THE FREE STATE FOUNDATION
A Free Market Think Tank for Maryland.....Because Ideas Matter

Perspectives from FSF Scholars
July 29, 2016
Vol. 11, No. 27

Liberty of Contract and the Free Market Foundations of Intellectual Property

by

Randolph J. May * and Seth L. Cooper **

Introduction and Summary

Intellectual property is a source of tremendous value in our digital age economy. A 2014 International IP Alliance report found that "core copyright industries in the U.S. generated over $1.1 trillion dollars of economic output in 2013, accounting for 6.71% of the entire economy" and "employed nearly 5.5 million workers in 2013." And according to a 2012 United States Patent and Trademark Office report, IP-intensive industries accounted for about $5.06 trillion in value added in 2010. The figures for IP's contributions to the overall economy and to jobs almost certainly are greater today.

The value of copyrights and patent rights is secured and maximized through market exchanges – both outright sales of exclusive rights and through licensing agreements. It is often the case that creative artists or inventors can maximize their economic returns by assigning their rights to more highly capitalized entrepreneurs or commercial enterprises that may be better situated to use, reproduce, or sell the creative works or inventions. Meanwhile, by all estimates patent licensing agreements generate well over a hundred billion dollars annually for American

enterprises. And licensing of music, movies, and other copyrighted works through digital media technologies collectively generates billions of dollars each year.

In considering the astonishing economic value of intellectual property and its future potential in the digital age, we need to be mindful of the free market foundations of intellectual property rights in the United States. And in considering the importance of market exchanges and licensing agreements involving intellectual property as drivers of economic growth and innovation, we need to be mindful that liberty of contract is an indispensable component of the free market foundations of intellectual property rights.

Specifically, there is a close connection between American constitutionalism and the free market enterprise system. To be sure, the U.S. Constitution does not formally institute capitalism as the nation's economic system. However, the Constitution contains several provisions particularly favorable to free market enterprise. Just as significantly, legal and policy developments of the 19th and early 20th centuries built upon the Constitution's entrepreneurial, market-friendly foundation.

This paper considers intellectual property in the context of American constitutionalism and the emergence of free market capitalism and, more particularly, the role played by liberty of contract protected by the Constitution. It focuses on the interstate commercial marketplace and the U.S. copyright and patent systems as they developed during the 19th and early 20th centuries. Building on the Constitution's framework and the work of the First Congress, the developments of the first several decades that followed established intellectual property as a form of exchangeable capital in a competitive interstate commercial marketplace. Although often overlooked, the protections accorded to copyrights and patent rights proved particularly conducive to free market economics, and they performed an important role in advancing art and innovation in the United States during the first 150 years under the Constitution.

Undoubtedly, IP's status as exchangeable capital rests on the foundational understanding that copyrights and patent rights are unique forms of private property subject to the protections accorded liberty of contract in our Constitution. As we explained in our recent book, *The Constitutional Foundations of Intellectual Property: A Natural Rights Perspective*, at the time the Constitution was adopted, the prevailing consensus was that copyrights and patent rights were rooted in the natural rights of inventors and authors to the fruits of their labors.

The Intellectual Property Clause provides that "The Congress shall have 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." The IP Clause is consistent with the natural law premise that inventors and authors are justly deserving of exclusive rights, at least for limited periods of time, to the proceeds of their inventions and creative works. At the same time, the Clause recognized and enabled the vital public purpose of encouraging the creation of artistic works and the invention of useful technologies by securing copyrights and patent rights.

The Clause was unique in conferring on Congress a role in defining the parameters of a property right – a role otherwise left to the states. Subsequent to the Constitution's adoption, the First Congress exercised its power under the IP Clause by granting particular types of "writings" by

"authors" exclusive rights protections. The Copyright Act of 1790 provided protections to maps, charts, and books. Likewise, the First Congress defined the types of "discoveries" for which "inventors" were to receive protections. The Patent Act of 1790 secured protections to "any person who has "invented or discovered any useful art, manufacture, engine, machine, or device, or any improvement therein not before known or used."

Over the next century, Congress would continue to enlarge and refine the categories of copyrightable and patentable subject matter. The Copyright Act of 1909, for example, expressly broadened the scope of copyrightable works. It secured copyright protections for "all the writings of an author," and established fourteen classifications of copyrightable works, including dramatic compositions, motion pictures, and sound recordings. Similarly, the Patent Act of 1870 expressly broadened the scope of protections to "any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, not known or used by others in this country." Congress later swapped the term "useful art" for "processes."

Importantly, the First Congress also set IP firmly on a free market footing by expressly authorizing copyright and patent right holders to transfer their exclusive rights or license the use of their writings and inventions. The Copyright Act of 1790 secured copyright protections for authors as well as "his or their executors, administrators or assigns." And the Patent Act of 1790 secured exclusive rights in inventions to "petitioning inventors as well as his, her or their heirs, administrators or assigns." Thus, from the time of the First Congress, liberty of contract has been indispensable to maximizing the enjoyment and value of IP rights. Copyright and patent legislation passed by later Congresses followed those precedents in authorizing the assignment through contractual arrangements of exclusive IP rights. Subsequent legislation also enhanced the value of copyrights and patent rights as freely exchangeable goods by establishing recording requirements for assignments.

Contractual liberty in selling or licensing IP was reflected in court decisions throughout the 19th and early 20th centuries. According to the Supreme Court in *Bement v. National Harrow Company* (1902), "the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States." The same rule of liberty of contract is equally applicable regarding the sale of copyrights. The legal enforceability of contracts for the sale or licensing of IP rights is a critical aspect of contractual liberty. Depending on the circumstances, violations of contracts for sale or licensing agreements concerning IP rights may give rise to legal claims based on breach of contract grounds as well as copyright or patent infringement grounds.

It is easy to take for granted the accessibility of IP rights in the interstate commercial market. The value of IP was significantly enhanced by the uniformity supplied by federal copyright and patent laws, and by IP's ready accessibility in our nation's interstate commercial marketplace. Uniform federal IP laws reduced administrative compliance burdens for authors and inventors seeking exclusive rights protections. Beginning in 1790, authors and inventors were relieved of the burden of securing IP protections on a state-by-state basis. And they could count on a uniform legal standard when seeking to enforce their rights in a court of law against infringers.

Another important consequence of the constitutional commitment to uniform federal laws for securing copyrights and patent rights was that it restrained states from directly regulating in those areas pursuant to states' general jurisdiction or "police powers." IP rights were thus a step removed from the generalized legal disputes of the late 19th and early 20th centuries regarding the rights of property owners, liberty of contract, the right to pursue a lawful calling, and the extent of state police powers to regulate economic activities that impact the exercise of those rights.

The Constitution's respect for copyrights and patent rights as legally secure forms of property rights that are freely exchangeable by virtue of liberty of contract in an interstate marketplace and unencumbered by local restrictions unlocked the economic potentialities of creative works and inventions. The Court's bolstering of a free commercial market between states coincided with the first two stages of industrialization in the American economy – often called America's First and Second Industrial Revolutions. The growth of copyrighted goods and patented inventions both partook of and propelled those legal and market developments. Courts enforced IP rights secured by federal law, enhancing their underlying market values. This, in turn, enhanced the opportunities of creators and inventors to earn a livelihood. Subsequently, further advances in useful information and technology were embodied in copyrighted works and patented inventions, providing still further capital investment opportunities for entrepreneurs and fledgling industries.

Copyrights and Patents Grounded in Natural Rights to Private Property

The Founding Fathers regarded protection of private property as a primary duty of government. In this respect, their views reflected fundamental principles of classical liberal political philosophy. Consistent with the ideas of 17th century British liberal John Locke, the Founding Fathers held that private property is an inherent or natural right of individuals. That is, individuals by nature possess a right to keep and enjoy the fruits of their labor. A person's natural right to property also includes a natural right to assign it or exchange it by contract. It is a primary purpose of government to protect private property rights according to a system of equal laws. This premise concerning government's role in protecting property formed a critical part of the intellectual backdrop to the ratification and adoption of the U.S. Constitution.

It was also a basic premise, held by the Founding Fathers, that copyrights and patent rights were unique forms of private property rights. In our book, *Constitutional Foundations of Intellectual Property: A Natural Rights Perspective*, we explain how Founding Fathers James Madison and Noah Webster personified the prevailing understanding that useful inventions and original writings were private property rooted in inventors' and authors' labors. The Constitution reflected the natural rights premise that inventors and authors are justly deserving of exclusive rights, at least for limited periods of time, to the proceeds of their inventions and writings. At the same time, the Constitution reflected the understanding that securing copyrights and patent rights would benefit the public by encouraging the creation of artistic works and useful inventions.

Congress's Power to Define Copyrightable and Patentable Subject Matter

The IP Clause provides that "The Congress shall have 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." While not unlimited, the Clause contains a broad grant of authority to Congress to secure copyrights and patent rights. That broad grant of power includes legislative discretion in delineating the types or categories of property that may be the object of those rights. That is, the Constitution delegates to Congress the power to identify particular types of "writings" by "authors" for exclusive rights protections. Likewise, Congress has power to specify "discoveries" for which "inventors" are to receive protections.

For example, whereas the Copyright Act of 1790 provided protections to maps, charts, and books, the Copyright Act of 1831 added protections for musical compositions, prints, cuts, and engravings. The Copyright Act of 1909 expressly broadened the scope of copyrightable works. It secured copyright protections for "all the writings of an author," and established fourteen classifications of copyrightable works, including dramatic compositions, motion pictures, and sound recordings. The 1909 Act also expressly secured protection for translations and public performances of copyrighted work.

With respect to inventions, the Patent Act of 1790 secured protections to "any person who has "invented or discovered any useful art, manufacture, engine, machine, or device, or any improvement therein not before known or used." Significantly, both new inventions and improvements to existing inventions received legal protections. The Patent Act of 1870 expressly broadened the scope of protections to "any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, not known or used by others in this country." Although for several decades courts construed "useful art" to include "processes," Congress later swapped the two terms and made protection of "processes" explicit in statute. Congressional legislation has also identified specific categories of patentable subject matter. An 1842 amendment to the patent law, for example, recognized design patent protections. The Plant Patent Act of 1930 recognized the patentability of certain asexually reproduced varieties of plants.

Pursuant to the IP Clause, Congress is empowered to consider marketplace experience, the state of the art in technology, as well as practical realities in public administration and legal enforcement. This is particularly important with respect to copyright, where IP protections are conferred on ideas expressed in tangible media – including though new and unanticipated media technologies. Congress has an obligation to bring copyright law up to date when new technology platforms foster emergent types of property. That is, it can extend exclusive copyright protections to those new forms of property that constitute tangible expressions to which their authors attach value.

Liberty of Contract as the General Rule Regarding Copyrights and Patent Rights

The First Congress was essential to establishing IP as a form of capital in American economy. Expressly recognizing the transferability or assignability of IP rights, the expectation that copyrights would be freely exchangeable is reflected in the preamble to the Copyright Act of

1790, which proclaims the statue was passed "for the encouragement of learning, by securing the copies of maps, Charts, [a]nd books, to the authors and proprietors of such copies, during the times therein mentioned." A proprietor is a person who possesses exclusive legal title to property. The exchangeable character of copyrights was more fully expressed in Section 1 of the Act, which secured to the:

> [A]uthor and authors of any map, chart, book or books already printed within these United States, being a citizen or citizens thereof, or resident within the same, his or their executors, administrators or assigns, who hath or have not transferred to any other person the copyright of such map, chart, book or books, share or shares thereof; and any other person or persons, being a citizen or citizens of these United States, or residents therein, his or their executors, administrators or assigns, who hath or have purchased or legally acquired the copyright of any such map, chart, book or books, in order to print, reprint, publish or vend the same, shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the term of fourteen years from the recording the title thereof in the clerk's office.

Section 1 also provided that executors, administrators, and assigns enjoyed exclusive copyright protection for 14 years under the statute's renewal option. Further, the 1790 Act conferred on authors and proprietors of copyrighted works a legal right to file lawsuits against infringers and obtain damages.

The First Congress's decision to ensure the transferability of copyrights was important, since only a handful of the twelve states that passed copyright statutes prior to the adoption of the Constitution expressly allowed for such transfers. The Act provided a sure foundation that was lacking under state statutes and state common law. Similarly, the Patent Act of 1790 granted exclusive rights in inventions to "petitioning inventors as well as his, her or their heirs, administrators or assigns for any term not exceeding fourteen years." Pursuant to the Act, inventors, heirs, administrators or assigns also possessed legal rights of action against infringers. And the Patent Act of 1793, adopted by the Second Congress, included identically worded provisions permitting patent rights to be freely exchanged.

Subsequent copyright and patent legislation followed the precedent set by the First and Second Congresses in authorizing the assignment of exclusive rights, whether through contractual arrangements or by inheritance. In this regard, the value of copyrights and patent rights as freely exchangeable goods was enhanced by Congressional establishment of recording requirements. Amendments in 1834 to federal copyright law first established a process for authors and proprietors to record the assignment of copyrights. Likewise, the Patent Act of 1793 provided an administrative recording requirement for assignments of patent rights: "[I]t shall be lawful for any inventor, his executor or administrator to assign the title and interest in the said invention, at any time, and the assignee having recorded the said assignment, in the office of the Secretary of State, shall thereafter stand in the place of the original inventor, both as to right and responsibility, and so the assignees of assigns, to any degree."

Recordation provides means by which legal title to copyrighted works can be demonstrated by owners or licensees seeking to enforce their rights in court. And recordation provides a way for would-be proprietors or licensees to ascertain legal title to copyrighted works and to pursue economic opportunities with identifiable copyright holders.

Court Recognition of Liberty of Contract in IP Cases

Contractual liberty in selling or licensing IP was reflected in court decisions throughout the 19th and early 20th centuries. Freedom in assigning patent rights is particularly evident in Supreme Court and lower court decisions. Describing a patent right in *Wilson v. Rousseau* (1846), the Supreme Court explained: "The law has thus impressed upon it all the qualities and characteristics of property for the specified period, and has enabled him to hold and deal with it the same as in the case of any other description of property belonging to him." According to the Court in *Bement v. National Harrow Company* (1902): "An owner of a patent has the right to sell it or to keep it; to manufacture the article himself or to license others to manufacture it; to sell such article himself or to authorize others to sell it." And thus, "the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States." Liberty of contract was also reflected in the patent license decision of the Sixth Circuit in the 1896 "Button-Fastener case." In an opinion that was approvingly quoted by the Supreme Court on more than one occasion, then-Circuit Judge William H. Taft wrote "we should bear in mind that very high considerations of public policy are involved in the recognition of a wide liberty in the making of contracts."

The economic choices afforded by assigning IP rights were briefly reflected in *Seymour v. McCormick* (1853). As the Court observed, on the one hand:

> A man who invents or discovers a new composition of matter, such as vulcanized India rubber or a valuable medicine, may find his profit to consist in a close monopoly, forbidding anyone to compete with him in the market, the patentee being himself able to supply the whole demand at his own price. If he should grant licenses to all who might desire to manufacture his composition, mutual competition might destroy the value of each license. This may be the case also where the patentee is the inventor of an entire new machine.

On the other hand, the Court reflected on "t[h]e case of Stimpson's patent for a turn-out in a railroad," wherein "[i]t was the interest of the patentee that all railroads should use his invention, provided they paid him the price of his license. He could not make his profit by selling it as a complete and separate machine." The Court considered that an instance "[w]here an inventor finds it profitable to exercise his monopoly by selling licenses to make or use his improvement."

The legal enforceability of contracts for the sale or licensing of IP rights is a critical aspect of contractual liberty. Consistent with both general principles of contract law, outright assignments of copyrights or patent rights are legally enforceable agreements that contain no conditions or restrictions in the use of the rights assigned. However, when patent grants exchanged by contracts were later shown to be invalid, court rulings in the 19th and early 20th centuries similarly deemed such contracts invalid for lack of consideration or fraud. Moreover, where a

license agreement confers on a licensee the right to use or sell a particular copyrighted work or patented invention in a particular time, place, or manner, those terms are part of legally enforceable agreements. Depending on the circumstances, violations of contracts for sale or licensing agreements concerning IP rights may give rise to legal claims based on breach of contract grounds as well as copyright or patent infringement grounds.

First Sale and Patent Exhaustion: Contract Doctrines for IP

At the same time, the Courts have declined to enforce contractual provisions or licensing terms that purport to extend exclusive protections beyond the terms established by Congress. For example, in *Bobbs-Merrill Co. v. Straus* (1908), the Court concluded that copyright law does not give copyright holders the right, after a sale of the book to a purchaser, to restrict future sales of the book at retail, including restrictions on the per copy prices of future sales. It held that "the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose, by notice… a limitation at which the book shall be sold at retail by future purchasers, with whom there is no privity of contract." In copyright law, the exception recognized in *Straus* has come to be known as the "first sale" doctrine. Congress later codified the doctrine in the Copyright Act.

An analogous limitation on the enforcement of contractual provisions or licensing terms was also recognized by the Supreme Court in the patent context. Under the patent exhaustion doctrine, the first sale of a patented item in the regular course of business terminates all patent rights to that item. The Court first applied the doctrine in *Bloomer* v. *McQuewan* (1853), where the Court held that "the purchaser of the implement or machine for the purpose of using it in the ordinary pursuits of life... exercises no rights created by the act of Congress, nor does he derive title to it by virtue of the franchise or exclusive privilege granted to the patentee." Rather, the purchaser who intends to use the invention according to its ordinary use "does not look to the duration of the exclusive privilege, but to the usefulness of the thing he buys, and the advantages he will derive from its use. He buys the article for the purpose of using it as long as it is fit for use and found to be profitable." Of course, when the inventor sells his patent right in an invention, the buyer is differently situated. In such circumstances where the sale is for the exclusive right of "making or vending it for use in a particular place, the purchaser buys a portion of the franchise which the patent confers. He obtains a share in the monopoly, and that monopoly is derived from, and exercised under, the protection of the United States." But even in such circumstances, contracts or licenses cannot extend the duration of patent terms. As the Court recognized with regard to the purchasers of patent rights, "the interest he acquires, necessarily terminates at the time limited for its continuance by the law which created it."

The first sale and patent exhaustion doctrines are both sound deductions from liberty of contract premises. Consistent with the Court's invocation of "privity of contract" in *Straus*, both doctrines are best viewed as expressing the general principle of contract law that parties to an agreement cannot impose obligations on third parties. Rather than be seen as restrictions on IP rights as such, those doctrines are also best viewed as reflections of the IP Clause's provision that the exclusive rights to be secured to authors and inventors must be for the "limited times" set by

Congress. That is, the copyright and patent terms established by law constitute background facts and aspects of the consideration between a selling author or inventor and an outright purchaser or licensee.

By making liberty of contract the *de facto* rule concerning the transferability of IP rights, creative artists and inventors in the 19th and early 20th centuries enjoyed vastly expanded economic opportunity. The ability to freely exchange IP rights through contract enabled creative artists and inventors to put their works and inventions to their highest economic value, while at the same time bringing greater benefits to the public. And, as will be seen, liberty of contract further expanded the scope of economic opportunity for creative artists and inventors as well as other entrepreneurs by establishing a free market in interstate commerce.

IP in the Context of the Constitution's Interstate Commercial Marketplace

It is easy to take for granted the accessibility of intellectual property rights in the interstate commercial market. That accessibility owes to the Constitution's structure and provisions touching on commerce and – equally important – IP. The value of IP is significantly enhanced by the uniformity supplied by federal copyright and patent laws, and by IP's ready accessibility in our nation's interstate commercial marketplace.

Commercial concerns were undoubtedly a driving force behind the drafting of the Constitution. After all, the Constitutional Convention held in Philadelphia in 1787 was not only preceded by but called by the resolution of the Annapolis Convention of 1786. The commissioners who met in Annapolis had been authorized by the Confederation Congress "to take into consideration the trade and commerce of the United States, to consider how far a uniform system in their commercial intercourse and regulations might be necessary to their common interest and permanent harmony."

Several provisions in the Constitution drafted in Philadelphia addressed commercial matters. Most notably, the Article I, Section 8, Clause 3 Commerce Clause provided Congress with regulatory power over foreign and interstate commerce, thereby allowing the federal government to clear away state or local obstructions to commercial activities among the states. Among other provisions encouraging a robust interstate marketplace, Article I, Section 8, Clause 5 authorized Congress to coin money and establish a uniform system of weights and measurements. Article I, Section 8, Clause 4 empowered Congress to establish uniform laws on bankruptcy. And the Article I, Section 10, Section 1 Contracts Clause barred state laws impairing the obligations of contracts, while Section 2 prohibited states from imposing tariffs, import duties, or other trade barriers on other states.

Writing in *Federalist No. 11*, Alexander Hamilton described the commercial advantages that resulted under the proposed Constitution:

> An unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished, and will acquire additional motion

> and vigor from a free circulation of the commodities of every part. Commercial enterprise will have much greater scope, from the diversity in the productions of different States. When the staple of one fails from a bad harvest or unproductive crop, it can call to its aid the staple of another. The variety, not less than the value, of products for exportation contributes to the activity of foreign commerce. It can be conducted upon much better terms with a large number of materials of a given value than with a small number of materials of the same value; arising from the competitions of trade and from the fluctuations of markets.

Like Hamilton, Madison was a member of the Annapolis Convention and also a member of the Confederation Congress that passed a resolution in 1783 calling on states to adopt copyright laws. Madison considered a vice of the Articles of Confederation "the want of uniformity in laws concerning… literary property." As a leader at the 1787 Philadelphia Convention, Madison contributed to the Convention's drafting of the IP Clause. Describing the purpose and benefits of granting Congress power to secure copyrights and patent rights in *Federalist No. 43*, James Madison explained that "[t]he States cannot separately make effectual provisions for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress."

Expanding Economic Opportunity: The Interstate IP Market

When the Constitution was ratified, the IP Clause constituted a unique instance in which Congress was authorized to secure private property rights. As indicated above, the First Congress acted expeditiously to adopt the first copyright and patent laws that applied on a nationwide basis.

Uniform federal IP laws reduced administrative compliance burdens for authors and inventors seeking exclusive rights protections. Beginning with the Copyright Act of 1790 and continuing to the present, an author needed to register a work only once in order to receive the protections of federal law throughout the United States. Likewise, beginning from the time of the Patent Act of 1790, inventors only needed to apply in one place for a patent in order to receive federal protection. Authors and inventors were relieved of the burden of securing IP protections on a state-by-state basis. And they could count on uniform legal standards when seeking to enforce their rights in court against infringers.

In the decades that followed the first Copyright and Patent Acts, the nascent interstate commercial market contemplated by the Constitution's framers was strengthened by decisions by the U.S. Supreme Court. During the tenure of Chief Justice John Marshall, the Court established a broad – but by no means unlimited – construction of Congress's authority over interstate commerce and solidified the supremacy of federal law by several times striking down state laws deemed to be in conflict with Congressional statutes.

An important consequence of the Constitution's policy favoring uniform federal laws for securing copyrights and patent rights was that it restrained states from directly regulating in those areas pursuant to states' general jurisdiction or "police powers." In *Patterson v. Kentucky* (1878), the Supreme Court affirmed that a federal patent grant did not automatically make an invention

legal under state law or preempt state-level safety regulations. Justice John Marshall Harlan wrote, "It is true that letters patent, pursuing the words of the statute, do in terms grant to the inventor, his heirs and assigns, the exclusive right to make, use, and vend to others his invention or discovery throughout the United States and the territories thereof." However, "the right which the patentee or his assignee possesses in the property created by the application of a patented discovery must be enjoyed subject to the complete and salutary power, with which the states have never parted, of so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few." Focusing in on the nature of the exclusive rights secured by federal copyright and patent law, Justice Harlan explained that "[t]he right of property in the physical substance, which is the fruit of the discovery, is altogether distinct from the right in the discovery itself, just as the property in the instruments or plate by which copies of a map are multiplied is distinct from the copyright of the map itself."

By this same reasoning, approval of a patent application does not provide legal immunity for an injury caused by negligent use of an invention in its ordinary operations. Nor does copyright registration offer a shield to authors or publishers from libel claims made under state law. Such tort claims do not affect the legal title or exercise of the exclusive rights secured by Congress. As Judge Taft observed in the Button-Fastener case, "[t]he property right of a patentee is, after all, but a property right, and subject, as is all other property, to the general law of the land."

Even so, by virtue of the IP Clause it follows that exclusive rights in the reproduction and vending of copyrighted works and the manufacturing, use, and vending of patented inventions – including the rights to sell or license them – are immune from state interference. An important consequence of uniform copyright and patent law is that states are effectively prohibited from imposing barriers that hinder authors or inventors in registering for copyrights or applying for patents. IP rights were thus a step removed from the notable legal disputes of the late 19th and early 20th centuries over the rights of property owners, liberty of contract, the right to pursue a lawful calling, and the extent of state police powers to regulate economic activities that impacted the exercise of those rights.

Thus, the Constitution's respect for copyrights and patent rights as legally secure forms of property rights that are freely exchangeable in an interstate marketplace and unencumbered by local restrictions unlocked the economic potentialities for creative works and inventions. The Court's bolstering of a free commercial market between states coincided with the first two stages of industrialization in the American economy – often called America's First and Second Industrial Revolutions. The growth of copyrighted goods and patented inventions both partook of and propelled those legal and market developments. Courts enforced IP rights secured by federal law, enhancing their underlying market values. This enhanced the occupational opportunities of creators and inventors. Then further advances in useful information and technology were embodied in copyrighted works and patented inventions, providing more capital investment opportunities for entrepreneurs and fledgling industries.

The Democratization of Invention and Artistic Creation

In *The Democratization of Invention: Patents and Copyrights in American Economic Development, 1790-1920* (2005), B. Zorina Kahn analyzed "the role that patents and copyrights played in the securitization of ideas through the creation of tradeable assets" in 19th century America. Kahn summarized the effects of the nation's democratic and interstate market-oriented IP rights system this way:

> [I]ntellectual property rights facilitated market exchange, a process that assigned value, helped to mobilize capital, and improved the allocation of resources. Access to markets and trade in inventions led to greater specialization and division of labor among inventors, and furthered the diffusion of new technologies. Extensive markets in patent rights allowed inventors to extract returns from their activities through licensing and assigning or selling their rights. The ability to transform their human inventive capital into tradeable assets disproportionately helped inventors from disadvantaged backgrounds who lacked the financial resources or contacts that would have allowed them to extract returns by commercializing their inventions on their own.

Kahn's analysis paid particularly close attention to the institutional dynamics and economic effects of the system established under the Patent Act of 1836. That analysis brought into focus the democratization of invention that came to characterize America's constitutional and public policy approach toward patents. "The patent system," according to Kahn, "exemplified one of the most democratic institutions in early American society, offering secure property rights to true inventors, regardless of age, color, marital status, gender, or economic standing."

In the 19th century, the European systems of IP were rooted in royal charters, characterized by complex administrative procedures, high administrative fees intended to enhance government revenues, and vulnerability of legal title to government commandeering or revocation. The U.S. system consciously departed from the European approach. Kahn emphasized four respects in which the U.S. patent system realized democratic aims: (1) granting patents only to the first inventor in the world; (2) efficient centralized administrative processing of patent applications; (3) low patent application fees that were affordable for most of the population; and (4) a system of legal enforcement through predictable and ascertainable rules. Kahn concluded that those aspects of the U.S. patent system "created an environment in which inventors could experiment to perfect their ideas, obtain financing for future discoveries, and sell of their rights without fear of expropriation by competitors or the state."

Although recognizing the democratic aspects of the copyright system, Kahn's treatment of copyright is much less sanguine – and also less convincing. Whether one considers the U.S. copyright system established by the Copyright Acts of 1831, 1870, or 1909, the same democratic characteristics that Kahn identified with the patent system were also applicable to the copyright system. That is, the U.S. copyright system: (1) secured copyright protection to the author of any original work within the scope of the law; (2) offered efficient centralized administrative

processing of copyright registrations; (3) featured low copyright registration fees and copy deposit requirements that were affordable for most of the population; and (4) received enforcement through a legal system of predictable and ascertainable rules.

As an initial matter, Kahn too readily dismissed both the natural rights claims of authors to the fruits of their creative labors as a casually employed but seldom believed ruse or pretense of politicians. Such treatment mistakenly downplays the pervasiveness with which notable 19th century personages such as John Marshall, Joseph Story, Daniel Webster, Henry Clay, and George Ticknor Curtis consistently defended both patents and copyrights on natural rights grounds. Indeed, 19th century scholar Francis Lieber even proclaimed that copyrights are on a more secure natural rights footing than other forms of property. According to Lieber, the higher the degree of an individual's judgment and intellect in creating something new, the stronger that individual's legal right and title to the new thing created. On that natural rights basis, wrote Lieber: "Both personal and intellectual activity appear clearest in a literary production; and if any product of individual activity has any claim whatever to an individual title of property, it is a literary composition." This philosophical understanding of the grounds of patent rights and copyrights was the subject of our book, *The Constitutional Foundations of Intellectual Property: A Natural Rights Perspective*.

Moreover, Kahn persuasively extolled the virtues of the U.S. patent system in diffusing innovation and technical knowledge through the publication and wide access to patent application specifications. But Kahn's truncated analysis of copyright deemed exclusive rights for authors and creative artists a threat to freedom of speech in a democratic society. This criticism is unwarranted. For starters, as we observed in much greater detail in *The Constitutional Foundations of Intellectual Property*, the business of the First Congress – often called the Constitutional Congress – included proposing the First Amendment to the U.S. Constitution as well as the passage of both the Copyright and Patent Acts of 1790. That is, the same body approved of both the Constitution's provision prohibiting Congress from passing any law abridging freedom of speech and the first exercise of Congressional power under the IP Clause to secure copyright protections. Indeed, many of the members of that Congress were at the 1787 Philadelphia Convention and in state ratification conventions as well. At the very least, some persuasive reasoning should be proffered before suggesting that the First Congress acted contradictorily in passing both the First Amendment and the first Copyright Act.

Further, while a jurisprudential analysis of the First Amendment and the IP Clause is beyond the scope of this paper, it is pertinent to consider an important parameter of copyright protection that touches upon the diffusion of knowledge and free speech. Copyright protection extends only to particularized tangible expressions of ideas, not to abstract ideas themselves. This aspect of copyright is exemplified by a circuit opinion offered by Justice Robert Grier. With an approving nod to George Ticknor Curtis's *A Treatise on the Law of Copyright* (1847), Justice Grier wrote in *Stowe v. Thomas* (1853):

> An author may be said to be the creator or inventor, both of the ideas contained in his book, and the combination of words to represent them. Before publication he has the exclusive possession of his invention. His dominion is perfect. But when he has published his book, and given his thoughts, sentiments, knowledge or

> discoveries to the world, he can have no longer an exclusive possession of them. Such an appropriation becomes impossible, and is inconsistent with the object of publication. The author's conceptions have become the common property of his readers, who cannot be deprived of the use of them, nor of their right to communicate them to another clothed in their own language, by lecture or by treatise.
>
> The claim of literary property, therefore, after publication, cannot be in the ideas, sentiments, or the creations of the imagination of the poet or novelist as dissevered from the language, idiom, style, or the outward semblance and exhibition of them. His exclusive property in the creation of his mind, cannot be vested in the author as abstractions, but only in the concrete form which he has given them, and the language in which he has clothed them. When he has sold his book, the only property which be reserves to himself, or which the law gives to him, is the exclusive right to multiply the copies of that particular combination of characters which exhibits to the eyes of another the ideas intended to be conveyed. This is what the law terms copy, or copyright.

Copyright registration and publication therefore makes common property out of an author's or creative artist's "conceptions and inventions," which Justice Grier termed "the essence of his composition." It is only the "concrete form" given to abstractions by the author, that receives protection.

Indeed, there is a critical link between the understanding that protections attach concrete expressions of ideas – rather than the underlying ideas themselves – and the natural rights basis of copyright. It was in light of this understanding of copyright protections in specific articulations of authors in original writings that Congressman and Patent Commissioner William E. Simonds concluded the natural rights of authors stood on *stronger* grounds than inventors:

> Copyright gives no exclusive possession in the author's ideas; it is only the form of expression in which the author clothes his ideas that is protected by copyright…No two men ever originate the same forms of expression, to any considerable extent, wherefore no such difficulty about the allowance of the exercise of the natural right can ever arise as has arisen already with reference to inventions in the useful arts. A patent for a new and useful invention (a machine, for instance) covers not only the precise mechanism in which the inventor embodies the principle of his improvement, but it also covers, and that necessarily, all the equivalents thereof, for otherwise a patent would give nothing in the semblance of protection. In other words, a patent cover's the inventor's idea, while a copyright never does.

In any period of time, one can inevitably spot discrepancies between the laws adopted by statesmen and the laws of nature. Yet, in its essentials, the U.S. copyright system of the late 19th and early 20th centuries was consonant with theoretical basis for copyrights rooted in the natural rights of authors to the fruits of their own labor.

Conclusion

Intellectual property is a source of tremendous economic value in our digital age economy. In considering the astonishing value of IP and its future potential in the digital age, including the importance of market exchanges and licensing agreements in driving economic growth and innovation, we must keep in mind the free market foundations of intellectual property rights in the United States. Those foundations are supplied, in significant part, by the Constitution.

Undoubtedly, IP's status as exchangeable capital rests on the foundational understanding that copyrights and patent rights are unique forms of private property. From the time of the First Congress, liberty of contract has been indispensable to maximizing the enjoyment and value of IP rights. The value of IP was significantly enhanced by the uniformity supplied by federal copyright and patent laws, and by IP's ready accessibility in our nation's interstate commercial marketplace. Uniform federal IP laws reduced administrative compliance burdens for authors and inventors seeking exclusive rights protections. Another important consequence of the Constitution's policy favoring uniform federal laws for securing copyrights and patent rights was that it restrained states from directly regulating in those areas pursuant to states' general jurisdiction or "police powers."

Thus, the Constitution's respect for copyrights and patent rights as legally secure forms of property rights that are freely exchangeable in an interstate marketplace and unencumbered by local restrictions unlocked the economic potentialities of creative works and inventions. The courts' bolstering of a free commercial market between states coincided with the first two stages of industrialization in the American economy. The growth of copyrighted goods and patented inventions both partook of and propelled those legal and market developments. Courts enforced IP rights secured by federal law, thereby enhancing their underlying market values. This enhanced the occupational opportunities of creators and inventors. Further advances in useful information and technologies were embodied in copyrighted works and patented inventions, providing still more economic opportunities for entrepreneurs and fledgling industries.

* Randolph J. May is President of the Free State Foundation, an independent**,** nonpartisan free market-oriented think tank located in Rockville, Maryland.

** Seth L. Cooper is a Senior Fellow of the Free State Foundation.

Sources

Bement v. National Harrow Company (1902).
Bloomer v. *McQuewan* (1853).
Bobbs-Merrill Co. v. Straus (1908).
Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co. (1896).
Patterson v. Kentucky (1878).
Seymour v. McCormick (1853).
Stowe v. Thomas (1853).
Wilson v. Rousseau (1846).

Publius (Alexander Hamilton), *Federalist No*. 11 (1787).
Publius (James Madison), *Federalist No*. 43 (1787).
George Ticknor Curtis, *A Treatise on the Law of Copyright* (1847).
Francis J. Lieber, On International Copyright (1840).
William E. Simonds, "Natural Right of Property in Intellectual Production," 1 *Yale Law Journal* 16 (1891-1892).

B. Zorina Kahn, *The Democratization of Invention: Patents and Copyrights in American Economic Development, 1790-1920* (2005).
Economics and Statistics Administration and United States Patent and Trademark Office, "Intellectual Property and the U.S. Economy: Industries in Focus" (2012).
Steven E. Siwek, "Copyright Industries in the U.S. Economy: 2014 Report," International Intellectual Property Alliance (December 2014).

Previous Publications in this Series on Intellectual Property

Randolph J. May and Seth L. Cooper, "The Logic of International Intellectual Property Protection," *Perspectives from FSF Scholars*, Vol. 11, No. 3 (January 13, 2016).

Randolph J. May and Seth L. Cooper, "The Public Contract Basis of Intellectual Property Rights," *Perspectives from FSF Scholars*, Vol. 11, No. 13 (April 19, 2016).

Randolph J. May and Seth L. Cooper, *The Constitutional Foundations of Intellectual Property: A Natural Rights Perspective* (2015).