



# THE FREE STATE FOUNDATION

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

***Perspectives from FSF Scholars***  
***April 23, 2018***  
***Vol. 13, No. 14***

**World IP Day – An Opportune Time to Modernize Music Copyright  
Protections**

**by**

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

April 21, 2018

[The Hill](#)

April 26 is World Intellectual Property Day, and a timely reminder that music copyright protections need to be strengthened. The 115th Congress should demonstrate America's global leadership in securing IP rights by passing H.R. 5547 — the Music Modernization Act.

The U.S. Constitution's Copyright Clause entrusts Congress with responsibility "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors" the exclusive right to their writings. As explained in our book, *The Constitutional Foundations of Intellectual Property*, the founders viewed copyrights as unique property rights that deserve to be protected like land and other physical property. Copyright law secures creative artists' rights to reap the "fruits of their labor."

The founders rightly recognized the role of copyright law in incentivizing creative artists to make their works commercially available for public use. The need to shore up copyright protections is amplified by the tremendous value of copyrighted works in today's economy. The International

---

**The Free State Foundation**  
**P.O. Box 60680, Potomac, MD 20859**  
**[info@freestatefoundation.org](mailto:info@freestatefoundation.org)**  
**[www.freestatefoundation.org](http://www.freestatefoundation.org)**

Intellectual Property Alliance reported that “core copyright industries” generated \$1.2 trillion in economic activity and employed 5.5 million workers in the U.S. in 2015. Musical compositions and sound recordings are particularly potent sources of value. A report by the Recording Industry Association of America cites \$8.7 billion in retail revenues from recorded music in 2017.

However, much of U.S. copyright law reflects assumptions from the 1970s, when Congress last overhauled the Copyright Act. Copyright provisions for musical compositions and sound recordings need to be updated to better secure the rights of creative artists and to facilitate royalty payments in the Digital Age economy.

If passed into law, the Music Modernization Act would improve music copyright protections in at least three ways. First, the act would provide copyright holders with federal protections for public performances via digital audio transmission of sound recordings made before 1972. A legal loophole denies to copyright holders of sound recordings made prior to early 1972 the same federal protections enjoyed by copyright holders of sound recordings made in 1972 and later. As a result, digital music services such as Sirius XM and Pandora have publicly performed pre-1972 sound recordings without paying royalties to copyright holders. A tangle of lawsuits against digital music services based on state copyright laws has followed.

Passage of the Music Modernization Act would end the disparity in copyright protections for pre-72 sound recordings and also end free-riding commercial usage of such valuable IP. Under the act, copyright holders would receive royalties based on rates established by the Copyright Royalty Board pursuant to the “willing buyer/willing seller” standard which is designed to approximate market prices for public performances of sound recordings. The act would preempt future state copyright claims regarding public performances of pre-72 sound recordings. And it provides a streamlined payment option for settling preexisting state copyright lawsuits.

Second, the Music Modernization act would set up a process for producers, mixers, and sound engineers to directly receive royalty payments via a collective entity, SoundExchange. Producers, mixers, and sound engineers serve important roles in creating sound recordings. Yet existing law does not provide a streamlined mechanism for creative artists to direct portions of their royalties for outright payments to sound recording professionals. Under the act, sound recording artists and other owners of copyrighted sound recordings could submit “letters of direction” to SoundExchange, authorizing such direct payments. Importantly, this provision of the act is entirely in keeping with the liberty of creative artists and studios to negotiate contract terms with sound professionals.

Third, the Music Modernization Act would enable more timely and accurate payment of songwriter “mechanical license” royalties and also streamline blanket licenses for digital streaming services. Mechanical license royalties are revenues for songwriters when sound recordings of their compositions are recorded and copied. Songwriters sometimes fail to receive royalties on time for digital audio transmissions of their songs by services like Spotify. And such services encounter difficulties in locating songwriters. Among other things, the act would establish a Mechanical Licensing Collective to facilitate songwriter royalties by helping to ensure digital music services have correct information. Digital service providers would receive blanket usage licenses for copyrighted compositions.

The act would also link mechanical licensing royalties to the “willing buyer/willing seller” standard in order to “most clearly represent the rates and terms that would have been negotiated in the marketplace.” Current law problematically subjects mechanical license royalties to a rate standard that results in below-market returns for songwriters.

What makes the Music Modernization Act’s prospects bright is the bill’s broad support. The sound recording industry, songwriter organizations, digital music services, sound recording professionals, and collective rights organizations are all supporters of the Act. Solid bipartisan backing also exists. On April 11, the Act received a 32-0 vote of approval by the House Judiciary Committee.

On World IP Day 2018, Congress should commit itself to updating and streamlining copyright protections and royalty payments for musical compositions and sound recordings. By enacting the Music Modernization Act, the 115th Congress can solidify America’s position as the world’s leader in securing IP rights.

\* Randolph J. May is President of the Free State Foundation, an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland. *World IP Day – An Opportune Time to Modernize Music Copyright Protections* was published in *The Hill* on April 21, 2018.

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