

POLICY FOCUS

Your Ideas, Your Rights— Intellectual Property in the 21st Century

RECIPES FOR RATIONAL GOVERNMENT FROM INDEPENDENT WOMEN'S FORUM

By Patrice Onwuka, Senior Policy Analyst, Independent Women's Forum

JUNE 2017
VOLUME 7, NUMBER 6

IN THIS ISSUE

WHAT YOU NEED
TO KNOW..... 1

WHY YOU SHOULD CARE .. 2

MORE INFORMATION..... 3

Types of
Intellectual Property3

Challenges..... 4

Modernizing the
Copyright Office 4

Combating Patent Trolls..... 4

IP in the Internet Age 5

WHAT YOU CAN DO 6

WHAT YOU NEED TO KNOW

Inventors, artists, and authors inspire the ideas that drive our economy, our culture, and our world. These creators assume the costs of bringing their ideas to the market because they have rights to their intellectual property. If those protections erode, the impact will ripple across every sector.

Women in particular have a lot at stake when it comes to intellectual property. The contributions of women to the arts, film, music, science, and technology surround us, and the Internet age has created even more opportunities for women as entrepreneurs, content creators, and small business owners. The **creative economy** now employs more than 5.5 million workers and accounts for more than \$1.2 trillion dollars, or almost 7 percent of the U.S. economy.

This makes intellectual property a very enticing target for pirating, theft, infringements, and other illegal activities. According to the **IP Commissions Report of 2016**, the U.S. economy loses \$225 to \$600 billion in counterfeit goods, pirated software, and the theft of trade secrets annually. We lose another \$60 billion per year from online piracy of digital content such as music, film, and books. But intellectual property violations don't just cost dollars: Unsuspecting Americans suffer harmful—even fatal—results when counterfeit medications land in their hands.

It's critical that our intellectual property policies stay abreast of the rapidly evolving world of technology. This requires modernizing the agencies charged with carrying out intellectual property protections and the rules governing the protection of ideas.

WHY YOU SHOULD CARE

Intellectual property rights are fundamental to innovation, but are constantly under attack. Policy reforms can better protect innovators and consumers:

- **Modernize the Copyright Office:** Reform is needed to restructure the leadership of the Copyright Office and upgrade its technological infrastructure. Congress is considering a **measure** that would make the Registrar of the Copyright Office a presidentially-nominated (Senate confirmed) position rather than an appointment by the Librarian of Congress. This is a step toward greater autonomy that will give this agency the freedom it needs to implement needed reforms.
- **Combat Patent Trolls:** Like the troll under the bridge in the Billy Goat's Gruff tale, patent trolls are companies which try to extract a benefit (royalties or licensing fees) from anyone who crosses the bridge they control (the patent). Patent trolls are not just a costly nuisance to real creators, but they also inhibit business growth. Policymakers should look at reforms that discourage patent trolls from abusing the justice system.
- **IP in the Internet Age:** It's commonplace to post unauthorized videos, images, and music on user-driven content websites. Congress should update federal law to ensure that rights of innovators are protected—even online.

MORE INFORMATION

Intellectual property (IP) refers to the creations of one's mind or intellect such as music, films, literature, art, inventions, medicine, symbols, names, and images.

As creators engage in the marketplace, there is a framework of legal protections for their work and agencies that oversee or administer those protections. All together they form our intellectual property system. As innovation and art evolve, it's critical that our IP system is updated and makes room for this evolution while protecting IP rights.

Intellectual property rights have a clear place in our founding history. The U.S. Constitution granted Congress the power to “promote the Progress of Science and useful Arts.” A hundred years later, Abraham Lincoln **affirmed** intellectually property rights—specifically patent laws—noting, “Patent laws... thereby added the fuel of *interest* to the *fire* of genius, in the discovery and production of new and useful things.”

IP rights are fundamental rights and are critical to innovation and discovery because they allow creators to profit from their work. In turn, creators make their work public for others to admire, build upon, or benefit from (Stiglitz, 2008). The costs to developing a new product or idea and taking it to the marketplace can be staggering for an inventor. In medicine, it takes at least **10 years** and costs \$2.6 billion on average for a new drug to be approved by the Food and Drug Administration. However, IP protections can

attract investors who are willing to place their resources at risk for the potential reward.

IP protections also stimulate creation.

Research also shows that patents improve a company's productivity and market value. The profits earned from their products or services tend to be reinvested in their businesses (some in research and development), leading to further innovations and growth for their enterprise.

Types of Intellectual Property

Intellectual property generally falls into three categories: patents, trademarks, and copyrights. They each carry different protections and are administered by different federal agencies.

Patents provide inventors exclusive rights over their products or processes for a limited period of time, generally 20 years. Inventors can secure patent protection from the U.S. Patent and Trademark Office even before the product has been manufactured. That allows inventors to permit (license) use of their invention to others in exchange for compensation. The “shark” investors of the television show “Shark Tank” will often ask inventors if they have a patent on their product because that ensures that a potential competitor can't, for example, watch the episode and mimic their product.

A copyright is a form of protection given to an author for literary, dramatic, musical, pictorial, audiovisual, artistic, architectural, and choreographic work that is visibly expressed. The original author is usually the owner, and he or

she has exclusive rights to reproduce and publicly distribute, perform, or display his or her work. One important consideration is the **fair use doctrine**, which permits the unlicensed use of copyright-protected work in certain circumstances, which include criticism, comment, news reporting, teaching, scholarship, and research.

The U.S. Copyright Office manages copyright protection, but a work need not be registered to be protected. Copyright is secured automatically when the work is “fixed on a physical object.”

Sampling or copying even a small part of someone else's work without their permission can trigger copyright infringement and costly results. For example, in an **infamous copyright case** settled by Vanilla Ice for an undisclosed amount, the 1990s rapper admitted that he sampled “Under Pressure” by David Bowie and Queen without permission for his song “Ice Ice Baby.”

Finally, a trademark is a word, phrase, symbol, and/or design that identifies and distinguishes the source of the goods or services of one party from those of others. Trademarks must be related to goods or services and be distinctive.

There's a rich history of infringement cases and applications for IP protections that have created the framework for our rules and norms. For example, a person can't patent an abstract idea (**O'Reilly v. Morse, 1853**), and the federal government cannot be sued for patent infringement (**Schillinger v. U.S.**). In other interesting cases, **Facebook** trademarked the word “face,” but **Twitter failed** to get exclusive

ownership of “tweet.” Most recently, the Supreme Court struck down federal law that prohibited trademarks of slurs and offensive terms finding that offensive language doesn’t supersede free speech (*Matal v. Tam*, 2017).

Challenges

As important as intellectual property rights are to spurring innovation, there is a balance to be struck. Overly restrictive rules can have the unintended consequences of stifling competition: When patents are too strong, they can discourage new competitors by making it too costly to compete. Large firms disproportionately benefit—allowing them to entrench their leadership position. This stifles the creative destruction process where one good is eventually replaced by another better, more efficient, or lower cost alternative. Lawmakers must find the right balance between innovation and rights.

The Internet presents new challenges to intellectual property as well.

Modernizing the Copyright Office

How can we expect a key federal agency charged with upholding IP rights to keep up with the digital age when it is forced to use medieval tools? The Copyright Office serves an important function in administering copyright registrations and recordings and in providing counsel to Congress on copyright policy. This office housed in the Library of Congress maintains all 60 million registrations for copyrighted work in the U.S.

After 120 years in operation this office is struggling to fulfill its mission. It remains hamstrung by the Library of Congress, which does not make the Copyright Office a priority. As a result, the Copyright Office lacks the **technology** and resources needed to be effective and secure. The Copyright Office is so antiquated that most copyright registrations are not digitized or available online in a searchable database.

Reform is needed to restructure the leadership of the Copyright Office and upgrade its technological infrastructure. Congress is considering a **measure** that would change the director of the Copyright Office to be a presidentially-nominated (Senate confirmed) position rather than an appointment by the Librarian of Congress. Greater autonomy will give this agency the freedom it needs.

Combating Patent Trolls

Not everyone who owns a patent is an inventor or innovator. Some companies simply secure patents and threaten legal action against (deep-pocketed) targets who unknowingly infringe. Apple has been trolled for years by Nevada-based VirnetX. In 2016, Apple was forced to pay VirnetX \$302.4 million for infringing on patents used in its iMessage and FaceTime services, \$24 million in 2014 and \$200 in 2010 for other infringements.

As with the children’s story the Billy Goat’s Gruff, patent trolls try to extract a benefit (royalties or licensing fees) just for crossing the bridge they control (the patent). These

companies may be legitimate, but are a nuisance to real creators, and more importantly, an inhibitor to business growth.

According to the **Federal Trade Commission**, there are two types of patent trolls: Mom and pop litigation trolls control a small number of patents, but often sue or settle for massive amounts. Portfolio trolls control massive portfolios of patents and through licensing agreements secure revenue generating over \$3 billion in total. In total, trolls cost our economy billions of dollars, with estimates ranging from \$29 to \$80 billion a year.

Patent trolls were dealt a blow recently by the Supreme Court, which held that patent infringement cases should be decided where the defending company is based rather than where plaintiffs chose (**T.C. Heartland v. Kraft Foods**). That ends the practice of shopping around for a court that might be tilted in the plaintiffs' favor. One district in Eastern Texas attracted a disproportionate number of patent cases and handed big wins.

Congress has also considered legislation to end the exploitation of our patent system. There are other proposals that would shift some or all of the costs for litigation on the loser of the case or shift pre-trial discovery costs. Ideally reforms should target the litigious nature of patent trolling so that businesses can innovate without fear of expensive court costs.

We need Washington to make reform a priority so that our intellectual property system works for the new age.

IP in the Internet Age

The Internet has grown to be a place where everything is considered free: music, images, articles, and videos. Artists, musicians, media companies, the film industry, and others were often slow to keep up with the pace of how quickly content could be made public then shared. That has changed as subscription-based models for television, records, streaming music, and movies have replaced free content downloads. Content creators rightly argue that unauthorized use of their work reduces their earnings and control of how their works can get used.

In the late 90s, Congress enacted a series of legislation to strengthen copyright protections. One bill named after Sonny Bono extended the exclusive rights of existing and new copyrights by 20 years. Another bill, the Digital Millennium Copyright Act (DMCA), strengthened penalties for copyright infringement online and criminalized tools and services created to get around controlled access to copyrighted works.

It's been almost two decades since the DMCA has been updated to reflect the changing nature of user-uploaded content. Some Websites rely heavily on users to upload content that they may not own. Congress should help ensure that rights of innovators are protected even online.

WHAT YOU CAN DO

You can help protect the creations of the artists, writers, and inventors in your life by ensuring our intellectual property system is modernized for the future.

- **Get Informed:** Learn more about intellectual property rights. Visit:
 - **U.S. Patent and Trademark Office**
 - **U.S. Copyright Office**
 - **Independent Women's Forum**
- **Talk to Your Friends:** Help your friends and family understand these important issues. Tell them about what's going on and encourage them to join you in getting involved.

- **Become a Leader in the Community:** Get a group together each month to talk about a political/policy issue (it will be fun!). Write a letter to the editor. Show up at local government meetings and make your opinions known. Go to rallies. Better yet, organize rallies! A few motivated people can change the world.
- **Remain Engaged Politically:** Too many good citizens see election time as the only time they need to pay attention to politics. We need everyone to pay attention and hold elected officials accountable. Let your Representatives know your opinions. After all, they are supposed to work for you!

ABOUT INDEPENDENT WOMEN'S FORUM

Independent Women's Forum (IWF) is dedicated to building support for free markets, limited government, and individual responsibility.

IWF, a non-partisan, 501(c)(3) research and educational institution, seeks to combat the too-common presumption that women want and benefit from big government, and build awareness of the ways that women are better served by greater economic freedom. By aggressively seeking earned media, providing easy-to-read, timely publications and commentary, and reaching out to the public, we seek to cultivate support for these important principles and encourage women to join us in working to return the country to limited, Constitutional government.

We rely on the support of people like you! Please visit us on our website www.iwf.org to get more information and consider making a donation to IWF.

Our Partners

Contact us if you would like to become a partner!

Connect with IWF!
Follow us on: