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**The Property Rights View of Copyrights Beats Bogus Monopoly Talk**

by

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Copyrights are property rights, and based on that understanding, the Framers put copyright protection in the Constitution. The Copyright Clause was intended to encourage Americans to acquire, use, and sell creative works in the marketplace. Yet the careless claim is sometimes made that copyrights are just a monopoly. For example, journalist Matthew Yglesia recently stated in an [online article](#) that "copyright and other forms of intellectual property really are cases of monopoly." But that off-base contention would only be true if the Constitution's property rights view of copyrights was false and all property rights were harmful monopolies.

Clear differences between copyrights and illicit monopolies have been widely and wisely recognized in principle and in practice by American statesmen and jurists. Harmful monopolies depend on possession of market power to control an entire product or service market. But copyrights confer no such power. They only secure property rights in the particular movies, TV shows, songs, or other works that its owners created or acquired. And copyright protections leave everyone else free to create and market their own works.

The Copyright Clause, contained in Article I, Section 8 of the Constitution, states that Congress has 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." Copyrights and patent rights are the only expressly protected individual rights contained in the Constitution of 1787. The Founding Era's political philosophy of natural rights informed the drafting of the Constitution, including the Copyrights Clause. According to this philosophy, a person has a natural or inherent moral right to the fruits of his or her own labor which are his or her private property. This philosophy holds that the government exists to secure and encourage private property ownership. As explained in my book, [\*The Constitutional Foundations of Intellectual Property: A Natural Rights Perspective\*](#) (2015), co-authored with Free State Foundation President Randolph May, the Constitution was preceded by several state laws that applied natural rights philosophy to copyrights, defining them as property rights that justly deserve to be protected and promoted for the good of individual creators and for the public.

Importantly, the political thought of the Founding Era also was informed by anti-monopolistic concerns. The American Revolution was in part a response to Great Britain's stifling of American enterprise and liberty through royal grants of trade franchise monopolies, such as the monopoly granted to the East India Company. Indeed, the landmark passage of the Copyright Act of 1790 by the First Congress amounted to a rejection of the British monopolistic model for licensing printed works. The First Congress's securing of copyrights as an individual right in an author's own creative works is consistent with that same Congress's later passage of the proposed First Amendment protections for freedom of speech and of the press. The takeaway is that early American statesmen who were acquainted with harmful monopolies and sought to curb them viewed copyright differently and took steps to secure copyright protection.

Additionally, Jacksonian Era political statesmen, jurists, and legal scholars who exhibited a firm understanding and even hostility toward monopolies affirmed the distinct basis for copyrights in natural property rights. Many politicians in the Jacksonian Era opposed government grants of monopolies to corporations as forms of corruption and unfair favoritism to elite interests. Yet for all their mindfulness of illicit monopolies, copyrights were preserved and promoted during that era. Congress passed and President Jackson signed the Copyright Act of 1828, the first major revision of federal copyright law since the First Congress. The 1828 Act, which expanded copyright terms, was endorsed by its supporters as a measure for better protecting the rights of property owners in creative works.

Furthermore, copyright law includes an "idea/expression dichotomy" that prohibits ideas from being copyrighted but permits expressions of ideas in tangible media to be copyrighted. As Section 102(b) of the Copyright Act states: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." In other words, individual movies, TV episodes, and recorded songs can receive copyright protection, but not the underlying ideas of those works or non-copyrightable facts expressed through those works. As the Supreme Court stated in *Eldred v. Ashcroft* (2003), due to copyright law's distinction between ideas and expression, "every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication."

Key differences between copyrights and illicit monopolies become even clearer when considered in light of antitrust concepts. It is a bedrock principle of antitrust jurisprudence

that a monopoly involves the possession of market power regarding a product or service. That power involves the ability to reduce market supply, including by preventing new competitor entrants, or the ability to charge above-market prices over a not insignificant period of time. But ownership of a movie, TV episode, or a recorded song does not empower anyone to corner a market. A copyright does not allow someone to restrain others from creating and marketing their own movies, TV episodes, or recorded songs. Any attempt by a copyright owner to drive up prices for copies or access to his or her creative work above the market's clearing price will make less expensive creative works by market rivals more attractive to consumers.

Of course, Congress's constitutional power to secure copyrights and the first federal copyright statute predate the first federal antitrust statute by a century. And the same Congress that passed the Sherman Antitrust Act of 1890 to combat monopolies also passed the International Copyright Act of 1891 to strengthen copyright protections. As explained in my book, [\*Modernizing Copyright Law for the Digital Age: Constitutional Foundations for Reform\*](#) (2020), co-authored with Randolph May, copyright law and antitrust law are not at odds with each other. Instead, they share a common salutary purpose in promoting market output. Modern jurisprudence affirms that mere possession of a copyright does not give a copyright owner presumptive market power. Nor does a copyright owner exercise market power merely by seeking to enforce his or her copyright.

Loose or careless use of the term "monopolies" over the years by some American statesmen, jurists, and commentators may have given a deceptive surface plausibility to criticisms of copyrights for somehow being unfair or anti-competitive. But a fair reading of those thinkers shows that the use of the term "monopolies" in conjunction with copyrights typically referred to protections for individual rights in property rather than government bestowals of special favoritism on powerful anti-competitive entities. A more precise differentiation was offered by journalist and publisher R.R. Bowker in his book *Copyright: Its History and Its Law* (1912):

Copyright is a monopoly to which the government assures protection in granting the copyright. It is a monopoly not in the offensive sense, but in the sense of private and personal ownership; the public is not the loser but is the gainer by the protection and encouragement given to the author. The whole aim of copyright protection is to permit the author to sell as he pleases and to transfer his rights collectively or severally to such assigns as he may choose. *Copyright is a monopoly only in the sense that any ownership is a monopoly.* (Emphasis supplied.)

Indeed, equating a copyright with monopoly or market power is particularly absurd in view of property rights principles. If a creative artist's property rights in a movie, TV episode, or sound recording are an illegitimate monopoly, then an individual's property rights in a home, car, or a boat would be an illegitimate monopoly. It's easy to recognize the ridiculousness of calling the owner of a house with a white picket fence on 123 Main Street a monopolist, because ownership of that house doesn't stop anyone else from acquiring their own home or condo or refitting an old commercial building into a personal residence.

Moreover, a copyright owner's exclusive rights regarding distribution, public performance, and preparation of derivatives in creative works do not make market power claims any more plausible than they do for other forms of property. Property rights to real property, personal property, and intangible property all include rights to exclusive use. For instance, property ownership of the house on 123 Main Street includes the right of the homeowner to live in that home, and in so doing, to keep strangers out of the house. This exclusivity depends on the ability of the property owner to exclude trespassers from using that property and from generating revenues by such trespassing.

Harmful monopolies do exist, and they pose legitimate concerns regarding government arbitrariness, special favoritism to cronies, denials of equal justice, transgressions of limited government principles, infringements of entrepreneurial freedom, and harm to consumers. To pick a current example, Congress and anyone else concerned about real monopolies may wish to consider the potential market power and possible anticompetitive actions of Big Tech. But the claim that copyrights are harmful monopolies turns the meaning of property rights and market power on their heads. Rather than focus on bogus monopolies in movies, TV shows, or recorded songs, Congress and anyone else interested in copyrights should recall – and appreciate – the Founder's constitutional vision of copyrights that is rooted in natural property rights as well as its delimited scope of protection for specific creative expressions.

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### **Further Readings**

Seth L. Cooper, "[Copyright Law Needs a Modernization, Not a Restatement](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 12 (March 5, 2021).

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Randolph J. May and Seth L. Cooper, "[Congress Should Preserve Anti-Circumvention Rights: The Online Market for Movies and Music Depends on DMCA Section 1201](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 52 (October 6, 2020).

Seth L. Cooper, "[Congress Should Stop States from Infringing Copyrights](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 43 (July 31, 2020).

Seth L. Cooper, "[Congress Shouldn't Blanket Copyright Owners of Sound Recordings with New Restrictions](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 30 (June 8, 2020).

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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).