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World IP Day 2022: Strengthen Copyright Protections for Creative Works

by

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World Intellectual Property Day 2022 is April 26. The day provides a welcome occasion to recognize the vital role of copyrights to the U.S. economy. It is also a time to size up some of the shortcomings of current U.S. copyright law and to focus on ways to strengthen protections for American copyright owners as they market their creative works at home and across the world.

In keeping with its constitutional obligation to secure copyrights, Congress should pass the American Music Fairness Act (H.R.4130) and thereby ensure that owners of sound recordings receive royalties when their music is broadcast by for-profit terrestrial radio stations. Congress also ought to advance the SMART Copyright Act (S.3880) and thus empower copyright owners and relevant service providers to develop technical measures to protect their works from online infringement. And state legislators should say "no" to bills introduced in several legislatures that conflict with federal copyright law by trying to force publishers to license ebooks to libraries according to price controls set by state law.

According to a March 2022 report released by the U.S. Patent and Trademark Office titled "Intellectual Property and the U.S. Economy: Third Edition," so-called "IP-intensive" industries that primarily create or produce patents, trademarks, and copyrights accounted for $7.8 trillion in U.S. gross domestic product (GDP). In 2019, IP-intensive industries supported 62.5 million jobs, or 44% of U.S. employment. The report concluded that copyright-intensive industries accounted for about $1.3 trillion in GDP that year. Yet the benefits to the U.S. economy from copyrights are much greater than that, since the USPTO's definition of "copyright-intensive industries" excludes several lucrative industries, including book and music stores that distribute copyrighted goods. Notably, "[c]opyright-intensive industries outpaced other IP-intensive industries with respect to GDP growth since 2014—rising by 4.2%" And copyright-intensive industries supported 6.6 million jobs in 2019, up from 5.7 million five years before.

These tremendous contributions of copyrights to the U.S. economy validate the wisdom of the Constitution's Framers in expressly recognizing protections for creative works in the Article I, Section 8 Copyright Clause. The clause grants Congress the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors… the exclusive right to their respective Writings." According to the political philosophy of natural rights that informed the Framers' drafting of the Constitution, a copyright is a type of property right that is grounded in an individual's creative labor.

Beginning with the Copyright Act of 1790 and continuing to the present, the U.S. has maintained a uniform system of copyright protections that incentivizes creative artists to develop and deploy their works in a nationwide free market. Both the natural property rights understanding of copyrights and the nationwide pro-free market policy prevailed through the time of the International Copyright Act of 1891, by which Congress first recognized copyright protections for the works of foreign artists. In return, the 1891 Act expanded market opportunities for Americans by securing copyright protections for their creative works in foreign nations. Section 106 of the Copyright Act of 1976 further expanded on the property rights and free market foundations for copyrights by securing exclusive rights to reproduce, distribute, display and publicly perform their works and to reap the financial proceeds. This includes the exclusive right to decide whether to authorize the distribution of one's creative work and on what terms.

However, there are shortcomings to existing U.S. copyright law that undermine the ability of American copyright owners to seek financial returns for their creative labors and make a living. Congress, in particular, has an important role to play in better securing our nation's uniform system of copyright protections and our longstanding pro-market policy that enables creative artists to flourish in the 21st century economy.

Currently, U.S. copyright law fails to secure full public performance rights for owners of copyrighted sound recordings. The law exempts terrestrial AM/FM radio stations that broadcast copyrighted music from having to pay royalties to sound recording owners. This denies sound recording artists millions of dollars each year when terrestrial AM/FM stations make commercial use of their IP to attract listeners and generate advertising revenues. Moreover, the lack of full public performance rights under U.S. copyright law causes American copyright owners to forfeit annually tens of millions of dollars – if not hundreds of millions – in royalty payments from foreign terrestrial radio stations. Almost every foreign

country in the industrialized world recognizes public performance rights in terrestrial radio broadcasts of copyrighted sound recordings.

The American Music Fairness Act (H.R. 4130) would address this problem. The bill would confer on terrestrial radio stations a statutory license to broadcast copyrighted sound recordings. In return, AM/FM stations would pay royalties according to the Copyright Royalty Board's determination of rates that would "most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." For smaller commercial stations, the bill provides for a low, flat-rate annual royalty payment. And by bringing U.S. law into alignment with foreign nations on full public performance rights, the American Music Fairness Act would help make American copyright owners eligible to receive royalties when their copyrighted sound recordings are played by foreign radio stations.

Another problem plaguing American copyright owners is mass-scale online infringements taking place on popular user-upload platforms such as Facebook, Twitter, and YouTube. Infringing uses of copyrighted works diminish the market value of creative works and impose significant financial opportunity costs on creative artists. The Digital Millennium Copyright Act of 1998 (DMCA) is outdated. It confers legal immunity on Internet platforms for infringing activities taking place on their websites, provided certain conditions are met. One of those conditions is that an Internet platform "accommodates and does not interfere with standard technical measures" (STMs) that are used by copyright owners to identify or protect copyrighted works and that have been developed through a multi-industry standards process. But the DMCA's STM provision has failed to work as Congress intended. As the U.S. Copyright Office acknowledged in a May 2020 report, no existing measures qualify as STMs.

A bill introduced in the Senate called the Strengthening Measures to Advance Rights Technologies Copyright Act of 2022 or SMART Copyright Act (S.3880) would address this problem by expanding STM eligibility. If passed by Congress, the SMART Copyright Act would confer STM status on measures developed through a broad consensus of relevant copyright owners and service providers and that are applicable to a particular industry, type of work, or type of service provider. Additionally, the SMART Copyright Act would grant the Librarian of Congress authority to recognize "designated technical measures" (DTMs) that would perform similar copyright protection functions as STMs. Under the bill, the Librarian would conduct triennial rulemaking proceedings to propose and adopt DTMs that Internet platforms would need to accommodate and not interfere with in order to receive immunity for infringements on their websites.

Additionally, America's uniform system of copyright protection and its policy recognizing the freedom of copyright owners to decide whether to distribute their works and on what terms has been threatened by recent legislation in the states. Bills filed in several state legislatures would require publishers to license ebooks to public libraries and impose restrictions on what rates they can charge. Those state bills conflict with federal copyright protections for the exclusive right of distribution. Wisely, the Governor of New York vetoed that state's compulsory licensing bill for ebooks in December 2021, citing concerns about its conflict with federal law. And in February of this year, the U.S. District Court in Maryland correctly determined that the compulsory licensing law was preempted.

States should not seek to disrupt the Constitution's design for federal copyright protections. Nor should states disrupt longstanding federal copyright policy favoring market freedom. Authors and publishers should remain free to decide whether to license literary works in ebooks, who they will license them to, and on what terms. State legislators should not vote for bills like the ones passed in New York and Maryland.

World IP Day should remind us of the importance of the U.S. maintaining its leadership role in protecting IP, including copyrights. Stronger copyright protections will help ensure the economic vibrancy of copyright-intensive industries in the U.S. and better enable American copyright owners to enjoy the fruits of their creative labors.

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