



THE FREE STATE FOUNDATION

A Free Market Think Tank for Maryland.....Because Ideas Matter

Perspectives from FSF Scholars
November 18, 2015
Vol. 10, No. 38

The Copyright Alliance That Shaped Our Constitution

By

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

[The Federalist Society](#)

November 18, 2015

Congress is considering reforms to our copyright laws, including some that involve compensation for copyrighted music.

As lawmakers contemplate reforms, it should recall the little known copyright alliance that shaped the Constitution's Intellectual Property Clause. The alliance between Noah Webster—"The Father of Copyright"—and James Madison—"The Father of the Constitution"—sheds light on the constitutional foundations of copyright. These foundations should never be forgotten, even as Congress confronts novel issues arising from the digital revolution. This is especially so because the American economy loses about \$300 billion every year to online theft of intellectual property, including far too much piracy of music.

As we discuss in our new book, [The Constitutional Foundations of Intellectual Property – A Natural Rights Perspective](#), both Webster and Madison held that authors possessed exclusive rights over publishing and sales of original works. They regarded copyright as “literary property,” grounded in a person's natural right to the fruits of his or her own labor. As Madison

The Free State Foundation
P.O. Box 60680, Potomac, MD 20859
info@freestatefoundation.org
www.freestatefoundation.org

wrote in a 1792 essay, “government is instituted to protect property of every sort.” By this reasoning, Webster and Madison succeeded in securing a national system for protecting copyrights.

Article I, Section 8, Clause 8—the Intellectual Property Clause—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.” The clause’s inclusion in the Constitution was the culmination of a several-year advocacy effort by Webster and Madison.

In 1782, Webster was deeply concerned about unauthorized copying of his *American Spelling Book*. He lobbied the Confederation Congress to obtain nationwide copyright protection. Madison was favorably disposed. In 1783, Madison was appointed to a committee charged with considering means for “securing to the authors or publishers of new books their property in such works.” Congress passed a resolution recommending that states adopt laws securing authors’ exclusive rights to print and sell their new books.

Webster travelled to several states urging state legislators to pass copyright laws. He argued that the mind’s productions are a type of property on par with physical property, writing in one petition:

Among all modes of acquiring property, or exclusive ownership, the act or operation of creating or making seems to have the first claim. If anything can justly give a man an exclusive right to the occupancy and enjoyment of a thing it must be that he made it. The right of a farmer and mechanic to the exclusive enjoyment and right of disposal of what they make or produce is never questioned. What, then, can make a difference between the produce of muscular strength and the produce of the intellect?

Webster’s petitioning earned him the title “Father of Copyright.” By the late 1780s, twelve states had adopted laws protecting rights of “literary property.” Many expressly rooted copyright in the natural rights of authors. Connecticut’s law, for example, declared: “It is perfectly agreeable to the principles of natural equity and justice, that every author should be secured in receiving the profits that may arise from the sale of his works.”

While touring Virginia, Webster again teamed with Madison, then serving in that state’s legislature. Madison helped pass Virginia’s copyright law in 1785.

Madison’s pivotal role at the Constitutional Convention is well known, but few know that Webster was in Philadelphia during the summer of 1787. Webster frequently socialized with delegates, including Madison, and pleaded for copyright.

On August 18, 1787, Madison proposed to the Convention that Congress be given power “to secure to literary authors their copy rights for a limited time.” His proposal ultimately became the Intellectual Property Clause. And in the First Congress, Madison succeeded in securing passage of the Copyright and Patent Acts of 1790.

[Our book](#) demonstrates that “The Father of Copyright” and “The Father of the Constitution” viewed copyright as literary property arising from the fruits of a person’s labor and deserving protection. The Constitution’s IP Clause reflects the force of Webster and Madison’s reasoning. As Congress considers copyright law revisions, including provisions relating to compensation for music, it must remember why our Founders included protection of intellectual property in the Constitution.

* * *

* Randolph J. May is President of the Free State Foundation, an independent free market-oriented think tank located in Rockville, Maryland. *The Copyright Alliance That Shaped Our Constitution* was published by *The Federalist Society* on November 18, 2015.

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