the target of punitive legislation being pushed by Hollywood in Congress. The Valley, Hollywood charges, has profited from the piracy of Internet teens, by building devices that can be used too easily to copy music, films and books. Washington, they say, needs to step in and force Silicon Valley to build theft-proof machines—because technology equipment makers have no interest in regulating themselves.

The rhetoric in this battle has been over the top. For Hollywood's side, Michael Eisner of Disney has invoked the name of Abe Lincoln; Jack Valenti of the Motion Picture Association of America has conjured up visions of salvation. All told, the \$535 billion industry that Eisner and Valenti represent is being "shrunk and squandered" by Internet "thievery," Valenti has claimed. We need, he says, "a cleansing redemption"—in Valenti's view, apparently, a healthy dose of federal regulation.

This is an interesting argument for Hollywood to make. Remember when lawmakers were complaining about the effect of televised violence on children? Conservatives feared that Hollywood had no interest in restraining this violence, but Hollywood executives insisted that the Constitution guaranteed their right to program as the market demanded. Now, Hollywood is demanding that Washington intervene in the programming choices of teens. Apparently the souls of America's youth don't justify regulation, but protecting Hollywood's profit does.

I am a committed northerner who is terrified by the rage in this current war. I am also not optimistic about which side will prevail. Our problem has been the unwillingness of information industry leaders to stand up to the ragings of Hollywood. And so it was a welcome surprise recently to watch one company, Intel Corp., attempt to push the other side of this debate in a February hearing before the Senate Commerce Committee. Chairman Ernest "Fritz" Hollings (D-S.C.), has proposed an extraordinarily broad regulatory regime to govern the design of any machine that can carry Hollywood's content (we call these computers). His committee assembled a range of witnesses to testify about the need for Congress to regulate computer design.

But there were dissenters on the panel, and one in particular changed the character of the debate—Leslie Vadasz, a founder and vice president of Intel. "To inject a regulatory process into the design of [computer] products will irreparably damage the high-tech industry," Vadasz warned. Congress should instead be "listen[ing] to the consumer," Vadasz politely suggested, and be the consumer's voice.

Hollings was not pleased. Democrats don't like to be reminded when they have forgotten their core constituency. Though not a technologist, Hollings thought he knew enough about technology to call Vadasz's warning "nonsense." And for the next hour or so, he and others worked hard to batter Vadasz's pro-consumer views into silence.

But Vadasz's testimony had the necessary effect. For the first time, an IT industry leader clearly stood up to the content industry and said "enough." It's about time. Every time Congress has regulated technology to protect content, it has blown it. Hollings was proud of the Audio Home Recording Act of 1992, for example—Congress' first effort to mandate technology to protect content. He apparently doesn't realize that the industry affected by that regulation, DAT technologies, is dying a slow death. Nor, apparently, is the senator aware of the regulatory excess produced by the more recent Digital Millennium Copyright Act of 1998, a law designed to stop the circumvention of copyright protection technology. Hollings is a regulator, not a businessman. He can believe in his craft whether its products work or not.

This is not the first time that new technology has threatened to dislodge the content industry's business model or, as Xerox PARC's former director John Seely Brown puts it, its "architecture of revenue." But it is the first time that courts and Congress have tried to dislodge that dislodging. When the player piano Napsterized the sheet music business, no one thought to regulate player pianos. Instead, after some thought, Congress rebalanced the copyright law to take into account the new technology. When cable television Napsterized the exclusive control that broadcasters had over television content, courts did not ban cable TV. Instead, Congress again rebalanced the copyright laws to take the new technology into account. And when Disney and Universal Studios asked a court to stop "the Boston Strangler of the American film industry," as Valenti described the VCR, the Supreme Court denied the request. While acknowledging the illegal uses that a VCR could enable, the court said that it is up to Congress to again rebalance the law to accommodate new technology.

But some in Washington have now forgotten this history. Rather than fit copyright law to new technology, it is racing to force technology to fit last century's view of copyright. And it does so at the behest of an industry whose primary objective is to protect its market share from the competition the Internet could produce. While Hollywood cries "theft," it uses Washington to ensure that a vibrant competitive market for producing and distributing content on the Internet is never realized. By suing into the Stone Age anyone who "think[s] different," they produce a future that will look much like the past.

But there is a middle ground in this war, and it could bring peace without sacrificing innovation or income to artists.

The key is to distinguish old content from new. Old content exists in unprotected form (plain old CDs, for

example); new content will increasingly be protected by technology. The problem with old content, Hollywood says, is that anyone can "share" it with his or her 10,000 best friends. The problem with technologies protecting new content (from the perspective of consumers and innovators) is that it obliterates traditional values of fair use. Old content gives complete control to users; new content will give complete control to Hollywood.

The vulnerability of unprotected content is a fair and legitimate concern. But as Intel's CEO Craig Barrett testified to Congress, we would have to plant the police state into every Intel chip before computers were smart enough to control the distribution of unprotected content. And no doubt consumers and innovators are right to complain about the absurdities of current copy protection technologies—CDs that won't play on a computer, music files that can't be moved to a PDA. But the future is code, control implemented through technology. Existing unprotected content should be controlled through law, not through code. And the distribution of that content should be subject to what lawyers call a "compulsory license." Just as with recordings, cable TV and satellites in the past, businesses that make or facilitate the distribution of unprotected copyright content should have the right to use that content so long as they pay a relatively low, fixed rate. The revenue from this new use would be gravy to most existing copyright holders; Congress could require that this gravy be served first to the artists whose work is being distributed.

Future protected content could be subjected to a different rule—it could be sold the old-fashioned way—so long as the technology protecting that content adequately ensures consumers fair use.

A compulsory license also would encourage innovators to develop technologies for distributing content, while ensuring that content owners get paid. Also, guaranteeing fair use would create a great incentive among technologists to build systems that respect our tradition of balance. This compromise would ensure competition among innovators. And it is competition—not civil war—that would benefit creators and consumers best.

Lawrence Lessig is a professor of law at Stanford Law School and the author of *The Future of Ideas: The Fate of the Commons in a Connected World* and *Code and Other Laws of Cyberspace*. His next column will appear in September.

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