

## REFLECTION ON THE HOUSE REPUBLICAN STUDY COMMITTEE COPYRIGHT REPORT<sup>•</sup>

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### INTRODUCTION

In November 2012, the House Republican Study Committee (“RSC”) officially approved<sup>1</sup> and published the above report (the

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\* I wrote this piece with Cardozo because I wanted to encourage young people working within Congress and the Administration to have the courage to offer new ideas, challenge old assumptions and strive to “be the change” within the system. © 2013 Derek Khanna.

<sup>1</sup> The Report went through the normal channels for approval, and then escalated for additional levels of approval. Originally, when asked, I had brought it forward as ideas for legislation, and I was directed to write a report for our Members on the conservative position on copyright.

Unfortunately, I was under strict orders not to discuss the Report outside of the RSC, and not allowed to receive feedback or peer review from experts. I was under explicit command not to even discuss this report beyond a small group outside of the office because of a fear that lobbyists would “kill” the Report (as had just previously happened with another major report). Originally as first drafted, the Report was short on suggestions, but tried to frame the issue rather than lay out the actual legislative ideas.

Through the internal processes of our office, in the revision process, I was asked to focus more upon fleshing out solid, tangible legislative ideas that could be easily translated into legislation as a conservative copyright bill. After the piece was then revised, it was shown to other staffers in the office to receive their perspective. Lastly, the policy director, who had final

“Report”), which called for major reforms to the United States’ copyright system while strongly supporting traditional copyright protections. Among its conclusions, the Report noted: “[B]ecause 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.”<sup>2</sup>

The Report was generally well received, particularly by conservative and libertarian organizations.<sup>3</sup> The American Conservative Union featured it on their front page.<sup>4</sup> The American Conservative Magazine wrote that the Report “would be a heck of a start towards making copyright actually incentivize innovation, rather than stifling it, as it most often does today.”<sup>5</sup> Businessweek’s endorsement was titled, “This is How Republicans Can Show They’re Serious About Free Markets.”<sup>6</sup> RedState, one of the top visited conservative websites, whose editor had previously threatened to primary candidates on the right who supported the 2012 SOPA/PIPA legislation, wrote “it’s hard

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approval authority, gave a final approval for the Report. At that point, I pushed back and asked for the executive director to personally review and revise it. The executive director did so, even revising the document further before giving a final approval on behalf of the entire organization. In total, approximately half of the policy staffers in the office had seen the Report as well as all of my superiors within the staff. There was no ability to have received more scrutiny or review.

At that point, the executive director, policy director and I discussed the complicated nature of this particular issue and the likely consequences from the content industry. At that point I issued a warning to our executive director informing him to expect to receive calls from the content industry, some of our Members of Congress, and some Republican-affiliated groups after the Report was released. After he confirmed that he was prepared for that and again reconfirming that the Report had his final approval to be released and disseminated on behalf of the RSC, I then released the official e-mail to the RSC Members of Congress and their staff. At that point, the RSC chose to put it on their official website (which I did not have access to).

This narrative of events reflects not only my statement but also the official line from the RSC, as the RSC’s announcement to take the Report down did not claim that it was “unauthorized.” Numerous reporters have asked questions of the RSC, and neither the RSC nor anyone else with knowledge of the events has disputed any of these details. Overall, we were expecting even more opposition than we had received, and the Report was met with a significantly more positive reception than we had anticipated. Particularly among conservative organizations that gave it robust support.

<sup>2</sup> REPUBLICAN STUDY COMMITTEE, RSC POLICY BRIEF: THREE MYTHS ABOUT COPYRIGHT LAW AND WHERE TO START TO FIX IT 1 (2012).

<sup>3</sup> Some complained that the Report did not address piracy. To be clear, while piracy is a major problem that deserves substantial attention, it lies outside the bounds of the Report, and has little bearing on the particular arguments presented. Just because there is piracy, that does not justify current term limits or fair use vagueness etc.

<sup>4</sup> Ezra Klein, *Derek Khanna Wants You to Be Able to Unlock Your Cellphone*, WASHINGTON POST (Mar. 9, 2013, 9:31 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/03/09/derek-khanna-wants-you-to-be-able-to-unlock-your-cell-phone/>.

<sup>5</sup> Jordan Bloom, *An Anti-IP Turn for the GOP?*, THE AMERICAN CONSERVATIVE MAGAZINE (Nov. 16, 2012, 5:54 PM), <http://www.theamericanconservative.com/an-anti-ip-turn-for-the-gop/>.

<sup>6</sup> Brendan Greeley, *Here’s How Republicans Can Show They’re Serious About Free Markets*, BUSINESSWEEK (Nov. 21, 2012), <http://www.businessweek.com/articles/2012-11-21/heres-how-republicans-can-show-theyre-serious-about-free-markets>.

to find a real reason to oppose it [and] the proposed new policies make sense.”<sup>7</sup> Professor Randy Barnett, lead Constitutional scholar on the conservative challenge to the Affordable Care Act, wrote a post in favor of the proposals.<sup>8</sup> Professor Glenn Reynolds featured it on Instapundit,<sup>9</sup> and then Tim Carney with the Washington Examiner<sup>10</sup> noted “If Republicans took on this issue, they could make a play for younger voters while fighting for free enterprise” and Patrick Ruffini, lead Republican technology operative came out strongly in favor.<sup>11</sup> The New York Times two lead conservative voices, David Brooks<sup>12</sup> and Ross Douthat,<sup>13</sup> each positively cited the Report. Support on the right was so unanimous<sup>14</sup> that Commentary Magazine’s endorsement found that there was no backlash against the Report from the right<sup>15</sup> and the American Conservative Magazine wrote an article “Do Any Conservatives Strongly Support Today’s Copyright Regime?” after it was unable to find any conservatives that did not believe in reforming the system.<sup>16</sup>

Support was found across the political spectrum. The Electronic Frontier Foundation wrote “[the] document called attention to some of the principal problems with today’s copyright policy. The term of copyright is much too long, which chills innovations, weakens the public domain, and creates an enormous ‘orphan works’ problem.”<sup>17</sup> Slate Magazine,<sup>18</sup> Huffington Post,<sup>19</sup> Daily Kos,<sup>20</sup> Publishers Weekly,<sup>21</sup>

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<sup>7</sup> Neil Stevens, *The RSC Should Not Have Pulled the Copyright Paper*, REDSTATE (Nov. 20, 2012, 12:00 PM), <http://www.redstate.com/2012/11/20/the-rsc-should-not-have-pulled-the-copyright-paper/>.

<sup>8</sup> Randy Barnett, *House GOP Carries Water for Big Media*, VOLOKH CONSPIRACY (Dec. 6, 2012, 12:29 PM), <http://www.volokh.com/2012/12/06/house-gop-carries-water-for-big-media/>.

<sup>9</sup> Glenn Reynolds, *Forget the Fiscal Cliff: How About Copyright Reform*, INSTAPUNDIT.COM (Nov. 21, 2012), <http://pjmedia.com/instapundit/158150/>.

<sup>10</sup> Tim Carney, *GOP Sides with Mickey Mouse on Copyright Reform*, WASHINGTON EXAMINER (Dec. 5, 2012, 4:05 PM), <http://washingtonexaminer.com/gop-sides-with-mickey-mouse-on-copyright-reform/article/2515183>.

<sup>11</sup> Eliza Krigman, *Tech Activists Alarmed by RSC Retraction of Copyright Brief*, POLITICO (Nov. 18, 2012, 3:44 PM), <http://www.politico.com/news/stories/1112/84018.html>.

<sup>12</sup> David Brooks, *The Conservative Future*, N.Y. TIMES (Nov. 19, 2012), <http://www.nytimes.com/2012/11/20/opinion/brooks-the-conservative-future.html>.

<sup>13</sup> Ross Douthat, *What is Reform Conservatism*, N.Y. TIMES, (May 30, 2012, 3:57 PM), <http://douthat.blogs.nytimes.com/2013/05/30/what-is-reform-conservatism/>.

<sup>14</sup> See also Mytheos Holt, *Meet the Fired Republican Staffer Who’s Taking on Hollywood Over Internet Freedom*, THE BLAZE (Mar. 10, 2013, 6:15 PM), <http://www.theblaze.com/stories/2013/03/10/meet-the-fired-republican-staffer-whos-taking-on-hollywood-over-internet-freedom/>.

<sup>15</sup> Alana Goodman, *GOP’s Short-Lived Shift on Copyright Law*, COMMENTARY (Nov. 26, 2012, 11:10 AM), <http://www.commentarymagazine.com/2012/11/26/gops-short-lived-shift-on-copyright-law/>.

<sup>16</sup> Jordan Bloom, *Do Any Conservatives Strongly Support Today’s Copyright Regime*, THE AMERICAN CONSERVATIVE MAGAZINE (Dec. 5, 2012, 12:27 PM), <http://www.theamericanconservative.com/do-any-conservatives-strongly-support-todays-copyright-regime/>.

<sup>17</sup> Parker Higgins, *Calling On Congress: Time to Fix Copyright*, EFF (Dec. 12, 2012), <https://www.eff.org/deeplinks/2012/12/calling-congress-time-fix-copyright>.

<sup>18</sup> Matt Yglesias, *The Case of the Vanishing Policy Memo*, SLATE (Nov. 19, 2012), <http://www.slate.com>.

Reason,<sup>22</sup> Techcrunch<sup>23</sup> and Techdirt<sup>24</sup> all ran articles positively citing the Report. Influential technology commentator Virginia Postrel wrote that the paper was “a harbinger of what promises to be a sustained and substantial critique of today’s copyright regime from intellectuals and activists on the right.”<sup>25</sup>

Despite this widespread support, as predicted internally, several folks from the content industry voiced their displeasure (some receiving direct funding by the MPAA)<sup>26</sup> and, in a very unusual decision, the memo was removed from the RSC website, but not disowned or retracted.<sup>27</sup> One organization that had received funds from the content industry, through the MPAA, appeared to claim, or at least implied, credit for getting the memo pulled.<sup>28</sup>

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slate.com/articles/business/moneybox/2012/11/rsc\_copyright\_reform\_memo\_derek\_khanna\_tries\_to\_get\_republican\_study\_committee.html.

<sup>19</sup> Marty Kaplan, *GOP Smart on Copyright for 24 Hours*, HUFFINGTON POST (Nov. 19, 2012), [http://www.huffingtonpost.com/marty-kaplan/gop-smart-on-copyright-fo\\_b\\_2155931.html](http://www.huffingtonpost.com/marty-kaplan/gop-smart-on-copyright-fo_b_2155931.html).

<sup>20</sup> Geiiga, *Republican Report: 3 Myths of Copyright, Quashed by MPAA and RIAA*, DAILY KOS (Nov. 17, 2012, 6:51 PM), <http://www.dailykos.com/story/2012/11/17/1162738/-Republican-report-3-Myths-of-Copyright-quashed-by-MPAA-and-MIAA#>.

<sup>21</sup> Peter Brantley, *The Magically Disappearing Copyright Report*, PUBLISHERS WEEKLY (Nov. 18, 2012), <http://blogs.publishersweekly.com/blogs/PWxyz/2012/11/18/magically-disappearing-copyright-report/>.

<sup>22</sup> Ed Krayewski, *Republicans, Hollywood, Lobbyists Freak Out Over Copyright Entitlements*, REASON (Nov. 20, 2012, 3:19 PM), <http://reason.com/blog/2012/11/20/republicans-hollywood-lobbyists-freak-ou>.

<sup>23</sup> Gregory Ferenstein, *How A Fired Republican Staffer Became a Powerful Martyr For Internet Activists*, TECHCRUNCH (Mar. 8, 2013), [techcrunch.com/2013/03/08/how-a-fired-republican-staffer-became-a-powerful-martyr-for-open-internet/](http://techcrunch.com/2013/03/08/how-a-fired-republican-staffer-became-a-powerful-martyr-for-open-internet/).

<sup>24</sup> Mike Masnick, *House Republicans: Copyright Law Destroys Market; It's Time For Real Reform*, TECHDIRT (Nov. 16, 2012, 7:39 PM), <http://www.techdirt.com/articles/20121116/16481921080/house-republicans-copyright-law-destroys-markets-its-time-real-reform.shtml>.

<sup>25</sup> Virginia Postrel, *A Free-Market Fix for the Copyright Racket*, BLOOMBERG (Nov. 29, 2012, 4:54 PM), <http://www.bloomberg.com/news/2012-11-29/a-free-market-fix-for-the-copyright-racket.html>.

<sup>26</sup> See Motion Picture Association of America, Inc., IRS Form 990 Tax Filing, at 33 (2011), available at [http://990s.foundationcenter.org/990\\_pdf\\_archive/131/131068220/131068220\\_201112\\_990O.pdf](http://990s.foundationcenter.org/990_pdf_archive/131/131068220/131068220_201112_990O.pdf) (\$200,000 donation to the Copyright Alliance); *Id.* at 32 (\$50,000 donation to the Copyright Alliance Education Foundation) Motion Picture Association of America, Inc., IRS Form 990 Tax Filing, at 28 (2010), available at [http://990s.foundationcenter.org/990\\_pdf\\_archive/131/131068220/131068220\\_201012\\_990O.pdf](http://990s.foundationcenter.org/990_pdf_archive/131/131068220/131068220_201012_990O.pdf) (\$100,000 donation to the Copyright Alliance). *Id.* (\$40,000 donation to the Copyright Alliance Education Foundation). See also Robert Atkinson, *Copyright Policy and Economic Doctrines*, THE INFORMATION TECHNOLOGY & INNOVATION FOUNDATION, (Nov. 2012), [www2.itif.org/2012-copyright-economic-doctrines.pdf](http://www2.itif.org/2012-copyright-economic-doctrines.pdf); Motion Picture Association of America, Inc., IRS Form 990 Tax Filing, at 33 (2011) (\$25,000 donation to the Information Technology & Innovation Foundation); Motion Picture Association of America, Inc., IRS Form 990 Tax Filing, at 28 (2010) (\$25,000 donation to the Information Technology & Innovation Foundation).

<sup>27</sup> Mike Masnick, *That Was Fast: Hollywood Already Browbeat The Republicans Into Retracting Report On Copyright Reform*, TECHDIRT (Nov. 17, 2012, 4:59 PM), <http://www.techdirt.com/articles/20121117/16492521084/hollywood-lobbyists-have-busy-saturday-convince-gop-to-retract-copyright-reform-brief>. While several media outlets reported the memo as having been retracted, the e-mail from Paul S. Teller did not actually retract the memo.

<sup>28</sup> See Tom Giovanetti, *Copyright and the GOP*, INSTITUTE FOR POLICY INNOVATION (Nov. 20,

Two weeks later, in the midst of the controversy, the RSC informed me that I would not be retained as a staffer for the incoming Chairman.

#### I. REFRAMING THE COPYRIGHT DEBATE AND THE RSC REPORT

There is a general consensus in favor of reform,<sup>29</sup> and even on the Hill<sup>30</sup> a growing number of Congressional staff and Members of Congress understand and care about these issues. To many conservatives, it is no longer a question of whether or not we need copyright reform—for them, the operative question is what that reform should look like? The arguments and conclusions of the Report were consistent with the history of the conservative movement and its thought-leaders, including Steve Forbes<sup>31</sup> (a previous Presidential candidate), Phyllis Schlafly<sup>32</sup> (founder and President of the Eagle

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2012), [www.ipi.org/ipi\\_issues/detail/copyright-and-the-gop](http://www.ipi.org/ipi_issues/detail/copyright-and-the-gop) (“IPI shared our concerns with the RSC, and we were gratified to learn a few hours later that the paper had been retracted.”); *See also* Motion Picture Association of America, Inc., IRS Form 990 Tax Filing, at 33 (2011) (\$22,500 donation to the Institute for Policy Innovation). For previous backlash by content industry for the SOPA/PIPA defeat, see *EXCLUSIVE: Chris Dodd Warns of Hollywood Backlash Against Obama Over Anti-piracy Bill*, FOXNEWS (Jan. 19, 2012), [www.foxnews.com/politics/2012/01/19/exclusive-hollywood-lobbyist-threatens-to-cut-off-obama-2012-money-over-anti/](http://www.foxnews.com/politics/2012/01/19/exclusive-hollywood-lobbyist-threatens-to-cut-off-obama-2012-money-over-anti/) (“Candidly, those who count on quote ‘Hollywood’ for support need to understand that this industry is watching very carefully who’s going to stand up for them when their job is at stake. . . . Don’t ask me to write a check for you when you think your job is at risk and then don’t pay any attention to me when my job is at stake.”).

<sup>29</sup> Goodman, *supra* note 15.

<sup>30</sup> On Capitol Hill discussions about copyright in particular are almost always portrayed through a false dichotomy: that you are either for copyright or you are against it. But these are not the real choices. While the Judiciary Committee is undergoing a series of hearings on assessing copyright law, the MPAA/RIAA associated coalition has responded with op/eds touting the benefits of copyright, implying that anyone who is interested in critically assessing our laws and regulations is therefore against copyright. This false dichotomy—you are either for against copyright—does little to inform the policy rationale for our chosen way to implement copyright, which bans or chills so many beneficial technologies.

<sup>31</sup> Steve Forbes, *Fact and Comment*, FORBES (Mar. 31, 2003 12:00 AM), [www.forbes.com/forbes/2003/0331/027.html](http://www.forbes.com/forbes/2003/0331/027.html) (“The extension was pushed primarily by Disney, which didn’t want any of its old Mickey Mouse cartoons entering the public domain. . . . Maybe Congress should just be done with it and declare that a copyright is forever. . . . Stanford Law School professor Lawrence Lessig has proposed a sensible compromise. Borrowing a page from patent law, wherein holders have to pay a fee every few years to keep their patents current, Lessig would apply that principle to copyrights: After a certain number of years, copyright holders would have to pay a nominal amount of money to maintain protection. If the holder didn’t pay the charge for, say, three years, the work would go into the public domain.”).

<sup>32</sup> Phyllis Schlafly, *Why is Congress Criminalizing Copyright Law?*, EAGLE FORUM (June 24, 1998), <http://www.eagleforum.org/column/1998/june98/98-06-24.html> (“Congress seems intent on changing all our intellectual property laws to benefit big corporations.”); Phyllis Schlafly, *Why Disney Has Clout with the Republican Congress*, EAGLE FORUM (Nov. 25, 1998), [www.eagleforum.org/column/1998/nov98/98-11-25.html](http://www.eagleforum.org/column/1998/nov98/98-11-25.html) (“‘Limited time’ is not only a constitutional requirement, it is an excellent rule. There is no good reason for the remote descendants of James Madison, Julia Ward Howe, or Thomas Nast to receive royalties on the Federalist Papers, the Battle Hymn of the Republic, or Santa Claus. . . . [W]hy did Judiciary Committee Republicans quietly put through legislation that hurts the public interest but is so

Forum), Previous Department of Homeland Security and NSA Counsel Stewart Baker,<sup>33</sup> economists Friedrich Hayek,<sup>34</sup> Milton Friedman<sup>35</sup> and Ronald H. Coase,<sup>36</sup> conservative jurists including Judge Richard Posner<sup>37</sup> (a Reagan appointment and the most cited legal scholar of the twentieth century) and constitutional scholars such as Professor Glenn Reynolds,<sup>38</sup> among numerous others.

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immensely profitable to Disney?”); Phyllis Schlafly, *Copyright Extremists Should Not Control Information Flow*, EAGLE FORUM (Jan. 1, 2003), [www.eagleforum.org/column/2003/jan03/03-01-01.shtml](http://www.eagleforum.org/column/2003/jan03/03-01-01.shtml) (“Copyright extremists are committing all this mischief under current law. Yet, the music labels and Hollywood argue that current laws are not strong enough, and they are lobbying for an assortment of new anti-consumer legislation. . . . We should not permit copyright extremists to exploit current laws for that goal, and we should reject their demands that Congress give them even broader power to control and license information.”); Phyllis Schlafly, *Copyrights and the Constitution*, EAGLE FORUM (July 2, 2002), [http://townhall.com/columnists/phyllisschlafly/2002/07/02/copyrights\\_and\\_the\\_constitution](http://townhall.com/columnists/phyllisschlafly/2002/07/02/copyrights_and_the_constitution) (“The Disney Law mocks the constitutional requirement of “limited times” by extending copyright protection to 95 years.”). See also Brief of Amici Curiae Eagle Forum Education and Legal Defense Fund and the Association of American Physicians and Surgeons, Inc. in Support of Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01618), 2002 WL 1041834 at \*27 [hereinafter Amici Curiae Eagle Forum] (“The U.S. Constitution is fundamentally different from the rules of the European Union and virtually every other country. The Copyright Clause takes a more limited view of intellectual property than other jurisdictions, thereby allowing creativity and competition to flourish. Europe, for example, generally does not allow the ‘fair use’ that is constitutionally required in the United States.”).

<sup>33</sup> See, e.g., Stewart Baker, *Regulating Technology for Law Enforcement*, 4 TEX. REV. L. & POL. 53 (1999).

<sup>34</sup> FRIEDRICH HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* 113–14 (1948) (“The problem of the prevention of monopoly and the preservation of competition is raised much more acutely in certain other fields to which the concept of property has been extended only in recent times. . . . It seems to me beyond doubt that in [patents and copyright] a slavish application of the concept of property as it has been developed for material things has done a great deal to foster the growth of monopoly and that here drastic reforms may be required if competition is to be made to work.”).

<sup>35</sup> MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 128 (2002) (“In both patents and copyright, there is clearly a strong prima facie case for establishing property rights. . . . At the same time, there are costs involved. . . . The specific conditions attached to patents and copyrights [such as term lengths] are matters of expediency to be determined by practical considerations. I am myself inclined to believe that a much shorter period of patent protection would be preferable.”).

<sup>36</sup> Amici Curiae Eagle Forum, *supra* note 32.

<sup>37</sup> Richard Posner, *Do Patent and Copyright Law Restrict Competition and Creativity Excessively?* Posner, BECKER POSNER BLOG (Sept. 30, 2012), [www.becker-posner-blog.com/2012/09/do-patent-and-copyright-law-restrict-competition-and-creativity-excessively-posner.html](http://www.becker-posner-blog.com/2012/09/do-patent-and-copyright-law-restrict-competition-and-creativity-excessively-posner.html) (“copyright protection seems on the whole too extensive. . . . The most serious problem with copyright law is the length of copyright protection, which for most works is now from the creation of the work to 70 years after the author’s death. . . . The next most serious problem is the courts’ narrow interpretation of “fair use.” . . . The problem is that the boundaries of fair use are ill defined, and copyright owners try to narrow them as much as possible.”).

<sup>38</sup> Robert Merges & Glenn Reynolds, *The Proper Scope of the Copyright and Patent Power*, 35 HARV. J. ON LEGIS. 45 (2000) (“One possible approach to the constitutional test we advocate would be to examine a proposed extension from the hypothetical perspective of an author . . . could the term of protection possibly serve as additional motivation to set pen to paper, or to sit down at the lab bench? Or does it stretch out so far in time that the latter years of the term are irrelevant to any potential creator? This approach essentially translates proposed patent extensions into the ‘present value’ calculations familiar to accountants. . . . [The Constitution] states a utilitarian, incentive-based rationale for intellectual property protection. If the term of protection could not, under any plausible set of assumptions, serve as an incentive, it fails the constitutional

But the issues are broader than ones that just appeal to conservatives in a theoretical sense on government regulation. More and more people are aware of the impact of copyright laws upon their lives. More people are posting their own YouTube videos, music on SoundCloud, or blogging and dealing with copyright issues for the first time. Average people are now both content creators and content consumers. In 18<sup>th</sup> century America, only writers, mapmakers, and chart makers, could be copyright protected creators, but in modern America most Americans have likely created something protected by copyright every single day (texting, e-mailing, taking pictures or taking video etc.).

Everyone knows that one should not be able to steal another's work and profit from it, but many are stunned to hear that the copyright laws, which are implemented to protect content producers by incentivizing content creation, actually limit or effectively prohibit other forms of content creation including derivative works and are so broad that they make it illegal to jailbreak or unlock their iPads or iPhones. Copyright law is capturing more of the public spotlight because it has become more invasive, by limiting our freedom,<sup>39</sup> and deviated from traditional norms<sup>40</sup> of what is morally wrong<sup>41</sup> and what average people may want, or expect, to be illegal.<sup>42</sup> A good case in point could be seen when over seven million people reached out to their Member of Congress to stop the Stop Online Piracy Act (SOPA) and the Protect IP Act (PIPA), which would have implemented draconian and ineffective measures to censor the internet for American citizens to deal with piracy.<sup>43</sup> Similar outrage was experienced when the Librarian of Congress's rule went into effect making cellphone unlocking illegal under copyright law, leading to a White House petition with 114,000 signatures.<sup>44</sup>

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requirement of a forward-looking grant of property rights.”).

<sup>39</sup> Copyright law was used to go after the VCR, satellite TV, the Digital Audio Tape, and bankrupted the first digital media player (the Rio) and the first DVR (ReplayTV). Also, copyright law now impacts whether individuals can unlock or jail-break their own devices, back-up their own movies for personal use, among other things.

<sup>40</sup> Traditional norms referring to common-sense notions of what copyright is versus what it actually is in statute.

<sup>41</sup> Stealing being morally wrong and the basis of the normal person's notion of copyright infringement, in particular wholesale copying and selling of protected works.

<sup>42</sup> Software & Information Industry Association, *Types of Content Infringement*, SIIA, [http://www.siiia.net/index.php?option=com\\_content&view=article&id=353:types-of-content-infringements&catid=162:anti-piracy-articles&Itemid=385](http://www.siiia.net/index.php?option=com_content&view=article&id=353:types-of-content-infringements&catid=162:anti-piracy-articles&Itemid=385) (last visited Oct. 5, 2013) (“Many people who infringe copyright may be unaware they are doing anything illegal. Some illegal practices are so widespread that most people don't even think about whether or not they are legal.”).

<sup>43</sup> See Timothy B. Lee, *SOPA Protest by the Numbers: 162M Pageviews, 7 Million Signatures*, ARS TECHNICA (Jan. 19, 2012), <http://arstechnica.com/tech-policy/2012/01/sopa-protest-by-the-numbers-162m-pageviews-7-million-signatures>.

<sup>44</sup> See 17 U.S.C. § 1201 (2012). To jailbreak an iPhone is to change the software on the phone to

Today, many of our copyright laws, regulations implemented through administrative agents under copyright law, and court decisions on copyright law bear little resemblance to their constitutional and historical purposes, and in fact, it is difficult to define exactly what purposes our current system of copyright laws are designed to help.

## II. THE PURPOSE OF COPYRIGHT

The RSC Report debunked three myths that have been relied on to justify our current system of perpetual copyright and the evisceration of the public domain.<sup>45</sup> These myths are that:

1. The purpose of copyright is to compensate the creator of the work;
2. Copyright law is the operation of free-market capitalism; and
3. The current copyright legal regime maximizes innovation and productivity.

Taken together, these points have served to justify the current approach to copyright law, so it is important that we examine them with a critical eye.

The first myth, that copyright is strictly about creator compensation, runs contrary to the language in Article I, Section 8 of the Constitution, which grants Congress authority to exercise its power “to promote the Progress of Science and useful Arts.”<sup>46</sup> The Constitution explicates the purpose of this instrument in stark, unequivocal, language that is nearly as clear as the mandatory age minimum for serving in Congress (25-years old), how many Senators each state gets (2 per state) or how many states have to ratify an amendment (3/4s).

In fact, unlike any other powers in Article I, the Constitution specifies the purpose for which Congress has the power to create copyright.<sup>47</sup> The Constitution spells out an explicit purpose of copyright: to advance content creation and scientific invention, hence why some refer to it as the Progress Clause.<sup>48</sup> The specific purpose for

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use other software, to unlock a phone is to allow consumers to use a different SIM card.

<sup>45</sup> Indefinite because of constant and regular copyright renewal, perpetually keeping copyright from expiring and entering the public domain.

<sup>46</sup> U.S. CONST. art. I, § 8.

<sup>47</sup> Some in the content industry have read this section of the Report to imply that copyright law should not compensate the author. This is a complete misreading of the RSC report’s argument.

<sup>48</sup> See *Sony Corp.*, 464 U.S. at 429 (“[M]onopoly privileges that Congress may authorize . . . the limited grant is a means [for an] important public purpose . . . to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”); Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 992 (1990) (“[T]he U.S. Constitution’s copyright clause, echoing the English Statute of Anne, makes the public’s interest equal, if not superior, to the author’s. This clause authorizes the establishment of exclusive rights of authors as a means to maximize production of



this Clause makes it particularly unique within the framework of the Constitution. The Constitution does not tell us why we protect the freedom of speech or why the federal government can regulate interstate commerce. In fact, of the eighteen enumerated powers granted to Congress in Article I, Section 8, the power to provide copyright and patent protection is alone in providing for its specific purpose. The reason is not surprising: copyrights and patents alter the natural functioning of the free market in order to reward inventors for the research needed for inventions and content creators for creation. If Congress chooses to have either instrument—copyright and patents—the Framers cautioned us, then it must do so for this specified purpose. Therefore, if Congress determines that it fulfills this purpose, then artists should be compensated for the purpose of providing an incentive to generate new content, which the Report argued that it was.<sup>49</sup>

The second myth, that copyright is free-market capitalism at work, is factually incorrect: the U.S. copyright system is a system of government-imposed regulation,<sup>50</sup> not something organic to a free market. That regulation may take the form of a government created property right through statute, but it is nonetheless a form of regulation. Perhaps more than any other part of the Report, critics on the maximalist-IP side have criticized<sup>51</sup> the use of the term “monopoly” in the Report, as did Representative Blackburn when she criticized the

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and access to intellectual creations.”); Lydia Pallas Lorenn, *The Purpose of Copyright*, OPEN SPACES, open-spaces.com/article-v2n1-lorenn.php (last visited Nov. 1, 2013) (“[T]he true purpose of copyright - to promote the progress of knowledge and learning - and we must all realize that too broad a monopoly will impede rather than promote that progress on which this country was founded.”).

<sup>49</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. . . . the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”).

<sup>50</sup> The term “regulation” is widely used in legal literature, by both left and right leaning legal jurists. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY LAW*, (American Enterprise Institute Press 2004); Mark A. Lemley, *The Regulatory Turn in IP*, 36 HARV. J.L. & PUB. POL’Y 109 (2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2172440](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2172440).

<sup>51</sup> Scott Cleland, *The Copyright Education of Mr. Khanna -- Part 2 Defending First Principles Series*, PRECURSOR BLOG (Nov. 20, 2012, 1:29 PM), [precursorblog.com/?q=content/copyright-education-mr-khanna-part-2-defending-first-principles-series](http://precursorblog.com/?q=content/copyright-education-mr-khanna-part-2-defending-first-principles-series) (“Copyright is property not monopoly. [This terminology choice] is classic Lessig-ian buzzword blackmail to demonize ownership of private property by mischaracterizing property exclusive rights with a word he knows people don’t like – monopoly. . . . To show how silly this mischaracterization is, do we believe we have a monopoly over use of our car or home? . . . The only purpose in mischaracterizing property as a monopoly is to promote hostility to property and individual ownership of property separate from the state.”); Terry Hart, *Republican Study Committee Policy Brief on Copyright: Part 1*, COPYHYPE (Nov. 21, 2012), [www.copyright.com/2012/11/republican-study-committee-policy-brief-on-copyright-part-1/](http://www.copyright.com/2012/11/republican-study-committee-policy-brief-on-copyright-part-1/) (“There is perhaps no more elementary and persistent error in the history of copyright than the claim that it is a monopoly. And, just as persistently, it has been debunked.”).

Report<sup>52</sup> (it should be noted that Representative Blackburn generally disagrees with major concepts of copyright law such as being opposed to any “fair use”<sup>53</sup>), but “monopoly”<sup>54</sup> has been the historically accurate phrase, and the point of the document, for the audience involved, was to go back to founding principles. The criticism on this point was particularly intellectually dishonest, given that many of the criticisms were based on conservative arguments on property rights when many of the economists who have defined conservative theory on property rights, such as Friederick Von Hayek, were the first to point out that copyright is not a traditional property right and support “drastic reform.”<sup>55</sup> The RSC Report was speaking to an audience of conservatives that care about founding principles, and thus, the document was written to be historically accurate for that context.

The courts, conservative voices such as Phyllis Schlafly,<sup>56</sup>

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<sup>52</sup> Jennifer Martinez, *Report: Author of Controversial Copyright Brief Fired From RSC*, THE HILL (Dec. 7, 2012, 5:55 PM), <http://thehill.com/blogs/hillicon-valley/technology/271761-report-author-of-controversial-copyright-brief-fired-from-rsc> (quoting Representative Blackburn’s spokesman “Conservatives aren’t going to tolerate the ideology that copyright violates nearly every tenant of laissez-faire capitalism, that copyright is a government monopoly, and that property rights don’t matter anymore.”). See also Tessa Muggeridge, *Legacy Media Bankrolling Campaigns of SOPA CoSponsors*, SUNLIGHT FOUNDATION (Dec. 1, 2011, 12:13 PM), [reporting.sunlightfoundation.com/2011/legacy-media-bankrolling-campaigns-of-SOPA-consponsors/](http://reporting.sunlightfoundation.com/2011/legacy-media-bankrolling-campaigns-of-SOPA-consponsors/). Sunlight Foundation analysis of content industry contributions to Representative Blackburn, showing that she received \$261,700 over the course of her eight year career from content industry as of 2011, the fourth highest recipient of dollars from content on the Republican side.

<sup>53</sup> In a 2005 House hearing Representative Blackburn suggested that the use of short quotations or “snippets” were similar to being “a little bit pregnant,” arguing that “how do you go snip just a little bit of what somebody has created and where do you draw that line?” *Fair Use: Its Effects on Consumers and Industry: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 109th Cong. (2005) (statement of Rep. Blackburn, Member, H. Comm. on Energy and Commerce), available at [www.gpo.gov/fdsys/pkg/CHRG-109hhrg27003/html/CHRG-109hhrg27003.htm](http://www.gpo.gov/fdsys/pkg/CHRG-109hhrg27003/html/CHRG-109hhrg27003.htm).

<sup>54</sup> See *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 546 (1985) (“[M]onopoly granted by copyright actively served its intended purpose of inducing the creation of new material of potential historical value.”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The limited scope of the copyright holder’s statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”); *United States v. Paramount Pictures*, 334 U.S. 131, 157 (1948) (“[T]he monopoly of the copyright.”).

<sup>55</sup> HAYEK, *supra* note 34, at 113–14. (“The problem of the prevention of monopoly and the preservation of competition is raised much more acutely in certain other fields to which the concept of property has been extended only in recent times. . . . It seems to me beyond doubt that in [patents and copyright] a slavish application of the concept of property as it has been developed for material things has done a great deal to foster the growth of monopoly and that here drastic reforms may be required if competition is to be made to work.”).

<sup>56</sup> See Brief of Amici Curiae Eagle Forum Educ. & Legal Def. Fund and the Ass’n of Am. Physicians & Surgeons, Inc. in Support of Petitioners at 2, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1041834, available at <http://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/eagle-forum.pdf> (“Nothing beats a government-conferred monopoly, and a few special interests obtained one in the unprecedented single-day passage of the Sonny

Constitutional scholars,<sup>57</sup> and conservative leaning economists<sup>58</sup> have referred to copyright as a form of monopoly (in particular the Supreme Court has referred to copyright as a monopoly in as many as sixty-seven cases and all courts in as many as 2497 cases).<sup>59</sup> They do so not only because it is historically the legal<sup>60</sup> and economic<sup>61</sup> phrase, but also because it is terminology used by the Founding Fathers who spoke most

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Bono Copyright Term Extension Act (“CTEA”).”)

<sup>57</sup> See Robert Patrick Merges and Glenn Harlan Reynolds, Essay, *The Proper Scope of the Copyright and Patent Power*, 37 HARV. J. ON LEGIS. 45, 47–48, 56–57 (2000), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=987742](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=987742) (“Monopolies for intellectual property are not immune from this tendency. . . . [T]he general evils of monopoly are overcome, in this specific instance, by the benefits accruing to the public from encouraging authors and inventors to create and invent, and to make their works public. . . . Although monopolies are generally undesirable, monopolies [for copyright and patents] are the exception. They are monopolies that pay their own way with new knowledge and creation.”); Richard A. Posner, *The Constitutionality of the Copyright Term Extension Act: Economics, Politics, Law, and Judicial Technique* in Eldred v. Ashcroft, 55 SUP. CT. REV. 143, 147 (2003) (finding the argument “powerful” that “[t]he historic Anglo-American hostility to government grants of monopolies caused the framers of the Constitution to authorize the granting of copyrights . . . only for the purpose of promoting intellectual and cultural progress.”).

<sup>58</sup> For example, George A. Akerlof, Kenneth J. Arrow, Timothy F. Bresnahan, James M. Buchanan, Ronald H. Coase, Linda R. Cohen, Milton Friedman, Jerry R. Green, Robert W. Hahn, Thomas W. Hazlett, C. Scott Hemphill, Robert E. Litan, Roger G. Noll, Richard Schmalensee, Steven Shavell, Hal R. Varian, and Richard J. Zeckhauser. See Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners at 3, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1041846 (“In basic terms, copyright protection grants a monopoly over the distribution and sale of a work and certain new works based upon it. The copyright monopoly has several costs.”); MILTON FRIEDMAN, CAPITALISM AND FREEDOM 127 (Fortieth Anniversary ed. 2002), available at <http://books.google.com/books?id=iCRk066ybDAC&lpq=PA127&ots=QnYfBqU-kl&dq=&pg=PA127#v=onepage&q&f=false> (“A kind of governmentally created monopoly very different in principle from those so far considered is the grant of patents to inventors and copyrights to authors.”); HAYEK, *supra* note 34, at 113–14. (“The problem of the prevention of monopoly and the preservation of competition is raised much more acutely in certain other fields to which the concept of property has been extended only in recent times. . . . [the extension of property like rights to copyright has] done a great to foster the growth of monopoly and that here drastic reforms may be required.”).

<sup>59</sup> A WestLaw search “copyright” and “monopoly” retrieved 67 Supreme Court cases and 2,497 cases total. Westlaw just keeps published cases so the number of potential cases could be higher, but not all retrievals are instances of copyright being referred to as a “monopoly;” however, a check of a number of them demonstrates that most of them are. See, e.g., Eldred v. Ashcroft, 537 U.S. 186, 260 (2003) (Breyer, J., dissenting) (mentioning “the antimonopoly environment in which the Framers wrote the Clause,” which suggests the way the Framers understood “the basic purpose of the Copyright Clause”); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 28 (1979) (“A copyright, like a patent, is a statutory grant of monopoly privileges.”); Mazer v. Stein, 347 U.S. 201, 219 (1954) (Douglas, J., concurring) (“[M]ay statuettes be granted the monopoly of the copyright?”).

<sup>60</sup> See also Statute of Monopolies, 21 Jac. I, ch. 3 (1624) (Eng.) (prohibiting all royal grants of monopoly but excepting patents of invention of up to fourteen years and printing patents).

<sup>61</sup> For an example of an economic analysis of optimal copyright term that uses “monopoly” as the accurate economic term, see Rufus Pollock, *Forever Minus a Day? Calculating Optimal Copyright Term*, University of Cambridge 2 (2009), [http://rufuspollock.org/papers/optimal\\_copyright\\_term.pdf](http://rufuspollock.org/papers/optimal_copyright_term.pdf) (“Extending term on these works prolongs the copyright monopoly and therefore reduces welfare by hindering access to, and reuse of, these works.”); Robert M. Hurt, *The Economic Rationale of Copyright*, in 56 THE AMERICAN ECONOMIC REVIEW 421, 421–32 (Robert M. Schuchman ed., 1966), available at <http://www.jstor.org/stable/1821305>.

specifically about copyright.<sup>62</sup> Others can choose to use different terminology, but omitting reference to the fact that copyright was called a “monopoly” would have only misled the intended audience by failing to include the basis of the historic antecedent for modern copyright.

Some commentators have argued that copyright is a natural law property right rather than a form of regulation, but the Court has repeatedly insisted, copyrights are “monopoly privileges that . . . while ‘intended to motivate . . . creative activity . . . by provision of a special reward’, are limited in nature and must ultimately serve the public good.”<sup>63</sup> And Milton Friedman’s brief, arguing that extending copyright had negative economic consequences in the *U.S. v. Eldrid* case, signed by sixteen other economists explains that, “copyright protection grants a monopoly over the distribution and sale of a work and certain new works based upon it.”<sup>64</sup>

With this in mind, the relevant question is what form of regulation, through the form of a government created, and circumscribed, property right, represents the most effective means of achieving the desired goals. An economist would ask, “Is there a market failure that requires this level of government intervention or subsidy?” A system is not inherently bad simply because it involves a regulated content market rather than a laissez-faire free market, as even conservatives support numerous types of beneficial regulations. However, this generally means that a public good should justify intervention into the market through this instrument, and generally speaking the approach of most, particularly on the conservative side, is to favor less government regulation.<sup>65</sup> The Report articulates that there is a strong case for

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<sup>62</sup> See, e.g., Letter from Thomas Jefferson, to James Madison (Aug. 28, 1789), available at [http://www.founding.com/founders\\_library/pageID.2184/default.asp](http://www.founding.com/founders_library/pageID.2184/default.asp) (“Monopolies may be allowed to persons for their own productions in literature and their own inventions in the arts for a term not exceeding -- years but for no longer term and no other purpose.”); Letter from James Madison, to Thomas Jefferson (Oct. 17, 1788), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch14s47.html> (“With regard to monopolies they are justly classed among the greatest nuisances in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced?”).

<sup>63</sup> *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994) (quoting *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)). See also *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 123 S. Ct. 2041 (2003) (“The rights of a patentee or copyright holder are part of a ‘carefully crafted bargain’, under which, once the patent or copyright monopoly has expired, the public may use the invention or work at will and without attribution.”) (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150–51 (1989)).

<sup>64</sup> Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners at 3, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1041846.

<sup>65</sup> A recent law journal blog post mischaracterized the Report’s stance on this precise issue. There, the author incorrectly asserted that the RSC Report assumed that “the ideal market is laissez faire” and that since copyright is not laissez faire then copyright is bad policy. However, the RSC Report is clear in its support for market intervention in copyright. Copyright may not be laissez faire, but the Report did not say it was therefore bad policy, quite the opposite. See Rosalind Schonwald, *The Purpose of Copyright? Examining the Retracted Republican Study Committee Brief*, BERKELEY TECH. L.J. BOLT (Apr. 11, 2013), <http://btlj.org/?p=2704> (“All three

intervention in the form of copyright; but as a form of intervention it needs to be carefully evaluated for its impact upon innovation, the public and new content creation.

The Report also challenges a third myth, the notion that the U.S. copyright system strikes the intended balance of providing sufficient incentive to content producers without impeding new works—this is what the Report calls the “Goldilocks-like balance.”<sup>66</sup> Milton Friedman refers to the “specific conditions” of copyrights and patents as a matter of “expediency” to be determined by “practical considerations”:

One thing is clear. The specific conditions attached to patents and copyrights -- for example, the grant of patent protection for seventeen years rather than some other period -- are not a matter of principle. They are matters of expediency to be determined by practical considerations.<sup>67</sup>

The Report assesses these practical considerations and concludes that the current term of copyright protection is far from “just right.” An evaluation of term length is critical because many people are unaware that the copyright length today bears almost no resemblance to its historical precedent. Historically copyright has been short. Our Founding Fathers incorporated a modified version of the British legal conception of copyright, first in state laws, then through specific language in Constitution and lastly as implemented by statute in 1790—creating fourteen-year terms with a fourteen-year extension. British law, state law and federal law all had similar term lengths in the founding era—when the Founders wrote “limited” their understanding of an acceptable limited term was fourteen years.

Until 1976, the average copyright term was 32.2 years.<sup>68</sup> But then lobbyists got to work manipulating the system.<sup>69</sup>

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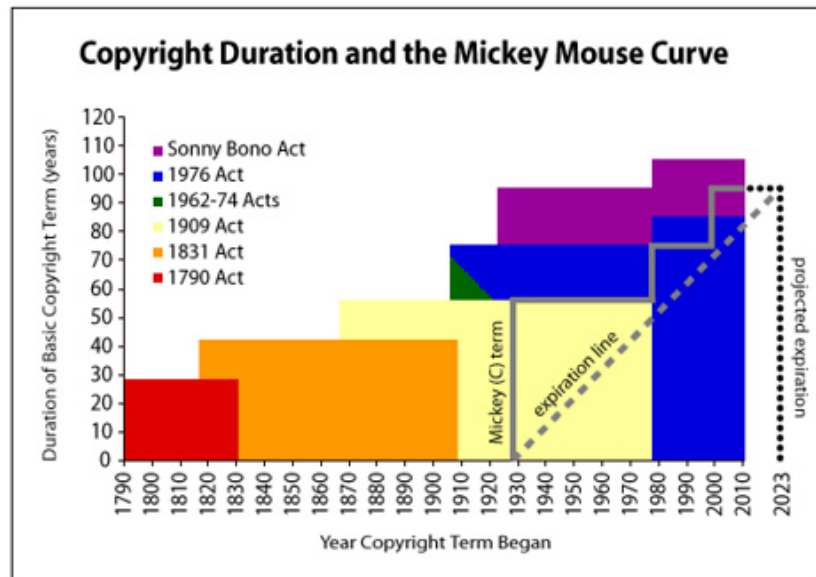
myths are couched in terms of two underlying assumptions: the ideal market is *laissez faire*, and a textualist constitutional interpretation of copyright and patents’ purpose is both accurate and desirable.”); REPUBLICAN STUDY COMMITTEE, *supra* note 2, at 8 (“To be clear, there is a legitimate purpose to copyright . . . Copyright ensures that there is sufficient incentive for content producers to develop content . . .”).

<sup>66</sup> See *id.* For more on the notion that copyright law requires a careful balancing of competing interests, see Pamela Samuelson, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1194 (2010) (“We believe that in this, as in other circumstances, a good copyright law must strike a balance between protecting authors and other copyright owners from infringement, on the one hand, and encouraging innovation, creative expression and public access to works, on the other.”); see *id.* at 1176 (“A well-functioning copyright law carefully balances the interests of the public in access to expressive works and the sound advancement of knowledge and technology, on the one hand, with the interests of copyright owners in being compensated for uses of their works and deterring infringers from making market-harmful appropriations of their works, on the other.”).

<sup>67</sup> MILTON FRIEDMAN, CAPITALISM AND FREEDOM 127–28 (Fortieth Anniversary ed. 2002).

<sup>68</sup> LAWRENCE LESSIG, FREE CULTURE 293 (2004), available at <http://www.free-culture.cc/freeculture.pdf>.

<sup>69</sup> Robert Darnton, *A Republic of Letters*, N.Y. TIMES (Aug. 20, 2010), <http://www.nytimes.com>

Copyright Duration and the Mickey Mouse Curve<sup>70</sup>

Today current U.S. law provides copyright protection for the life of the author plus seventy years, and for corporate authors, 120 years after creation or 95 years after publication.<sup>71</sup> But that change reflects only part of the real situation, because, historically, lobbyists have usurped the policy-making process to ensure that when one term of copyright would expire, then it would continue to be extended, sometimes even retrospectively.<sup>72</sup> If this policy is continued, over the course of many years, we will continue to have an effective indefinite copyright—*indefinite copyright being clearly unconstitutional.*<sup>73</sup>

/2010/08/22/books/review/Darnton-t.html?pagewanted=all&\_r=0 (“When asked how long he thought copyrights should last, Jack Valenti, the lobbyist for Hollywood, quipped, ‘Forever, minus a day.’ Valenti has won, Jefferson has lost.”). For an illuminating account of the history of special interest influence over copyright legislation, see JESSICA LITMAN, *DIGITAL COPYRIGHT* (2006). For one non-academic perspective, see Phyllis Schlafly, *Why Disney Has Clout with the Republican Congress*, EAGLE FORUM (Nov. 25, 1998), [www.eagleforum.org/column/1998/nov98/98-11-25.html](http://www.eagleforum.org/column/1998/nov98/98-11-25.html). See also Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987); Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975).

<sup>70</sup> Ray Corrigan, *Mickey Mouse Copyright Term*, (Aug. 7, 2009), [b2fxxx.blogspot.com/2009/08/mickey-mouse-copyright-term.html](http://b2fxxx.blogspot.com/2009/08/mickey-mouse-copyright-term.html) (original image, unaltered, from Tom Bell, *Copyright Duration and the Mickey Mouse Curve*, TECHLIBERATION.COM, (Aug. 11, 2009)).

<sup>71</sup> Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541; Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

<sup>72</sup> See Sonny Bono Copyright Term Extension Act, Public Law 105-298, § 102, 112 Stat. 2828 (1998).

<sup>73</sup> Unconstitutional can have multiple interpretations. While the Court upheld the Sonny Bono

If a longer copyright term were critical to provide sufficient incentive to content producers, then one would expect, particularly when copyright terms were much shorter, that content producers would choose to extend their copyright. But Congress found that only “a very

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Copyright Extension Act in *Eldrid v. Ashcroft* (2003), that does not make perpetual copyright therefore Constitutional. The Report does not take a particular stance on the Sonny Bono Act being unconstitutional, merely that this type of extension negatively affected public policy considerations and is bad policy. The Report itself took no positions on whether current US copyright law violates the Constitution. However, conservatives generally believe that just because the Court has adjudicated something as Constitutional, it does not necessarily make it so. As the Court has routinely acknowledged, it is generally reluctant to strike down laws as being un-Constitutional except for in certain cases—of which copyright would not typically fall under as a regular case under heightened scrutiny. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

The RSC had previously released a policy brief, which I authored, on this very point. It argued that Congress has a separate requirement to assess legislation’s Constitutionality, and with a different eye than the Supreme Court gives it. In other words, whereas the Supreme Court may say that “limited times” could be life plus fifty years one day and then life plus seventy years twenty years later, perpetually extended over the course of generations, like a legal shell game, to avoid copyright ever expiring; Congress ought to intervene and say that these laws, over generations, effectively negates the “limited times” requirement, and is therefore inconsistent with the original public meaning of the Framers of the Constitution. But given the different responsibility of Congress, the Report was arguing that, Congress should not perpetually extend copyright, even if the Court may not strike it down, because it does not abide by the original public meaning of the text to continue to extend it every twenty years as a legal ruse avoid the intended expiration.

There are certainly arguments that the Sony Bonno Act violates an express prohibition in the Constitution, specifically in providing a new copyright term for works out of copyright or extending the term for works under copyright and thereby not creating any new incentive to those content owners who receive this new benefit, but this is not the direction court the Supreme Court has chosen to enforce. While the Court was unwilling to provide any real scrutiny to this “limited term” being a ruse, it is difficult to imagine the Court being as reluctant if this shell game involved someone’s “limited time” behind bars or other issues where the Court provides actual scrutiny to look beyond pretext.

This line of argumentation, that the Congress has a separate and distinct responsibility in assessing the Constitutionality of legislation, is similar to conservative opposition to the enlargement of the Commerce Clause and the government’s taking power. While the Supreme Court may largely differ to Congress on what legislation it finds to violate the Commerce Clause and the Fifth Amendment’s Takings Clause, by upholding almost any bill under the Commerce Clause and almost any form of government taking, Constitutional conservatives believe that Congress has an obligation, under the Constitution, to ensure that these powers remain limited to the original public meaning behind the drafting of the text. Much of the written criticism of the Report failed to note this point, erroneously repeating that the Court has adjudicated copyright extension and therefore it is clearly consistent with the Constitution and Constitutional. See Derek Khanna, *RSC Policy Brief: The Role and Responsibility of Congress in Determining Constitutionality of Legislation*, RSC (June 27, 2012), [rsc.scalise.house.gov/uploadedfiles/the\\_role\\_and\\_responsibility\\_of\\_congress\\_in\\_determining\\_constitutionality\\_of\\_legislation.pdf](http://rsc.scalise.house.gov/uploadedfiles/the_role_and_responsibility_of_congress_in_determining_constitutionality_of_legislation.pdf) (“[O]ur elected representatives have a responsibility to ensure that legislation is supported by, and consistent, with the Constitution and not to defer to court action, . . . The Court has long held that acts of Congress are ‘presumptively constitutional,’ and . . . that the presumption of constitutionality accorded to Acts of Congress is ‘strong.’ . . . This precedent presents a serious problem if Members of Congress assume that the Supreme Court will be the arbiter of constitutionality. . . . Assessing a law’s constitutionality is not, and should not be, the sole dominion of the judicial branch. Congress has a responsibility to ensure that its legislation is consistent and enabled by the Constitution . . .”).

small percentage of copyrights are ever renewed,”<sup>74</sup> that the rate of renewal in the 1880s was fifteen percent, and that fewer than half of all works were registered at all.<sup>75</sup> If the much longer copyright term of life plus seventy years is necessary, then why did these content producers choose to have only twenty-eight years of protection, as opposed to the optional forty-two years available at the time? As William Patry argues in his book, *How to Fix Copyright*:

Was there a single author in the entire world who said, “A term of copyright that only lasts for my life plus fifty years after I die is too short. I will not create a new work unless copyright is extended to last for my life plus seventy years”? There is no such person.<sup>76</sup>

Moreover, in 2009, a study on the production of movies in twenty-three countries that had extended the term of copyright found no statistically robust evidence that longer terms of copyright led to the creation of more works.<sup>77</sup> Another study, from the University of Cambridge, found that the optimal copyright term is around fifteen years (the median of the economic analysis).<sup>78</sup> Perhaps most interesting in this study was the finding of high likelihood that the optimal term should be under 30 years (with a 95% certainty). Rufus Pollas finds:

The 25th percentile is 11 years, the 50th (the median) at 15 years, the 75th at 21 years and the 95th percentile at 31 years, the 99th percentile at 38 years and the 99.9th percentile at 47 years. This would suggest, that at least under the parameter ranges used here, one can be extremely confident that copyright term should be 50 years or less—and it is highly like that optimal term should be under 30 years (95th percentile).<sup>79</sup>

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<sup>74</sup> See H.R. REP. NO. 60-2222, at 14 (1909).

<sup>75</sup> H.R. Rep. 59-7083, at 14 (1907).

<sup>76</sup> WILLIAM PATRY, *HOW TO FIX COPYRIGHT* 57 (2011).

<sup>77</sup> I.P.L. Png & Qiu-hong Wang, *Copyright Law and the Supply of Creative Work: Evidence from the Movies* (2009), <http://www.comp.nus.edu.sg/~ipng/research/copyrt.pdf>.

<sup>78</sup> Rufus Pollock, *Forever Minus a Day? Calculating Optimal Copyright Term* (2009), [http://rufuspollock.org/economics/papers/optimal\\_copyright\\_term.pdf](http://rufuspollock.org/economics/papers/optimal_copyright_term.pdf). The study noted a ninety-nine percent confidence interval extending up to thirty-eight years, which means that there is a ninety-nine percent chance that the optimal range is under thirty-eight years. *Id.*

<sup>79</sup> *Id.* See also Rufus Pullock, *Optimal Copyright Over Time: Technological Change and the Stock of Works* (2007), [rufuspollock.org/papers/optimal\\_copyright\\_over\\_time.pdf](http://rufuspollock.org/papers/optimal_copyright_over_time.pdf).



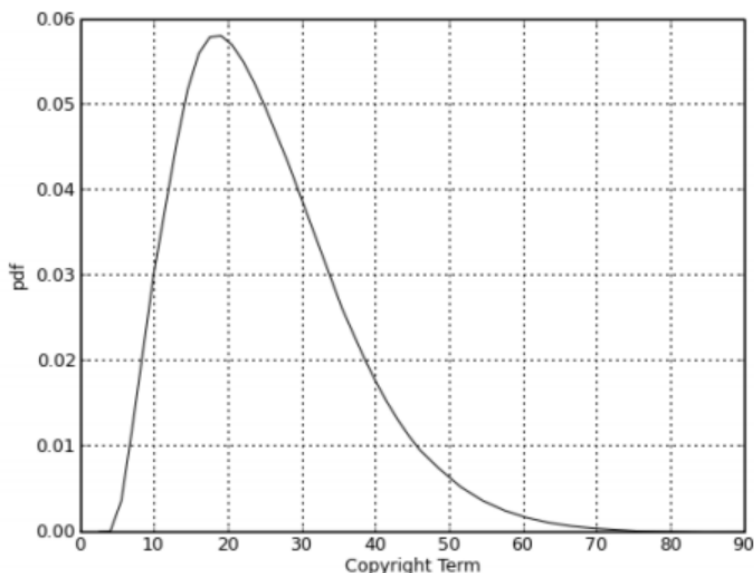


FIGURE 3. Probability distribution of optimal term given the parameter range set out above (with the exception that  $\gamma$  takes a single value of 0.129).

Even, the Congressional Research Service, which one might think would be inclined in favor of the perspectives of Members of Congress, nonetheless concluded that the added incentive to create new works provided by a twenty-year extension to the term of copyright was small compared to the preexisting incentive.<sup>80</sup> These studies are a small sample of a general consensus on the subject, optimal lengths may be shorter or longer, the studies differ on the exact number, but the data demonstrates that optimal length is significantly shorter than life plus seventy years. Further, a survey of available studies was unable to find any studies offering a counter perspective—that life plus seventy years is appropriate.

The Copyright Clause provides for both copyright and patents, both with the Constitutional requirement of being for a “limited time.” Therefore, an analysis of the perpetual extension of copyright can be best compared against the extension of patent terms—for which is virtually none. While copyright started with fourteen years, twenty-eight years maximum with renewal, and is today life plus seventy years

<sup>80</sup> CONG. RESEARCH SERV., COPYRIGHT TERM EXTENSION: ESTIMATING THE ECONOMIC VALUES 4 (1998), available at [http://assets.opencrs.com/rpts/98-144\\_19980511.pdf](http://assets.opencrs.com/rpts/98-144_19980511.pdf).

for individuals. Patents started with up to fourteen year terms under the Patent Act of 1790 and are seventeen to twenty year terms today (twenty years from filing or seventeen years from patent issuing, whichever is longer).<sup>81</sup> Patents, as a comparable data point, demonstrate the severity of copyright extension.<sup>82</sup> With the literature on the impact of lobbying interests upon copyright, one can hypothesize that with copyright there is only one major interest group. And that interest group, the content industry, is in favor of longer terms to ensure that their works never enter the public domain. This group has manipulated the system specifically over the past twenty-five to fifty to seventy-five years. Whereas, in the case of patents there are interest groups on both sides as there are major companies in favor of longer patents and also interest groups that do not want to see perpetual patents so that they can use the technology. Patents are essentially a deal with the general public—teach the world how to create your invention and in return you get an exclusive period of time to monetize off of that invention through a government created property right. With patents, interest groups are on both sides, in the vernacular of James Madison’s Federalist 10, patents create “factions” which combat other “factions” to ensure that the term length at least never gets too ridiculous.<sup>83</sup>

While some have claimed that technology companies are a special interest that is fighting against the content industry, what technology company would have a vested interest in having copyright terms eventually expire? They may have other considerations, like wanting to be able to develop a VCR, DVR, iPod, Satellite TV, and so on, without being bankrupted by the RIAA/MPAA—an existential threat given that each technology was challenged through lobbying and legal battles—but technology companies have no direct interest in opposing to copyright’s term extension, which is the example most emblematic of the system being manipulated by special interests rather than good policy considerations. This theory seems to provide one logical explanation for why patents have remained relatively constant in term length whereas copyright has not.

In addition to current copyright protection extending many times longer than at the time of Founders, effectively indefinitely, dropping the registration requirement and thereby making copyright automatic<sup>84</sup> is an unprecedented expansion in the scope of copyright—and a

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<sup>81</sup> See 35 U.S.C. 154 (2012).

<sup>82</sup> See also *Eldred v. Ashcroft*, 537 U.S. 186, 201 (2003) (“Because the Clause empowering Congress to confer copyrights also authorizes patents, congressional practice with respect to patents informs our inquiry. We count it significant that early Congresses extended the duration of numerous individual patents as well as copyrights.”).

<sup>83</sup> THE FEDERALIST NO. 10 (James Madison), available at [http://thomas.loc.gov/home/histdox/fed\\_10.html](http://thomas.loc.gov/home/histdox/fed_10.html).

<sup>84</sup> Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

substantial shift that has often been ignored. For much of our history, copyright required that a content creator register his copyright in order to receive the full benefit for the term extension. The simple act of changing the “default” option can have profound impact upon what is copyrighted.<sup>85</sup> The Founders designed a system where authors had to opt in to obtain copyright protection; copyright today requires that those who do not want protection must opt-out through a complex process that requires knowledge and use of creative commons licenses or similar agreements. As a result, most individuals who tweet,<sup>86</sup> facebook, text and send e-mails are likely unaware that of their content being copyrighted, and many recipients of e-mails would be surprised to know that even forwarding an e-mail to someone else could technically be a form of copyright infringement.<sup>87</sup>

Given that there are only, at best, marginal benefits of this change, what is the cost? As Milton Friedman, Richard H. Coase and fourteen other free market economists argued in their brief for the *Eldred v. Ashcroft* case:

[A] lengthened copyright term under the CTEA keeps additional materials out of new creators’ hands. Would-be new creators face increased transaction costs: the necessity to engage in costly locating (especially for very old works, the very ones that would be in the public domain but for the CTEA) and bargaining with multiple parties. These higher costs give new creators less incentive to produce. As a result, the CTEA imposes two kinds of burden on

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<sup>85</sup> See, e.g., RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* 35 (Penguin Books, 2d ed. 2009) (“The combination of loss aversion with mindless choosing implies that if an option is designated as the “default,” it will attract a large market share. Default options thus act as powerful nudges.”).

<sup>86</sup> All your tweets, as long as they are an “original works of authorship,” are presumably copyright protected (though there may be fair use to use them and the work may only consist of facts which are not themselves copyrightable). See 17 USC § 102 (2012) (a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”).

<sup>87</sup> See Software & Information Industry Association, *Types of Content Infringement*, SIIA, [http://www.siiia.net/index.php?option=com\\_content&view=article&id=353:types-of-content-infringements&catid=162:anti-piracy-articles&Itemid=385](http://www.siiia.net/index.php?option=com_content&view=article&id=353:types-of-content-infringements&catid=162:anti-piracy-articles&Itemid=385) (last visited Oct. 5, 2013) (“There are various ways to infringe copyright via e-mail. Any e-mail you receive from another person is their copyrighted work, so forwarding it to someone else or printing it without the author’s permission technically violates the author’s exclusive rights. E-mail is a fast and easy way to distribute information and therefore is a fast and easy way to violate a copyright owner’s right to distribution. This could be done by attaching a copy—even a legally obtained copy—of a file to an e-mail, or even by copying and pasting text into the body of an e-mail. Probably all of us have infringed someone’s copyright through e-mail, but one should be particularly careful in the case of proprietary information—information that is obtained only through paid subscription. Pay particular attention to copyright notices and warnings on e-mails you receive and on any attachments you send.”).

society, fewer new works produced and higher transaction costs in the creation of some works.<sup>88</sup>

They argued that extending terms length to life plus seventy years, and retrospectively, was inefficient and that it also “reduces consumer welfare.”<sup>89</sup>

Conservative Jurist Richard Posner, most cited jurist of twentieth century, explains the problems with our current copyright term length being too long, “copyright protection seems on the whole too extensive[.]” and how it effects content creators:

The most serious problem with copyright law is the length of copyright protection, which for most works is now from the creation of the work to 70 years after the author’s death. Apart from the fact that the present value of income received so far in the future is negligible, obtaining copyright licenses on very old works is difficult because not only is the author in all likelihood dead, but his heirs or other owners of the copyright may be difficult or even impossible to identify or find. The copyright term should be shorter.<sup>90</sup>

In *The Economic Structure of Intellectual Property Law*, Posner provides a useful list on the costs of too long copyright:

(1) Tracing costs increase with the length of copyright protection; (2) transaction costs may be prohibitive if creators of new intellectual property must obtain licenses to use all the previous intellectual property they seek to incorporate; (3) because intellectual property is a public good, any positive price for its use will induce both consumers and creators of subsequent intellectual property to substitute inputs that cost society more to produce or are of lower quality, assuming (realistically however) that copyright holders cannot perfectly price discriminate; (4) because of discounting to present value, incentives to create intellectual property are not materially affected by cutting off intellectual property rights after many years, just as those incentives would not be materially affected if . . . lucrative new markets for copyrighted work, unforeseen when the work was created, emerged . . .<sup>91</sup>

The RSC Report was based specifically upon these free market economist works when it argued that “[t]oday’s legal regime of copyright law is seen by many as a form of corporate welfare that hurts

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<sup>88</sup> Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01618), 2002 WL 1041846 at \*14-15.

<sup>89</sup> *Id.*

<sup>90</sup> Richard Posner, *Do Patent and Copyright Law Restrict Competition and Creativity Excessively?*, BECKER POSNER BLOG (Sept. 30, 2012), <http://www.becker-posner-blog.com/2012/09/do-patent-and-copyright-law-restrict-competition-and-creativity-excessively-posner.html>.

<sup>91</sup> WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 213 (2003).

innovation and hurts the consumer.”<sup>92</sup> Consumers are denied the ability to acquire derivative works, as well as content that that would otherwise have been in the public domain (in addition, beyond term lengths various technologies are banned from consumers).

As a result of long copyright terms and unclear fair use laws, the issue that Posner has considered to be the second biggest problem with current copyright law,<sup>93</sup> we have clear evidence of content creation being limited rather than incentivized as new artists, directors and writers are unable to create derivative works without paying fees that often discourage content creation. As just a few examples: obtaining songs from one DJ costs fourteen dollars per song to pay for the underlying works,<sup>94</sup> Puff Daddy’s song *I’ll be Missing You* required him to pay Sting 100% of publishing royalties<sup>95</sup> and Director Jon Else had to pay \$7,000 to license 4.5 seconds of *The Simpsons* that were in the background of one scene in his educational documentary (because of budget constraints he removed the shot, which was clearly fair use protected).<sup>96</sup> When Public Enemy’s producer Hank Shocklee was asked whether it would be possible today to make a record like *It Takes a Nation of Millions to Hold Us Back*, which featured hundreds of samples, Shocklee remarked that “[i]t wouldn’t be impossible. It would just be very, very costly. . . . Now you’re looking at one song costing you more than half of what you would make on your album.”<sup>97</sup> Chuck D added that the noticeable difference in Public Enemy’s sound between 1988 and 1991 was a direct product of the sampling lawsuits that occurred at the time: “Public Enemy’s music was affected more than anybody’s because we were taking thousands of sounds . . . we had to change our whole style, the style of *It Takes a Nation* and *Fear of a Black Planet*, by 1991.”<sup>98</sup> Many of these samples would be in the public domain if copyright terms were closer to their historical average rather than effectively infinite.

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<sup>92</sup> REPUBLICAN STUDY COMMITTEE, *supra* note 2, at 4.

<sup>93</sup> Posner, *supra* note 90. (“The problem is that the boundaries of fair use are ill defined, and copyright owners try to narrow them as much as possible, insisting for example that even minute excerpts from a film cannot be reproduced without a license. Intellectual creativity in fact if not in legend is rarely a matter of creation ex nihilo; it is much more often incremental improvement on existing, often copyrighted, work, so that a narrow interpretation of fair use can have very damaging effects on creativity. This is not widely recognized.”).

<sup>94</sup> See Rachel Feltman, *These Songs Cost Upwards of \$14 Apiece, and People are Actually Paying*, QUARTZ (July 19, 2013), <http://qz.com/106473/these-songs-cost-upwards-of-14-apiece-and-people-are-actually-paying/>.

<sup>95</sup> Roger Friedman, *Is Diddy’s ‘Vote or Die’ Dead or Just Sleeping*, FOX NEWS (April 25, 2006), <http://www.foxnews.com/story/2006/04/25/is-diddy-vote-or-die-dead-or-just-sleeping/>.

<sup>96</sup> LESSIG, *supra* note 68, at 95-99.

<sup>97</sup> Kembrew McLeod, *How Copyright Law Changed Hip Hop: An Interview with Public Enemy’s Chuck D and Hank Shocklee*, STAY FREE!, Fall 2002, at 24, available at [http://www.stayfreemagazine.org/archives/20/public\\_enemy.html](http://www.stayfreemagazine.org/archives/20/public_enemy.html).

<sup>98</sup> *Id.*

As one incredible example, *Eyes on the Prize*, perhaps the most important documentary on the civil rights movement, has had serious difficulties being rebroadcast because of license requirements for photographs and archive music. Professor Peter Jaszi has said that “[i]t’s not clear that anyone could even make ‘Eyes on the Prize’ today because of rights clearances.”<sup>99</sup> These are not isolated examples, many documentaries are scared to rely upon “fair use” and have to pay sometimes exorbitant licensing costs to feature small amounts of other content.<sup>100</sup> If copyright terms were fourteen years as they were in 1790, or even fifty years, then the rights to short video clips for much of these historical events would be in the public domain.

Therefore, the Report argued that this copyright regime has the effect of picking winners and losers:

[Our copyright regime] 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 [current copyright law] actually hurts innovation, because we don’t know what isn’t able to be produced as a result of our current system.<sup>101</sup>

The Report argued that if our current copyright system were adjusted, that this would likely stimulate innovation and generate new industries.<sup>102</sup>

It is almost always difficult to demonstrate an alternative reality under a different system, but in public policy discussions, extrapolation is a common method of analyzing the implications of various policies. In this case, there are sufficient data points to begin to analyze the real impact of our copyright regulation upon new markets and untried

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<sup>99</sup> Nancy Ramsey, *The Hidden Cost of Documentaries*, N.Y. TIMES (Oct. 16, 2005), [http://www.nytimes.com/2005/10/16/movies/16rams.html?pagewanted=print&\\_r=0](http://www.nytimes.com/2005/10/16/movies/16rams.html?pagewanted=print&_r=0).

<sup>100</sup> See Mike Masnick, *Comic Strip Documentary Filmmakers Return to Kickstarter Because They’re Scared Fair Use Won’t Protect Them*, TECHDIRT (March 15, 2013), [www.techdirt.com/articles/20130308/03112522252/comic-strip-documentary-filmmakers-return-to-kickstarter-because-theyre-scared-fair-use-wont-protect-them.shtml](http://www.techdirt.com/articles/20130308/03112522252/comic-strip-documentary-filmmakers-return-to-kickstarter-because-theyre-scared-fair-use-wont-protect-them.shtml). See also Mike Masnick, *Arrested Development Documentary Has to Hit Up Kickstarter Because Fox Claims Copyright On Set Photos*, TECHDIRT (Mar. 27, 2013), [www.techdirt.com/articles/20130324/00142322432/arrested-development-documentary-has-to-hit-up-kickstarter-because-photos-set-are-covered-copyright.shtml](http://www.techdirt.com/articles/20130324/00142322432/arrested-development-documentary-has-to-hit-up-kickstarter-because-photos-set-are-covered-copyright.shtml) (“After five years, we’re finally close to releasing the documentary. Our final step is to pay the network for photos from the set of the show. These photos are extremely relevant to the story, and we can’t move forward with the release of the documentary until our fees are paid to the network. This is where you come in. Help us pay the network fees so every Arrested fan can see this documentary!”).

<sup>101</sup> REPUBLICAN STUDY COMMITTEE, *supra* note 2, at 4.

<sup>102</sup> See Fred von Lohmann, *Fair Use as Innovation Policy*, 23 BERKELEY TECH. L.J. 829, 843 (2008) (“[T]here would be no iPod if Apple could not count on copyright law to permit iPod buyers to copy their existing CD collections. Similarly, there would be no TiVo but for the ability of consumers to copy programming from broadcast, cable, and satellite television. Both the VCR and analog cassette recorder had the same genesis—when these devices were launched, only by indulging in private copying of existing television broadcasts or LP records could the consumer actually find anything to play on the devices . . .”).

market models.

The Report argued that our copyright regime has:

1. Retarded the creation of a robust music remix industry;
2. Hampered scientific inquiry;
3. Stifled the creation of a public-domain library;
4. Discouraged added-value industries; and,
5. Penalized legitimate journalism and oversight.<sup>103</sup>

Because we want to promote innovation and allow for new market models (often created by disruptive innovations), we should be skeptical of any regulation that goes beyond compensating the content creator and that may ultimately frustrate those ends. The music remix market is just one example,<sup>104</sup> as these derivative works do not displace the original works because “[b]y definition, a derivative work is an imperfect substitute; often it is no substitute at all.”<sup>105</sup> Given the wider exposure that comes from derivative works (new audiences being introduced), the empirical and anecdotal evidence shows that, at least in some cases, derivative works actually increase sales of the original works.<sup>106</sup> In light of this potentially expanded market, a copyright policy that creates uncertainty about the legal scope of fair use, or that legally restricts fair use excessively, might actually be counterproductive for both the original content creator and the new content creator, as it serves to chill the creation of derivative works that would otherwise benefit the owner of the original work. The chilling effect is particularly worrisome because of the severe statutory damages provision of copyright law.

Danger Mouse’s release of the *The Grey Album*<sup>107</sup> exemplifies the situation in which the beneficial impact of derivative works are stifled from being disseminated widely. *The Grey Album* remixed<sup>108</sup> Jay-Z’s *The Black Album*<sup>109</sup> and the Beatles’ *The White Album*.<sup>110</sup> When Jay-Z was asked for comment, during an interview on NPR, he said:

I think it was a really strong album. I champion any form of creativity, and that was a genius idea—to do it. And it sparked so

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<sup>103</sup> REPUBLICAN STUDY COMMITTEE, *supra* note 2, at 5–7.

<sup>104</sup> For more on the concept of “disruptive innovation,” see CLAYTON M. CHRISTENSEN, *THE INNOVATOR’S DILEMMA* (HarperBusiness Essentials 2003) (1997).

<sup>105</sup> LANDES & POSNER, *supra* note 91, at 109.

<sup>106</sup> W. Michael Schuster, *Fair Use, Girl Talk, and Digital Sampling: An Empirical Study of Music Sampling’s Effect on the Market for Copyrighted Works* (Oct. 14, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2340235](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2340235).

<sup>107</sup> DANGER MOUSE, *THE GREY ALBUM* (Self-Released 2004), available at <http://archive.org/details/DjDangerMouse-TheGreyAlbum>.

<sup>108</sup> This type of remix is sometimes called a “mashup.”

<sup>109</sup> JAY-Z, *THE BLACK ALBUM* (Roc-A-Fella, Def Jam 2003).

<sup>110</sup> *THE BEATLES, THE BEATLES* (Apple, 1968).

many others like it. There are other ones that—you know, it's really good—there are other ones that because of the blueprint that was set by him, that I think are a little better. But you know, him being the first and having the idea, I thought it was genius.<sup>111</sup>

When asked if he felt “ripped off” by Danger Mouse’s failure to purchase a license to use the underlying work, a license that would likely have been so excessive in cost that Danger Mouse would not bother creating the work at all, Jay-Z responded: “No, I was actually honored that, you know, that someone took the time to mash those records up with Beatles records. I was honored to be on—you know, quote-unquote, the same song with the Beatles.”<sup>112</sup>

Jay-Z likely wanted other artists to create derivative works using his material. He took the unusual step of releasing an a cappella version of his latest album giving DJs the opportunity to remix his vocals with new musical accompaniment.

While Danger Mouse’s album very well may have been introducing, or reintroducing, Jay-Z fans to the Beatles and vice versa, Jay-Z’s perspective was not shared by all parties. EMI, representing the Beatles’ sound recording, and Sony and ATV Publishing, owner of the compositions on the album, sent a cease-and-desist letter to Danger Mouse despite Jay-Z’s apparent approval. While this is perfectly acceptable behavior given our current term of copyright, a shorter copyright term, such as the term length for most of American history, would have already moved the Beatles songs into the public domain, where anyone could employ them for their own creative derivative use.

The success of George Clinton provides another anecdotal data point on this issue. George Clinton sold over ten million records in the 1970s, but by the 1980s most of his records were out of print. But then, Clinton became a favorite of hip-hop producers who used samples of Clinton’s songs in their new music. The sampling of Clinton’s work introduced him to an entirely new generation and revitalized Clinton’s career through the republication of most of his records. He has famously encouraged artists to sample his work, “we never minded them sampling . . . .”<sup>113</sup>

The argument that mash-ups and remixing increases the sales for each party is not just the perspective of these selected artists, there are many others, but it is also bolstered by empirical data. Recently, an empirical study was conducted by Michael Schuster on the effect that

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<sup>111</sup> *Transcript: Jay-Z: The Fresh Air Interview*, NPR (Nov. 16, 2010, 12:13 PM), <http://www.npr.org/templates/transcript/transcript.php?storyId=131334322>.

<sup>112</sup> *Id.*

<sup>113</sup> Jeremiah Alexis, *George Clinton: “We Never Minded Them Sampling,”* REDBULL MUSIC (May 14, 2013), <http://www.redbull.com/us/en/music/stories/1331590648362/george-clinton-on-samples-youtube-and-youth>.



digital sampling has on sales of copyrighted songs.<sup>114</sup> The study analyzed the impact of Greg Gillis's (Girl Talk's) most recent album that samples over 350 songs. His study found, within a 92.5% degree of statistical significance, that the copyrighted songs sold better in the year after being sampled relative to the year before.<sup>115</sup>

Millions around the world are fans of a genre of music known as electronic dance music, which mainly consists of remixes that combine samples of existing songs with new beats or instrumental tracks. With modern software and computing power, it is so easy to create that many amateurs are learning how to make this themselves. According to DJ Danger Mouse:

Mashing is so easy. It takes years to learn how to play the guitar and write your own songs. It takes a few weeks of practice with [a] turntable to make people dance and smile. It takes a few hours to crank out something good with some software. So with such a low barrier to entry, everyone jumps in and starts immediately being creative. **I don't understand why that is illegal.**<sup>116</sup>

Unfortunately, because of incredibly high royalty costs, most DJs (all but a very select few) sample music without receiving permission or paying licenses—opening themselves up to legal liability. Because many DJs do not have the resources to defend themselves in litigation—particularly against large corporate copyright holders with deep pockets and elite legal teams—they are forced to settle when sued, even when the claims against them are meritless or even frivolous.

Because fair use can be defined broadly or narrowly, the statute leaves it incredibly vague, some courts have upheld only limited uses of others work, while others have a higher threshold for what is fair use. As a result, decisions are all over the map, and the case law is muddled and incomprehensible—incomprehensible to most lawyers let alone most artists. This uncertainty creates a chilling effect upon this industry, greatly increases transaction costs,<sup>117</sup> and impedes the national market for many of these artists, fearing that if they grow too large then they become a bigger target for litigation. Unfortunately, it is difficult to

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<sup>114</sup> Schuster, *supra* note 106.

<sup>115</sup> *Id.*

<sup>116</sup> Jeffrey Veen, *Millionaires Making People Smile*, VEEN (Oct. 6, 2004), <http://www.veen.com/jeff/archives/000627.html> (quoting DJ Danger Mouse) (emphasis added).

<sup>117</sup> Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners, *supra* note 85, at \*13-14 (“As Ronald Coase and many others have pointed out, economic efficiency is best promoted by legal arrangements that minimize transaction costs. Here, a limit on the duration of control rights over derivative works tends to reduce transaction costs. To the extent that the duration of derivative rights is expanded instead, there will tend to be an increase in wasteful expenditures to locate and bargain with copyright holders, as well as a reduction in the creation of new works based upon earlier copyrighted works.”). *See also* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

completely assess and speculate as to what type of content is suppressed by our long terms of copyright and legal uncertainty about what qualifies as fair use, but given the anecdotal evidence, we can credibly hypothesize that it is likely significant.

As an aside, it is curious that the Disney Corporation is perhaps the main proponent of our current copyright system of indefinite copyright and unclear fair use laws, which discourage derivative works, given that the company was built largely on the success of derivative works. *Steamboat Willie* was a cartoon parody of *Steamboat Bill Jr.* Many of Disney's successes were derivatives of Grimms Fairy Tales: *The Little Mermaid*, *Snow White*, *Cinderella*, *Sleeping Beauty* and more.<sup>118</sup> As David Wolverine explains:

"Fantasia" was literally a series of short animated stories edited together to a soundtrack made up of mostly public domain music for which Disney paid no license (with the exception of "The Rite Of Spring").

From there on, most Disney feature animations would be based on stories that had since fallen into public domain. Snow White, Cinderella, Sleeping Beauty and many other princess stories, were based on age-old fairy tales that Disney was not required to pay license or royalties for. Later works would include children's literature like: "Pinocchio", "Alice in Wonderland", "The Jungle Book" (released just one year after Kipling's copyright expired),— All in the public domain! Disney didn't pay a cent for story license, yet reaped many millions. The "Little Mermaid", "Beauty and the Beast", "Aladdin" and all features made under the reign of Michael Eisner, would be from public domain. Of course, Disney touted "The Lion King" as an original story. Not! Besides being an adaptation of Shakespeare's "Hamlet" told through a pride of lions, there are way too many similarities between The Lion King and a 1960s Japanese animated series called "Kimba the White Lion". Though Disney claims these a coincidence, they would sue anyone else into oblivion if they came half as close to one of their properties.<sup>119</sup>

Content exists through remixing previous culture, both content made by professional outlets and amateur content made by users and uploaded to YouTube. Shakespeare has been repackaged and reproduced in thousands of books and movies, and music in some ways may be even more iterative in nature.

The RSC Report section on hampering journalism and oversight was another section that received some push-back from the content

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<sup>119</sup> David Wolverine, *The Wonderful World of Disney Hypocrisy*, ROAR OF WOLVERINE (Jan. 13, 2012), [roarofwolverine.com/archives/1435](http://roarofwolverine.com/archives/1435).

industry. In the original report, the section was written for clarity and brevity rather than going in-depth to fully explicate its point.<sup>120</sup> The section was shortened because there are numerous examples of where litigation threats of copyright infringement were used to stifle oversight, historical analysis and journalism.

As one example, in 2003, Diebold, a leading electronic voting machine company, was caught manipulating the testing data of its voting machines.<sup>121</sup> Students published internal memos that showed how Diebold's management knew of the machine's integrity problems but intentionally hid this information from the public.<sup>122</sup> Thus, the information that demonstrated that the nation's voting system, at least in certain areas, was potentially vulnerable—information that should have been factored in to the public dialogue for whether states adopt this technology—was intentionally withheld and then made public against Diebold's will. Diebold sued the students for copyright infringement.<sup>123</sup> The students managed to win in a countersuit.<sup>124</sup>

In *Salinger v. Random House, Inc.*, the court upheld J.D. Salinger's copyright claims to prohibit the publishing of unpublished letters.<sup>125</sup> Ian Hamilton's book, *J.D. Salinger: A Writing Life*, the subject of the litigation, included unpublished letters written to Salinger's close friends as well as Judge Learned Hand, Hamish Hamilton and Ernest Hemingway.<sup>126</sup> According to the Court findings, Ian Hamilton located "most, if not all, of the letters in the libraries of Harvard, Princeton, and the University of Texas" where they had been donated.<sup>127</sup> Of the forty-four letters that Hamilton obtained, the court found that "the Hamilton biography copies (with some use of quotation or close paraphrase) protected sequences constituting at least one-third of 17 letters and at least 10 percent of 42 letters."<sup>128</sup> The court prohibited Ian Hamilton from including these materials in his book by finding that this did not constitute fair use.<sup>129</sup> However, the court's holding, which prohibited the literal copying and paraphrasing of substantial portions, seemed to leave the door open for summarizing facts about the letter.

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<sup>120</sup> Brevity is a virtue in Congress. In fact, after the RSC Report I was asked by one Member to condense the arguments to one page.

<sup>121</sup> Micah White, *Targeting Diebold with Electronic Civil Disobedience*, MICAHWHITE.COM (Oct. 29, 2003), <http://micahmwhite.com/why-war-archive/targeting-diebold-with-electronic-civil-disobedience>.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987).

<sup>126</sup> *Id.* at 92–93.

<sup>127</sup> *Id.* at 93.

<sup>128</sup> *Id.* at 98.

<sup>129</sup> *Id.* at 99.

It should be noted that in 1992, Congress added to 17 U.S.C. § 107, “The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”<sup>130</sup> But in *Salinger*, while the letters weighed against Hamilton’s claim of fair use, it was part of its four-factor test analysis. Therefore, the 1992 revisions may not have, likely would not have, changed the outcome. This type of legal uncertainty as to whether it is legal to publish unpublished letters and in what quantity, in the case of biographies and journalism, can change what gets written. Biographers and journalist may bargain<sup>131</sup> with the rights holders to publish materials that could debatably be published under fair use.

In another example, Edward Felten, Professor at Princeton University and Director of the Center for Information Technology Policy, had his team analyze a new encryption scheme being used to protect digital content as part of a Public Challenge to analyze the new SDMI encryption protocol. His team identified key weaknesses in the encryption being used and believed it worthwhile to demonstrate that the encryption scheme was flawed because they knew that many other encryption systems would likely suffer the same weakness. They tried to publish a paper on the weaknesses of this system,<sup>132</sup> which is a quintessential example of first amendment protected speech, when they received a letter from an RIAA lawyer: “Any disclosure of information gained from participating in the Public Challenge would be outside the scope of activities permitted by the Agreement and could subject you and your research team to actions under the Digital Millennium Copyright Act (“DMCA”).”<sup>133</sup> Ed Felten then sued for the right to publish his findings. Ultimately the RIAA backed down and the case was dismissed, thereby allowing Felten’s team to publish.<sup>134</sup>

Ultimately, after litigation, in Diebold and in Felten’s SDMI case they were both allowed to publish. Some on the content story have claimed that Felten’s SDMI case was a “happy ending” because the RIAA backed down and ultimately allowed Felten to publish, but this misses the point.<sup>135</sup> These are the stories that went to court, most do not

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<sup>130</sup> 17 U.S.C. § 107 (2012).

<sup>131</sup> See, e.g., Mark O’Connell, *Has James Joyce Been Set Free?*, THE NEW YORKER (Jan. 11, 2012), [www.newyorker.com/online/blogs/books/2012/01/james-joyce-public-domain.html](http://www.newyorker.com/online/blogs/books/2012/01/james-joyce-public-domain.html) (“Scholars were charged extortionate permissions fees, and often bluntly refused the right to quote from his grandfather’s work at all.”).

<sup>132</sup> EFF, *Felten, et al., v. RIAA, et al.*, EFF, [http://w2.eff.org/IP/DMCA/Felten\\_v\\_RIAA/](http://w2.eff.org/IP/DMCA/Felten_v_RIAA/) (last visited Nov. 3, 2013).

<sup>133</sup> Matthew Oppenheim, *RIAA, CRYPTOME*, (April 9, 2001), <http://cryptome.org/sdmi-attack.htm>.

<sup>134</sup> Mike Masnick, *Felten Lawsuit Dismissed*, TECHDIRT (Nov. 28, 2001), [www.techdirt.com/articles/20011128/1641253.shtml](http://www.techdirt.com/articles/20011128/1641253.shtml).

<sup>135</sup> Ed Felten, *Happy Endings*, FREEDOMTINKER (April 28, 2006), <https://freedom-to-tinker.com/blog/felten/happy-endings/>.

have those resources. The real impact of these laws is not reflected just in the cases that go to court but rather the impact upon those who are at the receiving end of cease and desist letters, threats of lawsuit and legal jeopardy. Most researchers and independent journalists do not have the resources or time to fight everything to court. The real impact of this litigious strategy can be seen in settlements to avoid being sued, altering their content before they release it, or choosing not to publish all together. Not all researchers are willing to fight to court in the way that Ed Felten would. As Felten described it:

Let's catalog the happy consequences of our case. One person lost his job, and another nearly did. Countless hours of pro bono lawyer time were consumed. Anonymous donors gave up large amounts of money to support our defense. I lost at least months of my professional life, and other colleagues did too. And after all this, the ending was that we were able to publish our work—something which, before the DMCA, we would have been able to do with no trouble at all.

In the end, yes, we were happy—in the same way one is happy to recover from food poisoning. Which is not really an argument in favor of food poisoning.<sup>136</sup>

By the government facilitating a bargaining process, rather than an unrestricted ability to publish, it impacts which materials are published or even how they are presented. In that regard, it limits free speech.<sup>137</sup> Giving this level of control is a significant deviation from the purpose of copyright to incentivize the creation of the content to begin with. These examples are only a few of many.

The Report pointed out that all these problems are symptoms of the current system that has been implemented and evidence that Congress needed to seriously analyze if this there was not a more effective way to update copyright laws to foster innovation and lead to greater content creation.

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<sup>136</sup> *Id.*

<sup>137</sup> See Gordon Bowker, *James Joyce's Grandson Stephen and Literature's Most Tyrannical Estate*, THE DAILY BEAST (June 14, 2012), [www.thedailybeast.com/articles/2012/06/14/james-joyce-s-grandson-stephen-and-literature-s-most-tyrannical-estate.html](http://www.thedailybeast.com/articles/2012/06/14/james-joyce-s-grandson-stephen-and-literature-s-most-tyrannical-estate.html). See also *James Joyce's Grandson Stephen and Literature's Most Tyrannical Estate*, SHAREMORDESIGNS (Oct. 9, 2013), <http://sharewaremoredesigns.com/james-joyces-grandson-stephen-and-literatures-most-tyrannical-estate/> (“[O]thers had been thwarted by literary estates. Anthony Mockler was forced to drop his biography of Graham Greene after it had already been written, and was able to publish it only after the author’s death. Aspiring biographers of Sylvia Plath have been frustrated by her husband, Ted Hughes, who destroyed pages of her diaries wherever it mentioned him, in so blocking future attempts to write a comprehensive account of their stormy marriage.”).

### III. REFORMS TO COPYRIGHT LAW

The RSC Report argued for four main reforms to copyright law:

1. Reduce statutory damages;
2. Fix and expand fair use;
3. Reform DMCA take-down process to deal with false or fraudulent requests; and
4. Reduce the length of copyright to a rational term determined by economic data.<sup>138</sup>

#### A. *Statutory Damages and Fair Use*

Many of these reforms are not novel: for example, Pamela Samuelson has persuasively argued that “a model copyright act should address remedies for copyright infringement,” “[c]larify [i]nfringement [s]tandards,” and “[r]educe the [d]uration of [c]opyright.”<sup>139</sup> The Copyright Principles Project report, *Directions for Reform*, endorsed some similar proposals, including creating “new incentives for registering copyrighted works,” and “[addressing] the defects of the current statutory damages regime,”<sup>140</sup> but was unable to come to a consensus on reducing copyright terms.<sup>141</sup>

*Directions for Reform* argued that copyright statutory damages, which are capable of making individuals liable for up to a billion dollars in damages for material on their iPods, are arbitrary and sometimes grossly excessive.<sup>142</sup> In effect, if caught, copyright offenders, in the case of willful infringement, are often liable for more damages than they could ever repay for the rest of their lives—amounts that can be thousands or millions of times greater than actual damages.<sup>143</sup>

In addition to affecting individual consumers, this also has a chilling effect on legitimate businesses. As a society we want efficient investment in new technologies with new market models, but such unjustifiably high damages become a sword of Damocles, chilling any innovation, including legitimate technologies, that could be found to be potentially copyright infringing. If there is a 1% chance that a technology could be found to facilitate infringement, and that could lead to a company being found liable, then the potential billions of dollars in liability may make that technology too risky to develop. This is

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<sup>138</sup> REPUBLICAN STUDY COMMITTEE, *supra* note 2, at 7–9.

<sup>139</sup> See Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 558, 566–67 (2007).

<sup>140</sup> See Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1194, 1196 (2010).

<sup>141</sup> *Id.* at 1185.

<sup>142</sup> *Id.* at 1196. (“[S]tatutory damage awards sometimes appear arbitrary or grossly excessive in comparison with a realistic assessment of actual damages incurred.”).

<sup>143</sup> *Id.*

textbook inefficient risk aversion. And this is well beyond the traditional concepts of copyright theft impacting technologies that seemingly have little to do with piracy. The risk is not only born by the company, but personally born by the CEO, venture capital firms and potentially even the lawyers.

The VCR only survived as a commercial endeavor, and was made available to consumers, because Sony had the resources to continue to litigate when their Betamax recorders were found illegal, and was lucky enough to be one of the few cases to receive certiorari by the Supreme Court where the technology was upheld by one vote—just barely finding the technology as fair use.<sup>144</sup> By finding “fair use” applicable, the Court found manufacturers of home video recording machines were not liable for contributory copyright infringement for the potential uses by its purchasers.<sup>145</sup> The content industry then went after satellite television,<sup>146</sup> an early MP3 player (the Rio)<sup>147</sup> and an early DVR (RePlayTV).<sup>148</sup> All of these technologies were ultimately found to be lawful, but not before millions of dollars were spent in litigation costs, which might have gone to research and development.<sup>149</sup>

The Rio and RePlayTV demonstrate that these laws are so uncertain and poorly crafted that even winning in court is not enough, you also need the perseverance to fight in court for up to nine years (as Sony did) and you have millions of dollars at your disposal to fight all the way to the top (and luck on your side to get certiorari). While the technologies were upheld, this is not a success story as the litigation costs led to the end of the Rio and RePlay TV. Future companies will learn from these examples that developing these technologies is a gamble that they will have to defend in court to the point of potential bankruptcy. Entrepreneurs will know that they have to develop an idea, have a team to build their vision, get venture capital firms to invest, and then hire a powerful legal team in advance to defend against potential litigation.

Such a litigious oriented, legally uncertain, large legal exposure-ridden market is not optimized for innovation. Those millions spent by RePlay TV, Rio and Sony should be invested in new technologies—rather than diverted to tort lawyers’ pockets. In many legitimate technologies, simply having a good idea and developing a good product is not enough, you have to spend millions of your venture capital litigating for legal permission. Today this can be seen in the ongoing

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<sup>144</sup> Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

<sup>145</sup> *Id.*

<sup>146</sup> Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, § 119, 102 Stat. 3941 (1988).

<sup>147</sup> Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072 (9th Cir. 1999).

<sup>148</sup> Newmark v. Turner Broad. Network, 226 F. Supp. 2d 1215 (C.D. Cal. 2002).

<sup>149</sup> The trademarks were ultimately used by another company.

litigation against Aereo TV—the point is not that Aereo’s model should be legal, the point is that the law is so unclear that courts differ on its legality and companies have no legal certainty.<sup>150</sup>

Costly lawsuits against creators of legitimate innovations are a tax upon progress and inhibit economic growth; unfortunately, they are in the back of the mind of innovators developing new technologies. Legal uncertainty and extra legal costs are a result of special interest written laws surgically designed to go after new market participants.

When legal tools are used in a systematic campaign to stop innovation, they drain resources that should go to develop “the next big thing.” When tort law is abused through frivolous slip-and-fall and false medical malpractice claims, it costs businesses billions of dollars in excess litigation, settlements, and insurance.<sup>151</sup> Similarly, tort law is now being abused through copyright—the MPAA/RIAA’s lawsuits against lawful technologies constitute a new *digital-slip-and-fall*-like epidemic.<sup>152</sup>

One of the key components of the problem, and one that makes it more dangerous than conventional tort cases which can also be abused, like medical malpractice, is the massive statutory damages provision,<sup>153</sup> which ensures that there is a windfall if the technology is found to be infringing. In almost all other cases, the petitioner has to demonstrate actual damages, so even if a technology is found to create tort liability then the impact of being found liable is generally limited to actual damages to the other party (with the possibility of lawyers’ fees or punitive damages). But, on the other hand, with statutory damages, if a company is one step over the line of what that court finds legal then they could be liable for unrecoverable amounts in damages. And incredibly, these penalties pierce the corporate shield ensuring that CEOs and other executives could themselves be personally liable.<sup>154</sup> Further, just because many executives buy insurance for this does not remove it as a real cost, in fact, it ensures that this cost born by an even larger number of people.

Today, we have many legitimate market models where

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<sup>150</sup> *Am. Broad. Companies, Inc. v. AEREO, Inc.*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012) *aff’d sub nom.* WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013).

<sup>151</sup> U.S. Chamber of Commerce, *Fast Facts on Lawsuit Abuse Impact*, INSTITUTE FOR LEGAL REFORM, <http://www.instituteforlegalreform.com/featuredtool/fast-facts-on-lawsuit-abuse-impact> (last visited Oct. 6, 2013)

<sup>152</sup> See generally JASON MAZZONE, *COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW* (2011).

<sup>153</sup> 17 U.S.C. § 504 (2012).

<sup>154</sup> See, e.g., *Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 834 (8th Cir. 1992); *Gershwin Publ. Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). See also John J. O’Malley, *Personal Liability of Corporate Officers for Patent, Trademark and Copyright Infringement*, VKLAW.COM (June 12, 2000), <http://vklaw.com/publication/personal-liability-of-corporate-officers-for-patent-trademark-and-copyright-infringement/>.



entrepreneurs have to weigh the risks of taking a certain action: while the entrepreneur and his legal counsel might think the action is legal, he must also consider that, if it turns out that they are incorrect, he and other individuals could be personally liable for billions of dollars of damages. On one side of the legal Rubicon may be a billion dollar company; on the other side may be a billion dollar liability. It may depend on the court, the year and your legal counsel.

Given the risks involved, who would invest in such a technology? In fact, the risks to venture capitalists are greater than just investing in a precarious market and potentially losing every dollar invested; rather, investing can subject venture capitalists to legal liability themselves, putting them at risk of damages well beyond the amount they invest. In the case of Napster, the venture capital firm was sued<sup>155</sup> after investing thirteen million dollars in Napster where Universal Music and EMI were seeking \$150,000 per copyright violation as well as significant punitive damages.<sup>156</sup> Universal and EMI even issued a statement that can most accurately be described as a threat to future venture capitalists: “Businesses, as well as those individuals or entities who control them, premised on massive copyright infringement of works created by artists should face the legal consequences of their actions.”<sup>157</sup> The lawsuit ended with a settlement that some sources quote in the press estimated as between \$50 and \$150 million, which was on top of \$60 million already paid out by the venture capital firm.<sup>158</sup> Investing \$13 million and paying out \$110 million to \$210 million in damages is not an investment they would be likely to make on another technology with dual uses, which includes many legitimate technologies.<sup>159</sup>

Readers should not read this section as an affirmation that Napster’s business model did not pose problems. However, it should be noted that Napster tried to settle the case by agreeing to a filtering system that would remove 99.4% of copyrighted works, but the judge found that 99.4% filtering was not good enough.<sup>160</sup> With the rejection of a filtering system, the decision ultimately impacted the possibility of this technology ever being used for legitimate purposes in the future, with stronger filtering technologies.

While Universal and EMI’s threat to venture capitalists was premised upon technologies that allow for massive copyright

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<sup>155</sup> UMG Recordings, Inc. v. Bertelsmann AG, 222 F.R.D. 408, 410 (N.D. Cal. 2004).

<sup>156</sup> See Glen Shapiro, *Napster Investors Sued by Record Labels*, TAX-NEWS (April 25, 2003), [http://www.tax-news.com/news/Napster\\_Investors\\_Sued\\_By\\_Record\\_Labels\\_\\_\\_11660.html](http://www.tax-news.com/news/Napster_Investors_Sued_By_Record_Labels___11660.html).

<sup>157</sup> *Id.*

<sup>158</sup> Joseph Menn, *Napster Lawsuits near resolution*, L.A. TIMES (Mar. 27, 2007), <http://articles.latimes.com/2007/mar/27/business/fi-napster27>.

<sup>159</sup> See also LESSIG, *supra* note 68, at 95–99.

<sup>160</sup> See Richard Menta, *99.4% Ain’t Good Enough: Judge to Napster*, MP3NEWSWIRE.NET (July 13, 2001) <http://news.hitb.org/content/994-aint-good-enough-judge-napster>.

infringement, those technologies are not necessarily as nefarious as the average reader would suspect. They would presumably include the VCR, which Jack Valenti, previous President of the MPAA, pronounced, “I say to you that the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone.”<sup>161</sup> And that “[w]hen there are 20, 30, 40 million of these VCRs in the land, we will be invaded by millions of ‘tapeworms,’ eating away at the very heart and essence of . . . copyright.”<sup>162</sup> Nearly all new technologies with dual uses could presumably qualify under this threat, which was the point. Would the Internet itself have been a dual-use technology? Statutory damages compound the problem exponentially: if there were not statutory damages, then the actual damages would be limited only to provable damages, as is the case with a slip and fall, making damages generally manageable. But the statutory damages element makes this legal uncertainty an existential problem for a company.<sup>163</sup>

The lawyers have not been absolved of personal liability either. In a case where the technology is of questionable legality, who would offer legal advice for a start-up knowing they could be legally liable? Take the case of MP3.com for example. MP3.com was sued by the major record labels and found guilty of willful infringement. After MP3.com was fined for \$118 million and settled with the remaining plaintiff, Vivendi Universal, for over \$54 million, MP3.com was then purchased by Vivendi for \$372 million, which was considered to be a “bargain-basement price compared with the company’s peak market value of more than \$2 billion.”<sup>164</sup> It was only \$5 per share, \$23 below their IPO share price.<sup>165</sup> Their technology was another technology where one could see a court upholding or striking down. MP3.com allowed “allowed users to purchase a CD online, through various cooperating sites, and placed the contents of the CD into the customer’s MP3 account, so that the music could be ‘streamed’ to his or her computer,

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<sup>161</sup> *Home Recording of Copyrighted Works: Hearing on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488 and H.R. 5705 Before the S. Comm. on the Judiciary*, 97th Cong. 485 (1982) (testimony of Jack Valenti, President, Motion Picture Ass’n of Am., Inc.), available at <http://cryptome.org/hrcw-hear.htm>.

<sup>162</sup> *Copyright Infringements (Audio and Video Recorders): Hearing on S. 1758 Before the S. Comm. on the Judiciary*, 97th Cong. 459 (1982) (testimony of Jack Valenti, president, Motion Picture Association of America, Inc.), cited in David Grazian, *A Digital Revolution? A Reassessment of New Media and Cultural Production in the Digital Age*, 597 ANNALS AM. ACAD. POL. & SOC. SCI. 209, 220 (2005).

<sup>163</sup> See generally JASON MAZZONE, *COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW* (2011).

<sup>164</sup> Jon Healey, *MP3.com Sues Former Copyright Counsel*, L.A. TIMES (Jan. 19, 2002), <http://articles.latimes.com/2002/jan/19/business/fi-mp3.com19>.

<sup>165</sup> Skwerl, *The Record Industry’s War on Innovation, and What you Need to Know About It*, ANTIQUIET (July 18, 2011), <http://www.antiquiet.com/truth/2011/07/the-record-industrys-war-on-innovation/>.

wherever it was located.”<sup>166</sup> This is not necessary a platform encouraging mass-piracy:

The company hoped to differentiate itself from Napster by requiring users to prove ownership of CDs before they downloaded their contents in MP3 format. The idea—and the legal defense to copyright claims—was that the user was not pirating a MP3 by gaining access to it for free; rather, he was only listening to music for which he had already paid.<sup>167</sup>

The music that MP3.com was streaming was music for which MP3.com had paid for. MP3.com’s founder Michael Robertson describes the record labels legal strategy as “a very effective campaign of terror.”<sup>168</sup>

But these differences aside, the record labels were extremely aggressive in their litigation: even after the record labels got their money, the website and the company, Vivendi then turned around and filed a malpractice lawsuit against the law firm, Cooley Godward, who had provided legal advice that MP3.com may have a good faith claim that it would be considered legal.<sup>169</sup> Many have speculated as to the negative impact of this litigation upon future legal advice to start-ups.<sup>170</sup>

Paul Graham, founder of Y Combinator, advises innovators and applicants to his program that there is little they can do to help start-ups involving anything the touches music: “[T]he record labels . . . are effectively a rogue state with nuclear weapons. There is nothing we or anyone else can do to protect you from them, except warn you not to start startups that touch label music.”<sup>171</sup>

The chilling effect also impacts larger companies trying to innovate, but they are usually less sensitive to regulation and through lobbyists they are often able to craft laws that protect their interests. Nonetheless as one example of the beneficial technologies kept away from consumers, an article in *Business 2.0* Rafe Needleman<sup>172</sup> describes how BMW chose not to include MP3 playing technology in American cars to avoid legal liability. MP3 players in cars is a common

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<sup>166</sup> Sonia Katyal, *A Legal Malpractice Claim by MP3.com: In the Changing Area of CyberLaw, is a Crystal Ball Necessary to Avoid Liability?*, FINDLAW (Feb. 7, 2002), [http://writ.news.findlaw.com/commentary/20020207\\_katyal.html](http://writ.news.findlaw.com/commentary/20020207_katyal.html).

<sup>167</sup> *Id.*

<sup>168</sup> Timothy Lee, *Unlicensed: Are Google Music and Amazon Cloud Player Illegal?*, ARS TECHNICA (July 4, 2011 7:00 PM), <http://arstechnica.com/tech-policy/2011/07/are-google-music-and-amazon-cloud-player-illegal/>.

<sup>169</sup> Sonia Katyal, *A Legal Malpractice Claim by MP3.com: In the Changing Area of CyberLaw, is a Crystal Ball Necessary to Avoid Liability?*, FINDLAW (Feb. 7, 2002), [http://writ.news.findlaw.com/commentary/20020207\\_katyal.html](http://writ.news.findlaw.com/commentary/20020207_katyal.html).

<sup>170</sup> *Id.*; See also LESSIG, *supra* note 68, at 95-99.

<sup>171</sup> Mike Masnick, *Innovation*, (Oct. 25, 2013 8:48 AM), <http://www.techdirt.com/blog/?company=y+combinator>.

<sup>172</sup> Raffe Needleman, *Driving in Cars with MP3s*, BUSINESS 2.0 (June 16 2003).

technology in many countries, and while a few U.S. cars have this technology, at least now, most manufacturers have avoided serious adoption, and if Rafe Needleman's article is accurate, they have avoided doing so to avoid potential, and perhaps even meritless, legal liability.

Unfortunately, while many have argued that statutory damages should be reformed, and many of the proposals here are consistent with those proposed by Jason Mazzone in *Copyfraud and Other Abuses of Intellectual Property Law*, some agree with Pamela Samuelson's article, *Is Copyright Reform Possible?*, which finds that "Congress seems unlikely to reform [copyright law] as Mazzone recommends, given that copyright industry groups favor statutory damages awards precisely because of their deterrent (that is, in *terrorem*) effects."<sup>173</sup>

Samuelson is right that content industry lobbyists would not favor reform, but statutory damage reforms that embrace an across-the-board approach—applying to commercial and noncommercial uses—could create new interest groups on the favor of reform and demonstrate the impact of these laws upon innovation, small businesses and economic growth. It is difficult to predict whether a use is fair *ex ante*—which hinders investment in legitimate innovations when the stakes are this high.<sup>174</sup> As one example of the impact of legal uncertainty upon investment, in the wake of the Librarian of Congress's ruling on cellphone unlocking, angel funder Greg Kidd, one of the first investors in Twitter and Square, explained the impact of regulatory and legal uncertainty in copyright law:

Here in the valley, we have a great appetite for taking calculated technical and business risks. But to add a jump ball of uncertainty over whether an opportunity that is legal one day might become illegal the next, for no other reason than a political or regulatory whim, is a red flag that shuts down my willingness to invest.<sup>175</sup>

It is easy to see how the demonstrated uncertainty of copyright law can chill innovation. As a whole these three policies create a piranha-filled pool discouraging innovation: start-ups founders know that they could be found personally liable, venture capital firms are scared to invest knowing that they can lose more than merely their investment and lawyers are forced to give their clients legally inaccurate advice to

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<sup>173</sup> Pamela Samuelson, *Is Copyright Reform Possible?* 126 HARV. L. REV. 740, 755 (2013) (reviewing JASON MAZZONE, *COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW* (Stanford Univ. Press 2011)). See also WILLIAM PATRY, *HOW TO FIX COPYRIGHT* (2011).

<sup>174</sup> To be clear the RSC report and this Article do not support whole-sale piracy peddlers. Companies whose only business is piracy should be bankrupted by damages judgments, but legitimate businesses engaging in typical activities involving content should not be.

<sup>175</sup> Derek Khanna, *H.R. 1123, the "Unlocking Consumer Choice and Wireless Competition Act" before the United States House of Representatives, Committee on the Judiciary, Subcommittee on Courts, Intellectual Property, and the Internet*, WIRED (June 6, 2013), <http://www.wired.com/opinion/wp-content/uploads/2013/06/HR1123-Khanna-testimony-06613.pdf>.

play it safe to avoid potential litigation if a particular court finds a dual-use technology illegal.<sup>176</sup>

Dual use technology includes the VCR, iPod, DVR etc. The Internet itself is a dual-use technology. There is no reason to say that for these types of legitimate innovations, we will throw all the rules of modern capitalism and tort law out the window.

### B. Reforming DMCA Take-Down Process

Title II of the Digital Millennium Copyright Act<sup>177</sup> (“DMCA”), the notice-and-takedown system,<sup>178</sup> has allowed for a heckler’s veto of political speech—a clear affront to freedom of speech. Campaign advertisements for John McCain,<sup>179</sup> Barack Obama<sup>180</sup> and Mitt Romney<sup>181</sup> were taken offline through false takedown requests.<sup>182</sup> Under the current process, the DMCA provides that the owner of copyright material may submit a “takedown notice” to an online service provider that is hosting material that allegedly infringes the copyright. The DMCA provides that this notice should be in writing and should state, among other things, that the complaining party has a good faith belief that the use of the material is not authorized by the copyright owner.<sup>183</sup> Upon receipt of a proper takedown notice, a service provider must respond “expeditiously to remove, or disable access to, the material that is claimed to be infringing or to the subject of infringing activity.”<sup>184</sup> The DMCA then provides that the user who posted the material subject to the takedown notice may in turn submit a counter-notice contesting the claim which must contain a statement under penalty of perjury that the “material was removed or disabled as a result of a mistake or

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<sup>176</sup> The fact that there has been innovation over the past thirty years does not prove this point wrong. There has clearly been innovation, but the question is: with a different set of policies would we not have more innovation?

<sup>177</sup> 17 U.S.C. § 512 (2012).

<sup>178</sup> Online service providers (“OSPs”) are exempt from secondary copyright infringement liability if OSPs meets certain conditions including a “notice-and-takedown” system. The incentive for the OSP is to be overly cautious in taking down content, and in general when an OSP receives a request they almost always automatically take down the content—but allow for the other party to petition to keep it up. In practice this can lead to a heckler’s veto.

<sup>179</sup> Wendy Seltzer, *Free Speech Unmoored in Copyright’s Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171, 172 (2010).

<sup>180</sup> *Id.* at 173–74.

<sup>181</sup> Timothy Lee, *Music Publisher Uses DMCA to Take Down Romney Ad of Obama Crooning*, ARS TECHNICA (July 16, 2012), <http://arstechnica.com/tech-policy/2012/07/major-label-uses-dmca-to-take-down-romney-ad-of-obama-crooning/>.

<sup>182</sup> For more on the debate surrounding the takedown procedure of Section 512 of the DMCA, see Jennifer M. Urban & Laura Quilter, *Symposium Review, Efficient Process or Chilling Effects—Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621 (2006). See also *Chilling Effects Weather Reports*, available at <http://www.chillingeffects.org/weather.cgi>.

<sup>183</sup> 17 U.S.C. § 512(c)(3).

<sup>184</sup> 17 U.S.C. § 512(c)(1)(C).

misidentification.”<sup>185</sup> Once a counter-notice has been submitted, the copyright owner has ten to fourteen business days to file a copyright infringement lawsuit against the user. If the copyright owner does not do so, the service provider can restore the video without secondary liability.

The incentive is for online service providers to quickly remove the content, and users often do not notice that their content is removed. While there is a cause of action for a false takedown request by “[a]ny person who knowingly materially misrepresents . . . that material or activity is infringing . . . .”<sup>186</sup> in practice, this is rarely litigated.<sup>187</sup> It is almost impossible to prove because it has been determined that only cases of “subjective bad faith”<sup>188</sup> are to be actionable for fees.<sup>189</sup> That means that the litigant has to prove that the other side knew that it was not fair use. In practice, proving that the film or music industry knew something was not fair use has been almost impossible. The MPAA in particular sends millions<sup>190</sup> of takedown requests per year, likely with a computer program, so to determine that there was subjective bad faith in that case may be effectively impossible. This is especially true because the MPAA, subjectively, has an unusual perspective on fair use as a legal doctrine. See MPAA’s previous President Jack Valenti’s quotation: “What is fair use? Fair use is not a law. There’s nothing in law.”<sup>191</sup>

The MPAA has argued that it has no obligation to assess the fair use of content before it files a takedown claim, because it “would impose significant and unwarranted burdens on copyright owners.”<sup>192</sup> But this is not necessarily true. A scanner looking for a 100% match may have solid grounds for a takedown, but these scanners are programmed to go after material that some courts have found to be fair use with remixes, mash-ups or audio played over a film clip. The MPAA could certainly develop smarter filters to mitigate the risk of false positives. One case in point, not involving the MPAA but

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<sup>185</sup> 17 U.S.C. § 512(g).

<sup>186</sup> 17 U.S.C. § 512(f).

<sup>187</sup> See Complaint Lessig v. Liberation Music PTY LTD, US District Court MA (Aug. 22, 2013), available at <https://www.eff.org/document/lessig-v-liberation-music-complaint> (some of the factual statements on implementing the takedown process comes from this filing).

<sup>188</sup> See Rossi v. MPAA, 391 F.3d 1000, 1004–05 (9th Cir. 2004).

<sup>189</sup> See Joe Mullin, *After Five Years, “Dancing Baby” Youtube Takedown Lawsuit Nears a Climax*, ARS TECHNICA (Oct. 16, 2012), <http://arstechnica.com/tech-policy/2012/10/after-five-years-dancing-baby-youtube-takedown-lawsuit-nears-a-climax/>.

<sup>190</sup> See Brief for Motion Picture Association of America, Inc., as Amici Curiae Supporting Neither Party, *Tuteur, M.D. v. Crosley-Corcoran*, WL 4832601 (D. Mass. Sept. 10, 2013), <https://www.documentcloud.org/documents/699602-mpaa-on-dmca-512f.html>.

<sup>191</sup> Derek Slater, *The Harvard Political Review – Interviews* (Jan. 25, 2003), <http://www.zeropaaid.com/forum/thread/harvard-political-review-interview-with-jack-valenti.5504/>.

<sup>192</sup> Brief of Amicus Curiae Motion Picture Association of America, Inc. in Support of Neither Party, *Tuteur v. Crosley-Corcoran*, No. 13-cv-10159-RGS (D. Mass. 2013).

involving automated takedowns, was when a NASA video, which was in the public domain, was removed from YouTube because of a copyright claim made by a private news service (then it was quickly restored but it was offline for hours).<sup>193</sup> The danger is, if the MPAA does not develop smarter filters and is sending out millions of takedown request, and the operators automatically comply, or as the McCain campaign explained “comply[ing] automatically,”<sup>194</sup> then the content that is remaining online will be limited to MPAA’s subjective, and unique, perspective on what fair use is,<sup>195</sup> but perhaps even worse as it will be implemented by a computer filter rather than a human. This is a very dangerous precedent as large amounts of legitimate speech can be impacted.

Current solutions in the law, damages under 17 U.S.C § 512 (f) for knowing and material misrepresentations, are insufficient and the standards to qualify are too cumbersome. Potential solutions are apparent: subjective bad faith is too high of a burden. It should be reduced to a lower standard, a standard that does not allow for computer filtering to remove all liability. Further, damages for this act should be higher, to greatly disincentivize false takedown requests. If it is hard to prove each false takedown request in court and establish the threshold, then having a higher penalty can presumably discourage this activity nonetheless. Specifically, the use of mass filtering techniques that have been known to red-flag legitimate materials should be discouraged through punitive damages. Since the damages should be higher, perhaps it should have the same maximum penalty as the statutory damages provision for a willful individual copyright violation<sup>196</sup>—up to a \$150,000 fine plus attorney’s fees with punitive damages as appropriate.

### *C. Reducing the Length of Copyright*

In response to the problem of an excessively long copyright term, the RSC Report recommended the use of scientific data and analysis to

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<sup>193</sup> Alex Pasternack, *NASA’s Mars Rover Crashed Into a DMCA Takedown*, MOTHERBOARD (2012), <http://motherboard.vice.com/blog/nasa-s-mars-rover-crashed-into-a-dmca-takedown>.

<sup>194</sup> Letter From Trevor Potter, General Counsel, McCain Presidential Campaign, to Chad Hurley, CEO YouTube LLC (Oct. 13, 2008), available at <https://www.eff.org/files/McCain%20YouTube%20copyright%20letter%202010.13.08.pdf>.

<sup>195</sup> See Brief for Motion Picture Association of America, Inc. as Amici Curiae Supporting Affirmance, *Sony Corp. of America v. Universal City Studios*, 457 U.S. 1116 (1982), available at <https://www.documentcloud.org/documents/686459-betamax-amicus-mpaa2.html> (“The Motion Picture Association has never acquiesced in the view that home videocopying is a fair use. An argument to the contrary in one of the amicus briefs is mistaken.”); see also Mike Masnick, *MPAA Pretends to be a Regular Defender of Fair US; The Evidence Suggests Otherwise*, TECHDIRT (Apr. 19, 2013), <https://www.techdirt.com/articles/20130417/03315522738/mpaa-fair-use-more-detailed-history.shtml>.

<sup>196</sup> 17 U.S.C. § 504–05 (2012).

determine the optimal length of copyright protection—creating a term that compensates the content producer and incentivizes content creation, but also encourages new uses and fosters a robust public domain. As previously noted, until 1976, the average term was just 32.2 years but today it is life of the author plus seventy years, or ninety-five years for a corporation. In 2003, the Economist magazine ran an editorial arguing for a fourteen year copyright term, noting:

Copyright was originally the grant of a temporary government-supported monopoly on copying a work, not a property right . . . Starting from scratch today, no rational, disinterested lawmaker would agree to copyrights that extend to 70 years after an author's death, now the norm in the developed world.<sup>197</sup>

And on March 20, 2013, the Registrar of Copyrights and Director of the U.S. Copyright Office, Maria Pallante, endorsed some of these proposals, including discussing shortening copyright length.<sup>198</sup>

During the last extension of existing copyright terms the head of the MPAA, Jack Valenti explained that this new extension was “very much in America’s economic interests.”<sup>199</sup> But the MPAA has been unable to produce a single study to that effect, and the economic data is unanimous and overwhelming to the contrary. It is only in the unusual world of Washington, D.C., where the head of a powerful lobbying organization can make such an economically verifiable claim that has been thoroughly disproved by every economist with a straight face.

The mass epidemic of “orphan works” is largely a result of excessively long copyright terms. Orphan works arise when the rights holder for a work is not apparent and it is either too expensive or impossible to determine who is entitled to compensation. This creates a large number of problems for the content industry; if you cannot track down who owns rights in the work, you cannot use the work. This

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<sup>197</sup> Editorial Board, *A Radical Rethink*, THE ECONOMIST (Jan. 23, 2003), <http://www.economist.com/node/1547223> (however, it should be noted that The Economist includes this as part of a “grand new bargain” to also provide new copy-protection technologies).

<sup>198</sup> *The Register’s Call for Updates to U.S. Copyright Law: Before the Subcomm. on Courts, Intellectual Property & the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Maria A. Pallante, Register of Copyrights of the United States), available at <http://judiciary.house.gov/hearings/113th/03202013/Pallante%20032013.pdf> (“[A]uthors do not have effective protections, good faith businesses do not have clear roadmaps, courts do not have sufficient direction, and consumers and other private citizens are increasingly frustrated. The issues are numerous, complex, and interrelated, and they affect every part of the copyright ecosystem, including the public at large. . . Congress should approach the issues comprehensively over the next few years as part of a more general revision of the statute. . . . [Congress] may want to consider alleviating some of the pressure and gridlock brought about by the long copyright term.”).

<sup>199</sup> *The Copyright Protection Act of 1995: Hearings on S. 483 Before the Senate Judiciary Committee*, 104th Cong. (1995) (statement of Jack Valenti, Chairman & CEO, Motion Picture Association of America).



problem was nearly nonexistent when copyright was shorter, but the perpetual extension of copyright (in addition to the lack of formality requirements) has now resulted in large quantities of content being unable to be reproduced by anyone. This is a terrible problem, as it means that those videos, books and music are effectively off limits to society but also that the heirs to those works cannot make a dime, so it is a policy nightmare that hurts everyone, especially the interests that the RIAA/MPAA claims to represent, and it is a direct result of too long copyright terms.

#### *D. Other Proposals*

There were other reforms that were kept off the table at the time of the Report that should also be given serious consideration. The DMCA has some important components that have been useful for content creators and for websites with user generated content on the Internet,<sup>200</sup> but the law was created to protect content holders and deal with legitimate instances of piracy so to the extent that this law has now been expanded in application and through judicial decisions to other areas that are counterproductive, Congress must update provisions of the DMCA. Otherwise, modern technology will increasingly be effected in perverse ways outside of the copyright protection impetus for the DMCA.

One such provision of the DMCA that needs updating is Section 1201<sup>201</sup>—the anti-circumvention section. The effect of the provisions is effectively: technology shall go no further. As content increasingly shifts to digital formats, and digital technology becomes increasingly pervasive in all aspects of our lives, Section 1201 restriction will gradually encompass these technologies, inhibiting their further development, as well as the development of new classes of technology if they are not expressly allowed by the manufacturer of the technology itself. The DMCA was passed three years before the iPod, six years before Google Books and nine years before the Kindle. Technology moves quickly; and it is therefore not surprising that the law is now antiquated. As technology progresses, if nothing is done, the DMCA will continue to become even more oppressive to innovation.

The anti-circumvention section makes it illegal to “jailbreak” your own iPad,<sup>202</sup> develop a program to read a Kindle book aloud to someone who was blind,<sup>203</sup> or add subtitles for movies for the deaf.<sup>204</sup> The

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<sup>200</sup> 17 U.S.C. §512 (b).

<sup>201</sup> 17 U.S.C. § 1201 (2012).

<sup>202</sup> John Paul Titlow, *Yup, Jailbreaking Your iPad Really is Illegal*, READWRITE (Oct. 28, 2012), <http://readwrite.com/2012/10/28/yup-jailbreaking-your-ipad-is-illegal#awesm=~o9flkljiNqBEO5>.

<sup>203</sup> American Council of the Blind and the American Foundation for the Blind, *Joint Comments Before the Copyright Office: Exemption to the Prohibition of Circumvention of Copyright*

DMCA still bars developing, selling, providing, or even linking to technologies that play legal DVDs purchased in a different region, or to convert a DVD you own to a playable file on your computer.<sup>205</sup> Because no licensed DVD-playing software is currently available for the Linux operating system, if a Linux user wishes to play a legally purchased DVD, they cannot legally play it on their own computer.

These rules have also made fair use of copyrighted material much harder or impossible. Using snippets of video during classroom lectures is fair use, but to do so, teachers have to use illegal technology to “rip” the DVD, convert the video to a playable and editable file or download the file illegally from the Internet. Essentially these provisions make commonplace, ordinary and widely used technologies illegal, making millions<sup>206</sup> of Americans felons for actions that have little to do with protecting content.<sup>207</sup>

In effect, these oppressive and draconian laws have been a treasure trove for lobbyists and corporate interest groups seeking to lock out competitors and new technologies. As Timothy B. Lee explained in *Circumventing Competition: The Perverse Consequences of the Digital Millennium Copyright Act*:

[The circumvention provisions in the DCMA] reduce . . . options and competition in how consumers enjoy media and entertainment. Today, the copyright industry is exerting increasing control over

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*Protection Systems for Access Control Technologies* (2011), [http://www.copyright.gov/1201/2011/initial/american\\_foundation\\_blind.pdf](http://www.copyright.gov/1201/2011/initial/american_foundation_blind.pdf).

<sup>204</sup> See 17 U.S.C. § 1201 (2012).

<sup>205</sup> DVD Copy Control Ass’n, Inc. v. Bunner, 31 Cal. 4th 864 (2003).

<sup>206</sup> Anthony Kosner, *What 7 Million Jailbreaks are Saying. Is Apple Listening?*, FORBES (Feb. 10, 2013 8:06 AM), <http://www.forbes.com/sites/anthonykosner/2013/02/10/what-7-million-jailbreaks-are-saying-is-apple-listening/>.

<sup>207</sup> Specifically, this refers to § 1204 of Public Law 105-304, which provides that “[a]ny person who violates section 1201 or 1202 willfully and for purposes of commercial advantage or private financial gain . . . [shall be subject to the listed penalties].” Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2876 (1998). However, given copyright law’s broad interpretation by the courts, it could be argued that merely unlocking your own smartphone takes a device of one value and converts it into a device of double that value (the resale market for unlocked phones is significantly higher) and therefore unlocking is inherently providing a commercial advantage or a private financial gain—even if the gain has not been realized. In other words, unlocking doubles or triples the resale value of your own device and replaces the need to procure the unlocked device from the carrier at steep costs, which may be by definition a private financial gain. Alternatively, one can argue that a customer buying a cheaper version of a product, the locked version versus the unlocked version, and then unlocking it themselves in violation of the DMCA, is denying the provider of revenue, which also qualifies. There are several cases that have established similar precedents where stealing coaxial cable for personal use has been held to be for “purposes of commercial advantage or private financial gain.” *Cablevision Sys. New York City Corp. v. Lokshin*, 980 F.Supp. 107, 109, 114 (E.D.N.Y. 1997); *Cablevision Sys. Dev. Co. v. Cherrywood Pizza*, 508 N.Y.S.2d 382, 383 (Sup. Ct. Nassau County 1986); see also Fred Von Lohmann, *Unintended Consequences: Twelve Years Under the DMCA*, ELECTRONIC FRONTIER FOUND. (Feb. 2010), [https://www.eff.org/sites/default/files/eff-unintended-consequences-12-years\\_0.pdf](https://www.eff.org/sites/default/files/eff-unintended-consequences-12-years_0.pdf).

playback devices, cable media offerings, and even Internet streaming. Some firms have used the DMCA to thwart competition by preventing research and reverse engineering. Others have brought the weight of criminal sanctions to bear against critics, competitors, and researchers.<sup>208</sup>

The impact of these restrictions has been to create large economic opportunities for programmers in other countries to sell to a massive and underserved US market. For example:

- Although jailbreaking was illegal, and is still illegal in some cases, there are an estimated 23 million “jailbroken” devices,<sup>209</sup> selling technology to the U.S. market for “jailbreaking” or “unlocking” is illegal—but this is a large market opportunity.
- Software to backup DVDs to a user’s computer is widely used across the world and in the United States, but American companies cannot develop or sell this technology—so Americans use a product called “Handbrake,” which is developed and hosted in France.<sup>210</sup>
- There are over 21.2 million Americans with vision difficulties that could benefit from closed captioning technology, and there are 36 million deaf persons in the United States<sup>211</sup> who could benefit from read aloud functionality—both technologies that can help these groups are illegal.<sup>212</sup>

These potential billion dollar markets are scratching the surface at the innovations that the content industry has succeeded in destroying, innovations that have little to do with anything related to protecting copyright. In particular, the market opportunities for unlocking and jailbreaking mobile devices are particularly large.

Phone unlocking is a clear example of a beneficial technology that could revolutionize competition in the telecommunications industry, if it were legal. The United States has slower and more expensive wireless services than most advanced countries in the world.<sup>213</sup> This is due in

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<sup>208</sup> TIMOTHY B. LEE, CATO INSTITUTE, POLICY ANALYSIS NO. 564, CIRCUMVENTING COMPETITION: THE PERVERSE CONSEQUENCES OF THE DIGITAL MILLENNIUM COPYRIGHT ACT I (2006), available at <http://www.cato.org/sites/cato.org/files/pubs/pdf/pa564.pdf>.

<sup>209</sup> iPhone Hacks, *Over 14 Million Devices on iOS6.x Have Been Jailbroken*, IPHONEHACKS.COM (Mar. 2, 2013), <http://www.iphonhacks.com/2013/03/over-14-million-ios-6-devices-jailbroken.html>.

<sup>210</sup> Declan McCullagh, *White House Wants New Copyright Law Crackdown*, CNET (Mar. 15, 2011), [http://news.cnet.com/8301-31921\\_3-20043421-281.html](http://news.cnet.com/8301-31921_3-20043421-281.html).

<sup>211</sup> *Disability and Functioning (Adults)*, CENTER FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/nchs/fastats/disable.htm> (last visited Oct. 19, 2013).

<sup>212</sup> Blake Reid, *The Digital Millennium Copyright Act is Even Worse Than You Think*, SLATE (Mar. 20, 2013), [http://www.slate.com/articles/technology/future\\_tense/2013/03/dmca\\_copyright\\_reform\\_u\\_s\\_law\\_makes\\_digital\\_media\\_inaccessible.html](http://www.slate.com/articles/technology/future_tense/2013/03/dmca_copyright_reform_u_s_law_makes_digital_media_inaccessible.html).

<sup>213</sup> See Stacy Curtin, *Why Your Phone, Cable & Internet Bills Cost So Much*, YAHOO! FINANCE (Sept. 24, 2012, 9:09 AM), <http://finance.yahoo.com/blogs/daily-ticker/why-phone-cable->

part to the nature of the telecommunications industry, which generally is dominated by a few market participants. But competition is also suppressed through the ban on phone unlocking, which allows a consumer to take a wireless device to another carrier.<sup>214</sup> As Federal Communications Commission (“FCC”) Commissioner Ajit Pai has explained, legalizing unlocking is critical to restoring the free market, and would allow for wireless services and devices to “flourish.”<sup>215</sup>

Under the DMCA the actual technology for unlocking has always been illegal for companies to develop, sell or traffic; but for the past six years, there was in place an existing exception that allowed individuals to unlock their own phones.<sup>216</sup> However, the main trade association for wireless carriers (particularly the bigger carriers<sup>217</sup>), the Wireless Association, petitioned the Librarian of Congress to reverse the existing exception. Opposing the move, over 100 wireless carriers, mainly smaller participants, but also Sprint & T-Mobile, through their trade association, the Competitive Wireless Association,<sup>218</sup> petitioned to keep the exception for personal use. The Librarian of Congress ruled against extending the exception, and on January 26, 2013, the DMCA exception that allowed individuals to unlock their phones was removed, making unlocking illegal—potentially a felony punishable by up to five years and a \$500,000 fine.<sup>219</sup>

In the few months since leaving Capitol Hill, I helped create and lead an unpaid<sup>220</sup> campaign to reverse the decision of the Librarian of

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internet-bills-cost-much-130914030.html.

<sup>214</sup> SIM cards are the small cards that go in phones that the cell tower recognizes for a specific phone. R. Kayne, *What Is a SIM Card*, WISEGEEK.COM, <http://www.wisegEEK.com/what-is-a-sim-card.htm> (last updated May 21, 2013). Cellphones are “locked” through software to block the phone from using SIM cards from other phone carriers. Unlocking is a relatively simple software patch, where a user plugs their phone into a computer and runs a small computer program. See Jesus Diaz, *How to Unlock the iPhone 4S Right Now*, GIZMODO (Apr. 22, 2012, 6:00 PM), <http://gizmodo.com/5904166/how-to-unlock-the-iphone-4s-right-now>. The unlocking process is not significantly more complex than updating a phone. In contrast to unlocking, the terms “jail-breaking” and “rooting” refer to modifying the software of a portable computing device, including a smartphone, to allow the device to run software programs, or “apps,” that were not authorized by the device manufacturer. See HTG *Explains: What’s the Difference Between Jailbreaking, Rooting, and Unlocking?*, HOW-TO GEEK.COM (Jan. 31, 2013), <http://www.howtogeek.com/135663/htg-explains-whats-the-difference-between-jailbreaking-rooting-and-unlocking/>.

<sup>215</sup> Ajit Pai, *Don’t Treat Consumers Like Criminals*, N.Y. TIMES (June 5, 2013), <http://www.nytimes.com/2013/06/06/opinion/switching-wireless-carriers-shouldnt-be-a-crime.html>.

<sup>216</sup> Corynne McSherry, *Breaking Down the DMCA Exemptions, Pt. 2: Free Your Phone and the Rest Will Follow*, EFF (Aug. 12, 2010), <https://www.eff.org/deeplinks/2010/08/breaking-down-dmca-exemptions-pt-2-free-your-phone>. See also *2009 DMCA Rulemaking*, EFF, <https://www.eff.org/cases/2009-dmca-rulemaking> (last visited Oct. 19, 2013).

<sup>217</sup> AT&T and Verizon being the biggest two mobile providers.

<sup>218</sup> Brendan Sasso, *Lobby Group Rebrands for Fight Against AT&T and Verizon*, THE HILL (Sept. 10, 2012), <http://thehill.com/blogs/hillicon-valley/technology/248437-lobbying-group-for-small-carriers-rebrands-in-fight-against-atat-and-verizon>.

<sup>219</sup> See *supra* note 207 and accompanying text.

<sup>220</sup> See Scott Cleland, *Mr. Khanna’s Call to Arms Over Cellphone Unlocking is More Copyright*

Congress and to permanently legalize phone unlocking, first with articles and appearances in the media and then with a White House petition<sup>221</sup> that received over 114,000 signatures.<sup>222</sup> At first, the campaign was tough, and the content industry provided a large amount of diversionary tactics to try to mislead the public:

What Mr. Khanna is really whining about is that he thinks it's unfair that people can't buy a smart-phone at a lower carrier-subsidized price, and then illegally break into and modify the phone's proprietary software to enjoy the value and flexibility of a full-price smart-phone. Essentially Mr. Khanna is indignant that it is illegal for

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*Misrepresentation -- Part 8: Defending First Principles Series*, PRECURSOR BLOG (Feb. 25, 2013), [www.precursorblog.com/?q=content/mr-khanna's-call-arms-over-cellphone-unlocking-more-copyright-misrepresentation-part-8-defending-first-principles-series](http://www.precursorblog.com/?q=content/mr-khanna's-call-arms-over-cellphone-unlocking-more-copyright-misrepresentation-part-8-defending-first-principles-series) (implying that the cellphone unlocking campaign was "well-organized" and "well-funded" on behalf of "Free culture/Google" even though it was not organized by anyone or funded by anyone, or on behalf of anyone).

<sup>221</sup> Sina Khanifar, who was another leader on the campaign on unlocking, created the petition. *See Petition: Make Unlocking Cell Phones Legal*, WHITEHOUSE.GOV (Jan. 24, 2013), <https://petitions.whitehouse.gov/petition/make-unlocking-cell-phones-legal/1g9KhZG7>.

<sup>222</sup> *See* Derek Khanna, *The Most Ridiculous Law of 2013 (So Far): It is Now a Crime to Unlock Your Smartphone*, THE ATLANTIC (Jan. 27, 2013, 10:31 AM), <http://www.theatlantic.com/business/archive/2013/01/the-most-ridiculous-law-of-2013-so-far-it-is-now-a-crime-to-unlock-your-smartphone/272552/>; Derek Khanna, *The Law Against Unlocking Cellphones is Anti-Consumer, Anti-Business, and Anti-Common Sense*, THE ATLANTIC (Feb. 11, 2013, 9:33 AM), <http://www.theatlantic.com/business/archive/2013/02/the-law-against-unlocking-cellphones-is-anti-consumer-anti-business-and-anti-common-sense/272894/>; Derek Khanna, *Cellphone Unlocking is the First Step Toward Post-SOPA Copyright Reform*, BOING BOING (Feb. 22, 2013, 11:30 AM), <http://boingboing.net/2013/02/22/taking-on-real-reform-in-a-pos.html>; Derek Khanna, *The Public Has Spoken – 100,000 Americans Sign WH Petition on Cellphone Unlocking*, TOWNHALL.COM (Feb. 23, 2013), <http://townhall.com/columnists/derekkhanna/2013/02/23/the-public-has-spoken--100000-americans-sign-wh-petition-on-cellphone-unlocking-n1518234/page/full/>; Derek Khanna, *Small Businesses Ask Congress to Reconsider on Unlocking Cellphones*, FORBES (Feb. 26, 2013, 11:57 AM), <http://www.forbes.com/sites/derekkhanna/2013/02/26/small-businesses-and-regional-carriers-ask-congress-and-white-house-to-reconsider-unlocking-cellphones/>; Derek Khanna, *FCC to Investigate Cellphone Unlocking*, FORBES (Mar. 1, 2013, 10:15 AM), <http://www.forbes.com/sites/derekkhanna/2013/03/01/fcc-to-investigate-cellphone-unlocking/>; Derek Khanna, *The White House Supports the Right to Unlock Your Cellphone—But That's Just the Start*, THE ATLANTIC (Mar. 4, 2013, 4:35 PM), <http://www.theatlantic.com/business/archive/2013/03/the-white-house-supports-legalizing-unlocked-cell-phones-but-thats-just-the-start/273696/>; Derek Khanna, *Why the GOP Has to Get Behind Cell-Phone Unlocking*, NATIONAL REVIEW ONLINE (Mar. 6, 2013, 11:16 AM), <http://www.nationalreview.com/corner/342296/why-gop-has-get-behind-cell-phone-unlocking-derek-satya-khanna>; Derek Khanna, *Unlocking Your Cell Phone is No Crime*, CNN.COM (Mar. 25, 2013, 9:03 AM), [http://www.cnn.com/2013/03/25/opinion/khanna-unlocking-cell-phone/index.html?hpt=hp\\_c3](http://www.cnn.com/2013/03/25/opinion/khanna-unlocking-cell-phone/index.html?hpt=hp_c3); Derek Khanna, *First Bill Introduced to Fix Phone Unlocking*, FORBES (May 9, 2013, 1:53 PM), <http://www.forbes.com/sites/derekkhanna/2013/05/09/first-bill-introduced-to-fix-phone-unlocking/>; Derek Khanna, *Librarian of Congress Has Turned Millions of Americans into Felons*, POLITIX (May 10, 2013), <http://politix.topix.com/homepage/5993-librarian-of-congress-has-turned-millions-of-americans-into-felons>; Derek Satya Khanna, *Phone Unlocking Made Legal*, NATIONAL REVIEW ONLINE (May 27, 2013, 4:00 AM), <http://www.nationalreview.com/article/349379/phone-unlocking-made-legal>; Derek Khanna, *Exclusive Testimony on Unlocking: Beware of Cellphone Companies' 'Red Herring'*, WIRED (June 6, 2013, 8:30 AM), <http://www.wired.com/opinion/2013/06/testimony-on-cellphone-unlocking/>.

someone to purposefully cheat the system and take something of value that one did not pay for, or have the permission of the property owner to do.

Mr. Khanna goes on to misrepresent that since a consumer owns the phone that they should be able to do whatever they want with their smart-phone. Mr. Khanna's slick misdirection here is that a consumer owns everything in their smart-phone. They do not. They own the device and the version of software that they legally bought; they do not "own" software that they illegally break into and take without the permission of the copyright licensee.<sup>223</sup>

As our campaign very clearly explained, subsidizing the phone is through contract law. We had no problem with providers subsidizing their phone and demanding a phone contract during that window. Contract law is critical to a functioning system of commerce.

Our quibble, if they had bothered to read our work, which was very clear, was that you should not go to jail for using your own device as you see fit. It is a simple contractual matter between you and your provider. Using the heavy hand of government, though copyright law, to make behavior that the cellphone providers may not like illegal, rather than just civilly liable, is an incredible reach by the federal government. And this reach distorts the market and is a form of government regulation and subsidization of a particular market-model. Further, our campaign never argued that users can copy the software on their phone and "take" it. This copying of copyrighted software is a complete fabrication and has nothing to do with our campaign.

But, despite these charges,<sup>224</sup> our campaign gathered steam. After we achieved the 114,000 signatures in a month, it led to a FCC investigation<sup>225</sup> and the White House reversing its position and coming out in favor of unlocking. "[Unlocking is] crucial for protecting consumer choice, and important for ensuring we continue to have the

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<sup>223</sup> Cleland, *supra* note 220.

<sup>224</sup> For an argument that unlocking is bad, see Michael Moroney, *Legislators Choosing Populism Over Good Policy on Mobile Phone Unlocking*, THE HILL (June 4, 2013), [thehill.com/blogs/congress-blog/technology/303379-legislators-choosing-populism-over-good-policy-on-mobile-phone-unlocking](http://thehill.com/blogs/congress-blog/technology/303379-legislators-choosing-populism-over-good-policy-on-mobile-phone-unlocking) ("The technological advancements that flourished in the cell phone industry came about precisely because of strong intellectual property laws that reward developers for creating cutting-edge, exclusive products."). Intellectual property laws may have helped, but those intellectual property laws would be patent laws, not copyright laws. And copyright as applied to cellphone unlocking was not the intended purpose of the DMCA or any statute. Further, being in favor of cellphone unlocking, because it has nothing to do with copyright, does not make you anti-IP. Quite the opposite, it makes you in favor of IP's Constitutional purpose which is the conservative perspective. See Derek Khanna, *Facts Need Not Apply: New Propaganda On Unlocking*, FORBES (June 21, 2013), [www.forbes.com/sites/derekhanna/2013/06/21/facts-need-not-apply-new-propaganda-on-unlocking/](http://www.forbes.com/sites/derekhanna/2013/06/21/facts-need-not-apply-new-propaganda-on-unlocking/).

<sup>225</sup> Press Release, Federal Communications Commission, Chairman Julius Genachowski, *Statement from FCC Chairman Julius Genachowski on the Copyright Office of the Library of Congress Position on DMCA and Unlocking New Cell Phones* (Mar. 4, 2013).

vibrant, competitive wireless market that delivers innovative products and solid service to meet consumers' needs.”<sup>226</sup> This quickly led to the introduction of several bipartisan bills<sup>227</sup> in Congress to fix this problem.<sup>228</sup>

In my House Judiciary Committee testimony, some examples of the impact of this ban's impact upon innovative new market models were explored. Specifically, the ban's impact in limiting a resale market of devices, inhibiting competition from smaller market participants and hurting potential new market models such as that from Republic Wireless.<sup>229</sup> The testimony includes a quotation from the General Counsel of the parent company of Republic Wireless, which is provided here:

If consumers can legally unlock their phone, and if businesses can legally offer services for phone unlocking, both consumers and companies like ours will benefit from the competitive forces such laws would unleash—particularly if it is done on a permanent basis. Allowing customers to bring their favorite devices to their chosen provider after their contract has expired will spur more competition in the wireless market and boost market models like ours as a result.

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<sup>226</sup> R. David Edelman, *Official White House Response: It's Time to Legalize Cell Phone Unlocking*, WHITEHOUSE.GOV (2013), <https://petitions.whitehouse.gov/petition/make-unlocking-cell-phones-legal/1g9KhZG7> (“The White House agrees with the 114,000+ of you who believe that consumers should be able to unlock their cell phones without risking criminal or other penalties. In fact, we believe the same principle should also apply to tablets, which are increasingly similar to smart phones. And if you have paid for your mobile device, and aren't bound by a service agreement or other obligation, you should be able to use it on another network. It's common sense, crucial for protecting consumer choice, and important for ensuring we continue to have the vibrant, competitive wireless market that delivers innovative products and solid service to meet consumers' needs.”).

<sup>227</sup> See The Unlocking Consumer Choice and Wireless Competition Act, H.R. 1123, 113th Cong. (2013); The Unlocking Technology Act of 2013, H.R. 1892, 113th Cong. (2013); The Wireless Consumer Choice Act, S. 481, 113th Cong. (2013); Wireless Device Independence Act, S. 467, 113th Cong. (2013).

<sup>228</sup> Press Release, Federal Communications Commission, Statement from FCC Chairman Julius Genachowski on the Copyright Office of the Library of Congress Position on DMCA and Unlocking New Cell Phones (Mar. 4, 2013), *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-319250A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-319250A1.pdf) (“From a communications policy perspective, [the Copyright Office of the Library of Congress' new position] raises serious competition and innovation concerns, and for wireless consumers, it doesn't pass the common sense test. The FCC is examining this issue, looking into whether the agency, wireless providers, or others should take action to preserve consumers' ability to unlock their mobile phones. I also encourage Congress to take a close look and consider a legislative solution.”). See also The Unlocking Consumer Choice and Wireless Competition Act, H.R.1123, 113th Congress (2013); The Unlocking Technology Act of 2013, H.R. 1892, 113th Congress.

<sup>229</sup> *Unlocking Consumer Choice and Wireless Competition Act: Hearing on H.R. 1123 Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Derek Khanna, Founder, Disruptive Innovation), *available at* <http://www.wired.com/opinion/wp-content/uploads/2013/06/HR1123-Khanna-testimony-06613.pdf>.

Our goal is to be able to offer our service on a level playing field and let the consumer decide what service works best for them.<sup>230</sup>

For these reasons, among others, my testimony argued that “[p]ermanently legalizing users unlocking[,] and the technology to enable unlocking[,] could be the most beneficial change in mobile policy in over nine years.”<sup>231</sup>

The cellphone unlocking issue is a case in point as one beneficial technology caught in the dragnet of an overly broad restriction, affecting an entire class of technologies. This is generally a poor form of regulation and one that Americans would be very uncomfortable with in other contexts. While cars can usually travel well over 120 MPH, the highest speed limit in the United States is 85 MPH.<sup>232</sup> Thus, law allows for technology that can be abused, and the cost of abuse in the case of vehicles can be deadly, as we know that speeding is a contributor to deadly accidents. But just because a car can be used to break the law, does not mean that public policy dictates that cars cannot travel above 85 MPH. Society generally punishes the behavior, speeding and reckless driving, rather than place arbitrary limitations upon legitimate technology.

Therefore, we must ask ourselves: “What specific limitations upon our personal freedom and liberty are we prepared to accept in the name of achieving the goal of protecting intellectual property?” Some limitations may be sound, and Congress should debate them on the record. Obviously, and I argue rightfully, we do not have the right to pirate books, movies and music. But other restrictions are both invasive and ineffective for the goals of protecting intellectual property, such as prohibitions on unlocking and jail-breaking phones or adaptive technology for the blind to read.

The default rule should be that these types of technology are lawful. Affected parties can then petition their government and explain why we need a new law to ban it. The onus should be on that party to explain to Congress and the public why this is an appropriate use of federal power.

A free society should not have to petition its government every three years to allow access to technologies that are ordinary and commonplace. Innovation cannot depend on begging permission from an unelected bureaucrat, such as the Librarian of Congress, every three years. A free society should not ban technologies unless there is a truly overwhelming and compelling governmental interest. Requiring

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<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> Maggie Kerkman, *Texas Opens Highway with 85 MPH Speed Limit, Fastest in America – Is it Too Fast?*, FOXNEWS (Oct. 24, 2012), <http://www.foxnews.com/leisure/2012/10/24/fastest-road-in-america-opens-to-motorists-in-texas/>.



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proponents of accessibility technology for the blind and deaf, computer science researchers, and all other affected parties to petition the Librarian of Congress for permission for personal use of their technologies on a triennial basis has proven to be expensive, complicated and unpredictable.

This is a failed process that has stifled innovation, reduced freedom and hurt our nation's blind and deaf citizens in the name of "promoting" the "Progress of the Sciences and useful Arts."

#### IV. CONCLUSION

There are several medium-term opportunities to amend copyright law, starting with orphan works, reforming DMCA take-down requests and Section 1201 anti-circumvention provisions, fair use and statutory damages. The RSC Report, statements by the Register of Copyright and the success of the movement on cellphone unlocking shows that these issues are increasingly gaining attention and beginning to achieve an intellectual consensus. If we do not begin to examine intellectual property law now, this body of law will become increasingly convoluted as newer technologies are developed, presenting novel legal questions on the application of antiquated laws (for example 3-D printing). As it becomes increasingly convoluted and antiquated, more legitimate innovations will begin to be effected in the dragnet of twentieth century law.

Copyright protection creates an important incentive for content producers, but the threat of piracy should not be used as a diversion to justify the creation of other laws that are ineffective or even counterproductive to that end. Society must be very careful in its application of laws to ensure that they are narrowly tailored to their objectives, because the implication is banning the technology, harming the public or hindering new artists ability to create. Very often when one discusses copyright reform, the retort is that piracy costs copyright holders billions of dollars. This may or may not be true, but this is not an argument in favor of a copyright system that extends to life plus seventy years. This is not an argument in favor of statutory damages that pierces the corporate veil, implicating even legal counsel and venture capital firms, and making individuals liable for up to billions of dollars in damages.

While piracy is real, that does not lead to the conclusion that our current system of copyright is the only way to protect intellectual property holders; in fact, quite the opposite. Copyright laws are amongst the bluntest tools in the policy toolkit. We have to be surgical in providing incentives for new artists and protecting existing content holders, while not hindering innovation. The best way to do that is to go back to Founding principles and look to the original purpose of

copyright, and then apply those principles to our modern economy. As the RSC Report concluded: “Our Founding Fathers wrote the Constitution with explicit instructions . . . 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.”<sup>233</sup>

#### V. ADDRESSING THE NATURAL RIGHTS COUNTER ARGUMENT

In the wake of the release of the RSC Report on copyright reform, most responses were positive and endorsed similar reforms, especially responses on the conservative side, or at least the concept of evaluating the costs and benefits of different policy solutions, which was the main point of the Report. There were a number of unofficial responses from the content side,<sup>234</sup> most of which focused almost exclusively upon property rights arguments, or what appeared, most implied some stated clearly, to be a “natural rights”<sup>235</sup> based arguments.<sup>236</sup>

In general, these content-industry sponsored (although not all are by the content industry) counter-essays<sup>237</sup> discount the Report’s argument that copyright is a government-created instrument designed to foster innovation and provide compensation to the copyright holder.

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<sup>233</sup> REPUBLICAN STUDY COMMITTEE, *supra* note 2, at 8.

<sup>234</sup> See, e.g., Paul Clement, Viet Dinh & Jeffrey Harris, *The Constitutional and Historical Foundations of Copyright Protection*, CENTER FOR INDIVIDUAL FREEDOM (2012), <http://cif.org/v/images/pdfs/constitutional-and-historical-foundations-of-copyright-protection.pdf>; Mike Masnick, *RLA Lawyers Trying to Rewrite History of Copyright Clause Through Shoddy Scholarship and Selective Quotations*, Comment to Derek Bambauer, *Copyright Greenwashing*, INFO/LAW BLOG (Dec. 21, 2012, 4:37 PM), <http://blogs.law.harvard.edu/infolaw/2012/12/17/copyright-greenwashing/>; Terry Hart, *Republican Study Committee Policy Brief on Copyright*, COPYHYPE, (Nov. 21, 2012), <http://www.copyhype.com/2012/11/republican-study-committee-policy-brief-on-copyright-part-1/>.

<sup>235</sup> Some literally through arguing natural rights, and others through implying that copyright is a property right and that property rights are natural rights, or similar extrapolations. For a basis on natural rights as applied to intellectual property, see Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540-78 (1993); Alfred C. Yen, *Restoring the Natural Law: Copyright As Labor and Possession*, 51 OHIO ST. L.J. 517, 534 (1990). For a perspective on labor theory and personality theory in relation to intellectual property see Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO L.J. 287 (1988).

<sup>236</sup> According to the labor theory, the copyright is justified by the assumption that the author has a natural right in the fruits of his or her labor. See Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 36, 45 (1989).

<sup>237</sup> See *The Copyright Education of Mr. Khanna – Part 2 Defending First Principles Series*, NET COMPETITION (Nov. 20, 2012), <http://www.netcompetition.org/congress/the-copyright-education-of-mr-khanna-part-2-defending-first-principles-series> (“Mr. Khanna’s hostile views towards copyright are at war with those of the Founding Fathers because property is strongly protected in the Constitution and the Bill of Rights. James Madison understood protection of private property rights was a first principle in stating in Federalist #10 that the protection of property rights ‘is the first object of Government.’ That comports with John Locke, whose social contract philosophy undergirds the American Constitution; he said: ‘The reason why men enter into society is the preservation of their property.’”).

Content industry lobbyists and thought leaders have used natural-rights arguments<sup>238</sup> in particular to explain why such a long period of copyright is appropriate. However, they fail to argue, in general and in these counter-essays, why, *specifically*, life plus 70 years is the appropriate copyright term as opposed to an infinite copyright protection, which would seem to be the logical extension of their argument. However, according to several accounts, the Motion Picture Association of America (“MPAA”) has argued for something similar, infinity minus a day.<sup>239</sup> Representative Mary Bono Mac said on the House floor while debating the Sonny Bono Copyright Term Extension Act (Jack Valenti being the MPAA President): “As you know, there is also Jack Valenti’s proposal for term to last forever less one day. Perhaps the Committee may look at that next Congress.”<sup>240</sup>

It is intellectually dishonest that these pieces blindly assert that copyright is a natural right, without addressing any of the obvious problems with that theory. One would think that given that leading treatises on copyright law have concluded to the exact opposite, it would at least require an explanation as to how “natural rights” supporters can reconcile these issues. From William Patry’s treatise: “Federal copyright law in the United States is purely statutory. There is not and has never been a federal common-law copyright.”<sup>241</sup>

Overall, before blindly asserting that the United States has a system of natural rights based copyright, there are numerous problems that advocates of natural rights arguments have to explain:

1. If copyright is a natural right through traditional property rights, then why did the Founders’ copyright, state laws,<sup>242</sup> Constitution, the 1790 Copyright Act and the British under the Statute of Anne ensure that it expires? Natural rights last forever, if you own the fruit of your labor under natural law, you would own that

<sup>238</sup> Terry Hart, *James Madison on Copyrighting Thomas Jefferson’s Memoirs*, COPYHYPE (Jan. 30, 2013), <http://www.copyhype.com/2013/01/james-madison-on-copyrighting-thomas-jeffersons-memoirs/>.

<sup>239</sup> Sonny Bono Copyright Term Extension Act, Public Law 105-298, § 102, 112 Stat. 2828 (1998).

<sup>240</sup> 144 CONG. REC. 9952 (Oct. 7, 1998).

<sup>241</sup> 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:1 (2013).

Copyright in the United States is not a property right, much less a natural right. Instead, it is a statutory tort, created by positive law for utilitarian purposes: to promote the progress of science. Once copyright is correctly viewed as positive law, proper discourse can take place . . . Abandoning the use of ‘property talk’ should assist in developing an acceptable balance of incentives and unconsented to and uncompensated uses, without creators being tagged as monopolists and without “users” being tagged as people seeking to reap what they have not sown.

*Id.* See also Edward C. Walterscheid, *Understanding the Copyright Act of 1790: The Issue of Common Law Copyright in America and the Modern Interpretation of the Copyright Power*, 53 J. COPYRIGHT SOC’Y U.S.A. 313 (2006).

<sup>242</sup> Twelve of the thirteen states had their own copyright laws.

forever—not 14/28 years as the Founders’ copyright implemented.<sup>243</sup>

2. If natural right arguments explain the extension of copyright’s length and scope versus that of the Founding era, then under natural rights arguments why wouldn’t the same principles be applicable to patents? But in the case of patents, term length has only increased from 14 to 17/20 years, whereas copyright terms have increased exponentially.
3. Natural rights arguments generally include a property right to full control of all derivative works. But, why then did the Founders’ copyright, as statutorily enacted in 1790 at the federal level, limit only the “printing, reprinting, publishing and vending” of the protected works and not include any derivative control? The 1790 provision was interpreted as literal reproduction of the whole work as even abridgement and translations were not deemed infringing for years.<sup>244</sup> Notably, similar limitations existed across the state copyright laws of the eighteenth century and England with the Statute of Anne.<sup>245</sup>
4. If copyright is a natural right, then what about the myriad of exceptions to copyright protection including the fair use doctrine and first sale? If it’s a natural right, then why could someone use any of your “property?”
5. If copyright and patents are a natural right, are there other natural rights that the founders referred to as “monopolies?” Why did the founders choose to use a different vernacular choice to refer to

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<sup>243</sup> Lysander Spooner is credited with helping create the term “intellectual property.” As a believer in “natural rights” she argued for perpetual rights for IP. See Lysander Spooner, *The Law of Intellectual Property*, LYSANDERSPOONER.ORG (1855), lysanderspooner.org/node/10 (“Even if intellectual property were allowed extraordinary protection, that would be no excuse for taking from the owners the property itself, at the end of a limited period . . . Merchandise-in cities is allowed an extraordinary protection . . . but no one ever deemed that to be any reason for making such property free plunder, after the owners had enjoyed it for fourteen years. Yet there would be as much reason and justice in outlawing such property, after a specified the, as there are in outlawing intellectual property.”); see also Derek Bambauer, *Copyright Greenwashing*, INFO LAW BLOG (Dec. 17, 2012), blogs.law.harvard.edu/infolaw/2012/12/17/copyright-greenwashing/ (“[I]f copyright is based upon labor desert, and therefore is treated like property, why on earth does the Constitution provide that the right to exclude terminates? Title to physical property lasts forever. Copyright seems like it does, but the Constitution sets an outer bound: it can endure only for “limited Times.” That limitation in itself suggests, at least, a significant admixture of utilitarian thinking in the IP clause.”); PATRY, *supra* note 241, at § 1:17. Among the state copyright statutes 14 years for most common and was adopted by Connecticut, Georgia, Maryland, New Jersey, New York, North Carolina, Pennsylvania, and South Carolina. Three states, Massachusetts, Rhode Island and Virginia granted a 21-year term, while New Hampshire granted a 20-year term. Again, like the Statute of Anne, seven states allowed a renewal term of 14 years. See *id.*

<sup>244</sup> John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. DAVIS L. REV. 465, 474–80 (2005).

<sup>245</sup> See Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 767 (2001) (“A natural right would last indefinitely and cover all expressions . . .”).

natural rights, a vernacular choice that denotes that the instrument itself is optional and statutorily created versus a natural right?

6. Natural rights arguments generally include that this property right attaches to anything created. But then why did the Founders' copyright, as statutorily enacted in 1790, only apply to maps, charts, and books? Why not theatrical performances or artwork?<sup>246</sup> Similar limitations existed across state copyright laws<sup>247</sup> of the eighteenth century and England with the Statute of Anne.<sup>248</sup>
7. Natural rights arguments generally include that protection of the intellectual property is automatic upon creation, as in it does not require government granting because it exists even without the government. Then why did the Founders' copyright, as statutorily enacted in 1790, and in eight state's copyright laws of the eighteenth century<sup>249</sup> (and the British with the Statute of Anne), require registration with the government, and until 1988 required notice, for copyright protection?<sup>250</sup> As further evidence of this point, a year after the 1790 act, France implemented their copyright system and chose to have no "formalities" of any kind—which means that this concept was one that they could have considered at the time.<sup>251</sup>

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<sup>246</sup> Pictures were added for protection in 1802, but the omission of them for 12 years shows that if Congress wanted to then it could repeal copyright for pictures by choice and that this is not, presumably, a natural right. *See* 1802 Copyright Act.

<sup>247</sup> PATRY, *supra* note 241, at § 1:17 ("South Carolina protected only 'books'; New Jersey, New York, Pennsylvania, and Virginia protected 'books and pamphlets'; Maryland protected 'books and writings'; Massachusetts, New Hampshire, and Rhode Island protected 'books, treatises, and other literary works'; and Connecticut and Georgia more expansively protected 'books, pamphlets, maps, and charts.'").

<sup>248</sup> Copyright Act of 1790, ch. 15, 1 Stat. 124. Note that this act expanded copyright to maps and charts, in comparison with the Statute of Anne, which only applied to books. Since the legislators were expanding it already, if their conception was a "natural rights" one, then why did they stop with only two new mediums? *See also* Bell *supra* note 245, at 767 ("A natural right would protect all authors; . . .").

<sup>249</sup> PATRY, *supra* note 241, at § 1:17 ("Connecticut, Georgia, New Jersey, New York, North Carolina, and South Carolina conditioned protection on filing the title of the book with the Secretary of State; Virginia with the clerk of the council; and Pennsylvania 'in the prothonotary's office' in Philadelphia.").

<sup>250</sup> *See* Tom W. Bell, *Intellectual Privilege: A Libertarian View of Copyright* (2008) (unpublished manuscript), available at <http://webcache.googleusercontent.com/search?q=cache:v3tKCBMeGYJ:www.intellectualprivilege.com/book/IntellPrivCh02.pdf+&cd=1&hl=en&ct=clnk&gl=us> ("A natural right would arise, well, naturally. In contrast, no state allowed copyright as a matter of course. New Hampshire and Rhode Island demanded that authors identify themselves and all the other state copyright acts imposed registration requirements of one sort or another. North Carolina demanded that copyright holders forfeit a copy to the secretary of state whereas Massachusetts demanded that two copies go to 'the library of the University of Cambridge.' Several states went so far as to demand that copyright holders provide works at reasonable prices and in sufficient numbers.").

<sup>251</sup> *See, e.g.,* Laligant, *The French Revolution and Authors' Rights or Perenniality of the Subject Matter for Protection*, 147 *Revue Internationale du Droit D'Auteur* 2 (1991).

8. If copyright is a natural right, then why is it optional for Congress to create them? It is listed under Congressional powers, and like the power to constitute tribunals inferior to the Supreme Court, Congress could choose not to have copyrights and patents.
9. If natural rights arguments are similarly applicable to patents, then why is it acceptable for patents to adopt a first to file system rather than a first to invent system for protection (as they did in 2012)?<sup>252</sup>
10. Do natural rights supporters also oppose the “compulsory mechanical license,” and would a natural rights argument make this license and similar statutory license schemes unconstitutional under the Ninth Amendment?
11. And if copyright is a traditional property right, then why is the creation of copyright and patents the only power given to Congress with a specific delineated purpose to “promote” the “progress” of the “sciences” and the “useful arts”?<sup>253</sup> No other power given to Congress expressly states its purpose.<sup>254</sup>

But beyond these questions, the natural rights arguments fail to address the substantive proposals in the RSC Report. For example, why are copyright terms life plus 70 years, specifically? How can we solve the abuse of copyright problem, which is stifling journalism and oversight? How can we address false DMCA take-down requests? As Tom W. Bell explains:

Who cares whether copyright qualifies as a natural right? Not many lawmakers, judges, or lawyers. They regard the question as settled. Under the conventional view . . . copyright represents nothing more than a tool of public policy. Courts and commentators . . . see it as a merely a possibly useful way to promote the general welfare and the progress of science and useful arts—not as a natural right.<sup>255</sup>

The counter-essays to the RSC Report sometimes reverted to

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<sup>252</sup> Leahy-Smith America Invents Act, Pub. L. No. 112-29, §§ 1-36, 125 Stat. 284 (2011).

<sup>253</sup> WILLIAM W. CROSSKEY, 1 POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 486 (1953) (“Reading the power, then, in light of the [S]tatute of Anne and the then recent decisions of the English courts, it is clear that this power of Congress was enumerated in the Constitution, *for the purpose* of expressing its limitations.”).

<sup>254</sup> Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress’s Intellectual Property Power*, 94 GEO. L.J. 1771, 1776–77 (2006). (“First, Madison and Pinckney’s initial proposals to vest patent and copyright powers in Congress were plenary and did not include language relating to the promotion of progress in science and useful arts. Had the Framers been content with such plenary patent and copyright powers, they would have likely adopted them as proposed. The Framers’ choice not to adopt the plenary proposals, but rather to subject their exercise to specific ends, tends to prove that the Progress Clause was added as a limitation.”); *but see* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03 (2004) (offering a counter perspective: “[T]he phrase ‘To promote the progress of science and useful arts . . .’ must be read as largely in the nature of a preamble, indicating the purpose of the power but not in limitation of its exercise.”)

<sup>255</sup> Bell, *supra* note 250, at 1–2.

polemics and personal attacks that the Report was somehow “unauthorized”<sup>256</sup>—an incredible false and libelous claim but one of which is also illogical. Congressional staffers would not alone have the capacity to authorize a memo of this nature to be put online and disseminated without approval. One article by a major, extreme pro-intellectual property blog even implied that the Report may have been a result of a shady deal on behalf of technology companies.<sup>257</sup> Another article implied that the ideas advocated in the RSC Report were similar to Karl Marx and Joseph Engels. The logic of that article would put all the Founding Fathers in that camp.<sup>258</sup>

More often, most of the counter-essays strongly implied or claimed<sup>259</sup> that the Report argued against intellectual property. However, despite a concerted attempt to re-characterize the Report as anti-intellectual property for those who have not read it, the Report is strongly in favor of copyright and intellectual property and in favor of compensating content producers. In fact, it is substantially more strongly in favor of copyright than the Founding Fathers were by way of favoring a system of longer and more expansive copyright than they enacted.<sup>260</sup> But the RSC Report’s support for copyright does not negate

<sup>256</sup> Timothy Lee, *Assault on IP Rights Should Alarm Conservatives and Libertarians*, CFIF (Jan. 24, 2013), [cfif.org/v/index.php/commentary/42-constitution-and-legal/1725-assault-on-ip-rights-should-alarm-conservatives-and-libertarians](http://cfif.org/v/index.php/commentary/42-constitution-and-legal/1725-assault-on-ip-rights-should-alarm-conservatives-and-libertarians) (finding an “apparent lack of authorization to publish”); Tom Giovanetti, *Copyright and the GOP*, THE INSTITUTE FOR POLICY INNOVATION (Nov. 20, 2012), [www.ipi.org/ipi\\_issues/detail/copyright-and-the-gop](http://www.ipi.org/ipi_issues/detail/copyright-and-the-gop) (the Report was “inappropriately published. It appears that the paper reflected the views of a single RSC staffer, rather than the careful thinking and informed perspectives of Republican thought leaders.”).

<sup>257</sup> Derek Khanna is Wrong, *Copyleft Mystery Man’s Misleading Memo Creates its Own Myths*, TRICHORDIST (Jan. 29, 2013), <http://thetrichordist.com/2013/01/29/derek-khanna-is-wrong-copyleft-mystery-mans-misleading-memo-creates-its-own-myths/>.

<sup>258</sup> Scott Cleland, *The Copyright Education of Mr. Khanna -- Part 2 Defending First Principles Series*, PRECURSOR BLOG (Nov. 20, 2012), [precursorblog.com/?q=content/copyright-education-mr-khanna-part-2-defending-first-principles-series](http://precursorblog.com/?q=content/copyright-education-mr-khanna-part-2-defending-first-principles-series) (“Mr. Khanna is flat wrong asserting ‘copyright violates every tenet of laissez faire capitalism’ . . . Even capitalism’s biggest opponents, Marx and Engels, knew the opposite of capitalism was ‘Abolition of property.’”).

<sup>259</sup> Ellen Seidler, *Hey Derek. . . the Tech Industry is a “Special Interest” Too!*, VOX INDIE (May 21, 2013), <http://voxindie.org/Derek-Khanna-one-sided-copyright-reform> (“[A] lopsided anti-copyright ‘policy brief’ for Republican Study Committee.”); David Newhoff, *Derek Khanna Tweets “Don’t Read Gatsby”*, ILLUSION OF MORE (May 7, 2013), [illusionofmore.com/derek-khanna-no-gatsby/](http://illusionofmore.com/derek-khanna-no-gatsby/) (“the memo was his public application to the Holy Anti-Copyright Empire”); *Derek Khanna is Wrong: Copyleft Mystery Man’s Misleading Memo Creates its Own Myths*, TRICHORDIST (Jan. 29, 2013), [thetrichordist.com/2013/01/29/derek-khanna-is-wrong-copyleft-mystery-mans-misleading-memo-creates-its-own-myths/](http://thetrichordist.com/2013/01/29/derek-khanna-is-wrong-copyleft-mystery-mans-misleading-memo-creates-its-own-myths/); Timothy Lee, *Assault on IP Rights Should Alarm Conservatives and Libertarians*, CFIF (Jan. 24, 2014), [cfif.org/v/index.php/commentary/42-constitution-and-legal/1725-assault-on-ip-rights-should-alarm-conservatives-and-libertarians](http://cfif.org/v/index.php/commentary/42-constitution-and-legal/1725-assault-on-ip-rights-should-alarm-conservatives-and-libertarians); Adam Mossoff, *How Copyright Drives Innovation in Scholarly Publishing*, George Mason University School of Law and Economics Research Paper Series, [cpip.gmu.edu/wp-content/uploads/2013/01/Mossoff-How-Copyright-Drives-Innovation-In-Scholarly-Publishing.pdf](http://cpip.gmu.edu/wp-content/uploads/2013/01/Mossoff-How-Copyright-Drives-Innovation-In-Scholarly-Publishing.pdf) (citing the RSC copyright report as “anti-copyright rhetoric . . . on the right”).

<sup>260</sup> REPUBLICAN STUDY COMMITTEE, *supra* note 2. The Report calls copyright protection a “Goldilocks-like balance,” where copyright is a pro-market policy if utilized correctly.

its argument that copyright protection terms are far too long, the damages lead to excess risk aversion, the DMCA take-down procedures censor legitimate speech, and the fair-use provisions stifle innovation and depresses content and profit for all market participants.

Most of the counter-essays repeat several times, that property is important, that intellectual property is property and that property is the basis of society/culture/economy/order and so on. But this is a straw-man argument. The RSC Report is not against property. The Report even cedes the argument on property. The RSC Report sees copyright as a government instituted regulatory scheme through a statutorily granted *property right*. The Report was arguing in favor of the government creating a statutorily granted right of property for copyright. The Report was saying that we want more property rights than would exist under a *laissez faire* system. Most of the counter-essays, which insist on supporting property rights, fail to rebut the Report because both the Report and the counter-essays see copyright as a form of property and therefore arguments on the importance of property are completely off-point. The RSC Report merely recognizes that this is a statutorily granted right of property, rather than a natural right. That acknowledgement, the historical position of the conservative side, does not make the Report against intellectual property or against property unless the Founding Fathers, Milton Friedman, Frederick von Hayek and Ronald Coase, whom the paper was largely influenced by, are also against property.

Ultimately, “natural rights” arguments are a smart rhetorical device for the content industry to use to appeal to conservatives, but a “natural rights” argument is not a self-evident response to the reforms suggested and the problems outlined in the RSC Report. Even in real property there are limits upon owners’ property rights. In the case of copyright and patents, the Constitution clearly limits duration and provides a very particular purpose for this privilege.<sup>261</sup> Some on the left argue that copyright is a human right<sup>262</sup> that supersedes the Constitution, but those arguments will not be addressed here as those arguments are not the predominant ones made in the United States.

The natural-rights argument is an intellectually interesting one for

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<sup>261</sup> U.S. CONST. art. I, § 8.

<sup>262</sup> Orit Fischman Afori, *Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 497, 550 (2004). See also Paul Clement et al., *The Constitutional and Historical Foundations of Copyright Protection*, Center for Individual Freedom, CFIF (Dec. 11 2012), <http://cfif.org/v/index.php/press-room/1681-cfif-publishes-new-policy-paper-the-constitutional-and-historical-foundations-of-copyright-protection>; Greg Sandoval, *A Copyright Proponent’s Wish for the Presidential Debate (Q&A)*, CNET (Oct. 16, 2012), [news.cnet.com/8301-1023\\_3-57533611-93/a-copyright-proponents-wish-for-the-presidential-debate-q-a/](http://news.cnet.com/8301-1023_3-57533611-93/a-copyright-proponents-wish-for-the-presidential-debate-q-a/) (Robert Levine: “artists have a natural right to their work. That’s a human right in the Universal Declaration of Human Rights, not something that comes from the MPAA.”).



a law journal article, but it is simply not the system that we have chosen to adopt in the United States. Instead, the United States has a statutorily created property right through a temporary and limited copyright. Thus, the natural rights argument is not a coherent counter-response to sensible policy reforms unless the argument is in favor of a constitutional amendment to remove the Copyright Clause from the Constitution.

As is shown below, the Founders, like the British, were aware of copyright “natural rights” arguments, and they rejected<sup>263</sup> these arguments and created a constitutional and legal regime designed to prevent it. Our Founders were quite familiar with copyright. Books were a form of content that they were very familiar with as most were particularly affluent property owners. Far from being alien to the world of content creation, the Founders had a history under British law of wrestling with the issues of natural rights for copyright. And our Founders, like the British, rejected the idea of natural rights and indefinite copyright. The limited copyright system in our Constitution reflected a conscious rejection of the ideology of indefinite copyright. Yet today, a system of near-indefinite copyright is precisely what we have.

This section is not designed to be a full exploration on the subject—that can be found elsewhere.<sup>264</sup> Instead, it is meant to show that the case for copyright being a natural right is a difficult one to establish given our Founding tradition, Constitution and court precedent. And it is meant to show that, assuming *arguendo*, copyright is a “natural right” in some sense, it is an extremely circumscribed natural right, making most of the arguments for natural rights irrelevant. In other words, if it were to be a natural right, but a different type of natural right that is limited and circumscribed,<sup>265</sup> then the arguments applicable to non-limited and non-circumscribed natural rights would be of little utility in the context of this limited and circumscribed natural right (if there is such a thing as a limited natural right). And lastly, again assuming *arguendo*, that copyright is a “natural right,” that still does not resolve all of the problems demonstrated with current copyright law.

#### A. *The End of Perpetual Copyright*

In 1709, the Parliament of Great Britain passed the Statute of Anne

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<sup>263</sup> See Bell, *supra* note 245, at 769 (“The absence of any reference to natural rights in the Constitution’s Copyright and Patent clause thus suggests that the Framers considered and rejected the natural rights defense of copyright.”).

<sup>264</sup> Oliar, *supra* note 254; see generally Bell, *supra* note 250.

<sup>265</sup> Limited in duration, limited to a specific purpose—the literature debates this—limited in what creations are recognized, limited through fair use, limited in potentially requiring registration, and most importantly, limited in requiring a statute to establish it to begin with and therefore making it technically possible for Congress to decide to have no copyrights.

which “was designed to destroy the booksellers’ monopoly of the booktrade [sic] and to prevent its recurrence.”<sup>266</sup> In so doing, it limited copyright to two fourteen-year terms.<sup>267</sup> Parliament had rejected an earlier version of the Statute of Anne that referred to copyright as a “property right” which would have made it unlimited.<sup>268</sup> The goal of the statute was to encourage content creation and ensure a rich public domain by putting an end to “the continued use of copyright as a device of censorship.”<sup>269</sup> The statute’s long title identifies its purpose as “An Act for the Encouragement of Learning . . .”<sup>270</sup> This marked a radical shift from previous ideology and it reflected a major change in intellectual thought.

This was not a change without opposition; it was challenged in the British court system by those who argued that this statute was a violation of the plaintiffs’ natural rights—precisely the argument proffered by some today in favor of indefinite copyright. This issue was contested all the way to the highest court in the land, the House of Lords,<sup>271</sup> which rejected the arguments in favor of indefinite copyright.<sup>272</sup>

As the British Parliament and British courts had done before, our Founders, most specifically Madison and Thomas Jefferson<sup>273</sup>, rejected the argument of natural rights for copyright and endorsed a limited government-created term for copyright and patents. Thomas Jefferson was most skeptical of copyright and patents:

It has been pretended by some, (and in England especially,) that inventors have a natural and exclusive right to their inventions, and not merely for their own lives, but inheritable to their heirs. But while it is a moot question whether the origin of any kind of property is derived from nature at all, it would be singular to admit a natural and even an hereditary right to inventors. It is agreed by those who have seriously considered the subject, that no individual has, of natural right, a separate property in an acre of land, for instance.<sup>274</sup>

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<sup>266</sup> L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOC’Y U.S.A. 365, 379 (2000).

<sup>267</sup> *Id.*

<sup>268</sup> Ronan Deazley, *Commentary on the Statute of Anne 1710*, in PRIMARY SOURCES ON COPYRIGHT (1450-1900) (L. Bently & M. Kretschmer, eds., 2008) (“[T]he original Bill had in no way sought to limit the term of protection of such property. However, this assertion of the “undoubted property” of authors in their works was subsequently abandoned. As with the Act’s title, the preamble was reduced in length and altered in significance . . . [to] the ‘Encouragement of learned Men to compose and write useful Books’”).

<sup>269</sup> *Id.*

<sup>270</sup> 8 Ann., c. 19 (1710) (Eng.).

<sup>271</sup> Until 2009 the House of Lords was the court of last resort.

<sup>272</sup> *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837 (H.L.).

<sup>273</sup> A cursory search was not able to find contrary opinions from other Founders.

<sup>274</sup> Letter from Thomas Jefferson, to Isaac McPherson (Aug. 13, 1813).

He went on to explain why this is the case:

He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature . . . and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody. Accordingly, it is a fact, as far as I am informed, that England was, until we copied her, the only country on earth which ever, by a general law, gave a legal right to the exclusive use of an idea . . . generally speaking, other nations have thought that these monopolies produce more embarrassment than advantage to society; and it may be observed that the nations which refuse monopolies of invention, are as fruitful as England in new and useful devices.<sup>275</sup>

James Madison believed that there was more value to copyright and patents than Thomas Jefferson did. He responded to Jefferson's letter with:

With regard to monopolies they are justly classified among the greatest nuisances in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced? Would it not suffice to reserve in all cases a right to the Public to abolish the privilege at a price to be specified in the grant of it? Is there not also infinitely less danger of this abuse in our Governments, than in most others? Monopolies are sacrifices of the many to the few. Where the power is in the few it is natural for them to sacrifice the many to their own partialities and corruptions. Where the power, as with us, is in the many and not in the few, the danger can not be very great that the few will be thus favored. It is much more to be dreaded that the few will be unnecessarily sacrificed to the many.<sup>276</sup>

Another primary source from Madison, which while is from an unknown date seems to be consistent with his other writings, provides a much more on point perspective of the primary Framers of the Constitution:

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<sup>275</sup> *Id.*

<sup>276</sup> Letter from James Madison, to Thomas Jefferson (Oct. 17, 1788).

Monopolies tho' in certain cases useful ought to be granted with caution, and guarded with strictness agst abuse. The Constitution of the U. S. has limited them to two cases, the authors of Books, and of useful inventions, in both which they are considered as a compensation for a benefit actually gained to the community as a purchase of property which the owner might otherwise withhold from public use. There can be no just objection to a temporary monopoly in these cases but it ought to be temporary, because under that limitation a sufficient recompence and encouragement may be given. The limitation is particularly proper in the case of inventions, because they grow so much out of preceding ones that there is the less merit in the authors and because for the same reason, the discovery might be expected in a short time from other hands.

Monopolies have been granted in other Countries, . . . But grants of this sort can be justified in very peculiar cases only, if at all, the danger being very great that the good resulting from the operation of the monopoly, will be overbalanced by the evil effect of the precedent, and it being not impossible that the monopoly itself, in its original operation, may produce more evil than good. . . .

Perpetual monopolies of every sort, are forbidden not only by the genius of free Govts, but by the imperfection of human foresight.<sup>277</sup>

None of these perspectives are ones of natural rights.

If the monopoly can be “justified” only in “very peculiar cases only, if at all” then it is not a natural right; rather it is a government created property-like privilege, through a regulation, a regulation that they saw as a “monopoly” which Madison explained as the “sacrifices of the many to the few.”<sup>278</sup> That is not property law doctrine under natural rights. Madison wanted copyrights and patents to be limited such that a “sufficient recompence and encouragement may be given.”<sup>279</sup> Natural rights arguments generally hold that the owner is entitled to this forever, not that it should be limited only for the “sufficient recompence and encouragement.”<sup>280</sup> These are two of the most on-point primary sources of the Founding era.

However, some in the natural-rights side have pointed to a separate piece of evidence from James Madison in Federalist 43 where he states “[t]he copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good

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<sup>277</sup> James Madison, Monopolies Perpetuities Corporations. Ecclesiastical Endowments, *available at* [http://www.constitution.org/jm/18191213\\_monopolies.htm](http://www.constitution.org/jm/18191213_monopolies.htm) (last visited Nov. 4 2013).

<sup>278</sup> Letter from James Madison, to Thomas Jefferson (Oct. 17, 1788).

<sup>279</sup> Madison, *supra* note 277.

<sup>280</sup> *Id.*

fully coincides in both cases with the claims of individuals.”<sup>281</sup> This quotation has been thoroughly dealt with previously in several works by Professor Tom W. Bell. Bell explains that Madison is not giving a defense of a common law right at all; rather, Madison is explaining what he believed that the Courts had held.<sup>282</sup> Madison however was “misrepresenting copyright’s standing at common law” in Britain.<sup>283</sup> As Bell explains:

[Madison] presumably relied on the 1769 decision of the King’s Bench in *Millar v. Taylor*, which read the Statute of Anne not to abrogate common law’s protection of copyrights. But the House of Lords overruled that case five years later, in *Donaldson v. Becket*—some thirteen years before Madison published *Federalist Paper No. 43*. His claim that copyright ‘has been solemnly adjudged, in Great Britain, to be a right of common law,’ therefore had as much truth as the modern claim that “slavery has been solemnly adjudged constitutional.”<sup>284</sup>

Madison’s misinterpretation<sup>285</sup> of the current status of law, and a close examination of this quotation, seems to establish that Madison was merely explaining where he wrongly understood the law to be rather than what he believed that copyright actually should be as a legal instrument.<sup>286</sup> This is not that dissimilar from a Republican being asked about the constitutionality of the Affordable Care Act after the Supreme Court ruling in 2012. An average Republican may respond “The Affordable Care Act (“ACA”) has been solemnly adjudged, in the Supreme Court, to be Constitutional.” But a statement to this affect, does not necessarily mean that that Republican is endorsing the ACA as constitutional or that it should be constitutional; rather, it is a statement of the current status of law itself as adjudicated, not as desired or firmly believed. Therefore, this quotation, in itself, does not provide sufficient evidence to overshadow his letter to Thomas Jefferson on the subject where he was clearly opposed to the “natural rights” perspective. *Federalist 43* is also the only instance in the *Federalist Papers* that discusses the copyright clause.<sup>287</sup>

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<sup>281</sup> THE FEDERALIST NO. 43 (James Madison).

<sup>282</sup> Bell, *supra* note 245, at 771.

<sup>283</sup> See *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837 (H.L.).

<sup>284</sup> Bell, *supra* note 282, at 771.

<sup>285</sup> PATRY, *supra* note 241, at § 1:18 (“Madison’s reference to the common law basis for the Statute of Anne indicates he may have been unaware of the contrary ruling in *Donaldson v. Beckett*.”).

<sup>286</sup> See EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 110 (2002) (“Madison’s brief comments in *The Federalist No. 43* are not so much an explanation of the clause as a justification for its inclusion in the constitution.”).

<sup>287</sup> PATRY, *supra* note 241, at 1:18.

It is important to note another comment by Madison in Federalist 43 after that statement. Later in his essay he explains: “[In regard to patents and copyright] [t]he public good fully coincides in both cases with the claims of individuals.”<sup>288</sup> This can be read in light of the Constitutional text of “promoting” the “progress” of “sciences” and the “useful arts.” This is not necessarily a natural rights perspective that often claims that the public good is irrelevant to the patent and copyright system.

Some on the natural rights side have argued that the language of the preambles of the state copyright laws gives clear evidence that the Founders’ unanimously believed in “natural rights.” The preamble of the New Hampshire copyright law of 1783 provided:

As the improvement of knowledge, the progress of civilization, and the advancement of human happiness, greatly depend on the efforts of ingenious persons in the various arts and sciences; as the principal encouragement such persons can have to make great and beneficial exertions of this nature, must consist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man’s own than that which is produced by the labor of his mind: . . . .<sup>289</sup>

At the same time, the Connecticut copyright statute’s preamble, which North Carolina, Georgia, New York and South Carolina copied almost verbatim, similarly provided that:

It is perfectly agreeable to the principles of natural equity and justice, that every author should be secured in receiving the profits that may arise from the sale of his works, and such security may encourage men of learning and genius to publish their writings; which may do honor to their country, and service to mankind.<sup>290</sup>

Paul Clement, Viet Dinh and Jeffrey Harris use this one data point in combination with their unusual analysis of British history of copyright law preceding the revolution to argue that, “[c]opyright was seen not merely as a matter of legislative grace designed to incentivize productive activity, but as a broader recognition of individuals’ inherent property right in the fruits of their own labor.”<sup>291</sup> Their paper concluded by stating that because of this one data point from the Founding era,

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<sup>288</sup> THE FEDERALIST NO. 43 (James Madison).

<sup>289</sup> See *Copyright Enactments: Laws Passed in the United States Since 1783 Relating to Copyright*, COPYRIGHT OFF. BULL. (Libr. of Congress, Copyright Office, Wash., D.C.), 1963, at 18.

<sup>290</sup> *Id.* at 11.

<sup>291</sup> Paul Clement, Viet Dinh & Jeffrey Harris, *The Constitutional and Historical Foundations of Copyright Protection*, Center for Individual Freedom, CFIF (2012), <http://cfif.org/v/images/pdfs/constitutional-and-historical-foundations-of-copyright-protection.pdf>.

“This history flatly refutes any notion that copyright law is a matter of legislative grace intended solely to serve utilitarian ends.”<sup>292</sup>

There are numerous problems with this paper, as it is perhaps one of the most derided publications that makes an attempted analysis at the original public meaning of the Copyright Clause, and most of the problems will not be discussed here. But given that their one datum point from the Founding era was the state copyright statutes preambles, a few points will rebut that below (leaving significant amount elsewhere to rebut further).

First, citing to the preamble holds significantly less significant legal evidence than binding law. Of course the preamble may provide a vantage point on how the Founders saw the issue, but what matters most is what they actually did in binding language. The preambles uses grandiose language, this is understandable given the time as they had essentially very recently created copyright to begin with.

Since states were creating a property-like right, with many of the qualities of property but created by statute, it would be natural for them (having no history with this type of instrument) to incorporate the language and rhetoric from property—as they were creating a new property-like right through statute. It is logical that the preamble for such a statute would discuss it in a way that blends property theory. It is very likely that they thought of copyright as very similar to property or a property-like right, that is not really the question, the question is really what form of property? Property created through statute (essentially a form of regulation) or through natural rights? The statutes were dealing with a relatively new creation, copyrights, so what matters most is not how they prefaced this statute but what the actual statutes included and as William Patry concludes in his treatise, the views of the preamble are “directed contradicted by the substance of the laws, which are chock-full full [sic] of positive law formalities deeply antithetical to any natural law view of copyright.”<sup>293</sup>

The best rebuttal to the preambles as a data point is found in Tom W. Bell’s *Intellectual Privilege* (which was available and cited for over two years before the Clement paper was published). Given the importance of Bell’s argument, it will be quoted at length:

That the states invoked natural rights merely as rhetoric appears on the face of their copyright statutes, none of which actually treated copyright as a natural right. A natural right would last indefinitely and cover all expressions; state copyrights lasted only a few years and covered just a few types of expressions. A natural right would protect all authors; state copyrights generally covered only U.S.

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<sup>292</sup> *Id.* at 6.

<sup>293</sup> PATRY, *supra* note 241, at § 1:17.

authors. A natural right would disregard publication dates; most states denied copyright to any pre-printed work, regardless of its originality, as a general matter. A few states even discriminated against original expressive works by denying copyright to pre-printed books and pamphlets, while granting it to maps and charts. A natural right would not censor; Connecticut, Georgia, and New York barred copyright to works “prophane [sic], treasonable, defamatory, or injurious to government, morals or religion.” A natural right would arise, well, naturally. In contrast, no state allowed copyright as a matter of course. New Hampshire and Rhode Island demanded that authors identify themselves and all the other state copyright acts imposed registration requirements of one sort or another. North Carolina demanded that copyright holders forfeit a copy to the secretary of state whereas Massachusetts demanded that two copies go to “the library of the University of Cambridge.” Several states went so far as to demand that copyright holders provide works at reasonable prices and in sufficient numbers. No natural right would admit all the many sharp, artificial, and arbitrary limitations seen in the state copyright statutes. Despite their invocation of natural rights rhetoric, the states in fact treated copyright purely as a utilitarian tool for promoting arts and sciences in general, and special interests in particular.<sup>294</sup>

Bell concludes with “[a]t any rate, every iota of faith that one invests in the view that some state legislatures embraced a natural rights view of copyright ultimately ends up weighing against the view that the Constitution embodies the same philosophy.”<sup>295</sup>

Second, not every state incorporated similar language in their preamble. The Pennsylvania preamble instead copied the Statute of Anne almost verbatim. According to William Patry’s count in his copyright treatise, it is only seven of the states’ preambles with this language, seven of twelve states.<sup>296</sup> While seven is a bare majority of the states, this secondary point further undercuts the power of this preamble as denoting the original public meaning at the time of the Founding.

Third, if several states’ preambles provide a perspective on the original public meaning of copyright, then another datum point is the 1790 federal Copyright Act which had its own preamble that borrowed language from the Statute of Ann and that it was very different from the “natural rights” type of arguments. The preamble of the federal Copyright Act states that it is “[a]n Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of Such Copies, during the Times Therein

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<sup>294</sup> Bell, *supra* note 250, at 6-8.

<sup>295</sup> Bell, *supra* note 282, at 771.

<sup>296</sup> PATRY, *supra* note 241, at § 1:17.



Mentioned.”<sup>297</sup> If half of the states’ copyright statutes have preambles with grandiose natural rights language, and just under half do not, the state statutes themselves are the opposite of natural rights and the federal statute had a preamble without natural rights language that is almost verbatim the same language in the Statute of Anne, then collectively these refute the arguments of natural rights advocates using the state preambles as a major argument.

At this point in this section still it has been established that under the Statute of Anne, British court precedent, state copyright laws and the available evidence during the Founding era that there was a choice to consider but then to ultimately reject natural rights copyright. All of this could be marginalized by the text itself if the Copyright Clause in the Constitution clearly incorporates a natural rights version of copyright. However, instead of changing their perspectives on copyright, our Founders chose to codify their perspective on copyright as a statutorily created instrument, a government created monopoly, in Article I of the Constitution.

### B. *Codifying a Limited Copyright*

On August 18, 1787, at the Constitutional Convention, James Madison proposed that Congress be empowered “[t]o secure to Authors exclusive rights for a certain time.”<sup>298</sup> Joseph William Singer,<sup>299</sup> and others such as Tom W. Bell,<sup>300</sup> explained that the Framers relied on the Statute of Anne when drafting the copyright clause, which reads, “The Congress shall have Power . . . to promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . . .”<sup>301</sup> The Copyright Clause was intended “to be the engine of free expression.”<sup>302</sup> This clause is the only one in Article I, Section 8—which outlines specific congressional powers—to condition the enumerated power for a particular purpose.

Then our Founders fully fleshed out an optimal copyright system for their time, which is in many ways, was almost identical to the Statute of Anne.<sup>303</sup> Singer explained that Congress directly transferred the principles from the Statute of Anne through a recommendation to the states<sup>304</sup> to enact similar copyright laws, and then in 1790, with the

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<sup>297</sup> Copyright Act of 1790, 1 Stat. 124.

<sup>298</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 325 (Max Farrand ed., 1937).

<sup>299</sup> JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 219–21 (5th ed. 2010).

<sup>300</sup> See Bell, *supra* note 250.

<sup>301</sup> SINGER, *supra* note 299, at 219 (quoting U.S. CONST. art. I, § 8, cl. 8.).

<sup>302</sup> Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

<sup>303</sup> Copyright Act of 1790, 1 Stat. 124. Although it expanded copyright to maps and charts in addition to books.

<sup>304</sup> See Bell, *supra* note 245, at 767 (“Start with the copyright acts passed by twelve of the thirteen states under the Articles of Confederation. Granted, seven of those twelve acts, seven had

passage of the first federal copyright statute.<sup>305</sup> They tried to strike the careful balance of not too much and too little copyright protection. At first, states passed their own copyright laws: seven states provided for two fourteen-year terms, North Carolina provided for one fourteen-year term and three states provided for one twenty-one-year term.<sup>306</sup> Then, at the federal level, Congress passed the Copyright Act of 1790, which had a fourteen-year term of copyright upon registration and an optional fourteen-year renewal if the author was still alive.<sup>307</sup> In critical distinction to copyright law of today, this system required the copyright owner to opt in to receive copyright protection.

After codifying the Founders' perspective on copyright in the Constitution and implementing it in federal law and in state law, it was challenged in *Wheaton v. Peters* by those who were against any limitations on indefinite copyright and who argued for natural rights.<sup>308</sup> But, weighing these arguments, the Supreme Court affirmed the system of opt-in copyright for a limited period of time.<sup>309</sup> Thus, the Court's first case on copyright, decades after the Constitution was ratified, held that:

No such right at the common law had been recognized in England, when the colony of Penn was organized. Long afterwards, literary property became a subject of controversy, but the question was involved in great doubt and perplexity; and a little more than a century ago, it was decided by the highest judicial court in England, that the right of authors could not be asserted at common law, but under the statute.<sup>310</sup>

The Court explained:

Congress, in passing the act of 1790, did not legislate in reference to existing rights, appears clear, from the provision that the author, &c. 'shall have the sole right and liberty of printing,' &c. Now if this exclusive right existed at common law, and congress were about to adopt legislative provisions for its protection, would they have used this language? Could they have deemed it necessary to vest a right already vested. Such a presumption is refuted by the words above quoted, and their force is not lessened by any other part of the act.<sup>311</sup>

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preambles that invoked natural rights. The historical context of those statutes, however, gives their rhetoric more the air of apology than philosophy. . . . That the states invoked natural rights merely as rhetoric appears on the face of their copyright statutes, none of which actually treated copyright as a natural right.”)

<sup>305</sup> SINGER, *supra* note 299, at 219–20.

<sup>306</sup> Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 418 (2004).

<sup>307</sup> Copyright Act of 1790, 1 Stat. 124.

<sup>308</sup> *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591(1834).

<sup>309</sup> *Id.* at 592.

<sup>310</sup> *Id.* at 660.

<sup>311</sup> *Id.* at 661.

This is striking in the context of “natural rights” arguments, which hold that copyright is a “natural right” that preexists the Constitution. The Court concluded: “Congress, then, by this act, instead of sanctioning an existing right, as contended for, created it. This seems to be the clear import of the law, connected with the circumstances under which it was enacted.”<sup>312</sup> The conclusion of the Court was even repeated within the opinion for importance: “Congress, by the act of 1790, instead of sanctioning an existing perpetual right in an author in his works, created the right secured for a limited time by the provisions of that law.”<sup>313</sup> The Court has reiterated this position<sup>314</sup> and interpreted the Copyright Clause in favor of Congress, considering various interests such as maximizing content production, profit for all market participants and new business models, while also providing for a public domain.<sup>315</sup> In *Wheaton*, by the Court rejecting common law copyright, it meant that the federal copyright statute thus became the only source of copyright protection for a work that had already been published.<sup>316</sup>

However, it should be noted that sixty-five years later, the Supreme Court reevaluated this holding in *Holmes v. Hurst*. In that case they held that “while a right did exist by common law, it has been superseded by statute.”<sup>317</sup> But from an originalist perspective, the holding of the Court in 1899 does not provide of a datum point on the original public meaning of copyright during the era of the Founding. Further, the holding of Holmes did not claim that copyright is a natural right.

### C. Originalism and the Copyright Clause

To be clear, there are certainly legitimate policy arguments that copyright should be longer than it was at our country’s founding

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<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 592.

<sup>314</sup> See also *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340 (1991) (finding that labor is not enough to confer rights to the author; labor does not replace the minimal degree of originality necessary).

<sup>315</sup> See generally *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991); see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (discussing the objective of copyright monopoly, which lies in the public benefit from the labor of authors). For a thorough review of the steadfast rejection of the natural law theory of copyright by the Court due to the interpretation given to the Copyright Clause, see Marci A. Hamilton, *Copyright at the Supreme Court: A Jurisprudence of Deference*, 47 J. COPYRIGHT SOC’Y U.S.A. 317 (2000).

<sup>316</sup> For an analysis of *Wheaton* by a natural rights supporter, see Alfred C. Yen, *Restoring the Natural Law: Copyright As Labor and Possession*, 51 OHIO ST. L.J. 517, 530 (1990) (“Like *Donaldson*, *Wheaton* can be read as requiring the elimination of copyright’s natural law dimensions in favor of increasing emphasis on copyright’s economic theory. First, *Wheaton* explicitly disavowed the existence of common law copyright, which was based in the natural law. Second, *Wheaton*’s rejection of common law copyright meant that the federal copyright statute became the only source of copyright protection for a published work.”).

<sup>317</sup> *Holmes v. Hurst*, 174 U.S. 82, 85 (1899).

because of perhaps market conditions that are different from the 18<sup>th</sup> century—but there are no legitimate arguments that a system of indefinite copyright abides by the Constitution or the express intentions of our Founders.

The RSC Report was written primarily for a conservative audience and conservatives are generally believers in originalism and related Constitutional interpretation methods. The RSC Members of Congress, for whom the Report was primarily written, are almost unanimous on this perspective as an analytical framework for interpreting the Constitution (at least in theory). Originalists look primary to the Framers' intent, more accurately to the original public meaning of the Constitutional text. Under this concept of evaluating Constitutional text, the words of the Founders, the historical precedent under common law, the specific text in the Constitution, the choices by policy-makers in the Founding era in the form of their copyright statutes, and the analysis of the Supreme Court so closely after the Founding are data points that, in aggregate, demonstrate significant evidence that the original intent of the Copyright Clause was to provide Congress with the authority to provide a statutorily granted property right of copyright, through a form of regulation, rather than codifying an existing "natural right."

The data points presented show the Founders' intent, but it also appears to be the original public meaning of the text. "Because there is no apparent wedge between what the Framers did and external references, there is no reason to believe that the Clause's public meaning was substantially different from the Framers' intent."<sup>318</sup>

There is certainly still room for future research on this subject, for example by analyzing dictionaries from the Founding era on key terminology (this author has reviewed three separate founding era dictionaries for this piece). Documents from the ratification process are difficult to get a hold of, but those, among other documents, would provide other data points of relevance to a more complete originalism analysis.

Despite the American history on copyright, some still argue that copyright should be or could be a perpetual and inheritable right. Disney has successfully lobbied on a regular basis to temporarily ensure that certain highly lucrative works, namely Mickey Mouse, never enter the public domain.<sup>319</sup> Other opponents of copyright reform claim that they are not in favor of indefinite copyright, but lobby to extend copyright protection every twenty or thirty years. They have done so when copyright was extended from fifty-six years, to life plus fifty, and

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<sup>318</sup> Oliar, *supra* note 254, at 1791–92.

<sup>319</sup> See Alan K. Ota, *Disney in Washington: The Mouse that Roars*, CNN.COM (Aug. 10, 1998), <http://www.cnn.com/ALLPOLITICS/1998/08/10/cq/disney.html>.

again to life plus seventy. It is very clear what their intentions are: they intend, and have largely succeeded, in precluding anything of value from entering the public domain.

Changing the law from a strict limitation in duration to a duration and scope to many times the original intent of the framers represents a perversion of the legal concept of “copyright” and an abandonment of its constitutional purpose. Success in perverting the law should not be misinterpreted as constitutional fidelity despite using eighteenth century vernacular. These proponents are arguing for something very different from what the Founders believed.

Those proponents lost the argument 226 years ago. The Founders explicitly rejected this position and to revisit it today would require a Constitutional Amendment through the two options in Article V.

#### *D. Public Policy Questions*

Ironically, despite the attention to the issue of natural rights, and the use of these arguments as a counter-response to any substantive discussion of reform, the questions applicable to copyright are actual very similar in both property or regulation. As demonstrated, the natural-rights argument has serious evidentiary issues but, assuming *arguendo* that copyright is a natural-right and a traditional property right versus a form of a regulation, that provides little, if any, clarity on the core public policy questions. Questions including:

- What procedures and institutions should protect copyright?
- How long should copyright last?
- Should copyright be automatic or should it require some affirmative opt-in by the author?
- What things should be copyrightable?

If copyright is automatic, it is a radically different system from our Founders’. Given the current system today, a cellphone text to a friend would be copyrighted. Even if copyright is a natural right, would that attach to anything? Or is not there some limit to what copyrightable content is, because for most of our country’s history there have been restrictions on what qualified. And most works have little or no commercial value. As the Copyright Principles Project explained:

The vast majority of copyrighted works created each year have little or no commercial value. Billions of works, such as e-mails and business memos, are created without the incentive of copyright and lack independent commercial value as expressive works. Many other works that people create, such as blog posts, are subject to copyright, although their authors intend to distribute them without restraint or with fewer restraints than the default rules of copyright impose. Many works are created with the intent to exploit their commercial

value as expression, but lack that value at inception or perhaps enjoy evanescent commercial value that endures for a much shorter period than the current copyright term.<sup>320</sup>

As for enforcement mechanisms, the natural-rights retort is even less self-evident. Provisions of the DMCA take a specific approach to protect copyright that ultimately impacts free speech by effectively enabling a hecklers' veto of political speech, or that facilitates use of dragnet style computer filter programs that automatically takedown legitimate content. One can believe that copyright is a natural right, then want a different system to enforce that right than every provision in the DMCA.

In particular, policy-makers have decided that many forms of technology are by their nature "contraband," upon use or sale of which the government can place a person in jail for up to five years. These technological contraband are software for personal backups of purchased DVDs on one's computer, patches to unlocking one's phone in order to use a different cellular carrier, and add-on technology to enable an e-book to be read aloud for persons who are blind or add subtitles for persons who are deaf. While the first two technologies are completely illegal now, the last two receive an exception every three years by the Librarian of Congress (however it is an exception that is relatively ineffective).

These laws reflect a choice to effectuate copyright protection in positive law. But they are not the only ways to do so, and clearly not the most effective, and it is for these reasons that we have to craft sensible laws on copyright based upon reasoned argument.

The relevant public-policy-related questions on copyright are: How do we maximize content production? How do we ensure authors and artists a large profit, but also ensure that new market participants can make money, either through derivative works after a copyright has expired or under an expanded and clear fair use policy during the copyright term? How do we facilitate amateurs to be able to remix content to create new content?

In addition to the impact on innovation, content creation, and businesses, we must also think of the impact on individuals. Imagine a child from a disadvantaged background who studies every day with hopes of being the first in his family to go to college. What would be the impact on such a child if all the world's literature and non-fiction works, eventually, became available for free at the click of a button? The true value of a large, accessible and dynamic public domain in a web-enabled world and its profound impact upon learning cannot be understated. The societal impact could be astounding.

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<sup>320</sup> Samuelson, *supra* note 140, at 1198–99.

While the Founders did not have the Internet, the title of the Copyright Act of 1790 demonstrates that they saw a limited copyright term as a tool for learning.<sup>321</sup> The Act was entitled: “An Act for the encouragement of learning . . . .”<sup>322</sup> The Supreme Court has also recognized the importance of the public domain for this and other purposes.<sup>323</sup> Of course, as stated above, the importance of the public domain must be weighed against providing a substantial profit for the content producer.

We must balance individual expectations of profit against the importance of the public domain. After the first few years of most works’ publication, the works have exhausted most of their earning capacities. Allowing these works to enter the public domain after a lengthy, but limited, earning period would still ensure large profit for the content producers. Based upon the data, there is simply no basis for arguing that a copyright term of life plus seventy years provides additional incentives to produce content above life plus fifty years, or even less.

The “natural rights” counter-argument is not a self-evident response to these questions, as it provides little clarity to why our system is the way it is today. Supporters of natural rights arguments should answer relevant public policy questions on copyright:

1. On what policy basis does a natural rights believer justify a copyright term of life plus seventy years (why not 500 years)?
2. Will natural rights believers support taking additional action to extend copyright terms when Steamboat Willy would otherwise enter the public domain in 2019?
3. Why does protecting copyright require it to be illegal to “unlock” one’s own phone or jailbreak one’s own iPad?
4. On what policy basis does copyright law make it illegal to add adaptive technology that allows books to be read aloud for the vision-impaired, what copyright related interest is this protecting?
5. Does protecting copyright require that developers of this technology be liable for a felony, punishable by up to five years in prison and a \$500,000 fine?

These are the questions that supporters of the status quo must answer. The system is broken and these positions are largely indefensible.

Copyright law must be designed to incentivize content creation

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<sup>321</sup> Copyright Act of 1790, 1 Stat. 124.

<sup>322</sup> *Id.*

<sup>323</sup> See generally *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

and to incentivize a robust professional market, but it must also provide a rich public domain and opportunities for others to create new artistic works that grow the pie for everyone. Overall, a rational system of copyright is incompatible with an irrational fear of piracy. Piracy is undoubtedly a real problem, but it does not justify morphing copyright into a system that hinders innovation. We can craft a system of copyright that compensates rights holders and incentivizes innovation for start-ups and new artists. It is not an either/or proposition.<sup>324</sup>

A smart, constitutionally based policy would enable more profit for more artists and would foster new emerging and disruptive industries. Public policy should support copyright, but not forever. But we need to analyze our laws based upon the needs to innovators, the public and new market participants, including new artists, in addition to existing rights holders, rather than simply assume that any tampering with intellectual property means that one is against intellectual property.

Natural rights supporters need to answer tough questions of public policy and recognize that natural rights is simply not the system of copyright adopted by the United States, but even if it was, it still does not explain our current state of copyright law dysfunction. Overall, current copyright laws represent the worst of lobbying run amuck, rather than rational public policy considerations.

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<sup>324</sup> See also Derek Khanna, *Let Artists, Innovators and the Public Define Our Copyright System*, WASHINGTON POST BLOGS (May 21, 2013), [www.washingtonpost.com/blogs/wonkblog/wp/2013/05/21/hollywood-should-not-decide-our-copyright-laws/](http://www.washingtonpost.com/blogs/wonkblog/wp/2013/05/21/hollywood-should-not-decide-our-copyright-laws/).