

Free Markets, Monopolies, and Copyright

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Critics of copyright law sometimes refer to it as a grant of a “monopoly” right to the author, artist, or creator of a copyrighted work. In fact, the use of the term “monopoly” in the copyright context is a misnomer: While a copyright holder retains the exclusive rights *over his or her own particular work*, the artist must compete in the market with many close substitutes and thus lacks the character of the “textbook” monopolist and its associated market power (i.e., the ability to raise prices above competitive levels for extended periods of time). Indeed, the consensus today among experts is that the artist does not hold a “monopoly” in the usual economic/antitrust sense of one actor having control of an entire market; rather, the owner of a copyright only has control over certain uses of his or her particular work in the market.

Notwithstanding the above, those wishing to argue that copyright is antithetical to laissez-faire capitalism often seek to invoke the word “monopoly” because of its pejorative nature.¹ Since the concept of laissez-faire emerged in the 16th century as a counter to the widespread use of monopoly grants in the mercantilist model adopted by the European governments of that era (including monopolies over printing), this link is not terribly surprising.² Modern copyright law secures no such monopoly over printing (or any other mode of expression), but by casting copyright in opposition to laissez-faire capitalism, some hope to sway “conservative” lawmakers to weaken copyright enforcement.³

In this PERSPECTIVE, I present a brief argument against both the use of the “monopoly” terminology for copyright and the related claim that copyright is incompatible with laissez-faire capitalism. To do so, I appeal to authority by looking at the writings of arguably the three most respected and vocal advocates for laissez-faire economics—Ludwig von Mises (mentor of Friedrich Hayek), Milton Friedman, and philosopher Ayn Rand. Given the work of these three, and some modern documents on the issue related to the “monopoly” lingo, I conclude that the arguments that copyright is inconsistent with laissez-faire capitalism and constitutes a “monopoly” are exceedingly difficult positions to defend.⁴ As such, the keys to intellectual debate surrounding copyright do not lie in such arguments, but rather rest in a detailed, rational analysis of the trade-offs inherent in specific proposals.

What is Copyright?

The current legal regime of copyright in the U.S. is based on Article I, Section 8, Clause 8, of the U.S. Constitution, which authorizes Congress:

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

This clause empowers the legislature to secure for authors and inventors the exclusive right to their respective works and discoveries.⁵

Of course, the idea of copyright was not original in the U.S. Constitution, but dates back to

ancient Jewish and Roman law.⁶ Yet, the real need for formal copyright began with the invention of the printing press in the 15th and 16th centuries. As they did with many businesses at this time, the governments of Europe granted monopolies (in the true sense of the word) in printing and document registration (e.g., the Stationers' Company in England, which had exclusive control over essentially *all* printing). Such monopolies were created by government so that it could both share in the profits of such ventures and exercise censorship. At the time, the government's chosen actors controlled virtually all printing, and thus were very much like a monopolist as understood in modern economics (i.e., a single seller protected by entry barriers with no close substitutes).

Given the work of [von Mises, Friedman and Rand] ... the arguments that copyright is inconsistent with laissez-faire capitalism and constitutes a "monopoly" are exceedingly difficult positions to defend.

As with most monopoly privileges of the era, such exclusive rights began to be curtailed or eliminated during the Age of Enlightenment in the late 17th century. The *British Statute of Anne* in 1710 laid the foundation for most modern copyright law. Rather than creating government-sanctioned printing monopolists, the *Statute of Anne* granted an exclusive right, limited in duration, *directly to the author (and his or her chosen printer)* of a particular work. Since authors and printers were numerous, the market for intellectual property was now competitive in nature, and censorship was greatly curtailed. Unfortunately, even though modern copyright law does not grant a monopoly over "printing" all materials, the "monopoly" language

continues in use to this day, though it is plainly a misnomer.

In the formative years of the United States, the need for copyright was well understood. However, the development of copyright law was somewhat *ad hoc* at first. Congress passed the first formal law with the *Copyright Law of 1790* (based heavily on the *Statute of Anne*), which granted a 14-year exclusive right for books, maps and charts (extendable for another 14 years if the author survived the first 14 year term).⁷ Subsequent laws and treaties, typically extending the term of copyright and broadening its scope (e.g., to musical compositions, pictures, sculptures, derivate works, and so forth), appeared in 1831, 1909, 1954, 1971, 1976, 1988, 1992, 1994, 1992, 1994, and 1998.⁸ Today, copyrights generally expire 70 years after the author's death, a term set in the *Sonny Bono Copyright Term Extension Act of 1998*,⁹ a term proposed, interestingly enough, by John Locke in 1694.¹⁰ The *Digital Millennium Copyright Act of 1998* is another significant law on copyright.¹¹ Notably, none of the copyright laws in the U.S. awarded a monopoly right to control the production or distribution of all creations.

Since the ratification of the U.S. Constitution, the issue was not whether or not to secure the exclusive right, since that much seems required. Rather, the issue is the form such rights take and the types of work the law encompasses.

Obviously, copyright law has evolved over time, both generally and in the United States. Since the ratification of the U.S. Constitution, the issue was not whether or not to secure the exclusive right, since that much seems required. Rather, the issue is the form such rights take and the types of work the law encompasses.

Markets, Monopoly and Copyright

The copyright equals “monopoly” and is antithetical to laissez-faire capitalism positions are made most directly in the retracted 2012 Republican Study Committee (“RSC”) Report:

Copyright violates nearly every tenet of laissez-faire capitalism. Under the current system of copyright, producers of content are entitled to a guaranteed, government instituted, government subsidized content-monopoly.¹²

While I do not and cannot ascribe this extreme position to all those calling for copyright reform, the sentiments regarding “laissez-faire” and “monopoly” appear, to varying degrees, in other statements regarding copyright.

Certainly, the use of the term “monopoly” can be found in legal scholarship, economic research, and case law. I suspect the use of “monopoly” terminology is largely attributable to the practices in the distant past, when, in fact, government-sanctioned monopolies in printing were granted. Again, U.S. copyright law does not grant monopolies, but rather secures rights to authors, artists, performers, designers and other creators in their particular works. Such artists must compete with thousands of others for the attention of the consumer, so modern copyright is a far cry from the actual practices centuries ago of granting a monopoly. Also, government no longer plays a (meaningful) role in what gets printed, sung, or painted in the U.S., so censorship is not an issue.

Unfortunately, the “monopoly” terminology persists. As a consequence, analysts often evaluate copyright using the simple economic arguments against monopoly despite the fact that monopoly is no longer a good fit for copyright. Monopoly is also most amenable to the mathematical modeling of economists, and I suspect this fact plays a large role in the use of the “monopoly” lingo in economic research.¹³ I also suspect that the term “monopoly” plays a role in the argument that copyright is antithetical to laissez-faire capitalism. After all,

“laissez faire”—an idea attributed to the 18th century group of economists known as the Physiocrats—became popular at a time when government-granted monopolies (and other forms of regulation) were common, especially in France.¹⁴ Adam Smith was heavily influenced by the Physiocrats and their laissez-faire philosophy, and his *Wealth of Nations* was largely a brief against such monopoly grants (and other forms of regulation, collectively known as Mercantilism).¹⁵

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I believe this view that copyright is incompatible with laissez-faire capitalism and constitutes a monopoly is incorrect, but let’s not take my word for it. Below, I will consider the opinions of three of history’s most recognized advocates of laissez-faire capitalism—Ludwig von Mises, Milton Friedman and Ayn Rand. Among economists, Ludwig von Mises (1881-1973) makes one of the strongest cases for laissez-faire capitalism. His views are described by the Ludwig von Mises Institute (located near my alma mater, Auburn University) as follows:

Mises concluded that the only viable economic policy for the human race was a policy of unrestricted laissez-faire, of free markets and the unhampered exercise of the right of private property, with government strictly limited to the

defense of person and property within its territorial area.¹⁶

By any standard, Mises was a staunch and unwavering advocate of private property and laissez-faire. Milton Friedman (1912-2006), I'm guessing, requires no introduction. Ayn Rand (1905-1982) was a philosopher and novelist, author of *The Fountainhead* and *Atlas Shrugged*. Through her work, she remains a respected advocate of individual rights and capitalism, the latter of which she defines as "a full, pure, uncontrolled, unregulated laissez-faire capitalism—with a separation of state and economics, in the same way and for the same reasons as the separation of state and church."¹⁷ Mises, Friedman, and Rand are certainly some of laissez-faire capitalism's heaviest hitters, so their views on copyright (and intellectual property generally) are worth reviewing. I also provide statements from the U.S. antitrust agencies, experts and the courts on the issue of intellectual property and "monopoly."

Ludwig von Mises on Copyright

In his seminal work *Human Action*, Mises presents a clear case for intellectual property. While he uses the term "monopoly," he rejects the depiction of copyright as monopoly in the normal meaning of the term. After discussing the ills of public policies that promote and create monopolies (public policy is the only true source capable of sustaining a monopoly over the long term in Mises' view), Mises states:

Yet there is an exception to this general rule that monopoly prices benefit the seller and harm the buyer and infringe the supremacy of the consumers' interests. If on a competitive market one of the complementary factors, namely *f*, needed for the production of the consumers' good *g*, does not attain any price at all, although the production of *f* requires various expenditures and consumers are ready to pay for the consumers' good *g* a price which makes its production profitable on a competitive market, the monopoly price for *f* becomes a necessary requirement for the production of *g*. It is this idea that people advance in favor of patent and

copyright legislation. If inventors and authors were not in a position to make money by inventing and writing, they would be prevented from devoting their time to these activities and from defraying the costs involved. The public would not derive any advantage from the absence of monopoly prices for *f*. It would, on the contrary, miss the satisfaction it could derive from the acquisition of *g*.¹⁸

Indeed, copyright does not convey any person or entity a monopoly over all works. It merely gives an individual autonomy over his or her specific works. Nor does copyright put the government hand on the scale regarding whether the particular works succeed in the competitive marketplace; that is left to consumer preferences. Copyright guarantees no financial return and offers no subsidy. Each creator must compete with many others that are in the same market. Beyoncé holds no monopoly over music, but must peddle her wares in an intensely competitive music market.

On this same point, Mises observes:

But it is obvious that handing down knowledge to the rising generation and familiarizing the acting individuals with the amount of knowledge they need for the realization of their plans requires textbooks, manuals, handbooks, and other nonfiction works. It is unlikely that people would undertake the laborious task of writing such publications if everyone were free to reproduce them. This is still more manifest in the field of technological invention and discovery. The extensive experimentation necessary for such achievements is often very expensive. It is very probable that technological progress would be

seriously retarded if, for the inventor and for those who defray the expenses incurred by his experimentation, the results obtained were nothing but external economies.¹⁹

By “external economies” von Mises is referring to the value others (not the creator) obtain from the use of the creation. (Today, we sometimes use the term “spillovers” to denote such gains.) While Mises uses the word “monopoly,” he is clearly distinguishing copyright from the “general rule that monopoly prices benefit the seller and harm the buyer and infringe the supremacy of the consumers’ interests.”

According to Mises, intellectual property, if it is to be characterized as “monopoly,” cannot be discussed in the standard way economists analyze monopoly. Mises observes:

Now, it is true that the emergence of monopoly prices ... creates a discrepancy between the interests of the monopolist and those of the consumers. The monopolist does not employ the monopolized good according to the wishes of the consumers. As far as there are monopoly prices, the interests of the monopolist take precedence over those of the public and the democracy of the market is restricted. *With regard to monopoly prices there is not harmony, but conflict of interests. It is possible to contest these statements with regard to the monopoly prices received in the sale of articles under patents and copyrights.* One may argue that in the absence of patent and copyright legislation these books, compositions, and technological innovations would never have come into existence. The public pays monopoly prices for things they would not have enjoyed at all under competitive prices. (Emphasis supplied)²⁰

Plainly, according to Mises, the use of the term “monopoly” is a misnomer in the case of patents and copyright. The standard model is not applicable; there is no “conflict of interest.”

In fact, Mises makes the point plain, arguing that with regard to copyright the label of “monopoly” is without significance or relevance:

Under copyright law every rhymester enjoys a monopoly in the sale of his poetry. But this does

not influence the market. It may happen that no price whatever can be realized for his stuff and that his books can only be sold at their waste paper value.²¹

Indeed, copyright does not convey any person or entity a monopoly over *all* works. It merely gives an individual autonomy over his or her specific works. Nor does copyright put the government hand on the scale regarding whether the particular works succeed in the competitive marketplace; that is left to consumer preferences. Copyright guarantees no financial return and offers no subsidy. Each creator must compete with many others that are in the same market. Beyoncé holds no monopoly over music, but must peddle her wares in an intensely competitive music market.

Milton Friedman on Copyright

Milton Friedman’s views on copyright largely echo those of Mises, but he adds a more direct discussion of copyright as a *property right*, no different from the rights held in, for example, land. The analogy is quite helpful. Normally, a landowner has a “monopoly” right over his or her land, but this “monopoly” right conveys no real market power. Thus, the term “monopoly” in the context of copyright is merely referring to an exclusive property right over an item with possibly thousands of close substitutes, and its use does not imply the presence of market power.

In his seminal work *Capitalism and Freedom*, Friedman observes:

A kind of governmentally created monopoly very different in principle from those so far considered is the grant of patents to inventors and copyrights to authors. These are different, because they can equally be regarded as defining property rights. *In a literal sense, if I have a property right to a particular piece of land, I can be said to have a monopoly with respect to that piece of land defined and enforced by the government.*²² (Emphasis supplied.)

Friedman goes on to explain why copyright (and patents) are required for intellectual

property, again analogizing such rights to a property right:

In both patents and copyrights, there is clearly a strong prima facie case for establishing property rights. Unless this is done, the inventor will find it difficult or impossible to collect a payment for the contribution his invention makes to output. He will, that is, confer benefits on others for which he cannot be compensated. Hence he will have no incentive to devote the time and effort required to produce the invention. Similar considerations apply to the writer.²³

According to Professor Friedman, not only is there “clearly a strong prima facie case for establishing property rights,” but the “monopoly” granted by a patent or copyright is no different than the “monopoly” one possesses by virtue of owning a piece of land. In land use and housing policy, rarely is the terminology of “monopoly” used to characterize the property right.²⁴ It is no more sensible to do so in the case of copyrights and patents. The fact that we do is unfortunate, since clearly what is implied by the use of the term is incompatible with the standard treatment of monopoly and, consequently, leads to confusion.

Interestingly, Friedman’s discussion of copyright is sometimes used (misleadingly) by those opposing the present structure of copyright law, in particular copyright term. In *Capitalism and Freedom*, Friedman observes,

The specific conditions attached to patents and copyrights—for example, the grant of patent protection for seventeen years rather than some other period—are not a matter of principle. They are matters of expediency to be determined by practical considerations. I am myself inclined to believe that a much shorter period of patent protection would be preferable.²⁵

This quote is, not surprisingly, sometimes used by those advocating for shorter terms on copyright, but Friedman cautions against doing so. What is often left out of this excerpt from Friedman’s book is his concluding statement,

But this is a *casual judgment* on a subject on which there has been much detailed study and on

which much more is needed. Hence, *it is deserving of little confidence*.²⁶ (Emphasis supplied.)

Plainly, Friedman concludes that it would be improper to rely heavily on his casual remarks about copyright term, but some still do.²⁷

Ayn Rand on Copyright

Ayn Rand, another potent and unapologetic advocate of laissez-faire capitalism, had views on copyright that are particularly relevant to modern U.S. Copyright Law:

The government does not “grant” a patent or copyright, in the sense of a gift, privilege, or favor; the government merely *secures* it—i.e., the government certifies the origination of an idea and protects its owner’s exclusive right of use and disposal.²⁸

Rand’s view that the government “secures” the exclusive right parallels that of the U.S. Constitution. In her view, the *right* is not granted by government, but merely secured by it. She rejects explicitly the view that a copyright is a “gift” or “privilege,” which conflicts with some modern takes on copyright.²⁹

Like Friedman (among many others), Rand also equilibrates copyright with property:

A patent or copyright represents the formal equivalent of registering a property deed or title.³⁰

Furthermore, Rand comments directly on copyright term, concluding:

... the law has to define a period of time which would protect the rights and interest of all those involved. In the case of copyrights, the most rational solution is Great Britain’s Copyright Act of 1911, which established the copyright of books, paintings, movies, etc. for the lifetime of the author and fifty years thereafter.³¹

Today, U.S. Copyright law *secures* the rights of the creator, and does so for life plus 70 years. Plainly, current U.S. copyright law is quite consistent with the views of Ayn Rand,

including the extension of the rights to paintings, movies, and other creations.

Other Libertarian Views on Copyright

Of course, Mises, Friedman, and Rand are not the only staunch advocates of laissez-faire capitalism. Other “free market” supporters of intellectual property include such luminaries as John Stuart Mill, Adam Smith, and Jules Dupuit (1804-1866).³²

For some historical context, let’s consider Dupuit, a French engineer. Dupuit, whose contributions to economics stemmed largely from his interest in evaluating public projects such as bridges, laid much of the groundwork for the emergence of Neoclassical economics and the modern treatment of monopoly. A staunch utilitarian, empiricist and positivist— who rejected policy based on “natural law”— made his contributions to economics about fifty years after the ratification of the U.S. Constitution and the first U.S. Copyright Law.³³ Given his views, Dupuit made a positive, utilitarian argument for intellectual property (based on the familiar incentive effects for creation). While he did not recommend a specific term, he did call for terms of a limited period, and likewise argued that copyright terms should be longer than patent terms.³⁴

As noted, Dupuit’s work was vital to the modern economic understanding of monopoly. History is important here. When depicting copyright as “monopoly,” we must recognize that the foundation of copyright law in the U.S. (a late development by any standard) was established long before modern economic methods for analyzing monopoly were formulated, calling into question the value of invoking historical uses of the word “monopoly” as synonymous with modern economic understanding of the term. It is likely that many advocating “Constitutional Copyright”³⁵ fail to recognize that the first copyright law in the U.S. was contemporaneous with the release of Adam Smith’s *Wealth of*

Nations (1776). While Smith made significant contributions to economic science, his work and the first U.S. Copyright Law (1790) pre-date the Marginal Revolution in economics (and the modern treatment of monopoly) by nearly a century (if dated by Dupuit and the publication of Alfred Marshall’s *Principles of Economics* in 1890).³⁶

The word “monopoly” is bandied about in the modern political debate over intellectual property (including copyright), but it is a term that has no legitimate economic, antitrust, or legal use in this context. Its use succeeds not in advancing scholarship, but serves mostly as a weak rhetorical device designed to conjure up pejorative connotations. This value is limited only to those exercising their right to politically oppose or curtail the recognition of rights in intellectual property.

Friedrich A. Hayek (1899-1992), a student of Mises and a steadfast opponent of socialism, is another name sometimes invoked in the modern copyright debate. Yet, Hayek said very little about intellectual property. He expressed some concern that the “extension of the concept of property to such rights and privileges as patents for inventions, copyright, trade-marks and the like has done a great deal to foster the growth of monopoly,” and was critical of certain aspects of intellectual property because he felt the “intellectual class” supported by such laws tended to have a more socialist outlook (of which he was very opposed).³⁷ While Hayek is sometimes cited for stating that “drastic reforms [of intellectual property policy] may be

required” (emphasis added, and the “may be required” part often left out of attributions to Hayek), he seemed far more concerned about patents than copyrights, and merely questioned “whether the award of a monopoly privilege is really the most appropriate and effective form of reward for the kind of risk-bearing which investment in scientific research involves.” Hayek also stated that he “doubt[s] whether there exists a single great work of literature which we would not possess had the author been unable to obtain an exclusive copyright for it.”³⁸ This view is so antithetical to the Copyright Clause, and likewise contrary to what I (among most others) take to be common sense on incentives, that Hayek’s comments on copyright seem extraneous.

While one may carefully dissect Hayek’s words for a few gems (some have), Hayek does not in fact make strong statements or elaborate on his ideas about intellectual property. When read in context, his position is, at best, unclear. It would be misleading, therefore, to rely on Hayek to make claims about the relationship between intellectual property and the free market system.³⁹ So, I do not.

The Consensus on Monopoly

Mises and Friedman make it clear that the use of the term “monopoly” is an improper label for copyright. This sentiment is now widely accepted, and the ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995), issued by the Department of Justice and the Federal Trade Commission, makes it explicit:

The Agencies will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner. Although the intellectual property right confers the power to exclude with respect to the *specific* product, process, or work in question, there will often be sufficient actual or potential close substitutes for such product, process, or work to prevent the exercise of market power.⁴⁰

Plainly, there is no presumption by the antitrust authorities that a copyright grants a monopoly. Moreover, the ANTITRUST GUIDELINES state:

If a patent or other form of intellectual property does confer market power, that market power does not by itself offend the antitrust laws. As with any other tangible or intangible asset that enables its owner to obtain significant supracompetitive profits, market power (or even a monopoly) that is solely “a consequence of a superior product, business acumen, or historic accident” does not violate the antitrust laws.⁴¹

Like any other form of property, an intellectual property right may confer market power, but if so, the copyright is not a violation of the antitrust laws if such power is “rightfully earned.” Also, in this statement, the antitrust agencies, like Friedman and Rand (among many other scholars), treat an intellectual property right like any other property right. Indeed, the point is made explicitly elsewhere in the ANTITRUST GUIDELINES:

Agencies regard intellectual property as being essentially comparable to any other form of property; (b) the Agencies do not presume that intellectual property creates market power in the antitrust context; and (c) the Agencies recognize that intellectual property licensing allows firms to combine complementary factors of production and is generally procompetitive.⁴²

According to the antitrust agencies, copyright (and other forms of intellectual property) are “comparable to any other form of property” and are “generally precompetitive,” which is a finding in direct opposition to the “monopoly” claims against copyright.

Other guides for the practice of antitrust law concur with the ANTITRUST GUIDELINES. In Hovenkamp, et al.’s IP AND ANTITRUST (2009), the authors opine:

... if I have a patent on an easy-opening soft drink can, no one else during the life of the patent can duplicate this precise can in a way that would constitute patent infringement. However, (1) there may be alternative easy-opening cans, whether patented or unpatented

that are as good as or superior to mine; or (2) easy-opening cans may not be all that valuable to consumers, who would just as soon have the traditional cans or who would buy their soft drinks in bottles in response to any price increase in cans. ... My patent grant creates an antitrust "monopoly" only if it succeeds in giving me the exclusive right to make something for which there are not adequate market alternatives, and for which consumers would be willing to pay a monopoly price.⁴³

At the risk of whipping a dead horse, I'll also point to the U.S. Supreme Court's (2006) decision in *Illinois Tool Works v. Independent Ink*:

Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee. Today, we reach the same conclusion⁴⁴

While these references are to relatively recent documents, the distinction between monopoly and intellectual property has long been recognized. John Locke, for example, writing at the end of the 17th century, perceived the difference between the "monopoly" granted to the Stationer's Company, which included a "monopoly of all the classical authors," and the property rights of an author.⁴⁵ Locke was strongly opposed to the "ignorant and lazy stationers," but supported the exclusive rights of authors.⁴⁶

The word "monopoly" is bandied about in the modern political debate over intellectual property (including copyright), but it is a term that has no legitimate economic, antitrust, or legal use in this context. Its use succeeds not in advancing scholarship, but serves mostly as a weak rhetorical device designed to conjure up pejorative connotations. This value is limited only to those exercising their right to politically oppose or curtail the recognition of rights in intellectual property.

Conclusion

Reviewing copyright law is a useful exercise, if for no other reason than to assess its structure in

our radically transforming economic life caused by technological innovation. Opponents to existing copyright laws make some arguments worthy of debate. For example, transaction costs in some instances have been greatly reduced given modern information technology, although this attenuates friction for both legitimate and illegitimate uses of intellectual property.

As shown here, however, arguments based on the legitimacy of copyright in a free market economy are, for the most part, a distraction. According to (at least) three of the greatest luminaries advocating laissez-faire capitalism and free markets—Ludwig von Mises, Milton Friedman, and Ayn Rand—intellectual property (including copyright) is sound policy. Likewise, the use of the term "monopoly" in the context of copyright is in error. These authors describe copyright as property rights, and such grants award no more monopoly power than do property rights in land—an argument embraced by scholars, antitrust authorities, and courts. As such, it is reasonable to conclude that copyright does not convey a "monopoly" and may be viewed as compatible with laissez-faire capitalism and free markets. Claims otherwise are tenuous and may be fairly dismissed. Doing so will allow more thoughtful debate on the costs and benefits of proposals that are sometimes appended to such rhetoric.

NOTES:

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¹ See, e.g., D. Khanna, *Guarding Against Abuse: Restoring Constitutional Copyright*, R STREET POLICY STUDY NO. 20 (April 2014) (available at: <http://www.rstreet.org/policy-study/guarding-against-abuse-restoring-constitutional-copyright>) (hereinafter “R Street Study”); COPYRIGHT UNBALANCED: FROM INCENTIVE TO EXCESS, Mercatus Center: George Mason University (J. Britto (ed.) 2013); T.B. Lee, *Circumventing Competition: The Perverse Consequences of the Digital Millennium Copyright Act*, CATO POLICY ANALYSIS NO. 564 (March 21, 2006) (available at: <http://www.cato.org/publications/policy-analysis/circumventing-competition-perverse-consequences-digital-millennium-copyright-act>); J. Griffin, *More Is Not Always Better: Rethinking Copyright Length*, Public Knowledge (May 2, 2014) (available at: <http://www.publicknowledge.org/news-blog/blogs/more-is-not-always-better-rethinking-copyright-length>); D. Khanna, *Three Myths about Copyright Law and Where to Start to Fix It*, REPUBLICAN STUDY COMMITTEE POLICY BRIEF (November 16, 2012) at p. 2 (available at <http://www.scribd.com/doc/113633834/Republican-Study-Committee-Intellectual-Property-Brief>) (hereinafter “RSC Retracted Study”); D. Khanna, *Reflection on the House Republican Study Committee Copyright Report*, 32 CARDOZO ART & ENT. L.J. 11 (2013).

² See, e.g., R.B. Ekelund Jr., and R.F. Hebert, *A HISTORY OF ECONOMIC THEORY AND METHOD* (1990); R.B. Ekelund Jr., and R.D. Tollison, *POLITICIZED ECONOMIES: MONARCHY, MONOPOLY, AND MERCANTILISM* (1997); R.B. Ekelund Jr., *MERCANTILISM AS A RENT SEEKING SOCIETY* (1982).

³ As examples, see, e.g., COPYRIGHT UNBALANCED, *Guarding Against Abuse*, and *Retracted RSC Study*, *supra* n. 1.

⁴ On the “monopoly” issue, also see, e.g., E. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 VANDERBILT LAW REVIEW 1727 (2000) (available at: http://www.law.virginia.edu/pdf/faculty/hein/kitch/53vand_1_rev1727_2000.pdf).

⁵ A detailed history of this clause is provided in E. Walterscheid, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE* (2002).

⁶ The history of copyright law is covered in many sources. See, e.g., COPYRIGHT TIMELINE: A HISTORY OF COPYRIGHT IN THE UNITED STATES, Association of Research Libraries (available at: <http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#U49kVihvB8E>); L. R. Patterson, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968); B. Atkinson & B. Fitzgerald, *A SHORT HISTORY OF COPYRIGHT: THE GENIE OF INFORMATION* (2013); C. Witcombe, *COPYRIGHT IN THE RENAISSANCE: PRINTS AND THE PRIVILEGIO IN SIXTEENTH-CENTURY VENICE AND ROME* (2004); B. Kaplan, *AN UNHURRIED VIEW OF COPYRIGHT* (1966), at Ch. 1; M. Holland, *A Brief History of American Copyright Law*, in *THE COPYRIGHT DILEMMA* (1978)(H. White, ed.) at pp. 3-18; L. Patterson, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968).

⁷ *Id. generally*; Walterscheid, *supra* n. 5 at p. 197.

⁸ COPYRIGHT TIMELINE, *supra* n. 6; see also <http://www.copyright.gov/circs/circ1a.html>.

⁹ www.copyright.gov/legislation/s505.pdf.

¹⁰ Lord Peter King, *THE LIFE OF JOHN LOCKE* (1830)(available at: <https://archive.org/details/lifejohnlockewi00lockgoog>); see also J. Hughes, *Locke’s 1694 Memorandum (and More Incomplete Copyright Historiographies)*, 27 CARDOZO ARTS & ENTERTAINMENT JOURNAL 555 (2010).

¹¹ <http://thomas.loc.gov/cgi-bin/query/?c105:S.2037>.

¹² *RSC Retracted Study*, *supra* n. 1 at p. 2. Paul Teller, then-Executive Director of the Republican Study Committee, issued the following statement upon retracting the *Three Myths* memo:

From: Teller, Paul
Sent: Saturday, November 17, 2012 04:11 PM
Subject: RSC Copyright PB

We at the RSC take pride in providing informative analysis of major policy issues and pending legislation that accounts for the range of perspectives held by RSC Members and within the conservative community. Yesterday you received a Policy Brief on copyright law that was published without adequate review within the RSC and failed to meet that

NOTES CONTINUED:

standard. Copyright reform would have far-reaching impacts, so it is incredibly important that it be approached with all facts and viewpoints in hand. As the RSC's Executive Director, I apologize and take full responsibility for this oversight.

Enjoy the rest of your weekend and a meaningful Thanksgiving holiday....

Paul S. Teller

Executive Director
U.S. House Republican Study Committee
Paul.Teller@mail.house.gov
<http://republicanstudycommittee.com>

See also T. Syndor II and D. Rose, *Capitalist Copyrights: A Republican Reply to "Three Myths about Copyright,"* Copyright Alliance (December 5, 2012) (available at: http://www.copyrightalliance.org/sites/default/files/three_myths_reply_fin.pdf).

¹³ See, e.g., S. J. Liebowitz and S. Margolis, *Seventeen Famous Economists Weigh In on Copyright: The Role of Theory, Empirics, and Network Effects*, 18 HARVARD JOURNAL OF LAW & TECHNOLOGY 435, 441 (2004) ("While it is misleading to refer to a copyright as equivalent to a monopoly, the monopoly model is the easiest to apply and is the standard vehicle illustrating these issues.")

¹⁴ See Ekelund, *passim*, *supra* n. 2.

¹⁵ *Id.*

¹⁶ <http://mises.org/page/1468/biography-of-ludwig-von-mises-18811973>.

¹⁷ A. Rand, CAPITALISM: AN UNKNOWN IDEAL (1967) at p. 19.

¹⁸ L. Von Mises, HUMAN ACTION (Fourth edition 1996) at p. 385-6 (available at: <http://mises.org/Books/humanaction.pdf>).

¹⁹ *Id.* at p. 662.

²⁰ *Id.* at p. 680.

²¹ *Id.* at p. 277-8. Mises notes that "monopoly" in the copyright context matters only if "the monopolist can secure higher net proceeds by selling a smaller quantity of his product at a higher price than by selling a greater quantity of his supply at a lower price." Since the prices of music, books, and so forth are generally equal across a wide range of works, some with high demand and other without, the monopoly labels seems inapplicable.

²² M. Friedman, CAPITALISM AND FREEDOM (1982) at p. 107-8.

²³ *Id.*

²⁴ Notably, there is a long-standing philosophical debate about treating "copyright" as "property." See, e.g., J. Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 SOUTHERN CALIFORNIA LAW REVIEW 993 (2006).

²⁵ *Capitalism and Freedom*, *supra* n. 22 at p. 108.

²⁶ *Id.*

²⁷ See, e.g., *R Street Study*, *supra* n. 1 at pp. 1, 25.

²⁸ Rand, *supra* n. 17 at p. 130.

²⁹ T. Bell, INTELLECTUAL PRIVILEGE: COPYRIGHT, COMMON LAW, AND THE COMMON GOOD (2013), but also see *The Nature of the Intellectual Property Clause*, *supra* n. 5 at Ch 1 and generally for a richer history of the Copyright Clause.

³⁰ Rand, *supra* n. 17 at p. 130.

³¹ *Id.* at p. 131.

NOTES CONTINUED:

- ³² See, e.g., J. Mokyr, *Intellectual Property Rights, the Industrial Revolution, and the Beginnings of Modern Economic Growth*, 99 AMERICAN ECONOMIC REVIEW: PAPERS & PROCEEDINGS 34-355 (2009); R.B. Ekelund Jr., and R.F. Hebert, SECRET ORIGINS OF MODERN MICROECONOMICS: DUPUIT AND THE ENGINEERS (1999).
- ³³ *Economic Theory and Method*, *supra* n. 2 at Ch. 12.
- ³⁴ See, e.g., R.B. Ekelund Jr. and R.F. Hebert, SECRET ORIGINS OF MODERN MICROECONOMICS: DUPUIT AND THE ENGINEERS (1999); J. Dupuit, INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES (1968).
- ³⁵ See, e.g., cited studies *supra* n. 1.
- ³⁶ *Economic Theory and Method*, *supra* n. 2 at Ch. 15.
- ³⁷ F. A. Hayek, INDIVIDUALISM AND THE ECONOMIC ORDER (1948) at pp. 113-4; F.A. Hayek, THE INTELLECTUALS AND SOCIALISM (1949).
- ³⁸ F. A. Hayek, THE FATAL CONCEPT (1988) at p. 36 (available at: <http://www.libertarianismo.org/livros/fahtfc.pdf>).
- ³⁹ *C.f.*, Khanna, *supra* n. 1 *passim*.
- ⁴⁰ See, e.g., ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY, U.S. Department of Justice and the Federal Trade Commission (April 6, 1995) at §2.2 (“Market power is the ability profitably to maintain prices above, or output below, competitive levels for a significant period of time.”) (available at: <http://www.justice.gov/atr/public/guidelines/0558.htm>) (hereinafter “IP Guidelines”).
- ⁴¹ *Id.*
- ⁴² *Id.* at §2.0.
- ⁴³ H. Hovenkamp, M. Janis, M. Lemley, & C. Leslie, IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW, VOLUME 1 (2009) at p. 4-9.
- ⁴⁴ *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 45-46 (2006) (available at: <http://supreme.justia.com/cases/federal/us/547/04-1329/opinion.html>).
- ⁴⁵ Hughes, *supra* n. 24.
- ⁴⁶ *Id.*