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Considering Copyright on Constitution Day

by

Randolph J. May and Seth L. Cooper *

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Constitution Day is September 17—the 234th anniversary of the Constitution's signing in 1787 by the Framers. While some of the long-standing controversies surrounding various prominent constitutional provisions are generally familiar to the public, the Constitution's Copyright Clause receives little public attention. That's too bad because it too is important to the social and economic progress of the nation.

Article I, Section 8 of the Constitution 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." This Constitution Day, there are two ways Congress should consider acting to fulfill its constitutional responsibility to secure copyrights: recognize full "public performance" copyright protection in music sound recordings and establish a "notice-and-stay down" system to hold Big Tech companies accountable for repeated infringements that occur on their websites.

The Free State Foundation
P.O. Box 60680, Potomac, MD 20859
info@freestatefoundation.org
www.freestatefoundation.org

As we explain in considerable detail in our book, ["Modernizing Copyright Law for the Digital Age – Constitutional Foundations for Reform,"](#) the Framers were prescient in including in our foundational governing charter a congressional power to protect creative artists' right to seek returns on their labors and, at the same time, enhance the nation's cultural and economic life. Yet not even the Founders could have foreseen the vibrancy and value of copyright-enabled creative industries in the early 21st century.

A report published by the International Intellectual Property Alliance (IIPA) in December 2020 found that industries whose primary purpose is to create, produce, distribute, or exhibit copyrighted content added over \$1.5 trillion to the U.S. gross domestic product (GDP) in 2019. That same year, those "core copyright industries" employed 5.7 million U.S. workers. Given the tremendous contribution of copyrighted works to growth in the U.S. economy and their value in American life, the Constitution's protection of copyrights was indeed providential.

But current copyright law contains some glaring inconsistencies and severe weaknesses that undermine copyright protections. There are two ways Congress could address the law's deficiencies in order to protect U.S. copyright owners.

First, Congress could recognize full "public performance" rights to owners of copyrighted sound recordings. The law generally secures to copyright owners a "public performance" right to receive royalties when their creative works are transmitted to the public or performed before audiences. But sound recording owners are denied those rights whenever terrestrial AM/FM radio stations play their music over the air. The law unfairly gives those stations a special exemption from having to pay royalties. As a result, copyright owners receive nothing when radio stations play their music to attract listeners and generate ad revenues.

Even worse, the lack of full "public performance" rights absolves foreign radio broadcasters of obligations to pay royalties to U.S. copyright owners. Each year, U.S. copyright owners lose tens of millions—and even as much as \$200 million—in royalties from foreign countries.

A bill introduced in the 117th Congress, the American Music Fairness Act (H.R. 4130), would eliminate the law's favoritism for AM/FM radio stations and the secure full public performance rights in sound recordings. The bill would help copyright owners be compensated when radio stations make commercial use of their music.

Second, Congress could establish a "notice-and-stay down" system to combat mass repeat infringements. Every day, astonishing amounts of music, movies, and other creative media are unlawfully uploaded and reloaded by users onto Big Tech sites like Facebook, Instagram, Twitter, and YouTube. The infringing copies are then globally accessible for streaming. And U.S. copyright owners suffer millions of dollars in annual revenue losses.

Section 512 of Digital Millennium Copyright Act of 1998 (DMCA) contains a "notice-and-takedown" system that gives online service providers immunity for infringement on the condition that they expeditiously remove infringing content from their sites. But that system was designed for the late 1990s dial-up internet era, when user-upload sites hardly existed. The old system is now overwhelmed. Individual artists and smaller companies are unable to send

repeated takedown notices when postings of their copyrighted work rapidly reappear in numerous places on the same website.

Moreover, courts have interpreted Section 512 to give Big Tech social media sites overbroad immunity. Those online behemoths generate tremendous ad revenues from webpage views, regardless of the lawfulness or unlawfulness of the content uploaded by their users. Big Tech has low incentive to ensure that once-removed infringing content does not reappear.

Senator Thom Tillis has released a draft bill that would establish a "notice-and-stay down" system to combat repeat mass infringement. Under his Digital Copyright Act of 2021, when a copyright owner sends a takedown notice identifying webpages or "representative lists" of pages with infringing copies, the website must expeditiously remove new postings of the same content to receive immunity from infringement. Congress should revise the Digital Copyright Act to specify that major online websites seeking immunity must use automated content recognition technology to flag new uploads of infringing content—and make that technology available to all interested copyright owners.

Constitution Day is an occasion to be grateful for the Constitution bequeathed to us by the Founders. And Constitution Day 2021 should be a day for Congress to renew its commitment to secure the intellectual property in copyrights pursuant to the Constitution's Copyright Clause.

* Randolph May is President and Seth L. Cooper is Director of Policy Studies and a Senior Fellow of the Free State Foundation, a free market-oriented think tank in Rockville, MD. The views expressed in this *Perspectives* do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it. *Considering Copyright on Constitution Day* was published on the FedSoc Blog on September 17, 2021.