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3-D Printed Guns Put Free Speech Guarantee To The Test

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It's, alas, old news when the government couples an imposition on liberty with an exercise in futility—security theater, anyone?—but it's still finding inventive ways to do so in a nifty case that combines the First Amendment, the Second Amendment and 3-D printing.

Defense Distributed, a nonprofit organization that promotes popular access to constitutionally protected firearms, generates and disseminates information over the Internet for a variety of scientific, artistic and political reasons.

The State Department has ordered the company to stop online publication of certain CAD (Computer-Aided Drafting) files—complex three-dimensional printing specifications with no intellectual-property protection—even domestically. These files can be used to 3-D-print the Liberator, a single-shot handgun.

The government believes that the files that could be used to print the Liberator are subject to the International Trafficking in Arms Regulations, because they could be downloaded by foreigners and thus are "exports" of arms information that could cause unlawful acts.

When Defense Distributed, ably represented by Alan Gura and Josh Blackman, challenged this restriction of its right to disseminate information to Americans—which the State Department's own guidance says is protected by the First Amendment—the federal district court ruled for the government.

Cato has now filed an amicus brief in the U.S. Court of Appeals for the Fifth Circuit, urging it to defend the First Amendment right of Americans to share open-source technical information.

Defense Distributed is not in the business of distributing arms. What it distributes, as properly recognized by the district court, is computer code in the form of CAD and other files. Code and digital files are speech for purposes of the First Amendment, as several federal appellate courts have recognized.

Most importantly, simply because speech may be used for unlawful purposes by third parties doesn't mean it loses constitutional protection.

Since the 1930s, the Supreme Court has consistently held that "the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it," and that "[p]rotected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse. "Ashcroft v. Free Speech Coalition (2002).

In the seminal case of Brandenburg v. Ohio (1969), the court provided a baseline for judging statutes that ban protected speech because of the chance it could enable crime. Unless such encouragement is "inciting or producing imminent lawless action and is likely to incite or produce such action," it's protected by the First Amendment.

Moreover, the First Amendment requires "precision of regulation" in cases like this to survive even "rational basis" review—the lowest form of judicial scrutiny. But blanket restraints on methods of mass dissemination aren't precise; the Supreme Court has said that such actions "burn the house to roast the pig." Butler v. Michigan (1957).

To add practical insult to constitutional injury, attempting to shut down all Internet transfers of these files is an exercise in futility. The State Department would be better served by a more targeted approach that doesn't infringe on the right to disseminate and receive information. The Fifth Circuit should reverse the lower court when it hears Defense Distributed v. U.S. Dep't of State.

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