

3D-Printed Guns Hit the Courts

David Kimball-Stanley

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As three-dimensional printers have become widely available in electronics and appliance stores, they have begun to raise hard legal and regulatory issues related to firearms. The laws that govern firearms were not written with 3D printers in mind, and it remains to be seen how widely available self-made firearms will be treated by our firearm regulatory rules.

In September, the United States Court of Appeals for the Fifth Circuit grappled for the first time with this question. The three-judge panel rejected a preliminary injunction request that would have temporarily halted the State Department's efforts to control the uploading of 3D-printable firearm files onto the web under Export Control regulations. Earlier this month, the plaintiffs in that case filed a petition for an en banc hearing, which is still under consideration. In the meantime, this post will review the court's decision rejecting a preliminary injunction, consider its implications for the case, and attempt to place the ruling in the larger context of 3D printed firearm regulation.

Background

The 1968 Gun Control Act requires that people who make or sell firearms in the United States be licensed and deal only in firearms with serial numbers and paperwork that allow the government to trace the weapons. But there is an exception to this general rule: the law applies to people "engage[d] in the business" of firearm manufacturing or sale, but it does not apply to Americans who make their own firearms for personal use.

Typically, making one's own firearm means starting with what is called an "80% receiver" or "unfinished receiver"—receivers being the component of the gun that the 1968 Gun Control Act deems to be a firearm, separate from other parts like the barrel or magazine. An "80% receiver" is a piece of metal that looks like a receiver, but requires some work before it could be considered a firearm (some examples of unfinished receivers are available here). Using drills, jigs, and other tools, craftsmen can lawfully turn these pieces of metal into un-serialized, untraceable firearms. But this takes a kind of skill and specialized labor that has so far prevented such firearms from being widely distributed.

3-D printers dramatically alter the significance of the exception of the 1968 Act. Now, anyone with the right computer files and a 3-D printer can make his or her own anonymous firearm. The impact of this innovation extends beyond the United States, since any file uploaded to the

internet can be downloaded anywhere in the world—including by terrorists or criminals and in countries with strict gun regulations.

In 2012, Defense Distributed, a Texas-based non-profit corporation that sees 3D technology as integral to a libertarian “world of equality,” sought to take advantage of the 1968 loophole by uploading files onto its website that allow users with a capable 3D printer to manufacture their own firearms. In 2013, the State Department sent a letter to Defense Distributed stating that the Department was “conducting a review” of the website, and that Defense Distributed’s files may have been controllable “technical data related to” items subject to International Traffic in Arms Regulations (ITAR). State went on to say that Defense Distributed may have released these files “without the required prior authorization” from the Directorate of Defense Trade Controls.

According to the State Department’s letter, “disclosing (including oral or visual) or transferring technical data to a foreign person, whether in the United States or abroad, is considered an export under § 120.17 of the ITAR.” The Department requested that Defense Distributed make official “Commodity Jurisdiction determination requests” to determine if the data was subject to ITAR and instructed Defense Distributed to remove the files from public access until they received a ruling on the request. Defense Distributed complied. After receiving the official requests, the State Department determined that six of the files originally uploaded were subject to ITAR, as were several other new files for which Defense Distributed submitted official requests.

In 2015, Defense Distributed and the Second Amendment Foundation, a gun rights advocacy group, challenged the State Department’s regulation as a violation of their First, Second, and Fifth Amendment rights. The plaintiffs sought a preliminary injunction that would have allowed Defense Distributed to continue posting 3D-printable firearm files online pending the resolution of the suit.

Under the traditional standard for a preliminary injunction, in order to succeed, a moving party must show: (1) a substantial likelihood of prevailing on the merits, (2) a substantial threat of irreparable injury if the injunction is not granted, (3) that the threatened injury outweighs the threatened harm to the party whom he seeks to enjoin, and (4) that granting the preliminary injunction will not disserve the public interest. In August, the federal district court in west Texas denied the preliminary injunction after concluding that Defense Distributed satisfied the irreparable harm requirement but failed to satisfy the other three requirements. In September, the Fifth Circuit affirmed after concluding that the district court did not abuse its discretion.

The Decision

The Fifth Circuit acknowledged that this case

presents a number of novel legal questions, including whether the 3D printing . . . files at issue here may constitute protected speech under the First Amendment, the level of scrutiny applicable to the statutory and regulatory scheme here, whether posting files online for unrestricted download may constitute ‘export,’ and whether the ITAR regulations establish an impermissible prior restraint scheme.

These issues on the merits of the dispute animated the parties’ briefs, as well as the several amici briefs that were submitted. While the majority opinion ultimately declined to address the merits,

the questions raised are worth reviewing to give a flavor of the issues ultimately at stake in the case.

Plaintiffs argued that the State Department's regulation is a content-based restriction on their free speech and could not withstand strict scrutiny review. The brief characterized Defense Distributed as "merely communicating with their fellow Americans, through a website, information regarding simple arms of the kind in common use for traditional lawful purposes that are themselves constitutionally protected." The plaintiffs argued the State Department's expansive definition of what constitutes an "export" and "technical data" could criminalize any public speech concerning controlled weapons that any noncitizen might happen to overhear. This point was reiterated in the plaintiffs' reply brief, which argued the State Department's regulations were leading to "the point where Americans cannot speak about 'technical data,' whatever that is, without ensuring that the theater, auditorium, trade show floor, television audience or streetcorner is free of 'foreign persons.'"

In its brief, the State Department argued that its restrictions do not violate the First Amendment because these files do not constitute expressive content, but merely direct a computer to perform a function. Further, the brief argued that the international community relies on ITAR export controls, such as this, to ensure that dangerous weapons do not fall into the wrong hands and submitted that lifting its restriction could lead to 3D-printable firearms circumventing arms embargoes or falling into the hands of terrorist organizations. Beyond the agency's security concerns, the State Department feared that United States could be blamed if a terrorist organization committed an act of violence abroad using 3D-printed weapons made with files uploaded in the United States. The fallout from such an attack could cause lasting damage to the nation's foreign policy interests.

The Fifth Circuit received seven amicus briefs, six of which were filed in support of the plaintiffs. One amicus brief, filed by a group of fifteen Republican congressmen led by Rep. Thomas Massie (R-KY), argued that Congress did not delegate to the State Department the power to "regulate domestic public speech," and further that the State Department's reading of the law would chill innovation. The other amicus briefs supportive of the plaintiffs were written on First Amendment grounds, and were filed by the Cato Institute, The Electronic Frontier Foundation, The Reporters Committee For Freedom of the Press, and the Texas Public Policy Foundation. These briefs provide additional depth to parts of the plaintiffs' arguments: for example, the Electronic Frontier Foundation expanded on the argument that a 3-D printing file is expressive, and the Reporters Committee provided specific examples of news articles that appear to violate the State Department's reading of ITAR.

The final two amicus briefs were focused on the case's Second Amendment issues. The Madison Society Foundation argued that the Second Amendment was created at a time when Americans often made their own weapons, and thus it protects those who want to make their own firearms using 3D printers. And, in the only amicus brief filed in support of the government, the Brady Campaign to Prevent Gun Violence argued that the weapons at issue in this case are not of the kind in "common use" or "typically possessed by law-abiding citizens" and thus are not entitled to Second Amendment protection. The Brady Campaign further argued that allowing the State Department's regulation to be lifted would make untraceable firearms more accessible and would exacerbate longstanding difficulties in combatting gun trafficking.

The Fifth Circuit skirted all of these merits issues, however, and focused instead on the prongs of the preliminary injunction standard concerning the balance of harms and the public interest. The Court further narrowed the inquiry by acknowledging that the two public interests in the case—the vindication of the plaintiff’s constitutional rights, and the government’s interest in national defense and national security, and more particularly in preventing U.S. enemies “from obtaining technical data on how to produce weapons and weapon parts”—were strong. While affirming the district court’s ruling on the public interest prong, the Fifth Circuit acknowledged that “both public interests asserted here are strong,” and thus found it “most helpful to focus on the balance of harm requirement.”

In balancing the harms, the court was concerned that granting the preliminary injunction would allow Defense Distributed to not only repost the original files back online, but also to post any new, previously unpublished files. Critically, all of the files Defense Distributed posted online before the State Department’s letter remain online today on internationally accessible third-party sites. This suggests, the court wrote, that even if Defense Distributed eventually lost this case, any new files posted online in the interim would likely also, “remain essentially forever, hosted by foreign websites such as the Pirate Bay and freely available worldwide . . . a preliminary injunction would function, in effect, as a permanent injunction as to all files released in the interim.” In the court’s view, granting a preliminary injunction could create a permanent national security harm, which outweighed the potential temporary harm to Defense Distributed’s constitutional rights.

In dissent, Judge Edith Jones focused on the “likelihood success on the merits” prong of the preliminary injunction standard. She doubted that a mere uploading of files, without a specific foreign audience in mind, constituted an export. She also agreed with the plaintiffs that the regulation was a prohibition on expressive content, was not content-neutral, and therefore must withstand strict scrutiny to be valid under the First Amendment. Judge Jones argued that the restriction is “significantly overinclusive” and is not narrowly tailored to the government’s interest of preventing noncitizens from obtaining the files, as it is “significantly overinclusive.” She was concerned, consistent with many of the amicus briefs, that the government’s definition of “technical data” subject to ITAR included potentially protected speech, such as news articles that include information about bombs and weaponry. Judge Jones noted that, “at oral argument the government would not definitively answer whether the State Department would purport to regulate the posting of such unclassified technical data that appeared in library books or magazines like Popular Mechanics.”

The judge went on to argue that the plaintiffs met the other prongs of the preliminary injunction analysis. She agreed with the district court’s irreparable harm analysis, but on the public interest and balance of harms prongs argued that “the Executive’s mere incantation of ‘national security’ and ‘foreign affairs’ interests do not suffice to override constitutional rights.”

What Happens Next

Most commentators viewed the decision as a loss for free speech. Most alarmist of these was Popular Science, whose headline declared, “3D-Printed Gun Files Aren’t Free Speech, Court Rules.” The article goes on to say, “it looks like files for printing guns aren’t protected by both the 1st and 2nd Amendments, but are instead protected by *neither*.”

That is not what the court ruled. In fact, Judge Davis concluded his opinion on a somewhat ominous note for the State Department: “On remand, the district court eventually will have to address the merits, and it will be able to do so with the benefit of a more fully developed record. The amicus briefs submitted in this case were very helpful and almost all supported Plaintiffs-Appellants’ general position.” Normally, a decision on a preliminary injunction can provide some insight on the direction of a case. If the pending motion for an en banc hearing fails, that may be less true in this instance.

Outside of this case, there have been efforts to change the law governing 3-D-printed guns. California recently passed a state law requiring that 3-D-printed guns be registered. Additionally, Congressman Steve Israel (D-NY) introduced legislation that would have regulated 3-D-printed firearms as part of a larger proposal aimed at banning plastic weapons that are undetectable by metal detectors. Congressman Israel’s legislation was introduced in both 2013 and 2015 and both times was referred to, and died in, the Judiciary Subcommittee Judiciary Subcommittee on Crime, Terrorism, Homeland Security, and Investigations. Its Senate counterpart similarly died in the Judiciary Committee.

Congressman Israel will retire from Congress after this term to write a second novel, but the effort to regulate 3D-printed weapons will likely go on without him. The sponsor of the bill’s Senate counterpart, Bill Nelson (D-FL), will still be in office. So will Senator Chuck Schumer (D-NY), who is poised to become the Senate minority leader next year, and who devoted one his famous Sunday press conferences to this issue.

If those bills are to be successful, they will have to overcome the polarization that appears destined to plague this subject. The Senators sponsoring these bills and the congressmen signing onto amicus briefs fall along predictable party lines. In fact, *The Blaze*, a conservative media outlet, used *Defense Distributed v. State Department* as an example of why the next Supreme Court Justice will be an important vote for conservative causes.

Perhaps most importantly, it is not yet clear what President-elect Donald Trump’s views will be on this subject, which will affect not just proposed legislation but potentially the State Department’s posture in this litigation as well. While the President-elect has yet to speak about 3D-printed firearms, Trump was mostly opposed to gun regulations during the campaign. Given the conservative focus on this case and the results of the recent election, it appears unlikely there will be any federal action in the near future to update regulations on 3D-printed firearms. If this case proceeds on its current path, which is far from certain under the new administration, it could decide the bounds of federal law on 3D-printed firearms. And if plaintiffs are successful, the federal political reality suggests legislative reforms will have to come at the state level, if at all.