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**Congress Shouldn't Blanket Copyright Owners of Sound Recordings with
New Restrictions**

by

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Beware of copyright reforms that promise more money for creators but actually take away the rights of copyright owners. Such a plan is being floated by the Electronic Frontier Foundation (EFF), in the form of a new government-imposed compulsory "blanket license" system that would extend to nearly any type of use of sound recordings for all Internet music services. EFF's plan features the same basic flaws contained in most technocratic collectivist plans. It points to perceived market problems in fuzzy terms, downplays the difficulties of resolving technical details crucial in its formulation and implementation, exaggerates the likely benefits, and skips over the costs – including the surrender of a copyright owner's rights.

EFF's plan would take away the freedom of copyright owners of sound recordings to negotiate royalties with Internet music service providers and to sell their rights. Yet, EFF offers no reason to expect that its plan would be achieved by compromise or be made administratively feasible. Nor does it offer any reason to believe government-managed competition for Internet music providers would benefit consumers – especially given the number of existing Internet music services, plus broadcast radio, satellite radio, and other alternatives.

Copyright law should be modernized. But it should be achieved in a way that respects constitutional principles and the rights of creative artists and other copyright owners.

In our new book, [*Modernizing Copyright Law for the Digital Age – Constitutional Foundations for Reform*](#), Free State Foundation President Randolph May and I trace the constitutional political economy of copyrights. The American Founders understood that individuals have inherent or natural property rights to the fruits of their labors, which include rights to acquire, use, and sell their property. Reflecting that philosophical foundation, the Constitution's Copyrights 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 Copyright Act of 1790 recognized that copyrights include rights to sell copies of creative works and to transfer one's copyright interests. Over the next several decades, statesmen, jurists, and treatise writers continued to identify copyrights as property rights grounded in an individual's labors, and they affirmed a general policy of freedom of contract for selling copies and for assigning copyright ownership. Those principles were applied to copyrighted music – subject to a few exceptions, such as compulsory licensing and rate controls for public performances of sound recordings by non-interactive Internet streaming (or "webcasting") services. Indeed, the idea of compulsory licensing of copyrighted works is generally at odds with the constitutional concept of exclusive ownership, and it should only be considered in limited circumstances where there is a compelling justification for it.

In a [May 27 article](#), EFF outlines a bare bones "plan" to curtail copyright owners' contract rights and impose a compulsory "blanket license" for commercial use of all sound recordings by all types of Internet music services. This compulsory blanket license behemoth would cover digital performances via all subscription streaming services and digital distribution rights (or mechanical license rights) for download purchases. It also would cover rights to make music videos (synchronization license rights), as well as mash-ups and remixes.

EFF's plan rests on decidedly unrealistic hopes. It supposes that diverse and fierce market competitors will negotiate a surrender of a substantial portion of their property and contract rights to a "collecting society" and to anyone who is, or who wants to become, an Internet music service provider. Under EFF's plan, all would-be Internet music service providers would sign up for an account with the collecting society and pay it a monthly per-user fee. Internet music service providers also would pay a per-usage fee for sound recordings based on a to-be-determined-later formula. Additionally, the plan would prohibit recording artists from selling all of their royalty interests by mandating a 50% minimum ownership fraction.

The plan appears driven by a perceived lack of competition in the Internet music marketplace. It also trades on the idea that the three major music labels are big bad actors that provide no value. In EFF's imagined world, labels supposedly siphon away money from sound recording artists who choose to contract with them and profit from members of the public who choose to buy their music. The hope of the EFF plan seems to be that a lot more Internet music providers will go into business by relying on the compulsory blanket license and sign up a lot more users who will consume a lot more music, and that this will squeeze out labels and put more money into the pockets of sound recording artists.

However, the EFF plan sidesteps the fact that there are several major Internet music service providers and numerous smaller providers. Popular interactive (or "on-demand") streaming music providers include Spotify, Tidal, Apple Music, Amazon Music, and Google Play Music. Popular webcasters include Pandora, iHeartRadio, and Deezer. And there are many others. [SoundExchange](#) reported that some 3,600 webcasting services were operating in 2019.

Importantly, consumer choices also include nationwide satellite radio broadcaster Sirius XM and local AM/FM radio broadcasters. Indeed, radio broadcasts are widely available through apps on smartphones and other devices. Additional choices include digital downloads from major Internet music service providers as well as independent and individual artist websites. CDs and vinyl records are also available at retail.

Given the number of competitors and platform choices, it is highly unlikely that Internet music services possess market power – or the ability to charge consumers above-market prices and otherwise engage in anti-competitive conduct. There's no showing of market power here and so the case for government intervention falls apart. Even if there was a problem caused by lack of competitors in that space, the remedy should specifically address that same space. EFF's plan goes off the mark here because it targets a different part of the commercial music value chain. It complains about Internet music service competitors but it proposes to regulate their upstream suppliers – owners of copyrighted sound recordings.

EFF's slam against the three major music labels ignores the fact that Sony, Warner, and Universal compete against each other. Reports variously put the major labels' annual market revenue share between 65% and 80%, and so there is sizable competition from the numerous independent labels of differing size. Plus, many "unsigned" recording artists rely on specialty vendors, and do-it-yourself services. And there are antitrust tools to address specific instances where competitors collude or engage in other anticompetitive conduct.

Music labels surely do provide value in identifying and cultivating talent, recording songs, developing products, and marketing them to consumers. And music labels that are co-owners of sound recordings have strong incentive to seek high volumes of licensed use and retail sales. Sound recording artists are competent to judge the value of those services and voluntarily sign contracts that represent a fair exchange.

Free market negotiation always ought to be the preferred way to address complex and competing interests. On-demand Internet streaming services have never been subject to compulsory licensing and rate regulation. Neither have digital downloads or music videos. But EFF's plan would pull them all into its vortex, and copyright owners of sound recordings would lose their negotiating rights on all those fronts. It also would prohibit recording artists from selling all of their royalty rights in their sound recordings, thus depriving them true property ownership rights and economic opportunity. The EFF plan purports to do all this for recording artists' own good, but that choice should remain with individual artists.

U.S. copyright law does have shortcomings. Going forward, Congress ought to modernize copyright law consistent with constitutional principles of property rights, copyrights, and free market exchange. For example, current law fails to protect the exclusive property rights of sound recording owners when terrestrial broadcast radio stations play their creative works. The Ask Musicians for Music Act (AMFM Act), [S.2932](#) and [H.R. 5219](#), would eliminate the

terrestrial broadcasters' exemption from having to paying public performance royalties for sound recordings. Under the AMFM Act, owners of copyrighted sound recordings would have the choice of allowing radio stations to play their sound recordings for free or negotiate royalties for air play. The AMFM Act is a pro-property rights, pro-contract rights, pro-market exchange reform.

EFF's plan rests on hyper-inflated confidence that technical expertise in the formulation and administration of the compulsory blanket license, rate controls, and collecting society can overcome real-world obstacles posed by sharply competing interests in the market. And at the end of the day, there is no good reason to expect the plan's competitor welfare policy would benefit consumers. Instead of radical regulatory plans to take away the rights of copyright owners, Congress should remain true to the Constitution's Copyright Clause mandate and bolster protections for the exclusive rights of sound recording artists.

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Further Reading

Randolph J. May and Seth L. Cooper, "[Modernize Copyright Protections to Combat Worldwide Online Piracy](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 27 (May 28, 2020).

Randolph J. May and Seth L. Cooper, "[World IP Day 2020 – Protecting Americans' Copyrights from Digital Piracy](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 21 (April 29, 2020).

Randolph J. May and Seth L. Cooper, "[Copyright Law Needs a Digital Age Modernization](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 19 (April 16, 2020).

Randolph J. May and Seth L. Cooper, "[The Copyright 'Notice and Takedown' System Needs Modernizing](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 12 (March 11, 2020).

Randolph J. May and Seth L. Cooper, "[The Constitutional Foundations of Strict Liability for Copyright Infringement](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 3 (January 10, 2020).

Randolph J. May and Seth L. Cooper, [Modernizing Copyright Law for the Digital Age – Constitutional Foundations for Reform](#) (Carolina Academic Press, 2020).