

# The Fluidity of Copyright Law: Emerging Internet Technologies Raise Legitimate Questions Surrounding the Nature and Scope of Property Rights & Copyright Protection

By Congressman Chris Cannon (R-UT)

Let me begin by saying that as a Conservative, I believe in and respect property rights - whether the property in question is physical, personal, or intellectual. Without sufficient protection of intellectual property, we would not have companies such as Novell or Ebay, employing thousands of Americans, including many in my district. The global marketplace for books written by American authors, movies created by American directors, and songs performed by American artists flourishes in part because our nation respects creativity and provides a legal framework that encourages it.

Indeed, this tradition of respect for intellectual property in America dates back to the founding of the Republic. No lesser authorities than the framers of the Constitution saw fit to include in that document a paragraph granting Congress the authority to protect creative works. Article One, Section 8, paragraph 8 of the United States Constitution grants Congress the power "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."

It is important to recognize, as the Founding Fathers did, that there are some significant distinctions between physical property and intellectual property. Perhaps the most striking difference between physical property and intellectual property is that when you sell physical property (or give it away), it is gone. Yet, intellectual property may be disseminated thousands of times, often without lessening its value. Indeed, in stark contrast to physical property, in our modern and networked world, intellectual property often becomes more valuable the more it is sold or given away. (Microsoft's distribution of Internet Explorer is but one obvious example of this dynamic.)

These differences extend beyond the conceptual to include the practical. In dealing with the complexities of

intellectual property over the years, Congress has balanced competing interests. The Congressionally-guided evolution of copyright law over the last two centuries has sought to maintain a delicate balance that: (1) maintains a strong incentive for authors to write, painters to paint, and composers to compose; (2) ensures that the public will have access to intellectual property for a variety of purposes; and (3) allows creators some measure of (but not necessarily total) control over the destiny of their creations. This balancing act is more difficult than ever as we enter the digital age. In our hands we clutch constructs of law that have served us well in the past, but may quickly become outdated. Nevertheless, our goals remain the same.

Foremost among these goals, I believe, is ensuring that adequate incentives to creativity remain in place. As such, I cannot and will not support anyone who profits off of other people's creativity or innovation, yet fails to compensate the creator.

However, facilitating public access to creative works is also a key goal — one that is in no way inconsistent with Congress providing incentives for creativity. And with that thought in mind, I would like to specifically address the issue of the digital music distribution market place.

As some may know, I have experience as a venture capitalist, starting more than a decade ago with Utah-based Geneva Steel. But as e-commerce has taken hold, I have moved the focus of my efforts to the technology arena.

Like most venture capitalists, I have watched companies such as Musicmaker.com, Riffage.com, and others that had hoped to distribute music via the Internet, go out of business. To be sure, the failure of online music distribution to take hold is, in part, rooted in the immaturity of the marketplace and the lack of residential broadband access that would allow for high-speed downloads of music and information.

But there are also troubling signs that the recording industry may have intentionally chosen not to license music to new entrants to the marketplace. It has been suggested by a number of observers that the industry may be manipulating copyright law to deprive the digital music market of competitive forces. If that charge is proven, the copyright model the recording labels have come to rely upon will almost certainly require adjustment. Any system of distribution that increases costs to consumers, decreases choices, or distorts the market should be thoroughly examined - particularly when that system exists only as an outgrowth of rights to intellectual property conferred by Congress.

Let me reemphasize that Congress' historical approach to copyright law has not been static. Copyright protection is not a black-and-white issue. We can go back to the player piano controversy of the early 1900's to see that there are gray areas in Congress' views of how best to preserve incentives for artists while encouraging distribution and utilization of intellectual property. Early last century, copyright holders fighting the advent of the player piano argued that without absolute control of copyrights, the music

industry was destined to fail. Congress, however, disagreed. It created a compulsory copyright mechanism that ensured artists were paid, while at the same time providing information liquidity in the music marketplace.

This was far from the only time that Congress has modified copyright law to balance intellectual property rights with distributional concerns and technological progress. Twenty-five years ago, Congress enacted amendments to the Copyright Act that authorized compulsory copyrights for cable TV retransmission of broadcast signals. Eight years later, we enacted the Satellite Home Viewer Act to provide satellite carriers with a similar capability. In 1995, we provided a mechanism for artists to collect license fees from satellite and cable digital music services. And just last year, we renewed the Satellite Home Viewer Act to increase competition between cable TV and the direct broadcast satellite industry. Technological advances in the past few years have once again caused a potential crisis in the current copyright regime.

Congress has demonstrated its willingness to modify copyright laws when warranted to ensure that artists, consumers, and creators of new technologies are all treated fairly. Whether the problem of digital music requires such a modification has yet to be determined. But I would hope Congress would not shy from an examination of the issues merely because the same copyright stakeholders who sought from us the sweeping changes of the Digital Millennium Copyright Act two years ago now demand absolute rigidity of the status quo.

Some have suggested that the solution to the problem of digital music distribution is to enact a compulsory copyright or a similar mechanism. I understand that the recording industry is strongly opposed to such an approach for sound recordings on the Internet. But it should be pointed out that

their opposition to compulsory licenses appears to many policy makers as less a matter of copyright principle and property rights than a matter of business interests. Were it a matter of principle, then Vivendi-Universal and other labels would not be pursuing a compulsory license for publishing rights.

Clearly, everyone involved would prefer a market-driven resolution to this issue. The recent announcement regarding the industry's new deal with Real Networks is a step in the right direction. However, the fact that the new distribution service is owned in substantial part by recording labels highlights the potential dangers of vertical integration in the marketplace. If anti-competitive practices are taking place, we must be prepared to shift our paradigms regarding music licensing to ensure a vibrant and competitive market for online music.

The Internet continues to bring us wonderful new developments for the world — from entertainment to telemedicine. With it comes frictionless e-commerce, which can only create greater competition in the marketplace. My hope is that as a result of vigorous competition among digital media companies, we will see a decline in the costs of digital music and other information, and with it more options for artists, consumers, and the public as a whole.

As a member of the House Judiciary Committee's Subcommittee on Courts, the Internet and Intellectual Property, I will continue monitoring developments in the digital music marketplace, to see whether the full effects of competition are being diluted in the digital music world because of laws that are outdated. And I will continue to work with other members of Congress to ensure an appropriate balance between protection of intellectual property rights and the need for efficient distribution of information in the digital world.