

## House Republicans: Copyright Law Destroys Markets; It's Time For Real Reform

from the *congress-wakes-up dept*

by **Mike Masnick** Fri, Nov 16th 2012 7:39pm

**Update:** *Wow. It took less than 24 hours for the RSC to fold to Hollywood pressure. They have now retracted the report and attempted to claim that it was not properly vetted.*

Right after the Presidential election last week, Chris Sprigman and Kal Raustiala penned an opinion piece suggesting that one way the Republicans could "reset", and actually attract the youth vote, would be to become the party of copyright reform. We had actually wondered if that was going to happen back during the SOPA fight, when it was the Republicans who bailed on the bill, while most of those who kept supporting it were Democrats. Since then, however, there hadn't been much movement. Until now. Late on Friday, the Republican Study Committee, which is the caucus for the House Republicans, released an amazing document debunking various myths about copyright law and suggesting key reforms.

If you're used to Congress not understanding copyright, prepare to be surprised. It's clear, thorough and detailed about just how problematic copyright has become and why it needs to change. To give you a sense of where the document heads, note the final line:

*Current copyright law does not merely distort some markets -- rather it destroys entire markets.*

There is a lot in this document, and we can't go through it all, but I highly recommend reading through it. The three "myths" it attacks are:

1. **That the purpose of copyright is to compensate the creator.** No, it correctly notes, it's about benefiting the public:

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

*productivity and innovation.*

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

2. **That copyright is a representation of free market capitalization.** The paper properly notes that the reality is the exact opposite:

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

3. **That the current copyright regime leads to the greatest level of innovation and productivity.** That makes no sense at all, the paper says:

*Today’s legal regime of copyright law is seen by many as a form of corporate welfare that hurts innovation and hurts the consumer. It is a system that picks winners and losers, and the losers are new industries that could generate new wealth and added value. We frankly may have no idea how it actually hurts innovation, because we don’t know what isn’t able to be produced as a result of our current system.*

From there, it goes on to look at some of the specific harms of today's copyright law, including harming remix culture and a lot of commercial activity around it, that it "hampers scientific inquiry," discouraging value added industries and others.

Finally, it puts forth suggestions for copyright reform that go way, way, way beyond anything we've seen legitimately discussed in Congress, ever. Below I just show some snippets from the recommendations, so go read the full thing.

1. **Statutory Damages Reform:**

*Copyright infringement has statutory damages, which most copyright holders can and do use in litigation (rather than having to prove actual damages). The government sets a range – which is \$750 to \$30,000 per infringement – but that goes up to \$150,000 if the infringement is “willful.” Evidence suggests that the content holder almost always claims that it is willful. This fine is per infringement. Those rates might have made sense in commercial settings (though even then they arguably seemed high), but in a world where everyone copies stuff at home*

*all the time, the idea that your iPod could make you liable for a billion dollars in damages is excessive.*

**2. Expand Fair Use:**

*Right now, it's somewhat arbitrary as to what is legally fair use based upon judicially created categories. One example: parodies are considered protected by fair use but satire is not. There's an excellent book (and a shorter paper) called *Infringement Nation* that details how things you do every single day are infringing and leave every single person liable for billions in damages each year ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1029151](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1029151)).*

**3. Punish false copyright claims:**

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

**4. Heavily limit the terms for copyright, and create disincentives for renewal:**

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

It goes on to suggest a sliding scale for copyright renewal, after a free initial term of 12 years. The fee for renewal would be a percentage of revenue from the work, and that percentage increases with each additional renewal term. Under such a system, those who are still exploiting the copyright can continue to hold one, but for most, where there is greater benefit to have the work in the public domain, the work goes into the public domain.

This document really is a watershed moment. Even if it does not lead to any actual legislation, just the fact that some in Congress are discussing how copyright has gone way too far and even looking at suggestions that focus on what benefits the public the most is a huge step forward from what we've come to expect. In many ways, this is the next logical step after the completion of the SOPA fight. Rather than just fighting bad policy, it's time for Congress to recognize that existing copyright law is bad policy and now is the time to fix it. It comes as a surprise, but kudos to the Republican Study

Committee -- and specifically Derek Khanna, the policy staffer who wrote the document -- for stepping up and saying what needed to be said, but which too many in Congress had been afraid to say for fear of how the entertainment industry lobbyists would react.