

New Technology and Intellectual Property

The Cato Institute's Fourth Annual Technology and Society Conference, "The New Entertainment Era: The Convergence of Technology & Entertainment," was held in Reston, Virginia, November 9–10, 2000. Among the speakers were Christie Hefner, chairman of Playboy Enterprises; Michael L. Robertson, chairman and CEO of MP3.com; and Tyler Cowen, professor of economics at George Mason University, a Cato Institute adjunct scholar, and author of *In Praise of Commercial Culture*. Excerpts from their remarks follow.

Christie Hefner: It has been said that a brand name is like a theme park and your product is the souvenir. If the brand is really good, then it isn't just the identifiable logo of a product. It is an attitude, a point of view, something that people identify with. Some people have argued that even some of the most successful brands today, Coca-Cola and Levi's, will ultimately die if they remain captive to a single product.

When my father started *Playboy* in 1953, he certainly didn't envision building an empire, but he had some very good instincts about things that would turn out to be very important in terms of ultimately creating a brand. And one of those was the idea of a magazine representing not just a package of entertainment but a lifestyle promoted and personified by Hef himself—the Playboy mansion and Black Bunny plane.

Many of the best magazines were started by entrepreneurial founders who had a passion for their ideas. Magazines have always been a very personal form of mass communication. But *Playboy* also understood early on that if the magazine could represent a lifestyle, then the magazine's title and symbol could represent a consumer brand. And from almost the beginning, the company experimented with the idea of *Playboy* products, clubs, and TV shows.

More important than the translation of the magazine into a brand, which no other magazine has ever done, was what we did in the 1980s when I took over the company. We decided that the most leveragable asset of our company was not its publishing expertise but our brand and that our growth would not come by launching

or acquiring other magazines, as many others had done. Instead, we looked at what was happening in technology with the multiplying of channels and the spread of the VCR. We realized that brands would have greater value than ever before in the electronic media because people would look for brands they could identify with. And so we decided to leverage not our publishing capabilities but our brand into television in the 1980s.

In retrospect, that seems like a fairly obvious opportunity, but I would point out that today there is a hugely popular music TV network, but it's not called Rolling Stone—it's called MTV. There is a hugely popular sports network, but it's not called Sports Illustrated—it's called ESPN. And there is a hugely popular news network, but it is not called Time—it's called CNN. That was an important lesson when we moved onto the online world. A lot of magazine companies thought they could just put their magazines online.

So we differentiated *Playboy* TV from *Playboy* magazine. We could not be as comprehensive online. When you buy the magazine you can read the Jesse Ventura interview that month or look at the Playmate of the Month. But if you turn on *Playboy* TV, you can't exercise that same choice. So we actually compressed the brand and said *Playboy* TV will be quality sexy entertainment all the time.

The second decision we made was that, unlike reading, watching television is principally a social experience. So, instead of creating content that was for men only, we created quality sexy content that couples could watch together. Today three-quarters of *Playboy* Television's viewers are couples.

When we started to think about *Playboy* online in the early 1990s, we were sure it wasn't going to look just like the magazine or the TV channel. One of the best differences was that we didn't have to edit for space or time—the consumer would be the editor. Magazine editors and television producers have space or time restrictions. In the world of online, consumers make their



After her luncheon address at the Fourth Annual Technology and Society Conference, Christie Hefner talks with entrepreneur Leo Hindery, Cato's David Boaz, and First Amendment lawyer Robert Corn-Revere.

own choices. We could also be more timely online. We asked readers which person from "Survivor" they would like to see in the magazine. We published an excerpt of the Unabomber trial online three months before we could get it into the magazine. So we tried to shift our thinking from a monthly magazine schedule to a daily publication schedule.

The ultimate challenge is, "How do you make money online?" You have to start by attracting people who want to spend time on the site. Therefore, it's very hard, I think, for sites that exist principally to meet very important but limited needs for information, like the weather or stock quotes, to actually build a business model. But if you've got a lifestyle and entertainment site where people are spending a lot of time, it gives you a chance to monetize that traffic. And that led us to one of the important principles that we started with: we wouldn't be dependent on a single revenue stream.

So we have reconfigured the company, from one in which the magazine was at the heart to one in which the brand is at the heart. The magazine is a very important reflection of the lifestyle and brand and a very important beachhead in countries around the world. But it is, in fact, one of the legs of the stool of the world of *Playboy*, along with television and online. We believe this is the biggest opportunity our company has ever had. We don't pretend to be able to see around every corner, but we're confident that we are going to continue to be able to build a business that

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intersects with the other assets of the company while actually expanding both the audience and the definition of what Play-boy is, both here and around the world.

One concern we have is government attempts to censor. I'm a skeptic about the government's ability to be the source of standards and then act as the one to restrict access. But I'm a fan of labeling information that lets parents make choices. I don't think there's any one filtering system or rating system that is going to work for everybody. Some parents might like to know what sites the Christian Coalition feels are appropriate, and other parents might prefer to know what sites *Parents* magazine thinks are appropriate. We have to use the power of technology to provide different kinds of ratings and filterings that parents can choose from for their home and also recognize that technology has outpaced the ability of governments, whether they like it or not, to control what information citizens have access to.

We should get past the notion that the role of government is to restrict content and move to the notion that government can encourage technology to enable adults (particularly parents) to make their own choices about material that comes into their homes through both the TV screen and the computer. I am hoping that over some period of time the technological realities that keep governments, from Beijing to Washington, from being able to control information will win out. We can then focus on developing and marketing the best possible array of standards and rating systems and filtering programs so that individual parents can make informed choices.

Michael Robertson: MP3.com's battle with the large record companies is several classics—David and Goliath, consumers versus big business, innovation versus old economy—all wrapped into one fascinating story.

We started off as a site that gave artists, any artist in the world, an opportunity to distribute music online. Recording artists today have extremely limited options. If they don't sign with a major record label, they simply cannot get access to the retail shelves or radio. That isn't good for artists or consumers.

So we came up with a way for any band in the world to put its music on our Web site. We provide everything: the bandwidth, the storage, the Web sites. We add more than 200 bands every day. Unlike the record industry, which owns the rights to the music, we said: “Artists, come and use our site. You're free to go at any time. We're not going to lock you into a seven-year contract, which is about the industry norm. I'm not going to own the rights to your music.”

One way to think about what we're doing is to think about the food industry and what the refrigerator did for the selling of food. It radically changed the way that food was sold and how much you bought and what foods you could eat. Likewise with music. People can access their music from any device connected to the Internet.



Michael Robertson: “Copyright law today simply doesn't recognize the new uses of content.”

Just as a refrigerator doesn't replace the need to buy food, our technology was not designed to replace the need to buy music. And this is why it's so ironic to be in the state that we're in now, to be challenged and sued by the major record labels when we built a system that actually encourages people to buy more music, just as a refrigerator encourages you to buy more food.

There are two technologies that allow this to happen. One is called “Beam-it.” You download it and the first time you download it you put in your user name and password. We bought about a million dollars worth of CDs, and for each CD we created a sort of DNA sequence. When you

put Beam-it in your CD-ROM drive, the software reads the sound wave, creating a small DNA signature. Instead of sending all the music to us, it sends a small DNA signature up to us.

The second technology we came up with is something called “Instant Listening.” Unlike CDNow.com, which should really be called “CD in Four Days.com,” Instant Listening lets you listen to music almost immediately. When a retailer tells us you've bought a CD, we immediately stock your online catalog. You can listen to your music anywhere, anytime.

That's the technology that triggered the largest copyright lawsuit of all time. The record labels argue that we have an unlicensed database of music. Our argument is that we bought those CDs, and furthermore we don't use them unless the consumer already has a copy. So, in fact, we

have two copies that have been purchased and all we're doing is allowing consumers to listen to their own music. And from where we sit that is clearly a fair view that says, “Hey, you bought it—it's yours to listen to.” Imagine that you bought a car and then just as you were leaving the dealership they said, “Oh, by the way, you can drive it only in Virginia.” You'd say, “You're out of your mind.” This is about personal ownership of property.

And so we were sued by the five major record labels (they sell about 85 percent of the music in the United States) a week or so after we came up with this technology. We settled, for a lot of money, with four of the big five. Universal took us to court and they won. We were found guilty not only of copyright violations but of willfully violating copyrights—meaning that we knew it was illegal but continued anyway. We were fined \$25,000 per CD. Per CD!

That pointed out to us some serious problems with today's copyright laws. When you look at the copyright law today it simply doesn't recognize new uses of content. Everything we've done at MP3.com

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“This is really about the use of complex copyright laws to thwart innovation. An environment that chills innovation is bad for consumers.”

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fits within the spirit of copyright law, which says, “Hey, if you bought something you can listen to it.” And the very essence of the technology is good for the industry, which sold \$38 billion worth of albums last year. Our technology encourages them to sell more CDs. It’s good for consumers and retailers.

So we thought that everything we’d designed was clearly within the spirit of the copyright law. The problem is the complexity of the web of copyright laws.

There are much bigger issues here than simply one tiny Internet company with 300 people challenging an entire music industry. This goes much broader than that, and it’s really about the use of complex laws to thwart innovation. We are faced with a penalty of up to \$200 million. No one can prove one penny of damage. In fact, we introduced evidence showing that we’ve sold for the major record labels more than \$200 million worth of CDs.

An environment that chills innovation is bad for consumers. It threatens consumers’ rights to their own property. It threatens innovation. MP3.com, Napster,

and others have been sued unmercifully. Others are unlikely to experiment.

An important question is, Should we use the courts to dictate public policy, thereby thwarting innovation? Digital music is a new industry, and it’s incredibly challenging because we are one small company challenging an established music industry. Today MP3.com stands nearly alone.

Tyler Cowen: Copyrights are there to reward artists for what they have produced. By paying artists we get them to produce more, which makes us all better off. But we also need to step back and realize that copyright is not an absolute moral right; it is not a typical property right because it expires after some period of time. We apply copyright in an arbitrary fashion. Dennis Rodman can copyright the arrangement of tattoos on his body, but someone who does calligraphy or pantomime usually cannot get a copyright. We should think of copyright as something that we apply essentially for utilitarian reasons and as an institution that should adapt to the times.

Let me also say that copyright is a law that is best broken in many cases. Copyright in this regard is like the speed limit. We don’t want everybody strictly obeying it. The people in the music industry are afraid or unwilling to admit this, essentially for legal reasons. By having some people out there breaking copyright, making copies for free, we get more output. There also is pressure on the producers to keep their prices lower and to produce more.

In the past 40 years copyright has been extended 11 times. Copyright law as it exists now is a subsidy to producers, a kind of monopoly grant, and, in economic terms, its length and strength are unjustified. It is now good for the life of the artist plus 70 years. Corporate copyrights last for 95 years. This is simply a subsidy and a monopoly privilege we don’t need.

We’re all familiar with the expression “If it ain’t broke, don’t fix it.” Well, the message of Napster is “if it ain’t fixed, break it.” Copyright law today runs the risk of falling apart at the seams, quite simply because we have large numbers of people who are getting music for free from Napster and not paying people for producing it. ■

In the short run we do not need to be worried. The music industry is relatively healthy and services like Napster actually help it. But we face a long-run danger that the next generation won’t be paying for their music but will simply be getting it for free over a service like Napster.

My sense is that we should be cautiously optimistic about a new world where copyright is relatively weak. In the future we’re likely to have copyright enforcement that is too weak relative to ideal enforcement. But I can imagine that weak copyright enforcement may well be better than copyright enforcement that is too strong. The optimistic scenario is that the record companies will find it to their advantage to team up with companies like Napster. The less-optimistic scenario is that music is distributed over the Internet in a completely decentralized fashion and the record companies get little or nothing. I predict that we will see some version of the optimistic scenario.

This will have mixed results. It will mean that people at the very top of the market, the megastars like Madonna, will earn much less. Most middling stars receive no copyright income; instead copyright income goes to the record companies to cover their deficits and to cover the cost of finding new talent. For this reason, weaker copyright will change the music industry. We would expect more live recordings; studio costs would have to fall; home studios would become more important; less would be spent on marketing entertainment. Companies would spend less money trying to find out who the next stars were going to be. The entire music market would become less formal. Evaluating stars would move into the hands of fans outside of companies. The entire industry would become more decentralized. We probably would have more people being able to make a living from making music, but perhaps most people would be earning less from music than today. So there would be less of a monetary prize, but there would be more diversity: people who entered music because they enjoyed it or because they sought fame would have greater opportunities. I expect that over the long run we will see today’s weakening of copyright as a great blossoming in our cultural history. ■



Wade Dokken, chairman of American Skandia, discusses the need for Social Security privatization at a forum for his new book, *New Century, New Deal: How to Turn Your Wages into Wealth through Social Security Choice*.