CATO HANDBOOK FOR CONGRESS

Policy Recommendations for the 108th Congress

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40. Intellectual Property

Congress should

- reject proposals to *ban* new technologies or business models to solve copyright problems (examples include file sharing, copy protection, and ''collusion'' among creators);
- reject proposals to *impose* new technologies or business models to solve copyright problems (examples include federally certified copy protection standards and compulsory licensing);
- Phase out compulsory licensing for all communications content industries and avoid extending it to future services such as online downloading and streaming; and
- take the constitutional principle of ''promot[ing] the progress of science and useful arts'' seriously, but don't extend copyright protections far beyond reasonable terms.

The ''Napsterization'' of just about everything digitizable—books, music, movies, and, of course, software itself—has brought copyright issues to the forefront as never before, reenergizing the debate over questions such as the following:

- Why do we protect intellectual property at all?
- Do we really have ''property rights'' to our intangible creations the same way we do to our homes or the land on which they rest?
- Are there more effective market-oriented ways of encouraging artistic creation and scientific discovery than through the use of copyright and patent laws that protect a limited monopoly?

Those questions are hardly new, of course. Indeed, the debate over the nature and scope of intellectual property law is centuries old. More than 200 years ago, these questions concerned our Founding Fathers, who included a utilitarian compromise within the Constitution to ensure that

science and the useful arts would be promoted by offering limited protection. They arrived at the balancing act contained in Article 1, section 8, clause 8, which gave Congress the power 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.''

But the inclusion of this clause in the Constitution did not answer specific questions regarding such matters as the lengths of copyright or patent protections for various artistic or scientific creations, or what ''fair use'' or ''prior art'' were to mean. These highly subjective legal concepts didn't yet exist; the question of their meaning was left open to future generations of jurists, legal theorists, economists, and politicians.

And so today, in the midst of an explosion of digital and online creativity, the concept of intellectual property (IP) is being challenged as it has never been before. The current debate pits those who fear file-sharing technologies such as Napster and Kazaa, against those who are afraid that IP rights holders will lock up content with new copy protection scheme such as digital rights management (DRM), which includes a variety of tools and methods the creative community hopes to use to control access to, and reproduction of, various forms of entertainment and information content.

In the United States, the extremes manifest themselves in legislative proposals by file-sharing companies for compulsory licensing, on the one hand, and government-mandated DRM schemes to *prevent* file sharing on the other. But to the extent the market can be capable of self-protection, it can reduce the sphere of disagreement by minimizing the amount of legal protection required. For example, the market alternative to shutdown of file sharing, or targeting individual file swappers, may well be the improvement of digital rights management technologies to protect intellectual property. Perhaps such private, ''barbed-wire'' solutions can be superior. Indeed, some people must think so, because they argue that DRM technologies will be able to lock up content and violate fair use. But not yet: new copy-protected CDs have already been cracked by users who found they could use a 99-cent felt-tip pen to mark around the edges of the disc and defeat the DRM system. So even low-tech hacking techniques can sometimes cause headaches for industry.

It seems that even with legal protections of IP in the digital age, the reality of copying has confronted us with a need to find incentives to encourage artistic creation and scientific innovation if legal protections no longer work. If the market can do some of its own self-protecting and provide some incentives, is that enough? Or, paradoxically, is it too much?

There are certain things Congress should *not* do as we search for the answers.

IP and First Principles

Governments exist to protect property rights among other natural rights. But the property status of intangibles has always been unclear from a natural law perspective. Novelist-philosopher Ayn Rand wrote, ''Patents and copyrights are the legal implementation of the base of all property rights: a man's right to the product of his mind.'' Other theoreticians claim that there is no right to own intangible ideas, which are not scarce in the sense that physical property is. To this group, the cost of protecting IP is just another cost of doing business, so why socialize it?

A good argument can be made, however, that, in a world without any IP protection, some individuals would be discouraged from producing important goods or ideas (consider pharmaceuticals or genetically altered foods to feed hungry populations). Indeed, those who advocate the abolition of copyright or patent law might ask themselves why the same arguments and reasoning should not be applied to tangible property.

Nonetheless, it is clear that some creators seek and receive excessive terms of protection—which, by extending far beyond the life of the author, seemingly go beyond any reasonable possibility of motivating creators, who often are deceased. Other people seek to expand what is covered by copyright and patent law in the first place, such as ''One-Click'' Internet shopping (which Amazon.com patented) or even hyperlinking itself (which British Telecommunications claims it patented and on which it therefore deserves to collect fees).

So, succinctly stated, Congress's problem is balancing artistic and entrepreneurial incentives to create with the interests of the larger community of users in an unhindered exchange of ideas and products.

The Internet Changes Things

Previous technological innovations such as photocopiers and VCRs forced society to reconsider the proper balance of IP protections. Nonetheless, the shifts brought about by the modern communications and computing revolution are more profound because today's copies are perfect reproductions. Thus record companies and Hollywood claim that their intellectual property rights are under attack as never before, threatening their

economic livelihood and making it less likely they will want to put anything at all in the public realm.

In response, critics claim that copyright and patent law has been corrupted, that the balance has tilted too far in favor of copyright holders, and that digital technologies and other market developments have so fundamentally altered the nature of intellectual property that we need to radically shorten established terms of protection or eliminate them altogether. Those thinkers hold that information transmitted in electronic or digital formats should not be ''bottled up'' and controlled by its creators. They fear that copy protection technologies can go too far—even further than existing legal protections—and erode fair use rights that individuals have come to expect, as well as pose a technological threat to free speech. Thus they want assurances that noninfringing uses of materials and rights of fair use are preserved in the law.

Under the Digital Millennium Copyright Act of 1998, for example, one's intent to infringe is not relevant; rather, a person engaged in the development or distribution of circumvention technology, even for a benign purpose such as research or archiving, is at risk of being held criminally or civilly liable. There is no defense under the act even if there is no underlying copyright infringement. That's too extreme.

Potential Common Ground Solutions

Is there any common ground in this debate? Perhaps. The justification for copyright law is to create incentives. But if markets can create them, law may not need to play as great a role. Sometimes a private security guard and barbed wire may be superior to the policeman and the court. Then again, when someone breaks into your house and steals your property, you call the cops.

The first step toward common ground is to take the principle ''To Promote the Progress of Science and Useful Arts'' more seriously. Many agree on the concept of the protection of property; the disputes often arise over such matters as how long property should be protected. Any term set by law will be unavoidably arbitrary.

But copyright protection that extends far beyond the life of the originator provides diminishing incentives for that person to innovate (even if one assumes he is innovating on behalf of yet-unborn descendants). Thus terms of protection may need to be rethought; indeed a new Supreme Court case is challenging the 1998 ''Sonny Bono Copyright Term Extension Act,'' which extended copyright protection terms to life of the author plus

70 years (up from 50 years) (Table 40.1). Some jokingly call it the ''Mickey Mouse Protection Act.''

Rights owners certainly expend great energy on extending the legal monopoly granted by copyright. This is the widespread criticism of the Copyright Term Extension Act, in that new protections were given *retroactively*. The middlemen—and heirs—continue to want to be paid, an impulse having little to do with Walt Disney's initial inspiration to invent Mickey Mouse. Similarly, the heirs of Margaret Mitchell, author of *Gone with the Wind*, protested the derivative work *The Wind Done Gone* by Alice Randall. Although decisions about copyright terms inevitably will be arbitrary, there seems little reason to provide retroactive legal protection decades after a creator is dead.

Anger at the middleman (or heirs) is understandable: one exploring and sampling, say, roots-country music, would not be thrilled about paying BMG/RCA for the privilege when artists have been dead for more than 60 years. More consciously adhering to the Constitution's goal of promoting the progress of science and the useful arts—rather than promoting unnecessary government monopoly—seems a sensible course. Copyright laws that instead extend terms of protection to benefit a middleman do little to ''incentivize'' true creative activity.

One possible solution to the perceived problem of duplicating digital content that is still protected has been suggested by Wayne State University law professor Jessica Litman, who calls for revisions to ''recast . . . copyright as an exclusive right of commercial exploitation.'' She would focus less on whether copies were made of a work and instead focus more narrowly on ensuring that copyright holders retain the sole opportunities for commercial exploitation of their work. Under this model, she points out, individual trading of song files wouldn't be actionable, but perhaps Napster's facilitation of large-scale sharing would be because of its signifi-

Table 40.1
Ever-Increasing Copyright Terms of Protection

Year	Term of Copyright Protection
1790	28 years (14 years of protection + possible 14-year renewal)
1831	42 years (28 years of protection + possible 14-year renewal)
1909	56 years (28 years of protection + possible 28-year renewal)
1976	Life of the author + 50 years
1998	Life of the author + 70 years

cant interference with rights holders' commercial opportunities. Such an approach would put the law back in line with the public's typical understanding of the copyright bargain and fair use.

The second step toward establishing common ground is for Congress to reject the impulse to either *ban* or *impose* new technologies or business models to solve copyright problems. Examples of bans include bans on file-sharing programs, restrictions on copy protection, and prohibitions on ''collusion'' among creators seeking to shelter their content. Examples of technology impositions would include federally certified copy protection standards and compulsory licensing.

Calls to ban file sharing came early. The response to Napster was a perfect example of creators wanting the government to ban or restrict file-sharing technologies that reduce copyright control. Today—now that peer-to-peer file sharing has become even more widespread despite Napster's demise—some people go so far as to endorse measures such as Sen. Ernest Hollings' (D-S.C.) Consumer Broadband and Digital Television Promotion Act. This bill would require federally certified DRM controls on any devices capable of manipulating and copying digital content, such as computers and personal digital assistants (''palm pilots''). The idea would be to ensure that those who copy files do so only with permission, on approved equipment. Manufacturers would be forbidden to make devices that didn't include the copy protection technology.

While some people inappropriately want to ban file-sharing capabilities, others—equally inappropriately—want to ban copy protection technologies designed to halt file sharing. Those who eagerly share copyrighted files often condemn experimental DRM technologies by which copyright holders hope to shield works from reproduction, such as digital watermarking and enhanced encryption. As noted, some regard such efforts as threats to free expression (which is ironic, given that many in the next breath will assert that encryption or watermarking can always be cracked—and so far, that's been true).

Many opponents of copy protection also want government to impose a different type of technology mandate—a compulsory license—that would require content providers to license their products to others at a government-regulated rate. So while opposing mandatory DRM schemes, this crowd simultaneously endorses forced ''contracts'' and their accompanying government-set royalty fees, which are little more than price controls. Reps. Rick Boucher (D-Va.) and Chris Cannon (R-Utah) have pushed for a ''Music Online Competition Act,'' which would implement a version of this plan.

The legislative extremes of either banning or imposing particular technologies or business models should be avoided.

A New Model for the Future

Finally, when thinking about the future, it helps conceptually if we break up intellectual property into ''A, B, and C'' components. A is what's in the public domain. B is the stuff protected now, which we're fighting over. C is what hasn't been created yet. If Congress allows market mechanisms to take over C, then, over time, C and A will dwarf B.

In other words, we need to think of ways of making the role of government smaller. Avoiding interference with technological experimentation can do that. For example, digital rights management—although it will never fully prevent copying—can make it inconvenient enough so that cracking encrypted songs may not be worth the trouble. Perhaps a 19-cent music download, certified virus free, that also includes liner notes, lyrics, photos, and discount coupons on merchandise and concerts is a better deal than a free song.

And the fair use issue may not be as thorny as some people expect. First, it is not in the interest of profit-maximizing companies to restrict intellectual output and software research. In striking the balance, companies face market-induced incentives to avoid devising copy protection schemes so inconvenient or cumbersome that they go beyond the goal of deflecting piracy. For example, although one isn't necessarily entitled to a perfect digital copy as a matter of fair use, record companies are nonetheless experimenting with putting multiple versions of songs on CD as a way to alleviate fair use concerns and give people the portability they want.

Moreover, as University of Texas economics professor Stan Liebowitz notes, while digital rights management technologies won't prevent all copying, the imperative is to prevent massive unauthorized duplication. With respect to fair use, Liebowitz argues that, given technologies such as micropayments, voluntary DRM schemes will not restrict the output of intellectual property at all as IP pricing techniques are improved.

Technological experimentation may offer artists and inventors the option of ''opting out'' of the IP legal regime entirely and instead relying on new technologies and unique business models to protect their property and receive compensation for it. Digital distribution even gives producers and artists the option of avoiding the existing music companies and movie studios. Artists often claim to be ripped off, which is another fight within the wide-ranging copyright debate of today. (MP3.com was one of those

options—artists-direct-to-the-customer model.) Of course, if artists rather than middlemen control their copyrights, it won't end disputes over length of protection, but it could remove one layer of the dispute.

The bottom line is that Congress should not imagine that it has all the answers to practical problems of digital copy protection as ''Napsterization'' continues to unfold. Perhaps technology can be a better means of controlling use of one's creations, in some applications, than can law—even if law is in place as a backup.

Also, to lessen the reliance on traditional copyright protections, policymakers should ensure that unintentional government barriers don't stand in the way of private efforts by individuals to protect their intangible creations. For example, overzealous antitrust enforcement might hamper collective private efforts to license songs, such as the MusicNet and Pressplay services. Restrictive contracts that antitrust law might eye suspiciously could in fact benefit consumers by ensuring returns for producers, preserving their incentives to create. Indeed, some academics have suggested that regulation such as antitrust law may force the ''need'' for more intellectual property law and enforcement than would otherwise be warranted.

Suggested Readings

Crews, Clyde Wayne Jr. ''Musical Mandates: Must the Pop Music Industry Submit to Compulsory Licensing?'' Cato Institute TechKnowledge no. 16, August 15, 2001, www.cato.org/tech/tk/010815-tk.html.

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Litman, Jessica. *Digital Copyright.* Amherst, N.Y.: Prometheus Books, 2001.

Thierer, Adam, and Clyde Wayne Crews Jr., eds. *Copy Fights: The Future of Intellectual Property in the Information Age.* Washington: Cato Institute, 2002.

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