

**Vigilantes on the Cyberspace Frontier: The Berman P2P Bill**  
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The vigilante is a classic icon of American popular culture. From the dime novels of the late 19<sup>th</sup> century through the Westerns starring John Wayne and Clint Eastwood, the victim who takes the law into his own hands because the legal system has failed him has been portrayed as a hero. Disappointed by the ineffectiveness of judicial process and driven by an innate sense of justice and morality, the vigilante is the quintessence of American manhood.

Thus, it should come as no surprise that the U.S. entertainment industry has rallied behind legislation that would encourage copyright owners to take matters into their own hands and attack suspected infringers directly, without any judicial determination of wrongdoing. On July 25, 2002, Congressman Howard Berman of California introduced H.R. 5211, the P2P Piracy Prevention Act of 2002. The Berman bill provides copyright owners with a safe harbor against legal liability that could result from engaging in self-help activities aimed at preventing the unlawful distribution of their content over peer-to-peer networks such as Gnutella or Kazaa.<sup>1</sup>

**The Bill's Rationale**

The Berman bill starts from the premise that existing legal enforcement tools simply will not work against P2P networks. Copyright infringement actions succeeded in shutting down Napster because Napster's server acted as the lynch-pin in the Napster system. Since the Napster server contained the database of all the files available for sharing, by halting the operation of the server, the record industry could halt the operation of the entire Napster system. Conversely, P2P networks operate without a central server. Once users download Gnutella or Kazaa software, they can trade files with one another without ever returning to the Gnutella or Kazaa site. Even if the entertainment companies prevailed in copyright actions against Gnutella or Kazaa, the file trading will continue unabated.

To be sure, the entertainment companies could sue the individual file traders, or the users operating the "supernodes" critical to the functioning of the P2P network. This would involve lawsuits against hundreds of thousands, or even millions, of individuals around the world. The litigation costs would be overwhelming.

Accordingly, some entertainment companies have concluded that technological, rather than legal, attacks are the only way cost-effective way to defeat infringement over P2P networks. However, these technological attacks might violate existing U.S. federal and state computer crime laws. Unlike the fictional vigilantes who are willing to risk

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<sup>1</sup> Because the bill was introduced so late in the Congressional session, it is unlikely that any action will be taken on it this year. However, Congressman Berman probably will reintroduce it next year.

imprisonment because they feel they answer to a higher law, the entertainment companies want legal immunity for their self-help activities.<sup>2</sup>

The first drive for immunity occurred in the aftermath of the September 11, 2001 terrorist attacks. As part of the USA-PATRIOT anti-terrorism bill, the Department of Justice sought various amendments to the Computer Fraud and Abuse Act (CFAA), the main federal computer crime provision. Entertainment industry lobbyists tried to convince Congress to include an amendment that would exempt a copyright owner from CFAA liability for any action it took to protect its copyrights. The amendment would have permitted copyright owners to hack into users' computers to delete files and to disseminate computer viruses. Congress rejected the proposed amendment because of its breadth. Additionally, Congress felt it inappropriate to address commercial concerns in emergency legislation responding to the September 11 attacks.

### **The Bill's Impact**

The Berman bill is the entertainment industry's second bite at the apple. Press reports have indicated that the bill would permit copyright owners to hack into users' computers and destroy infringing files. In fact, the bill is more limited than the proposed amendment to the USA-PATRIOT Act, and specifically forbids the tampering with any files on a user's computer.<sup>3</sup>

However, what the bill would allow is almost as bad. The bill provides copyright owners with a green light to launch denial of service (DoS) attacks on suspected file traders. For example, the copyright owner could use a computer program that repeatedly requests the same file from a particular user. These repeated requests make the file unavailable to anyone else. Additionally, depending on the configuration of the user's computer and the nature of his Internet access, these repeated requests could prevent him from accessing the Internet for any other purpose. Such DoS attacks currently violate the Computer Fraud and Abuse Act and state computer crime laws. But the Berman bill provides the copyright owner with immunity from criminal or civil liability under State or Federal law for DoS attacks aimed at preventing infringement over P2P networks.

The bill's proponents contend that there is nothing wrong with DoS attacks on file traders. These people are breaking the law, and DoS attacks provide copyrighted owners with an effective, efficient means of protecting their property.

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<sup>2</sup> The American legal system permits self-help only in a very limited range of circumstances, such as the reasonable use of force for self-defense in the face of imminent physical harm; or the repossession of chattels such as cars that can easily be removed from a court's jurisdiction.

<sup>3</sup> It should be noted that this limitation on deleting files from the file trader's computer might be easy to circumvent. If copyright owners start to embed click-on and "browse-wrap" licenses in their content, a file trader that downloads a file may "agree" to permit the copyright owner onto his computer to delete the file if it is infringing.

## **The Ox-Bow Incident**

It appears that the bill's proponents have seen too many John Wayne and Clint Eastwood films, but somehow missed the 1943 Henry Fonda classic, *The Ox-Bow Incident*. In that film, when the sheriff is out of town, a mob hangs three cowboys suspected of murdering a popular rancher and stealing his cattle. At the film's end, the audience learns that the three men were innocent, and that the rancher was only wounded, not killed.

The film has much to offer the debate over the Berman bill. The Berman bill might prompt a copyright owner to launch a DoS attack on an innocent person. As in the film, there may be circumstantial evidence that seems to implicate a particular file trader, but a thorough, impartial investigation of the facts may lead to a different conclusion. Perhaps the file trader did not share a file owned by the copyright owner, or the sharing was lawful. (In *The Ox-Bow Incident*, the accused men claimed that they had bought the cattle in question from the rancher. So too, the file trader may have a license from a joint owner, or the sharing may be a fair use, or the work may have entered into the public domain.)

Additionally, just as the hanged men's families were harmed by their extra-judicial execution, a DoS attack can inflict injury on innocent by-standers. A computer under a DoS attack may be the family computer. Or a DoS attack on a particular computer may interfere with the Internet access of nearby computers that share the same Internet access services.

## **Deterrent Effect of Potential Liability?**

The legislation's proponents counter that the bill has safeguards that should reduce the risk of error or collateral damage. Most significantly, the safe harbor does not apply if the copyright owner's DoS attack prevents the distribution of non-infringing files.<sup>4</sup> The proponents contend that the threat of liability if a copyright owner falls outside the safe harbor is sufficient to deter copyright owners from launching DoS attacks in all ambiguous or uncertain situations. Unfortunately, this limitation contains a significant exception: a DoS attack can prevent the distribution of non-infringing files "*as reasonably necessary to impair the distribution*" of infringing content. This exception swallows the limitation. A DoS attack arguably would fall within the safe harbor so long as it impaired the distribution of some infringing material. This would have excused the hanging of the three cowboys because one of them (the Anthony Quinn character) stole the rancher's rifle.

More importantly, the fact that a DoS attack might fall outside the safe harbor, and might therefore subject the copyright owner to liability under the Computer Fraud and Abuse Act, will deter few DoS attacks. Copyright owners know that most victims

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<sup>4</sup> The safe harbor also does not apply if the copyright owner's actions cause monetary loss 1) to any person other than the file trader; or 2) of more than \$50 per impairment to the property of the file trader, other than loss relating to the infringing copies.

will never sue because it will not be economically worthwhile to do so; the damage rarely will be large enough to justify the time and cost of litigation. And even if they did want to sue, they typically will not know whom to sue. The copyright owner has no obligation to notify the victim why his Internet access has been impaired. (The copyright owner must provide the Justice Department with notice of the specific technology it intends to use in a DoS attack, but he not need notify the Justice Department whom he is attacking.)

A new cause of action created by the legislation for “wrongful impairment” will have little deterrent effect for similar reasons. Also, the legislation erects many procedural obstacles a victim must first overcome before he can bring a wrongful impairment action.<sup>5</sup>

Another factor that offsets the deterrent of potential liability is the reality of the marketplace. If Congress legalizes DoS attacks, companies will make DoS software readily available to the public. The market would be enormous, because anyone who has ever written something down is a copyright owner and thus a potential customer. The proliferation of DoS software will inevitably lead to a proliferation of DoS attacks, some justified, some not. Many historians and sociologists have long theorized that the high rate of murder in the U.S. generally, and in the Old West in particular, is a function of widespread ownership of handguns in the U.S.

### **Burden on Service Providers**

Nonetheless, assuming for the sake of argument that the threat of liability was sufficient to ensure that copyright owners launched only surgical DoS attacks against file traders who unquestioningly shared infringing material, the legislation would place a great burden on Internet service providers. As noted above, the copyright owner is not required to provide any notice to the target of the DoS attack. Thus, a target of a DoS attack will turn to his Internet service provider to determine why he can not access the Internet. The service provider will then need to expend significant resources to determine the cause and source of the impairment.

Moreover, since the September 11 terrorist attacks, service providers have been upgrading their systems to detect and prevent cyberterrorism, including DoS attacks. Until now, they have assumed that all DoS attacks are unlawful and require a response.

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<sup>5</sup> One can bring a wrongful impairment action in federal court if: 1) the copyright owner impairs the distribution of a particular file; 2) the copyright owner had no reasonable basis to believe that the distribution was a copyright infringement; 3) the file trader suffered a monetary loss in excess of \$250; 4) the file trader files a claim for wrongful impairment with the U.S. Attorney General; and 5) the Attorney General either investigates the claim and concludes that there is reasonable cause to believe that the facts alleged by the file trader are true, or the Attorney General fails to make a finding within 120 days of receiving the claim. Moreover, the Attorney General can bring suit against a copyright owner "that has engaged in a pattern of practice of impairing ... distribution ... without a reasonable basis to believe that infringement of copyright has occurred."

The bill will completely undermine this approach. Before responding to the attack, the service provider will have to determine its legitimacy. Additionally, as discussed above, the volume of attacks will increase dramatically. The net effect will be to delay service providers' response time to serious illegitimate attacks.

## **Spoofing**

The proponents' last line of defense of the Berman bill is that it shelters not only DoS attacks, but also more benign forms of self-help such as "spoofing." Spoofing involves the transmission of files that appear to contain the infringing content people want but instead contain other content -- e.g., a notice that lawful copies are available at a certain website. Copyright owners have already begun to use spoofing with some success. This current practice demonstrates the fallacy of this argument. Copyright owners are already spoofing because it violates no law; and since it violates no law, copyright owners require no safe harbor to engage in it. But even if spoofing did violate existing law, that hardly justifies enactment of a statute that permits DoS attacks. Rather, Congress could enact a narrow statute that provides spoofing -- and not DoS attacks -- with a safe harbor.

## **Conclusion**

Obviously, a DoS attack is not quite as serious as a hanging. A DoS attack can be terminated and service restored, while the hanged person cannot be resurrected. Also, money damages can go much farther to compensate the victim of a mistaken DoS attack than the victim of a wrongful hanging. Nonetheless, permitting all copyright owners to engage in DoS attacks is an extreme remedy that will harm innocent users and burden Internet service providers. Moreover, encouraging vigilante actions by copyright owners will hardly promote law-abiding behavior by users. To the contrary, it will provoke retaliatory attacks by some users, and the acquisition of defensive software by others. It will also reinforce in users' minds the belief that legal norms do not operate in cyberspace. In short, just like vigilantism in the Old West, the Berman bill sacrifices the long-term benefits of the rule of law in favor of the short-term satisfaction of revenge.

Before being hanged, one of the cowboys in *The Ox-Bow Incident* wrote a letter to his wife, which is read aloud at the film's conclusion. The cowboy wrote: "A man just naturally can't take the law into his own hands and hang people without hurtin' everybody in the world, 'cause then he's just not breakin' one law, but all laws."