

Telecom Industry, ITIF Frown on 'Government Privilege' Argument for Copyright

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The conservative debate on whether copyright is a property right or a government granted privilege (WID May 14 p1) continued at an American Enterprise Institute panel Tuesday. Four academics -- two on each side of the debate -- argued about whether and to what degree copyright protections support "liberty" and "innovation." Telecom industry officials and think tank leaders expressed concern that the "government privilege" argument could be a detriment to the free market. There's a "wide a variation among free market individuals" on copyright, said Stan Liebowitz, University of Texas-Dallas (UTD) economics professor. "The question is whether copyright should be treated as real property."

Having the ability to forbid an individual from singing a song by claiming a property right "does seem to infringe" on "liberty," said Tom Palmer, Cato Institute senior fellow. It's "not obvious that intellectual property or copyright" is "compatible with liberty," because it restricts individual behavior, he said. Copyright isn't a "silver bullet to create more innovation, nor is it the worst thing in the world," he said. "As long as it's a right that can be legally traded, people can innovate around all the stupid things that policymakers do." Palmer said he was "skeptical, but not an extremist" of "utilitarian claims" that say "extending copyright protections" affords "more innovation."

The conservative complaint that "modern copyright is a product of lobbying" isn't true, said Mark Schultz, associate law professor at George Mason University: Contemporary copyright is a "product of overregulation." Because copyright hasn't operated in a free market and is subject to some government control, "you're going to lobby," he said. Copyright "supports liberty" by strengthening "independence," he said. When a creator is allowed to own the "fruits" of their labor, they're allowed to "develop their ideas freely," he said. Like property rights, copyright creates a "private sphere of action," which "facilitates millions of mutually beneficial transactions," said Schultz.

The "key distinction" among conservatives is whether copyright is "property" or if it's a "privilege," said Jerry Brito, director of the Mercatus Center's Technology Policy Program at

George Mason University: "Copyright is absolutely a privilege." Based on the rights afforded by the Constitution, Congress can "repeal copyright," but it can't repeal property rights, he said. The "contours" of copyright -- the length of the copyright term, whether that term should be requested and if the term can be renewed -- are critical, he said: "Where we set that dial is the crux" of the copyright debate.

UTD's Liebowitz disputed several conservative "canards" on copyright, including the idea that copyright provides a "monopoly." Copyright doesn't offer of a monopoly any more "than owning a car provides a monopoly on the car," he said. Copyright doesn't restrict "creativity," but incentivizes the creation of original works in order to avoid copyright disputes, he said. Copyright isn't only a benefit to "major corporations," as some conservatives suggest, but helps the "small guys," said Liebowitz, citing Harry Potter series author J.K. Rowling as a "very wealthy" writer thanks to copyright protections. Copyright doesn't limit "free speech," but "eliminates plagiarism," he said.

'Troubling' Response

The "conservative side" of the copyright debate is "troubling, because it sort of seems like a race to the bottom of who can advocate for getting rid of more government than the other person," said Information Technology & Innovation Foundation President Robert Atkinson. If a nation doesn't have copyright protections, "you end up, actually, with more government rather than less government," he said. The "vast majority" of venture capitalists wouldn't "fund a startup that doesn't have intellectual property protections," said Atkinson.

The "unique" factor in copyright isn't "what is a copyright, but how you infringe," said Jeffrey Blum, Dish Network deputy general counsel. "How the content community has gone after technology that ultimately helps consumers" is a "very important lesson that hasn't been addressed," he said, citing challenges to the photograph and DVR, among others. If a consumer has "legitimate access to content," they should be able to use it as they see fit, he said.

Just because Congress "sets copyright" regulations doesn't mean they're like "Soviet central planners," said Brent Olson, AT&T vice president-public policy. "Soviet central planners had to prescribe outcomes," whereas copyright is a "tradable property," he said. "If you create something" that has "value, then you can have some control over how it's disseminated," he said. If the creation doesn't have value, "the copyright is worthless," said Olson. "The analogy to central planning does not work."

Songwriters "don't create works" without the financial rewards guaranteed by copyright protections, said Jay Rosenthal, National Music Publishers' Association (NMPA) general counsel. Conservatives can "be supportive of property interests in copyright and yet, be critical

of the way government has been involved" in copyright regulations, such as Copyright Act Section 115 or the compulsory license set by the Copyright Royalty Board, he said. NMPA called for the abolition of Section 115, in favor of a free-market solution, in comments submitted to the Copyright Office's music licensing study (WID May 27 p1).