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## Questioning Copyright's Trade-Off

The idea behind copyright is simple — it is supposed to be a balance in the service of the public interest. There's a trade-off: for accepting a restriction on certain speech, the public benefits from the production of more new creative works each year. That delicate equation is complicated by many factors, and the right policy should find the balance of copyright scope and duration, limitations and exceptions like fair use, and the appropriate remedies in case of infringement.

But in fact, copyright policies almost universally lack the serious cost-benefit analysis that must precede any evidence-based proposal. And indeed, while the unintended costs are clear to anybody who has observed [abuse of, say, the DMCA takedown system](#), the evidence that these policies create incentives — or even prevent harm — is less forthcoming.

Last week [Julian Sanchez](#) of the Cato Institute posted [a thought-provoking piece that questions the similar calculation at the core of national security rhetoric](#). In the area of security, he asks, are we actually getting a "trade-off" for all the costs we incur to the country's budget and our personal liberty? Sanchez convincingly argues that we haven't been working towards a balance between those two ideas at all. Liberty is consistently discarded in the name of "security," and the resulting policies don't actually make us safer. A dialogue that focuses only on striking a balance between these two ideas fails to address more fundamental questions about our policy.

So, too, with copyright. The right copyright policy should serve the constitutional purpose of promoting "[the progress of science and the useful arts](#)" while respecting the ideals of the First Amendment. The need for such a balance is well recognized from all corners of the copyright discussion. In a post about the misguided Supreme Court opinion in *Golan v. Holder* this January, for example, EFF referred to the "[traditional copyright balance between public and private interests](#)"; and while EFF doesn't always see eye-to-eye on copyright issues with content lobby groups like the Recording Industry Association of America (RIAA), its chief executive Cary Sherman has also described "[the careful balance struck within copyright law](#)."

It makes sense, then, that one typical response to bad copyright policy developments — and there are many — is to say that those developments skew this balance the wrong way, favoring the incentives and rewards for rightsholders more than is necessary to maximize creative production. But that approach overlooks the fact that many of the worst copyright proposals, like those that come out of content lobbying groups like the RIAA and the Motion Picture Association of America (MPAA) do worse than a skewed balance. Rather, they fail to strike any kind of balance at all, curtailing speech and fundamental online rights without a corresponding increase in the incentive to create new works.

By and large, in the legislature, in the courtroom, in the White House, and in the backroom negotiations for international treaties, balance does not seem to be the real goal. This year's protests against SOPA and ACTA were certainly historic demonstrations of online activism, but those proposed laws were just the latest in a long line. Even as [ACTA met defeat in Europe](#), the [Trans-Pacific Partnership Agreement](#)

[\(TPP\) was being negotiated](#) with industry representatives behind closed doors, with guardians of the public interest on the outside. SOPA was an [egregious and over-the-top wishlist of Hollywood demands](#), but it was hardly new: [its Senate counterpart, PIPA](#), was a re-write of [a bill from two years earlier called COICA](#). And Congress has passed dozens of other one-sided copyright laws over the last thirty years.

If it were simply a matter of striking the wrong balance, SOPA's cost in terms of [threatening human rights](#), [curtailing freedom of speech](#), and [damaging the economy](#) would have to be offset by gains to the content lobby backing the bill. It wouldn't be the *right* trade-off, but it would make sense in the context of a balance. In reality, though, the benefits for the content lobby simply weren't there. In January, Sanchez himself [calculated that the size of the foreign "pirate" movie market targeted at Americans](#) — the kind of activity SOPA was written to address — was orders of magnitude below the MPAA claims. And for their part, the RIAA recently revealed in [a leaked report from April](#) that despite its public rhetoric, it felt SOPA was "not likely to have been [an] effective tool for music" even if it had passed.

Similarly, when the 1998 Copyright Term Extension Act — sometimes called the "Mickey Mouse Protection Act" because it kept the world's most famous rodent out of the public domain — was challenged in the Supreme Court, [some of the world's leading economists lined up in a brief](#) [pdf] to question the premise that the public benefited from retroactive term extension at all. Once again, the costs to the public are clear: we all suffer from a poorer public domain with no clear gains in return. Worse, these examples are the rule and not the exception. Many elements of policy today — from [DMCA's problematic section 1201](#) to the unconstitutional [ICE seizures of websites](#) — and dozens more failed proposals — like the "[Hollywood Hacking bill](#)" or the [broadcast flag](#) — fit this pattern.

Compared to the trade-off of security and liberty, the question at the heart of copyright policy is an easy one: How do we optimize the incentive to create new works while minimizing the cost to our freedom of speech and ability to innovate? Unfortunately, sane policy developments that work toward this end are all too rare.