



Perspectives from FSF Scholars
April 16, 2020
Vol. 15, No. 19

Copyright Law Needs a Digital Age Modernization

by

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[The Tennessean](#)
April 15, 2020

Markets that generate and license copyrighted works contributed an estimated \$1.7 trillion dollars to the U.S. gross domestic product and supplied over 5.7 million American jobs in 2017. Yet U.S. copyright law comes up short in securing copyrighted works from infringing and other uncompensated uses. Our new book, [Modernizing Copyright Law for the Digital Age – Constitutional Foundations for Reform](#), contains proposals to remedy several shortcomings of current copyright law.

Here are three significant ones.

First, Congress should reform music royalty rates to prevent copyright owners from being deprived of compensation when their sound recordings are publicly performed by commercial AM/FM radio stations. When copyrighted music is transmitted by satellite radio provider SiriusXM and by webcasters like Spotify, owners of the recordings are entitled to public performance royalties.

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But when AM/FM radio stations play copyrighted sound recordings, current copyright law exempts them from royalty obligations. This special exemption for terrestrial radio stations is harmful to competing satellite and Internet radio providers who pay royalties. And it unjustifiably reduces the financial returns for recording owners.

This exemption for U.S. terrestrial radio stations has the compound effect of curbing the financial returns for sound recording owners when their creative works are publicly performed in foreign nations. As the U.S. Copyright Office explained in a 2015 study, "[v]irtually all industrialized nations recognize a more complete public performance right for sound recordings than does the United States." Sound recording owners "forgo an estimated \$70-\$100 million in royalties for foreign exploitations of their works due to the lack of reciprocity."

The Ask Musicians for Music Act or "AM-FM Act," introduced in the Senate and the House, sensibly would require terrestrial commercial radio stations to get copyright owners' consent before broadcasting their sound recordings. This would recognize the rightful choice of copyright owners to seek payment for radio play or to let stations play their recordings for free.

Second, current copyright law's "notice and takedown" system needs to be modernized to better protect copyright owners against the enormous amount of infringement taking place on user-upload websites. Under Section 512 of the Digital Millennium Copyright Act of 1998 (DMCA), online platforms that respond to takedown requests from copyright owners and expeditiously remove infringing content from their sites obtain a "safe harbor" from liability. When the DMCA was passed over two decades ago, web surfers were far fewer, online platforms were largely passive conduits with limited ability to detect what was taking place on their networks, and user-upload streaming sites didn't exist.

The notice and takedown system is now completely overwhelmed by large-scale uploading of copyrighted movies, TV episodes, and songs by users of popular online platforms. Owners of these copyrighted works may have to issue more than several hundred notices requesting takedowns of infringing copies of a single work across a single site. As soon as infringing copies are removed, new postings of that same content go up and require yet more notices to be filed.

Individuals as well as small and medium-size businesses that own copyrights lack the means to proactively monitor online platforms and promptly issue mass takedown notices. Moreover, today's major online platforms – such as YouTube, Vimeo, and Facebook – are not mere passive conduits. They routinely make user-uploaded content searchable, recommend content based on web surfers' perceived interests, and generate substantial revenues from web traffic.

This year, the Senate Subcommittee on Intellectual Property is holding a series of DMCA review hearings. Hopefully, these hearings will prompt reform legislation. Section 512's "notice and takedown" provision should be reformed to be more effectively a "notice and stay down" provision requiring online platforms that have previously received takedown notices regarding infringing postings of a particular copyrighted work to expeditiously remove future postings of that same work from their sites.

Third, the U.S. can clamp down on overseas piracy operations by negotiating stronger copyright provisions in international agreements. Frontier Economics has projected that the global value of digital piracy will increase to between \$289-\$644 billion for movies and \$53-\$117 billion for music in 2022. New free trade agreements should require countries with weak laws and paltry enforcement to expand access to justice in civil courts.

These countries also should be required to dedicate resources to interdicting counterfeit goods and prosecuting mass online infringers. The United States-Mexico-Canada (USMCA) free trade agreement, which the 116th Congress approved earlier this year, offers a good example. The USMCA includes a handful of key provisions that strengthen protections for Americans' copyrighted works across our borders.

By ending free-rider use of sound recordings by AM/FM radio stations, increasing online platform responsibility for mass infringements, and negotiating and adopting pro-copyright free trade agreements, Congress and the Trump Administration would go a long way in updating copyright protections to account for digital age realities.

As we explain in our new book, adopting these and other modernization measures will reward creators justly for their labors, while, at the same time, enhancing the copyright-related revenues and promoting job creation.

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