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OPINION: LAWRENCE LESSIG

Just Compensation

Congress should help artists get paid without delivering the Internet into the hands of the big labels.

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Just as the record labels smell victory in their judicial battle to control how content gets distributed on the Net, an interesting scuffle is beginning to erupt within the halls of Congress. It may well be that the laws as written give the labels the right to veto innovation in the distribution of content, but some in Congress, from both sides of the aisle, are beginning to wonder whether these laws make sense. We didn't deliver control over **FedEx (FDX)** into the hands of the Post Office; should we deliver control over Internet distribution into the hands of the labels?

As Congress knows, but as the recording industry wants us to forget, the struggle over **Napster (dossier)** is nothing new to copyright law. The past 100 years have been filled with Napsters - new technologies that "steal" content. But in every previous Napster-like case, Congress has struck a very different balance from the one that the courts are now establishing with the labels. Every time a major new technology for distributing content was born, Congress has assured compensation without guaranteeing control.

Take cable TV. Like Napster, cable was born as a commercial enterprise devoted to making tons of money by "stealing" other people's content. Twice the broadcasters took this "theft" of their freely broadcast content to the Supreme Court; twice the Supreme Court said it was a matter for Congress. It wasn't until 1976 that Congress finally resolved this "theft" by passing legislation designed to strike a balance between broadcasters and cable.

In finding that balance, Congress kept separate two questions the labels want you to confuse. One question was whether broadcasters should be paid for their content. Answer: Yes. The second question was whether broadcasters should have the power to control innovation in cable TV by deciding whether cable could run broadcasters' content. Answer: Absolutely not. While broadcasters and copyright holders were entitled to compensation for their content, the right to compensation did not have to mean the broadcaster's right to control. Cable providers had to pay for what they "stole," but they had, under Congress' law, a fundamental right to steal.

The wisdom in this balance is not hard to see. Artists should be paid for their art. But there are many ways to ensure this, and not all of them give labels a veto over innovation. The law could ensure that artists get paid by establishing some compulsory rate, or by requiring a license. This, in turn, would give innovators the freedom to build new distribution technologies. The content would be free - not in the sense of free beer, as **Richard Stallman** of the Free Software Foundation puts it, but in the sense of free speech. This is how it has always been. Every major new technology has enjoyed freedom from control by the old, from piano rolls to satellite TV, and Congress has been balanced and creative about it. So what makes the Net so different? Why is Congress sitting back as the buggy manufacturers get to decide how best to deploy the automobile?

The labels say congressional action is premature. Let them, they say, strike deals with these upstarts. The market works fine, they assure us. Government (as in Congress) should stay away as soon as government (as in the courts) has killed off any innovator that the RIAA doesn't own.

But what works for the RIAA does not necessarily work for innovation. Congress knows that truth in its heart, even if it pays to forget it. And, interestingly and importantly, some in Congress - from Rep. Rick Boucher (D-Va.) to Sen. Orrin Hatch (R-Utah) - are beginning to act on what they know.

Dinosaurs should die. A truly free market would let them die, and Congress could help this evolution along by passing laws to make sure artists get paid without delivering the Internet into the hands of the labels. Compensation, in other words, without control.

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