REPUBLICAN STUDY COMMITTEE POLICY BRIEF: THREE MYTHS ABOUT COPYRIGHT LAW AND WHERE TO START TO FIX IT·

EDITOR'S NOTE

The following report was written by Derek S. Khanna, at the time a congressional staffer with the House Republican Study Committee ("RSC"), and was published by the RSC on November 17, 2012. The RSC placed the report on their website and an e-mail was sent to approximately 165 Members of Congress and their staff with this official report. Within twenty-four hours of its publication, the RSC removed the report from its website but did not issue a formal retraction. As a result of the events following publication of the report, Mr. Khanna no longer works for the RSC. What follows is the text of that report, exactly as published, followed by Mr. Khanna's reflections on the report and the response it received.

INTRODUCTION

This paper will analyze current U.S. Copyright Law by examining three myths on copyright law and possible reforms to copyright law that will lead to more economic development for the private sector and to a copyright law structure that is more firmly based upon constitutional principles.

I. THE PURPOSE OF COPYRIGHT IS TO COMPENSATE THE CREATOR OF THE CONTENT

It is a common misperception that the Constitution enables our current legal regime of copyright protection—in fact, it does not. The Constitution's clause on copyright and patents states: "To promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]"[1]

Thus, according to the Constitution, the overriding purpose of the copyright system is to "promote the progress of science and useful arts." In today's terminology we may say that the purpose is to lead to maximum productivity and innovation.

This is a major distinction, because most legislative discussions on this topic, particularly during the extension of the copyright term, are not premised upon what is in the public good or what will promote the most productivity and innovation, but rather what the content creators "deserve" or are "entitled to" by virtue of their creation. This lexicon is appropriate in the realm of taxation and sometimes in the realm of trade protection, but it is inappropriate in the realm of patents and copyrights.

Strictly speaking, because of the constitutional basis of copyright and patent, legislative discussions on copyright/patent reform should be based upon what promotes the maximum "progress of sciences and useful arts" instead of "deserving" financial compensation.

II. COPYRIGHT IS FREE MARKET CAPITALISM AT WORK

Copyright violates nearly every tenet of laissez faire capitalism. Under the current system of copyright, producers of content are entitled to a guaranteed, government instituted, government subsidized content-

[1] U.S. CONST. art. I, § 9, cl. 8.

monopoly.

It is guaranteed because it is automatic upon publishing.

It is a system implemented and regulated by the government, and backed up by laws that provide massive damages for violations. These massive damages are not conventional tort law damages, but damages that are vastly disproportionate from the actual damage to the copyright producer. For example, Limewire was sued for $75 trillion, based upon Section 504(c)(1) of the Copyright Act enabling such large fines per violation. This potential award is more money than the entire music recording industry has made since Edison's invention of the phonograph in 1877, and thus in no way corresponds to the actual demonstrated "damages" to the record industry. By Congress creating an arbitrary statutory fine for damages the government has implemented its own system for dissuading copyright violation, above and beyond conventional tort law for a perceived "property" like right.

In addition, it is a government-subsidized monopoly in another sense. Copyright violators can face jail time, and government agencies are tasked with investigating copyright violations and stopping these activities. This may be a good decision or a bad decision, but, it is a form of the government subsidizing the costs of recovering assets that may or may not be considered to have been "stolen." There are other industries where the government has also chosen to subsidize in a similar manner, but the point here is that this is not a strictly laissez faire capitalistic institution.

III. THE CURRENT COPYRIGHT LEGAL REGIME LEADS TO THE GREATEST INNOVATION AND PRODUCTIVITY

There is surely an argument in favor of copyright, and it is the argument that our Founding Fathers were familiar with. While the size and scope of current copyright violations are vastly disproportionate to anything in previous history, in the 18th century our Founding Fathers were familiar with copyright. In fact, Great Britain was quite angry at what was perceived to be rampant theft in the colonies of their intellectual property in the form of literature.

With this in mind, our Founding Fathers wrote the clause in the Constitution on protecting content. But they knew that there was a very serious cost for this government-instituted monopoly. It is a balancing test to ensure that we have the maximum amount of productivity overall.

With no copyright protection, the Founders believed that there would be insufficient incentive for content producers to create new content—without the ability to compensate them for their work. And with too much copyright protection, as in copyright protection that

carried on longer than necessary for the incentive, it will greatly stifle innovation. In addition, excessive copyright protection leads to what economists call "rent-seeking" which is effectively non-productive behavior that sucks economic productivity and potential from the overall economy.

This Goldilocks-like predicament—not too little and not too much—was what our Founding Fathers had in mind with the phrase "securing for limited times."

A. *Current Status of Copyright Law*

Under the Copyright Act of 1790, the first federal copyright act, it stated that the purpose of the act was the "encouragement of learning" and that it achieved this by securing authors the "sole right and liberty of printing, reprinting, publishing and vending" their works for a term of 14 years (upon opting in to receive the benefit), with the right to renew for one additional 14 year term should the copyright holder still be alive. This is likely what our Founding Fathers meant when they wrote in the Constitution for a "limited time."

Gradually this period began to expand, but today's copyright law bears almost no resemblance to the constitutional provision that enabled it and the conception of this right by our Founding Fathers.

- **Original Copyright Law:** 14 years, plus 14 year renewal if author is alive.
- **Current Copyright Law:** Life of author plus 70 years; and for corporate authors 120 years after creation or 95 years after publication.

Critics of current law point out that the terms of copyright continue to be extended perpetually, ensuring that works never actually enter the public domain. This is particularly evident in the example of Walt Disney's production of Steamboat Willey, the first Mickey Mouse film which has been kept out of the public domain through regular extensions of copyright. If copyright is to be indefinitely extended, then that appears to violate Article I, Section 8, Clause 8 of the Constitution which provides protection only for "limited times."

B. *Can We Ever Have Too Much Copyright Protection?*

Yes. The Federal government has gotten way too big, and our copyright law is a symptom of the expansion in the size and scope of the federal government.

Today's legal regime of copyright law is seen by many as a form of corporate welfare that hurts innovation and hurts the consumer. It is a system that picks winners and losers, and the losers are new industries that could generate new wealth and added value. We frankly may have

no idea how it actually hurts innovation, because we do not know what is not able to be produced as a result of our current system. But we do know that our copyright paradigm has:

1. Retarded the Creation of a Robust DJ/Remix Industry

Many other countries have a robust culture of DJ's and remixing, but the United States, quite perplexingly as the creator of a large portion of the world's content, is far behind. The DJ/remix culture is a democratizing system where self-starters can compete based upon merit. In other countries, every 16-year-old with a computer and "Virtual DJ" software can remix various songs and compete based upon talent. As a result there are thriving DJ/remix markets in Turkey and other countries. These DJ's put their content online or sell mix-tapes (no longer tapes) and there is a meritocratic system that continues to innovate.

However, in the United States this culture is heavily retarded.

DJ's in the United States are mainly live performers, as there are heavy restrictions on what they are allowed to release and sell as mix-tapes. There are convoluted rules on what parts of songs they can sample, often requiring input from lawyers to avoid massive fines or lawsuits. As a result, in the United States there are great live performer DJ's, but selling most "real" mix-tapes by small level DJ's is illegal and disincentivized. This stifles most forms of mash-ups or selling of remixed songs by independent artists.

This does not completely eliminate the remix market. While the producing artists themselves can remix their own songs, and major DJ's or other artists can remix other people's songs and pay high level royalties in the $100,000's-per-song range. However, this prohibitively high price range stifles most average DJ's from legally releasing their own mash-up or remixed songs. While there is an underground remix black market, this market is nothing like it would be if this were legalized.

Since these prospective new remixes would not replace the original songs, but merely supplement them and perhaps even increase sales of the original songs, overall productivity is greatly hampered by making production of these materials effectively illegal.

2. Hampered Scientific Inquiry

Scientific papers from the early portion of the 20th century are still under copyright. . . This is illogical, as the purpose of most scientific papers is to further intellectual inquiry, and the goal of most authors of scientific papers is to advance their field and to be cited in other publications. Many professors are assessed upon the number of citations

for their major works. For these reasons, keeping their work in what are effectively locked vaults defeats the purpose of much of their work.

Obviously these producers need to be compensated to justify the cost of their research, but after around 14 years, most, if not nearly all, of the earning capacity of their work has been exhausted, and at that point the overriding interest is in ensuring that these works are available for others. While there are exceptions in the law for the use of this material for good faith exceptions, there are numerous examples where for-profit entities want to use published journal articles, but are unable to do so without negotiating a payment to the producer of the content.

If however, these older papers were available online for free on Google Scholar for anyone to access and use after a reasonable period of time, then it would greatly increase the availability and utilization of scientific analysis.

3. Stifled the Creation of a Public Library

Many of our country's smartest and most successful innovators and leaders were autodidacts who taught themselves far beyond conventional studies through intellectual inquiry of their own and a voracious appetite for reading. Benjamin Franklin conceived the idea of a subscription library because libraries allow for information to be democratized to the masses. Today the sheer amount of information available to the average person is several orders of magnitude beyond that available in 1990, let alone in 1790. But still today, an enormous amount of intellectual knowledge is locked behind physical books, rather than accessible on the general internet.

Project Gutenberg is trying to change that by becoming an online repository for a readable/downloadable version of every book available without copyright. Project Gutenberg's full potential is to provide, with a click of a button, the greatest amount of intellectual knowledge ever assembled in the history of the world.

But their repository of knowledge drops off around 1923 when materials are not in the public domain. Imagine the potential for greater learning as a result of obtaining books from the 1920–1980 period. Assigned books in high school classes could be all downloaded to a student's Kindle, rather than bought in a bookstore. The threshold cost for learning in many fields would lower or virtually vanish, and with that, the potential for greater learning would skyrocket.

From a technological perspective, the data size of books is very small; for example, every book in the Kindle store could fit on a very large, and currently available, consumer hard drive. Thus, in a few years it may be technologically possible to have every book ever written on our computer or iPad at the click of a button (though not necessarily

worthwhile because it is easier to just access the books you need when you need them online).

4. Discouraged Added-Value Industries

While the current copyright paradigm may work great for content producers, it does not work well for the creation of other industries. There is enormous potential for other added-value industries on top of existing media. For example, in a world where movies, television shows and books that were over thirty years old were available in the public domain, you would likely see new industries emerge up to offer a new experience on top of this media.

Reading a book with pop-up text on extra information on given topics.

Watching a movie with "VH1 Pop-up video" add-ons to provide trivia and relevant information. There would be thousands of fan-generated content analyzing Star Wars by providing commentary and analysis.

5. Penalized Legitimate Journalism and Oversight

This effect is perhaps the most egregious effect of our current copyright law and the most unacceptable. Current copyright law allows for producers of written materials, such as memos or other documents, to claim copyright when they are seeking to hide incriminating information. While these materials can be produced in court, producing this information, in its full form, in the media or through an oversight organization is often illegal.

Imagine if there were a memo published by a well-known DC think-tank during World War 2 and this memo endorsed Nazism. Likely if it were published in the 1940s, few memos would still be around, and it would likely fade into history never to be remembered. But if an enterprising reporter or political organization were to find a copy of these memos then the memos would, likely, still be protected by copyright. If that reporter or political organization put the memo on their website as proof of the think-tank endorsing Nazism, then the reporter or organization would be liable for significant damages from the copyright violation. The think-tank can sue them or threaten to do so to avoid the memo going public in the first place.

This is a disgusting use of copyright, yet there are examples of copyright being used in this manner—in order to stifle oversight and hide incriminating information. This is not the purpose of copyright, and our democracy functions best when the fourth estate is able to provide this type of information to the public.

IV. POTENTIAL POLICY SOLUTIONS

A. *Reform Statutory Damages*

Copyright infringement has statutory damages, which copyright holders use in litigation (rather than having to prove actual damages). The government sets a range—which is $750 to $30,000 per infringement—but that goes up to $150,000 if the infringement is "willful." Evidence suggests that the content holder almost always claims that it is willful. This fine is per infringement. Those rates might have made sense in commercial settings (though even then they arguably seemed high), but in a world where everyone copies stuff at home all the time, the idea that your iPod could make you liable for a billion dollars in damages is excessive.

Further, this system creates a serious clogging of the courts, because copyright holders now recognize that they can accuse anyone of infringement, and include the threat of $150,000 awards per violation. But in reality, most people then settle for less than that sum, perhaps $3,000. Scaring a large number of potentially innocent people into settling should not be an effect of copyright law.

Copyright awards were meant to make the copyright holder whole—they were not supposed to be punitive. Reforming this process is an important element of federal tort reform, which unlike other forms of tort reform is clearly within the federal prerogative.

B. *Expand Fair Use*

Right now, it is somewhat arbitrary as to what is legally fair use based upon judicially created categories. One example: parodies are considered protected by fair use, but satire is not. There is an excellent book (and a shorter paper) called Infringement Nation that details how things you do every single day are infringing and leave every single person liable for billions in damages each year.[2]

C. *Punish False Copyright Claims*

Because there is minimal or nearly non-existent punishment for bogus copyright claims today, false takedown requests are common and have a chilling effect upon legitimate speech. While those filing a takedown request have to swear on the threat of perjury, that swearing is only in regard to whether the work is theirs, but not whether the work is actually infringing. The court has said that their needs to be "subjective bad faith" in order to be sanctioned for false takedown requests. This

[2] John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1029151).

often leads to de facto censorship.

D. *Heavily Limit the Terms for Copyright and Create Disincentives for Renewal*

Because of the reasons explained in this paper, the constitutional conception of copyright was for a limited period of time. For our Founders, this was 14 years for copyright with a potential renewal for another 14 years, if the author was alive.

Current public policy should create a disincentive for companies to continue their copyright indefinitely because of the negative externalities explained in this paper. Unlike many forms of government revenue, generating revenue by disincentivizing activities with negative externalities is a productive way for the government to pay for its operations. This is a far superior way for the government to generate revenue rather than having a tax system that disincetivizes work.

Below is a suggestion for one such proposal:

1. Free 12-year copyright term for all new works—subject to registration, and all existing works are renewed as of the passage of the reform legislation. If passed today this would mean that new works have a copyright until 2024.
2. Elective-12 year renewal (cost 1% of all United States revenue from first 12 years—which equals all sales).
3. Elective-6 year renewal (cost 3% of revenue from the previous 12 years).
4. Elective-6 year renewal (cost 5% of revenue in previous 6 years).
5. Elective-10 year renewal (10% of ALL overall revenue—[minus] fees paid so far).

This proposal would terminate all copyright protection after 46 years. This is obviously a steep cliff, particularly from the extension of copyright from 36 to 46 years. But the point is to discourage indefinite copyright.

CONCLUSION

To be clear, there is a legitimate purpose to copyright (and for that matter patents). Copyright ensures that there is sufficient incentive for content producers to develop content, but there is a steep cost to our unusually long copyright period that Congress has now created. Our Founding Fathers wrote the Constitution with explicit instructions on this matter for a limited copyright—not an indefinite monopoly. We must strike this careful Goldilocks-like balance for the consumer and other businesses versus the content producers.

It is difficult to argue that the life of the author plus 70 years is an

appropriate copyright term for this purpose—what possible new incentive was given to the content producer for content protection for a term of life plus 70 years vs. a term of life plus 50 years?

Where we have reached a point of such diminishing returns we must be especially aware of the known and predictable impact upon the greater market that these policies have held, and we are left to wonder on the impact that we will never know until we restore a constitutional copyright system.

Current copyright law does not merely distort some markets—srather it destroys entire markets.