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Tech Regulation Done Right

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As soon as new technologies are introduced, the call for government regulation inevitably rings out. And as lawmakers feel the pressure to cure technology-related societal harms, their approach has increasingly focused on regulating technology, not bad conduct.

New laws are sometimes desirable and address challenges posed by new technologies. But when are they really needed? For a useful analytical framework, we can turn to the study *The Electronic Frontier: The Challenge of Unlawful Conduct Involving the Use of the Internet*, published in 2000 by the Working Group on Unlawful Conduct on the Internet (which was created by a 1999 Clinton Executive Order).

Although initially criticized by civil libertarians as focusing, almost deferentially, on the needs of law enforcement, the report's analytical framework is useful for analyzing legislative proposals to curb harmful conduct—an invariable byproduct of new technology. The report considers three main steps to determine whether new laws are needed:

- First, identify the conduct and the laws applicable to it. Are existing laws sufficient to address unlawful conduct involving the use of new technology?

- Second, ask whether novel ways are needed to detect and catch wrongdoers. Does the legislation provide not just new law, but also new tools or capabilities to investigate and prosecute bad conduct?

- Third, analyze market alternatives to government regulation. What is the potential for using education and empowerment tools to minimize the risks for misuse?

Feature Photo Service

Using a similar framework, let's analyze current legislative attempts to address two major Internet-related issues: spyware and file-sharing software.

Spyware

Spyware programs are potentially harmful programs often downloaded by unwitting computer users. In the first half of 2004, EarthLink, an Internet service provider,

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and Webroot Software, a company that produces privacy software, conducted a joint study that scanned approximately two million computers. The results: approximately 55 million instances of spyware were detected—an average of 26.5 per computer!

The Securely Protect Yourself Against Cyber Trespass Act (SPY ACT), introduced by Reps. Mary Bono (R-Calif.) and Edolphus Towns (D-N.Y.), is designed to curb spyware abuses, prohibiting the distribution of certain software programs over the Internet without notice and consent. The bill creates an expansive definition of "spyware" that could include many common, useful programs, such as Windows Update. It is one of several anti-spyware bills pending in Congress.

> Congress can advance the interests of both companies and consumers by focusing on the misuse of technology, rather than the technology itself.

Existing Laws: Title 5 of the Federal Trade Commission Act addresses unfair and deceptive trade practices. Provisions of the Computer Fraud and Abuse Act make it illegal to intercept a communication without a court order and could apply to some uses of spyware that co-opt control of computers or exploit Internet connections. State trespass, contract, tort, and fraud laws also apply.

New Tools for Investigation or Prosecution: The Internet presents a challenge to law enforcement because it is global, lacks boundaries, and provides for anonymity. But the pending spyware bills don't change the nature of the Internet, or provide law enforcement with investigative tools it doesn't already possess.

Education & Empowerment Alternatives: Products like Norton Internet Security 2004 include privacy-protecting software. And a number of products exist to eliminate unwanted applications.

Conclusion: Existing laws adequately address any misuse of software resulting in fraud or other deceptive acts. The Federal Trade Commission is already on record that spyware legislation is unnecessary. Congress should allow the combination of industry self-regulation, technological innovation, consumer education, and the enforcement of existing laws to progress.

File Sharing Software

According to the Recording Industry Association of America (RIAA), music companies have lost over $1 billion in revenues since the introduction of Napster in 1999 and other file-sharing peer-to-peer (P2P) networks. Musicians, actors, and other content owners fear that digital file-swapping of copyrighted material could undermine their "exclusive right" to potential revenue from their creativity.

Congress has moved to help copyright holders. Sen. Orrin Hatch (R-UT), for example, has introduced the Inducing Infringement of Copyrights Act of 2004 (Induce Act), which stipulates: "Whoever intentionally induces any violation... shall be liable as an infringer." It identifies "intentionally induce" to mean "intentionally aids, abets, induces, or procures" copyright infringement for commercial purposes.

Existing Laws: The Constitution's Patent and Copyright Clause grants Congress the power to secure rights to "authors and inventors" for their "writings and discoveries." Title 17, Chapter 5 of U.S. Code specifically prohibits copyright infringement and offers remedies. Common law plays a large role in deciding contributory and vicarious infringement cases—recent court cases have taken different approaches toward resolving infringement issues.

New Tools for Investigation or Prosecution: Copyright violations involving P2P networks involve individual behavior that is hard to police. Many copyright holders want the legislature to expand the definition of copyright infringement to include the distribution level (P2P system), not just the actual individual infringer (P2P user).

Education & Empowerment Alternatives: Copyright holders have several options available to protect their rights. Judicial infringement actions can focus on individual infringers. Digital rights management (DRM) allows digital copyright holders to "package" their products in ways that prevent copying. Furthermore, consumers are becoming more aware of the problems of copyright infringement and see how intellectual property plays a role in the digital marketplace.

Conclusion: Existing law adequately defines copyright violations; the Induce Act is about preventing possible distribution, an indirect "violation." Expanding the realm of copyright infringement threatens to chill the development of new technology. At this point in a complex debate, the judicial system combined with copyright self-help measures through DRM are superior routes for resolving infringement matters.

The Right Approach

Perceived technology policy issues still come down to a common variant: user conduct. Congress can advance the interests of both companies and consumers by focusing on the misuse of technology, rather than the technology itself. Under this approach, technology research and innovations will continue to flourish and enrich our economy long into the future.

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