

The American Conservative

Responding to Pro-IP Conservatives

By Jordan Bloom – 12/13/12

It sure is amusing to have comments from one of your copyright posts copied and recirculated by a pro-copyright trade group. C'est la vie, fair use and all that.

The Copyright Alliance represents most of the major players in the content industry. The four comments they copied were responses to a question I posed, asking whether conservative scholars, think tanks, or other intellectual heavyweights outside the industry itself actually support the current copyright regime. It seemed to me there weren't many, and frankly, despite these few dissents, it still seems that way. But let's take a look at some of the commenters' claims.

First there's Tom Sydnor, of the Progress and Freedom Foundation. Sydnor believes "the RSC correctly disowned the anti-private-property rhetoric of the laughably flawed Three Myths about Copyright paper," and makes a more lengthy case here. While Derek Khanna's paper was far from perfect, a line-by-line legal refutation is a bit like taking a gun to a knife fight, and the fact that he feels the need to do so while ignoring some of the more basic claims of IP-skeptics is telling. Sydnor also relies heavily on the canard that IP skeptics including Derek Khanna are "anti-private-property," which is completely untrue. It's worth noting that the founder of the PFF's Center for the Study of Digital Property is James DeLong, who conceded in National Review recently that copyright needs a complete overhaul.

Mark Schultz writes:

As a legal academic with a long history of working with free market organizations, I'm happy to affirm that, yes, many conservatives and libertarians do support copyright for principled reasons. While those organizations have included IP skeptics such as Stephan Kinsella, my experience has been that pro-IP sentiments have been the mainstream view among the free market advocates with whom I have worked.

I admire much of Stephan Kinsella's work but the label IP-skeptic doesn't really fit. He is decidedly anti-IP; opposed to the institution as a whole, damn the Constitution. There is a more moderate IP-skeptical position that holds that copyright is justifiable under some circumstances and allowed under the Constitution but the current system has metastasized into something indefensible. This is the position held by many free-marketers including James DeLong and Jerry Brito (and myself, FWIW), and Kinsella often criticizes it.

Schultz goes on to freak out about how IP-skeptics hate property rights, arguing that the position is "impoverished, amoral, and dangerous to liberty." In a longer post, he says, "Many modern copyright scholars and commentators have embraced a severe utilitarian view of copyright. In this view, the sole justification for copyright is the benefit that creators provide to society." This is also the view of the Founders, based on the very clear utilitarian language of the copyright clause.

Schultz also says that IP-skeptics "appear to forget that copyright law is private law, not public law." That's generally true, but one of the troubling developments of the last 15 years of copyright law has been the introduction of criminal penalties for infringing activities, starting with the DMCA. Surely he knows this.

Scott Cleland is a hack who gets paid by telecom companies to bash Google and tar IP-skeptics as crypto-Marxists. He is not a serious man. He objects to right-wing IP skepticism because some folks on the left are also skeptical (so what?), because copyright shouldn't be a conservative priority (it should), and because he thinks any copyright reform that doesn't specifically tackle piracy is "directionally" anti-property (it's not). Combating piracy is a legitimate policy goal. But even RIAA senior VP Mitch Glazier reluctantly conceded at the Cato Institute last week that the issue of sample clearinghouses and fair use was "difficult." So to say reform that doesn't move in the direction of greater exclusivity and stronger penalties is illegitimate is to be completely ignorant of the unbroken upward trend in copyright protection since 1790.

The most persuasive argument comes from GMU's Adam Mossoff, who's written extensively on the nuances of copyright through history. Specifically, he argues that a natural-rights conception of copyright was far more common than one might expect given the phrasing of the copyright clause and Thomas Jefferson's letter to Isaac McPherson, and that the distinction drawn between traditional property rights in land and IP rights is a fallacy from a legal standpoint (Mossoff is also an Objectivist, and there is no such thing as a utilitarian Objectivist). That makes sense to me, though I'd be interested to read a different take. However, regardless of their legal status and historical provenance, IP and regular property differ greatly for other reasons, and it doesn't follow that governments should commit ever-greater resources toward fighting every instance of copyright infringement, take down websites in violation of due

process (and property rights), and undermine the architecture of the Internet, as SOPA promised to do. Even Ayn Rand agreed that a natural-rights conception of IP still implies limits.

The question is where those limits ought to be. But we've never been able to have an honest debate about that, because the framework of copyright law has always been set by the industry, which understandably wants ever-longer terms, stronger enforcement, and greater exclusivity.

Be sure to check out Brito's interview with Reason's Nick Gillespie:

http://www.youtube.com/watch?feature=player_embedded&v=-Krl59fvilE