

NAS PRESENTATION

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Thank you for inviting me to share my thoughts with the Committee.

You've asked for input on the areas on which you should focus. Let me start with the economic background papers you are planning to commission.

As a general observation, do not underestimate the difficulty of the topics you've proposed. The fact is, we've had a property right in creative works for over 200 years. It will be enormously difficult to determine what the economic activity would have been in the absence of a property right in creative works.

Similarly, it may be possible to quantify economic activity, but once you get into concepts like "costs and benefits" and "theoretical" analyses of how copyright might "stimulate or inhibit innovation," we're in a world far removed from simple measurements.

Also, as described in the STEP proposal, the topics overlap considerably. Unless the Committee is far more specific about its expectations, you could wind up with papers covering the same subject matter. The few points I make below, for example, seem to apply to all of the topics.

I assume that these studies will focus on the jobs that are created as a direct and indirect result of copyright, the trade benefits of copyrighted products as our number one export, and the like. But there are some additional points the papers should consider:

First, I would urge the Committee to ask more specifically, "Is a property right an important incentive to creation of works of authorship?" I suppose that question could be viewed as implicit in the topics to be covered – it's possibly a "benefit" of copyright, or a way in which copyright can "stimulate" innovation. But the question is not clearly asked and an answer is not clearly called for. I think we need to ask and answer that question.

Certainly, the Constitution assumes that the grant of a property right is an important incentive to creation. Frankly, I do, too. But I think we need a thoughtful answer to that question because many of the other questions posed by STEP are about restrictions and limitations on copyright, on the apparent assumption that that may be an appropriate way to limit the adverse effects of the property right. If it turns out that the awarding of copyright rights in a work of authorship is an important reason why creators create, why amateur creators devote the thousands of hours of time and practice to become professional creators, why businesses devote the financial and human resources to subsidize and support the careers of professional creators, then that would suggest that we need to proceed very cautiously before we limit that property right.

It is intuitive to me that the copyright system has historically worked well to promote culture and creativity. The most vibrant creative communities appear to be found in countries with the most established copyright regimes. And a paper just published by OECD has concluded that generally strengthened frameworks for intellectual property rights in developing countries has delivered positive economic results. But I would welcome research to prove or disprove my assumption. If I am right about the importance of copyright to creativity, then we'd need to think long and hard before changing that system in a way that could do more harm than good.

Obviously, in addressing this question, we need to think broadly about creativity, and the kinds of creators we want to incent. There are lots of creators who will create purely for the sake of creating. But will they be any good at it? Will they devote the time and resources necessary to become better at it? Will they become professionals, instead of amateurs?

There is a mind-boggling amount of user-generated-content online, and some of it is amazingly good. And it's great that we now have access to all that. But surely we don't want a world of amateur creators, only. We also want professionals who have put in the time, who have studied at educational institutions and with teachers and mentors, who have learned from experience, and who have had the financial resources necessary to be creators who earn their livelihoods from their creativity. It is telling that, of all the content on YouTube, it is professionally produced music videos that are streamed the most, by far. How do we ensure that we have all types of creators?

Another difficult question lurking in these studies is, What is the right measure of creativity? Surely we cannot rely on the simple number of creative works to serve as the measure of creativity. But how can we measure such attributes as quality? Do economists have the necessary tools to be able to do so?

There were 97,000 record albums released in 2009. 81,000 of them sold less than 100 copies. That doesn't mean they weren't creative, or that they weren't quality works. But for whatever reason, they did not command much interest or attention from the public. Do those works get counted the same as the much smaller number of very popular creative works that people actively seek out? Using the right measurement metrics will be critical.

Perhaps it's that those 81,000 creators didn't have the human and financial resources of backers – like record labels, or music publishers – to help market and promote their work so that the public would get to know it. The Internet has enabled anyone and everyone to become her own publisher. But ironically, that has made it even more challenging to break through the clutter, to be heard. There are over two million artist pages on MySpace. How is any one of them going to get heard? Policies that encourage the creation of the best song in the world won't mean much if that song sits in a drawer, heard by no one.

This brings up another issue that I think needs to be considered in these papers – what is the incentive for BUSINESSES to support the creation, publication and distribution of creative works?

Creators benefit when businesses INVEST in them. And their fans benefit, too, because businesses help creators produce the very best work they can. They provide professionals to offer advice and expertise.

They give them the resources they need to spend their time honing their skills. And they provide the marketing support needed to launch creative works into the world.

When businesses can't earn a return on their investment, they stop investing. Spain is an excellent example of this. Online piracy in Spain has so decimated the market there that record companies have substantially reduced their investment. In 2003, there were 10 new Spanish acts in the top 50 albums. In 2008, there was one. In 2009, there were none.

So let's not look at just the creator side of the equation. I urge you also to look at the incentive needed for businesses to support creators.

Second, I would urge the Committee to ask, Is copyright a driver of innovation? Maybe that's another possible issue that can be counted among the "benefits" of copyright, but let's ask for this question to be considered very specifically. It's often been said that an iPod wouldn't have much appeal but for the music you could play on it. Of course, we've had recorded music for about a century, so it's hard to imagine that the iPod would need laws that encourage the creation of music to support sales of the device. So let me give a more current example:

Have you noticed the proliferation of new TVs offering 3D? This is not an accident. It's a direct result of Avatar, the most significant and successful 3D movie in history. It stimulated enormous interest in 3D content, which has generated more and more 3D movies, which in turn has driven technology companies to create technology and devices to broadcast and perform 3D content. If 3D content were to dry up tomorrow, would Panasonic and Samsung continue to develop 3D televisions? I don't think so.

A third question I would urge the Committee to consider is the cultural benefit of copyright. I realize that the economic studies are intended to focus on economic values, and they are obviously of critical importance. And the copyright industries certainly make a significant contribution to the American economy, even BEFORE one considers how much more they may be adding by driving some of our technology innovation as well.

But we should not overlook the importance of copyright's contribution to culture. Music is a defining cultural force in America. Even our cities are often identified with specific musical genres—New Orleans for jazz, Memphis for blues, Nashville for country, Miami for Latin music. We associate certain kinds of music and the messages in that music with transformational historical periods, like the antiwar protests of the 60's.

American culture defines us around the world. Our movies. Our music. No matter where you go in the world, you will always hear American music playing much of the time. It's an intangible, I know. But as long as we're attempting to measure other intangibles, let's not forget the intangible of culture that was one of the reasons for copyright in the first place.

Finally, I will simply note the issue of piracy. As the proposal paper says, "widespread digital piracy" is a salient feature of the landscape of the current copyright marketplace. Measuring the extent and characteristics of this piracy seems to me to be an obvious element of any research agenda.

Let me turn now to the list of “salient issues” in the STEP proposal. I was disappointed to see that almost all of this list of what STEP regarded as “the most salient issues” were claims critical of copyright. Fair use is as important to creators as it is to users, because everything we create is built on that which was created before. Yet critics of copyright seek to expand the scope of fair use so as to limit the property right in a copyright. Tech mandates, secondary liability, statutory damages – all are buzzwords for critics of copyright.

I’m not going to urge you NOT to study these issues. They have become public policy issues, and they should therefore be analyzed.

But it seems to me that the Committee is focusing on just one side of a very complicated equation. We need to look not just at restrictions on property rights or the ability to enforce property rights, but on how to facilitate the licensing of property rights in the digital age.

I’m reminded of the book *Gridlock Economy* by Andrew Heller, a professor at Columbia. He explains that airport congestion could be solved with the construction of 25 new runways. But building them has become almost impossible, because of the welter of property rights in the areas adjoining airports. But is the takeaway therefore that we should prevent people from owning private property? That people should not be allowed to own land or homes? Of course not. The solution is to find a better way to clear the necessary rights to cut through legitimate property interests.

Critics of copyright point to problems with the licensing of this property right in the digital age, and suggest that the solution is to LIMIT the scope of the right, or to limit the ability to enforce it. The better approach, I believe, is to find improved ways to clear the necessary rights.

I will make three suggestions for areas worth further study:

First, how can voluntary licensing systems be simplified to facilitate the clearing of rights in the digital age?

It was not very long ago that licenses were essentially issued an album at a time. Twelve, maybe fifteen songs, at once. Now, licenses are requested for literally millions of songs at a time. We’ve come a long way in the last decade, issuing licenses regularly for vast catalogs. But we can do better.

For one thing, our laws do not distinguish between works of authorship created with the intention of controlling and profiting from them, as compared with works created without any economic motivation or concerns. We need better ways to distinguish when copyright is a beneficial property right, and when copyright is a meaningless and even unwanted right.

We also have not done a very good job of cataloging our copyrighted works, and who owns them. It’s difficult to clear rights when it’s not even known who owns the rights. Can the government make copyright more transparent by ensuring that a repertoire database is created with current and accurate information necessary to make licensing simpler?

There are certainly other improvements that can be made to licensing regimes in the music industry, and I don't mean more compulsory licenses. The government should not be determining the value of creative works. But there may be better ways to issue blanket licenses, for example. As I said before, we've come a very long way on licensing. But we still have laws on the books – requiring such things as certified letters to individual copyright owners -- that have not been adapted to the digital age.

All of these are areas deserving of study.

Second, how can copyright rights be clarified to eliminate ambiguity? Many of the problems we face are caused by our attempts to fit an old copyright law into a new digital environment. Copyright critics have often claimed that this ambiguity benefited copyright owners and stifled innovation. I submit that this uncertainty is actually benefiting copyright users, and encouraging the wrong kind of innovation. Internet entrepreneurs are encouraged to create services that circumvent copyright and avoid royalty payments. Instead of accepting that creators must be paid for the use of their works, entrepreneurs look for the loopholes in existing law to find a way AROUND the creator. This is bad public policy. We should make the law more clear and encourage innovators to offer the best experience for consumers, not the experience that avoids payments to creators.

Finally, to what extent are antitrust laws inhibiting the ability of industries impacted by the Internet to respond with game-changing business models? One of the realities of the music space is that any really new and innovative business model has to offer ALL the music. Not just the music of one company, or two companies, but ALL of them. After all, consumers have no idea which company brings you Bruce Springsteen, and which Eminem, and which Sheryl Crow. To succeed, a music service must offer everything. That means that, as a practical matter, new businesses can't launch successfully unless they've gotten all the major sources of content bought into the same business model.

Unfortunately, antitrust restrictions prohibit the very communications that would make that more likely. Every company has its own ideas about how best to exploit its content, including how it should (or should not) be protected, what kinds of uses, and copies, and transfers, consumers should be permitted to make with the content. And on and on. But those companies cannot talk to each other about those issues in an effort to get on the same page, because they have been properly cautioned that such conversations could give rise to an antitrust violation.

When Congress wanted to protect the family farm and also ensure a reliable supply of milk, they enacted legislation allowing dairy farmers to act collectively. The FTC has suggested that newspapers should be able to license their products jointly to help them adapt to the crushing impact of the Internet. Why not music? Shouldn't the industries most impacted by the Internet be given some leeway, carefully circumscribed to avoid price-fixing and other clearly anticompetitive activities, to collaborate with each other and with licensees on new business models?

Maybe there's some other "industrial policy" that can be envisaged that would facilitate the adoption and take-up of truly new and innovative business models. But right now, it's every company for itself, trying to forge a new path, while the law actually operates to impede, rather than facilitate, finding a

common path. I urge the Committee to ask, How can we facilitate the adoption of new, voluntary business models without running afoul of antitrust laws.

STEP has launched an ambitious project. I congratulate you for your willingness to engage in a truly challenging and difficult public policy inquiry. But if you're going to do it, you have a responsibility to do it right. Abandon pre-conceived notions. Abandon the slogans from the copyleft and the copyright. Ask a lot of questions. And when you get your first round of answers, be prepared to ask still more questions. Because a lot depends on the conclusions you reach.

Thank you for listening.

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