

Who's Holding Back Broadband?

By Lawrence Lessig

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As the American economy struggles to get out of recession, an important part of the recovery will be the revival of the country's technology sector.

Not long ago, in a speech at a summit on Internet development, Federal Communications Commission Chairman Michael Powell gave the nation a glimpse of his vision of what might kindle such a revival. At least part of that vision was refreshingly new.

The key is "broadband." Broadband is the next generation of Internet service, and it could fuel the next great wave of Internet innovation. Broadband access is fast, and always on. It could deliver music or video content as well as applications that have not yet been imagined. It could offer innovators and creators a whole new platform on which to build.

Surprisingly, however, consumers in the United States have been slow to adopt broadband. South Koreans are four times more likely to have broadband Internet access than Americans, Canadians twice as likely. After five years of push, the market has failed to pull Americans along.

Why? That's a hard question to answer fully. Both the Korean and Canadian governments have played a significant role in pushing broadband access; our government has been much more *laissez-faire*. If that is the reason for the difference in deployment, then the future here promises to be much like the past. Powell signaled in his speech that *laissez faire* was his policy too.

But the chairman did identify a kind of regulation that may well explain the slow adoption of broadband technologies by consumers in the United States: copyright. Consumers are slow

to adopt broadband because, while there may be an infinite number of channels, there is still nothing on.

"Broadband-intensive content," the chairman said, "is in the hands of major copyright holders." These copyright holders have been hesitant to free their content to the net. Their slowness, in turn, has slowed broadband technologies in general.

In part, the reason for this slowness has to do with fear of piracy. Under existing technologies, digital content is easily copied; given technologies such as Napster, it is also easily shared. So copyright holders rightly fear that until they can protect themselves against piracy, their profits will slip through the net.

But piracy is not the most important reason copyright holders have been slow to embrace the net. A bigger reason is the threat the Internet presents to their relatively comfortable ways of doing business. "Major copyright holders" have enjoyed the benefits of a relatively concentrated industry. The Internet threatens this comfortable existence. The low cost of digital production and distribution could mean much greater competition in the production of content.

Online music is the best example of this potential. Five years ago the market saw online music as the next great Internet application. A dozen companies competed to find new and innovative ways to deliver and produce music using the technologies of the Internet. Napster was the most famous of these companies, but it was not the only or even the most important example. A company called MP3.COM, for example, had not only developed new ways to deliver content but had also enabled new artists to develop and distribute their content outside the control of the existing labels.

These experiments in innovation are now over. They have been stopped by lawyers working for the recording industry. Every form of innovation that they disapproved of they sued. And every suit they brought, they won. Innovation outside the control of the "majors" has stopped.

Whether or not these courts were right as a matter of

substantive copyright law, what is important is the consequence of this regulation: innovation and growth in broadband have been stifled as courts have given control over the future to the creators of the past. The only architecture for distribution that these creators will allow is one that preserves their power within a highly concentrated market.

The answer to this problem is the same one that Congress has given to similar changes in the past. When a new technology radically changes the opportunity for creation and distribution of content, Congress has legislated to ensure that old technologies don't veto the new.

For example, when the player piano made it possible for "recordings" of music to be made without payment to sheet music publishers, Congress changed the law to require that subsequent recordings compensate the original artist. Likewise, when cable TV started "stealing" over-the-air broadcasts, Congress passed a law to require that cable companies pay for the content they used.

But in both cases, the law Congress passed was importantly balanced. Copyright owners had a right to compensation, but innovators also had a right to get access to content. In both cases, Congress established what lawyers call a "compulsory license," to ensure that the right to compensation did not become the power to control innovation.

The same sort of change could unleash extraordinary innovation in the context of broadband service now, as Chairman Powell expressly suggested. "Stimulating content creation might involve a re-examination of the copyright laws," Powell argued. For as we've learned from the past, innovation is often the enemy of the old, and the old will do what they can to ensure that innovation doesn't innovate away their power.

This administration has been keen to warn of the harm that overregulation imposes on innovation and growth. It is a refreshing and promising development to see the chairman of the FCC include the regulation of copyright within that concern. Copyright laws should of course give artists and creators an adequate return for their creativity; but they should not become

a tool for dinosaurs to protect themselves against evolution.
Broadband will come when content can roam more freely.
Congress should act now to ensure that it can.

*The writer is a law professor at Stanford and author of "The
Future of Ideas."*

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