Cato Handbook for Policymakers

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38. Copyright and Patent

Congress should

- establish an ''orphan works'' defense for copyright infringement,
- shorten the term of copyrights,
- repeal the anti-circumvention provisions of the Digital Millennium Copyright Act but preserve the ''notice and takedown'' safe harbor for Internet service providers,
- reject copy protection mandates such as the ''broadcast flag,''
- restore jurisdictional competition in patent law,
- limit forum shopping by plaintiffs in patent cases, and
- establish an ''independent invention'' defense for patent infringement.

Property rights are the foundation of a free society. They provide a predictable legal framework for the allocation of resources, create incentives for productivity, and limit the arbitrary exercise of power by government officials. Economists have found that nations with secure property rights tend to perform better than nations with weak or unpredictable property rights.

People often describe copyright and patent law collectively as ''intellectual property'' law, but it's important to remember that, constitutionally and historically, these legal regimes are very different from traditional property rights. Property rights have existed for millennia, but copyright and patent protections are relatively recent developments. Private property is enshrined as a fundamental right by the Fifth Amendment to the Constitution. In contrast, Article I, section 8, of the Constitution empowers Congress to establish patent and copyright protections ''for limited times'' to the extent that doing so promotes ''the progress of science and the useful arts.''

Although copyright and patent laws deal with nontraditional kinds of property, the analogy to property rights provides a useful guide for improving these legal regimes, which have faced mounting problems in recent years. Property law has two important characteristics that can guide the reform of patent and copyright policies. First, property law establishes clear, predictable boundaries and straightforward mechanisms for determining who owns what. It ensures that property owners enjoy the fruits of their labor—and that others can determine what rights they need to acquire—with minimum litigation and uncertainty.

Second, the details of American property law have been fleshed out over centuries by a decentralized ''common-law'' process in which judges build on past precedents as they resolve individual disputes. This approach has produced a flexible body of law that adjusts smoothly to social and technological changes. In contrast, the legislative process often creates uncertainty. Newly enacted statutes often create confusion by dislodging long-held expectations and practices, and their meanings do not become clear until the courts have fashioned an accompanying body of case law.

As we will see, many of the changes Congress has made to patent and copyright laws over the last three decades have resulted in unintended consequences. As Congress considers reform proposals, its top priority should be to avoid doing further damage. When in doubt, Congress should take a wait-and-see posture, allowing the courts to flesh out the key issues before it gets involved.

Coping with the Loss of Copyright Formalities

As already noted, clear boundaries and good record-keeping are essential to a well-functioning property system. In real property, a system of surveyors and records at the county courthouse preserves detailed information about property boundaries, allowing anyone to discover who owns any given plot of land. Until recently, copyright had an analogous system of ''formalities'' that helped people determine which works were under copyright and who held the copyrights. To obtain a copyright, an author was required to register his or her work with the Copyright Office, affix a copyright notice to each copy, and renew the copyrights after a fixed period.

This system ensured that the burdens of copyright law fell only on the minority of works that were commercially significant. It also enabled anyone wanting to license a work to find the copyright holder, if one existed. Unfortunately, between 1976 and 1992, Congress dismantled this

system of formalities, replacing it with a system of automatic copyright protection for all creative works—whether or not authors want it.

One consequence has been a growing ''orphan works'' problem: hundreds of thousands of out-of-print works that cannot be used because their copyright holders cannot be found. Many such works have cultural or historical importance but no commercial value. The technology exists to digitize them and place them online, but under current law, anyone doing so would be exposed to enormous liability.

The ideal solution would be to reestablish formalities as a condition for receiving copyright protection. Unfortunately, that would require renegotiating an international agreement called the Berne Convention, which would be extremely difficult.

Creating an Orphan Works Defense

Property law has mechanisms for reclaiming property that has been abandoned by its previous owners; copyright law needs an analogous mechanism. Congress should create a new ''orphan works'' defense that would permit the use of a work if its copyright holder cannot be found. The courts would conduct a fact-specific inquiry to determine if a diligent search had been conducted, guided by a nonexhaustive list of statutorily defined factors analogous to copyright's four fair-use factors. These factors might include whether there is a notice on the work, whether the user searched databases maintained by the Copyright Office and private parties, and whether the user diligently pursued any clues turned up in the course of the search.

If the rights holder subsequently appeared, the user would not be liable for infringement if he or she could prove that he or she had conducted a diligent search that failed to locate the rights holder. If the court accepted the orphan works defense, the copyright holder would be owed royalties for any unsold copies of the infringing work, but could not seek the draconian ''statutory damages'' that are ordinarily available to plaintiffs in infringement cases.

Shortening Copyright Terms

The Constitution requires that copyrights be granted ''for limited times,'' but Congress has made a mockery of this requirement (and exacerbated the orphan works problem) by repeatedly and retroactively extending copyright terms. Retroactive extension of copyright terms violates the

spirit of the ''limited times'' restriction. It also does nothing to encourage the creation of new works. Congress should dramatically reduce copyright terms, perhaps to a more traditional 14 or 28 years, which would be more than adequate to reward the production of new works.

Repealing Provisions of The Digital Millennium Copyright Act

In 1998, the same year Congress last extended copyright terms, it also enacted the controversial Digital Millennium Copyright Act. The DMCA made numerous changes to copyright law, but two provisions stand out for their far-reaching consequences. One provision, which established a new safe harbor for Internet service providers, was a rare case in which Congress got it right. It gives ISPs protection from liability for the actions of their customers so long as they promptly remove copyrighted materials from their networks when asked to do so by copyright holders. The rule reduced the legal uncertainty faced by ISPs and created an efficient and fair process for copyright holders to seek the removal of infringing materials. Congress should leave it in place.

The DMCA's other major provision, which prohibits the ''circumvention'' of copy protection schemes, has not been so beneficial. Courts have long grappled with adapting copyright law to technological change. For example, in a 1984 decision that is widely viewed as a foundation of the modern consumer electronics industry, the Supreme Court rejected Hollywood's contention that Sony should be held responsible for the infringing activities of customers who purchased its Betamax VCR. By 1998, the courts had developed a body of law that struck a careful balance between deterring infringement and promoting technological progress.

The DMCA upset that balance, effectively giving copyright holders veto power over the design of digital media devices. The results have not been good. For example, copy-protected music purchased from the iTunes Music Store cannot be played on non-Apple MP3 players, and the DMCA bans third parties from developing conversion software. Similarly, Hollywood has used its power under the DMCA to limit the development of DVD players, preventing the release of DVD players that can skip commercials or play DVDs purchased abroad and hampering the development of DVD jukeboxes.

Market forces—not congressional edict—should control the evolution of the copy protection marketplace. Congress should repeal the ''anti-circumvention'' provisions of the DMCA. It should also reject new copy protection mandates. For example, Congress should not require television

manufacturers to comply with the ''broadcast flag,'' a copy protection technology championed by Hollywood.

Making Patents Work More like Property

Copyright law has experienced growing pains over the last decade, but those problems have paled in comparison with the crisis facing the patent system. Recent years have seen a massive increase in patent litigation. In *Patent Failure*, Boston University scholars James Bessen and Michael Meurer find that patent litigation exploded during the 1990s. Indeed, they estimate that outside of the pharmaceutical and chemical industries, the costs of patent litigation in 1999 significantly exceeded the profits generated for patent holders. That suggests that today's patent system may actually *discourage* innovation in many high-tech industries.

As with copyright, many problems with the patent system can be traced to the unintended consequences of congressional action. In 1982, Congress created the United States Court of Appeals for the Federal Circuit and gave it jurisdiction over all patent appeals. The theory was that a specialized patent court would improve the quality of patent rulings. Unfortunately, the change has created more problems than it solved. The Federal Circuit has demonstrated a permissive attitude toward patenting, steadily dismantling traditional limitations on patent protection that had made the patent system predictable. It allowed patenting of subject matter that had been considered unpatentable, and upheld patents with broad, vaguely worded claims.

The Federal Circuit's decisions have made it much more difficult for innovators to avoid infringing others' patents. Without the legal certainty that is the hallmark of a well-designed property system, innovators face dramatically reduced incentives to innovate and higher risks from doing so.

Restoring Jurisdictional Competition in Patent Law

A subtler problem with the consolidation of patent jurisdiction was the elimination of competition, which is a crucial part of the common-law process. In most areas of federal law, each of the 12 geographically based appeals courts develops its own distinct body of precedent. When different circuits' precedents begin to diverge—a situation known as a ''circuit split''—it serves as a signal to the Supreme Court that its attention is needed. By the time the Supreme Court takes a case, lower courts will often have developed several distinct bodies of case law, and the Supreme

Court need only pick and choose from among the doctrines that the lower courts have already fleshed out.

In contrast, because the Federal Circuit hears all patent appeals, the Supreme Court cannot rely on circuit splits as a signal to intervene in patent law. And when it does overturn a Federal Circuit decision, the high court cannot look to other circuits for ready-made alternatives.

Since 2006, the Supreme Court has begun to rein in the Federal Circuit, deciding four patent cases in three sessions. In each case, the Supreme Court overturned a patent-friendly Federal Circuit decision in favor of a decision that circumscribes patent holders' rights more narrowly. But the lack of competition in patent law makes it difficult for the Supreme Court to quickly bring the Federal Circuit to heel. It cannot look to other circuits for signs that the Federal Circuit has wandered off the reservation, nor can other circuits develop alternatives to the Federal Circuit's patent doctrines.

Therefore, Congress's first step should be to end the experiment with specialization in patent appeals and extend patent jurisdiction to the other 12 federal appeals courts. Restoring jurisdictional competition is an indirect route to fixing the problems with patent law, but if our experience with real property and copyright law is any indication, it's likely to be more effective in the long run.

Congress may still need to intervene at some point to clean up the mess the Federal Circuit has created. For example, the Federal Circuit's de facto legalization of patents on software, business methods, and other abstract concepts was a serious mistake that should be reversed. But the cumbersome, interest-group-driven legislative process is not a good venue for hashing out the details of an intricate body of law like patent law; Congress should give the Supreme Court time to repair patent law before intervening.

If Congress is ultimately forced to step in and overhaul patent law, it will find that competition among circuit courts aids its deliberations. Observing where the circuits differ will give Congress useful information about which areas of law require its attention and which can be safely left alone. And the competing bodies of law developed by the circuits will give Congress the raw material from which to fashion new patent doctrines.

Curtailing Venue Shopping

While it allows competition among courts to improve the substance of patent law, there are a few other steps Congress can take to reduce the harm patent law is currently doing to innovation. One important reform would be to reduce forum shopping by patent plaintiffs. For example, the

Eastern District of Texas has become notorious for its extreme patent-friendliness. As a result, plaintiffs from around the country file lawsuits there even when neither the plaintiff nor the defendant has any real connection to the area. Congress should curtail this abuse by limiting plaintiffs' discretion in choosing a venue for patent lawsuits.

Creating an Independent Invention

Finally, Congress should address the proliferation of broad, vague patents and the resulting rise in inadvertent infringement by creating an ''independent invention'' defense to charges of patent infringement. Defendants who can prove they developed their products independently without knowledge of the patentee's own technology should not be liable for patent infringement.

Suggested Readings

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