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SELF-DEFENSE: A DIFFERENT TUNE ON COPYRIGHT

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As the Internet has grown, music companies, Hollywood filmmakers, and other copyright owners have watched in horror as digital technologies have made it increasingly easy to copy and distribute their property without payment. All too often, the response of these copyright owners has been to lobby for potentially harmful regulation of new technologies and overly protective copyrights. This summer, Representative Howard Berman (R-CA) proposed a radically different approach: allowing copyright owners to use digital self-help measures to protect their own intellectual property.

The proposed legislation (H.R. 5211) has been met with a firestorm of controversy. Critics have assailed the prospect of “posses of copyright vigilantes” and music company hackers deleting hard drives. In reality, the Berman bill is narrowly drawn, allowing copyright holders only limited actions and including legal penalties should they go too far. Most important, while reasonable people could disagree about the specific language, the concept of self-help is both sound and a welcome alternative to government regulatory intervention in this vital field.

The Peer-to-Peer Explosion. The underlying controversy here is a practice known as “file sharing.” Pioneered by Napster in 1999, file sharing initially enabled users to “share” digital copies of songs after being placed on a central computer.

Because file sharing enables widespread distribution of copyrighted material—without payment of royalties to the creators—Napster’s activities were ruled illegal in 2000. File sharing continues, however, through more decentralized “peer-to-peer” (P2P) networks. These networks allow users to share files by plugging in directly to other users’ computers. This decentralization makes it more difficult to pursue copyright violators in court, as was done with Napster.

Moreover, these networks are not just technical toys used only by a few committed techies. KazaA, one of the most popular networks, boasts that its program has been downloaded over 100 million times. According to KazaA’s Web site, some 2 million people are using it at any one time. In addition to losses to intellectual property owners, Internet users themselves could be hurt by such widespread, unauthorized distribution—as producers are discouraged from providing content for new digital services.

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Long Tradition of Self-Help. Congressman Berman's proposal would make it easier for copyright owners to employ self-help measures to defend their products against such networks. The general concept of self-help against theft is nothing new to the law. Homeowners, for instance, have long been able to take reasonable action to stop burglars found in their homes, and storekeepers are entitled to stop shoplifters. Moreover, it is common for lenders to repossess automobiles and other secured items. The owner's consent is not needed, and lenders are explicitly allowed to enter the debtor's private property in order to repossess. The right of property owners to act is far from unlimited—for instance, homeowners may not simply shoot burglars on sight—but within clear limits, self-help is widely accepted.

The property at issue here—musical recordings and movies—is intangible intellectual property, but the principle remains the same. If, under the relevant copyright laws, these goods are being distributed without the owner's consent, the owner should be allowed to impede the theft.

Specifically, the Berman bill protects owners from liability for “blocking, diverting or otherwise impairing the unauthorized distribution... of his or her copyrighted work on a publicly accessible peer-to-peer file trading network.” Copyright owners, however, would not be able to “alter, delete, or otherwise impair the integrity of any computer file or data residing on the computer of a file trader.” The owner would also have to inform the Department of Justice in advance of any action to be taken.

Given the rapid pace at which technology changes, the bill, appropriately, does not list specific actions that would be allowed. Among the most likely to be used, however, is “spoofing”—flooding the P2P network with an enormous number of flawed or altered copies of the copyrighted material. For instance, to disrupt the distribution of the movie *Spiderman*, Sony might create 10,000 alternate files that appear to be *Spiderman* but actually are something else, such as static. Alternatively, a technique known as “first-in-line interdiction” could be used, by which a copyright owner would download certain materials from the P2P network at extremely low speeds, thus making them unavailable for others.

Boundaries of Self-Help. Equally important are the actions that H.R. 5211 would *not* allow. Files could not be deleted or corrupted. Indiscriminate “denial of service” attacks—shutting down P2P networks entirely—would not be allowed, since this would impair the legitimate activities of the network.

H.R. 5211 also allows P2P traders to sue if copyright owners go too far. Most important, if copyright owners should go beyond what H.R. 5211 permits, individuals are explicitly allowed to file suit for violations under any *existing* laws and can recover any damages those laws allow.

Moreover, the legislation creates a new legal claim, “wrongful impairment.” While this process is limited—the Attorney General, for instance, can keep such claims from going to court—it only supplements, rather than replaces, current mechanisms for redress. As a final check, H.R. 5211 allows the government to prevent a copyright owner from using any self-help measures if it finds a pattern of abuse.

Congressman Berman's proposal is not perfect. Critics have pointed out that some provisions are ambiguous. For instance, it allows copyright owners to impair the availability of non-infringing computer files to the extent “reasonably necessary” to prevent unauthorized distribution of a protected work. But what is “reasonable?” At worst, this is a potential loophole in the protections given to computer users; at best, the term invites litigation. Such ambiguities should be cleared up as the bill progresses.

Adapting intellectual property rules to the reality of today's digital age will be no easy task. This Gordian knot has no simple solution: It entails forging a delicate balance between the rights of content owners and users without hobbling technological innovation. Representative Berman's proposal, while not a cure-all, could be one small step in the right direction.

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