

STATEMENT OF

MARK SCHULTZ

Professor of Law,
Southern Illinois University School of Law

Senior Scholar,
Center for the Protection of Intellectual Property
George Mason University School of Law

BEFORE THE

COMMITTEE ON THE JUDICIARY
Subcommittee on Courts, Intellectual Property and the Internet

U.S. House of Representatives

The Scope of Copyright Protection

JANUARY 14, 2014

INTRODUCTION

Chairman Goodlatte, Chairman Coble, Ranking Member, and Members of the Subcommittee:

Thank you for this opportunity to speak with you today about the scope of copyright protection and copyright protection for broadcasts.¹ Today's topic addresses the very heart and purpose of copyright law. I will begin by addressing how copyright's broad subject matter reflects the moral and economic purposes of copyright law, and then I will address how those principles apply to protection for broadcasts.

THE SUBJECT MATTER OF COPYRIGHT

For over 200 years, our copyright law has progressively evolved to recognize that all original expressive works lie within its subject matter. As the years have passed and technology has progressed, copyright law has protected an ever-increasing variety of works – starting with books, maps, charts, and fine arts, and then including music, photographs, motion pictures, sound recordings, computer programs, video games, and many other works.

¹ Professor Schultz is speaking on his own behalf, and his views do not necessarily reflect the views of any institution with which he is affiliated.

While Congress and the courts have often revisited and adjusted the margins and peripheries of copyright, the heart of copyright has remained consistent: Copyright protects the productive intellectual labor of authors, provided that those labors result in an original expressive work.

Copyright's broad subject matter is in keeping with both its moral and economic purposes. One of the influential proponents of America's first copyright laws,² Joel Barlow, stated the moral case for property rights in authors' original expressions:

There is certainly no kind of property, in the nature of things, so much his own, as the works which a person originates from his own creative imagination: And when he has spent great part of his life in study, wasted his time, his fortune & perhaps his health in improving his knowledge & correcting his taste, it is a principle of natural justice that he should be entitled to the profits arising from the sale of his works as a compensation for his labor in producing them, & his risque of reputation in offering them to the Public.³

Barlow's description of the justification for copyright reflects a long-held understanding that the case for copyright lies not in the specific type of work produced, but rather in the productive, creative labor that results in original expression that edifies, entertains, informs, or otherwise improves the lives of others.

The Supreme Court later described the economic justification for copyright in similar terms in *Mazer v. Stein*, yet another case that confirmed⁴ the broad subject matter of copyright:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and the useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.⁵

² Barlow, along with Noah Webster, was a proponent of copyright during the 1780s. As a result of the Barlow's letter, quoted below, a committee of the Continental Congress including James Madison passed a resolution encouraging the states to adopt a copyright law. 24 Journals of the Continental Congress 326-27 (May 2, 1783). Eleven of twelve states followed the recommendation in the years leading up to the adoption of the U.S. Constitution. The preamble to the Rhode Island and Massachusetts acts echoed Barlow's language quoted here, stating "such security is one of the natural rights of all men, there being no property more peculiarly man's own than that which is produced by the labour of his mind." For more on Barlow and the pre-1790 state copyright acts, see Justin Hughes, Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson, 79 Southern California Law Review 993 (2006); Terry Hart, Letter from Joel Barlow to the Continental Congress (1783), Copyhype, January 28, 2013, <http://www.copyhype.com/2013/01/letter-from-joel-barlow-to-the-continental-congress-1783/>; Terry Hart, Myths from the Birth of US Copyright, Copyhype, May 15, 2012, <http://www.copyhype.com/2012/05/myths-from-the-birth-of-us-copyright/>.

³ Letter from Joel Barlow to the Continental Congress (1783), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org, http://copy.law.cam.ac.uk/record/us_1783b

⁴ *Mazer v Stein*, 347 US 201 (1954) (extending copyright protection to mass-produced statuettes incorporated into lamps).

⁵ *Mazer v Stein*, 347 US 201, 219 (1954).

For these reasons, the courts and Congress have long taken a broad view of copyright's subject matter, focusing on a work's originality rather than its characterization as a particular type of work. As Justice Holmes observed, "a very modest grade of art has in it something irreducible which is one man's alone. That something he may copyright unless there is a restriction in the words of the act."⁶

Still, policymakers may be tempted to employ restrictions on the scope of copyright to resolve particular public policy concerns. After all, one might reason that copyright is supposed to serve the public interest, and modern policy discussions thus frequently refer to the need to "balance" the interests of authors and creators against those of the public. The scope of copyright, however, would be the wrong place to strike such a balance.

In truth, the interests of creators and the public are rarely out of balance, at least with respect to core copyright principles such as the scope and subject matter of copyright. Copyright exists to provide those who create, invest in, and commercialize content the chance to enjoy the benefits of what they create through exclusive rights. When they are able to do so, the public also benefits.

We have relatively little direct evidence of the intent of the Framers with respect to the Intellectual Property Clause, but in that limited record this very point was made clear: The interests of creators and the public in securing intellectual property rights are one and the same. In advocating for the Intellectual Property Clause, in *Federalist Paper 43*, James Madison observed that "the public good fully coincides in both cases with the claims of individuals." The public is more likely to get the works that educate, edify, entertain, and inform them if their creators can obtain just compensation.

At the heart of copyright – its subject matter – the interests of copyright owners and the public need no balancing or reconciliation. The genius of the American political and economic system is that it has shown time and time again that allowing free people to reap the rewards of their labor benefits both the individual and society in great and equal measures. Just as we embrace the rights of individuals and businesses to own homes, cars, machines, and bank accounts without apology or embarrassment, we also promote their rights to own intellectual property.

The public interest is best served when individuals and entrepreneurs are empowered and free, and property rights of all kinds are essential to such full and free lives. Like other property rights, intellectual property rights are essential to the individual liberty and free-market system that drive our dynamic economy.

At the margins of copyright, on specific issues, Congress and the courts often must and do reconcile the rights and needs of copyright owners with the interests of others. Both promoters and critics of copyright often describe this exercise as striking a "balance" between the rights of copyright owners and the interests of the public. However, this characterization is really far too

⁶ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (holding that works of advertising fall within copyright's subject matter).

adversarial because it fails to capture Madison’s important and uniquely American insight that property rights and the public interest coincide.

In particular cases where a dispute has arisen, it is not really a matter of “balancing” two equal and inherently conflicting claims. Rather, it requires the sometimes difficult task of defining the scope of rights properly, based on the nature of the property and the legitimate rights of others. For instance, we do not “balance” the alleged liberty interests of deliberate trespassers with the rights of homeowners—there is no right to liberty in trespassing. Although this insight can be difficult to apply to complex social and economic situations enabled by modern technology, it is important to recognize that the rights of intellectual property owners are no more opposed to the public interest than the rights of homeowners necessarily clash with the interests of their neighbors.

A well-defined system of intellectual property rights thus serves both individual interests and the public good. Moreover, other laws – antitrust, consumer protection, communications law – can and do impose proper limits on the use of copyrighted works.

In the end, creators, businesses, and the public are all best served when our intellectual property laws recognize the essential core value that those who invest labor and risk capital to create and distribute original content deserve protection.

PROTECTION FOR BROADCASTS

These principles apply to legal protection for broadcasts, since substantial labor and investment goes into the creation and distribution of television content. In the modern copyright and telecommunications laws, Congress created a legal framework that ensures that both creators of television programs and their distributors (via broadcast signals) have the opportunity to be compensated for their work, investment, and innovation.

The purpose of this legal framework is clear: To prevent third party commercial enterprises from free-riding on the labor and investment of creators and broadcasters by retransmitting broadcast programming and signals for their own ill-gotten profit. Such actions undermine the labor, investment, and incentives of creators and broadcasters and the very purpose of intellectual property rights.

Thus, the Copyright Act of 1976 secured an exclusive right to authorize the public performance of audiovisual works.⁷ This provision expressly overturned Supreme Court decisions that held that retransmission of broadcast programs by cable systems did not constitute a public performance.⁸

⁷ 17 U.S.C. § 106(4).

⁸ See *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

Later, Congress enacted the Cable Television and Consumer Protection and Competition Act of 1992,⁹ and the Satellite Home Viewer Improvement Act of 1999¹⁰ to create a separate right for broadcasters in their signals. These statutes create an exclusive right in broadcast signals distinct from copyright, thus creating a market in the right to retransmit broadcast signals, separate from the copyright in the programs on those signals.

Together, these provisions recognize and secure the rights of creators and broadcasters. The airwaves may be viewed as a public resource, but privately created broadcast systems and the programs transmitted over them are not, and should not be treated as such. They require substantial labor and creative effort to produce and vast amounts of capital to distribute via local broadcast signals. As between the creators of programming and broadcasters on the one hand, and other, unrelated third party commercial enterprises on the other, only the creators and broadcasters have both a just moral and economic claim to commercially exploit the programs and signals.

These are the core policies animating US intellectual property laws since their inception in 1790, and expanded and developed by Congress and the courts since.

Specifically with respect to TV broadcasts, Congress sought to encourage the production of high-quality, locally-focused broadcast television that consumers can watch for free. Of course, broadcast programming is not in fact “free” to create or to broadcast, and has always been financed through commercials and then, later, by pay TV subscriptions. For this reason, broadcasters require the same protections under the copyright and telecommunications laws as other creators and distributors of creative works.

Our copyright and telecommunications laws have indeed achieved their purpose, promoting and securing a dynamic and vibrant broadcast industry in which the rights of individuals and the public good are both promoted. There are nearly 1400 full-power commercial broadcast television stations in the United States.¹¹ These stations serve local needs and tastes, providing news, sports, and public interest programming.

Local broadcasters serve a number of important functions. First, they deliver the news – the Pew Research Center found that “78% of Americans get news from a local TV station” on a “typical” day.¹² Such news is particularly important in emergency situations.

Second, over-the-airwaves broadcast television is still the exclusive source of television for a significant number of Americans – nearly 60 million people.¹³ Those households include 30% of households with annual incomes under \$30,000.¹⁴

⁹ Pub. L. No. 102-385, 106 Stat. 1460.

¹⁰ Pub. L. No. 106-113, 113 Stat. 1501.

¹¹ News Release, FCC, Broadcast Station Totals as of September 30, 2013 (Oct. 24, 2013), <http://tinyurl.com/FCC9-30-13>.

¹² Pew Research Center, Understanding the Participatory News Consumer 10 (March 1, 2010), *available at* <http://tinyurl.com/PewNewsConsumer>.

¹³ Press Release, National Association of Broadcasters, Over-the-Air TV Renaissance Continues as Pay TV Cord-Cutting Rises (June 21, 2013), <http://tinyurl.com/NABRenaissance> (citing GfK Media & Entertainment, The Home Technology Monitor (2013)).

Moreover, most others who watch television receive broadcast television that is lawfully retransmitted by a cable, satellite, or other distributor (known collectively as multichannel video programming distributors (MVPD)).¹⁵ Of course, these subscribers pay a fee, and the MVPDs in turn pay for retransmission rights.

By the most important measures, the market enabled by these property rights appears to be working well. While there have been notably challenging negotiations regarding retransmission fees, such tough dealings are typical of all business deals between a producer of a highly desirable product and a major customer. A better metric is to look at the product enjoyed by millions of consumers. This market promotes and supports a system of locally based broadcast stations that provide a unique blend of international, national, and local programming that is the best in the world.

It is often said today that we are enjoying a Golden Age of Television, where creators and consumers both find great fulfillment. The most ambitious young screenwriters seek to write for television, while broadcasters aired 96 of the top 100 most-watched programs in the 2011 – 2012 TV seasons.¹⁶ Televised sporting events have reached new heights of quality and technical excellence.¹⁷ While the National Football League is more popular than ever, teams this year have faced unprecedented challenges selling playoff tickets to fans who increasingly prefer the televised experience.¹⁸ The quality of modern programming, more than anything, shows that the public is well-served by the current system.

The fact that broadcast television comes to consumers free over the airwaves causes many to underestimate the substantial investment required to make it happen. Local broadcasters must maintain expensive transmission facilities and invest in new technology – including the recent shift to high definition broadcasting. They pay network affiliation fees and syndication fees. And they spend substantial amounts of money to create local programming. In an era where news budgets and organizations are disappearing, local TV stations are a welcome exception – a

¹⁴ Id.

¹⁵ The National Association of Broadcasters puts the number at 100 million households. See Comments of the National Association of Broadcasters, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203, at 2 (Sept. 10, 2012), available at <http://tinyurl.com/NABComments> (citing GfK-Knowledge Networks, Home Technology Monitor, 2012 Ownership Survey and Trend Report (Spring 2012/Mar. 2012)).

¹⁶ TVB, TV Basics 11 (June 2012), <http://tinyurl.com/TVBasics> (broadcasters aired 96 of the top 100 most-watched programs in 2011-12).

¹⁷ For example, to broadcast a single NFL game, Fox brings in a team of more than 150 people and “\$25 million worth of equipment, with thousands of individual parts.” David Pierce, Any Given Sunday: Inside the Chaos and Spectacle of the NFL on Fox, *The Verge*, November 25, 2013, <http://www.theverge.com/2013/11/25/5141600/any-given-sunday-the-chaos-and-spectacle-of-nfl-on-fox>.

¹⁸ Kevin Clark and Jonathan Clegg, NFL Fans Forgo Playoff Tickets, Prefer the Couch Packers, Colts, Bengals Struggle to Sell Seats Despite Soaring TV Ratings, *Wall Street Journal*, Jan. 3, 2014, <http://online.wsj.com/news/articles/SB10001424052702304325004579298840229263538>

National Association of Broadcasters survey of TV stations reported an average news operating budget of over \$4 million a year.¹⁹

There is no such thing as a free lunch. Broadcast programming is paid for in part by advertising, but in an era of DVRs, advertising cannot be the sole source of revenue. The retransmission fees enabled by the property rights regime in broadcast signals provide essential support for local programming. They also represent a cross-subsidy to the 60 million viewers who depend solely on broadcast television, many of whom are typically underserved by other mediums - disproportionately minorities, poorer viewers, and younger viewers. Without retransmission fees, we would likely have less free, high quality television and essential local news, particularly for those who cannot afford pay television.

CONCLUSION

Wholesale changes to the scope or content of copyright law, or to retransmission consent, are unnecessary. In the framework of exclusive property rights in creative content and broadcast signals, “the public good,” as Madison said about the intellectual property laws generally, “fully coincides . . . with the claims of individuals.”

Nevertheless, certain open legal questions resulting from evolving technologies may require this Committee to revisit this area of law to ensure that its implementation continues to comport with Congressional intent. There may be some need for readjustments at the margins to ensure that the law continues to protect creators and broadcasters sufficiently. Two issues that the Committee may wish to consider in particular are:

- (1) The use of distributed retransmission by companies such as Aereo, who are attempting to exploit alleged technical legal distinctions between multiple, aggregated streams and public performance; and
- (2) The need for explicit protection of content and broadcast signals from unauthorized retransmission over the Internet.

However, core provisions such as the scope of copyright need no revision; so long as Copyright continues to protect the original expressions of creators, the scope of copyright is right. As Congress intended, the law should continue to ensure that broadcasters are compensated for both the carriage of their programming and use of their signals regardless of the distribution platform or technology employed.

¹⁹ Comments of the National Association of Broadcasters, *Examination of the Future of Media and Information Needs of Communities in a Digital Age*, FCC GN Docket No. 10-25, at 5-6, 33 (May 7, 2010), available at <http://tinyurl.com/FutureNewMedia>.