



# THE FREE STATE FOUNDATION

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

***Perspectives from FSF Scholars***  
***September 17, 2018***  
***Vol. 13, No. 35***

**A Constitution Day Call to Strengthen Copyright Protection**

by

**Randolph J. May and Seth Cooper**

[Real Clear Markets](#)

September 17, 2018

September 17 is Constitution Day – the 231st anniversary of the Constitution’s signing at the 1787 Philadelphia Convention. The Constitution’s framework for a federal government with enumerated powers designed to “secure the Blessings of Liberty to ourselves and our Posterity” deserves reflection. This includes consideration of the Constitution's power to secure copyrights or what the Founders called “literary property.”

Congress and the Trump Administration should honor the Constitution this year is by modernizing music copyright law and by negotiating stronger international protections for Americans’ copyrighted works.

Article I, Section 8 of the Constitution grants Congress 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.” Intellectual property rights are the only individual rights specifically secured under the Constitution of 1787. The individual liberty guarantees in the Bill of Rights were added in 1791.

---

**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)**

Digital technology and Internet connectivity have made copyright-centric sectors of our economy increasingly vital wealth and job creators. A report by the International Intellectual Property Alliance found “core copyright industries” generated \$1.2 trillion in economic activity and employed 5.5 million workers in the U.S. in 2015. Movies and sound recordings are especially potent value drivers. According to industry reports for 2017, combined U.S. spending on theatrical and home entertainment totaled \$31.6 billion and revenues from recorded music totaled \$14.6 billion.

But existing copyright law often poses obstacles to copyright holders fairly and promptly receiving royalties. The last major overhaul of the Copyright Act was in 1976.

Adopting the Music Modernization Act now pending in the Senate would be one way to honor Constitution Day by enhancing copyright protection. First, the legislation would recognize federal protections for public performances via digital audio transmission of sound recordings made before 1972. A loophole in the existing law effectively denies copyright owners royalties for pre-72 recordings yet recognizes copyright protections for later recordings. Second, it would set up a process for producers, mixers, and sound engineers to receive direct royalty payments. And, third, it would enable more timely and accurate payment of market-based “mechanical license” royalties to songwriters and facilitate blanket licenses for digital streaming services.

In April, the House of Representatives unanimously passed the Music Modernization Act (H.R. 5447). Now, the Senate needs to act.

A separate problem that needs rectifying is insufficient international copyright protection for Americans’ creative works. The Trump Administration should ensure that stronger protections for Americans’ creative works are included in new trade agreements.

Much digital piracy and online infringement takes place in foreign countries. Cyberlocker websites and stream-ripping websites make infringing content available to Internet users through downloading and streaming. Individuals access infringing content through illicit streaming devices. Digital piracy has caused copyright owners steep financial losses. A report by Frontier Economics found that “the global value of digital piracy in movies, music and software in 2015 was \$213 Billion.” The report forecasts that the global value of digital piracy in 2022 will range between \$289-\$644 billion for movies and \$53-\$117 billion for music.

Unfortunately, many foreign countries do far too little to combat infringing activities. Several countries have inadequate enforcement remedies. For instance, they don't criminalize certain types of infringement, such as bootlegging motion pictures inside theaters. Some countries provide terms for protection that are too short. Other countries unduly restrict the scope of public performance rights of sound recordings or create overbroad exceptions to protection for creative works used in education-related markets. As a result, rogue site operators and other infringers reap illicit profits, undercutting copyright owners’ ability to earn a living.

The Trump Administration’s renegotiation of the North American Free Trade Agreement with Canada and Mexico offers an important opportunity to bolster Americans’ copyrights abroad.

And the Administration should work to further strengthen copyright protection in other international arenas.

In sum, renewed efforts must be made to protect copyrights. Enacting the Music Modernization Act and strengthening international agreements are two ways for policymakers to honor this Constitution Day.

*Randolph May is president, and Seth Cooper is senior fellow, at the Free State Foundation, an independent free market-oriented think tank located in Rockville, Maryland. They are co-authors of [The Constitutional Foundations of Intellectual Property - A Natural Rights Perspective](#) (Carolina Academic Press).*