

# **Modernizing Copyright Law**

FOR THE

## **Digital Age**



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CONSTITUTIONAL FOUNDATIONS FOR REFORM

**Randolph J. May**

**Seth L. Cooper**



**CAROLINA ACADEMIC PRESS**

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*For my wife, Laurie*

—Randolph J. May

*For my wife, Gretchen*

—Seth L. Cooper



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# Introduction

**T**his book examines copyrights and patent rights within the context of America's Constitution and its political economy, and it tracks key historical developments of those intellectual property (IP) rights. More particularly, the book's primary focus is on copyrights during the 20th and early 21st centuries. The book connects constitutional principles and historical insights to specific recommendations for modernizing U.S. copyright law to meet the marketplace and technological challenges of the Digital Age.

In referring to the U.S. Constitution's political economy, we mean governmental and marketplace principles and institutional arrangements that are expressed or implicit in the nation's fundamental law and which impact the nation's economy. Thus, we are not here concerned with charting legal or policy implications of a particular academic theory of economics. Rather, the meaning we employ for this book is in keeping with the classical understanding of political economy as a subset of moral philosophy, examining the rights and duties of human agents in pursuing happiness, including material prosperity, through the free exercise of their talents and the allocation of their resources within a political community. In this case, it is the text of the Constitution, and the original context of its adoption, that, foremost, supplies the basic parameters for our examination.

More specifically, natural rights thinking, which played an important role in guiding the American Founders, supplies crucial philosophic content to the Constitution's political economy. Our previous book, *The Constitutional Foundations of Intellectual Property: A Natural Rights Perspective* (2015), emphasized the primary philosophical basis of copyrights and patent rights in America's fundamental law. The American Founders and later generations viewed copyrights and patent rights as unique forms of property rights that are based on

an individual's natural right to enjoy the fruits of his or her own intellectual and physical labors. By the term "property right," we refer to the exclusive ownership of anything to which a person attaches value, including the right of acquiring, possessing, using, and transferring it. And by "natural right," we mean a right arising out of human nature and ultimately grounded in principles of truth and justice—or what the Declaration of Independence calls "the laws of nature or Nature's God."

This natural rights view of intellectual property served as the philosophical backdrop for the Constitution's Intellectual Property Clause, or as we may sometimes refer to it, the Copyright Clause—the primary textual embodiment of copyrights and patent rights in America's constitutional political economy. Article I, Section 8, Clause 8 grants to 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." For purposes of this book, we use the term "intellectual property" to refer to creative works and inventions—that is, to particular ideas fixed in a tangible medium and to discoveries—derived from individuals' intellectual labors. We also use "intellectual property rights" collectively to describe both copyrights and patent rights—that is, to describe the just legal claims of creative artists and inventors in their creative works and inventions. Other types of intellectual property, such as trade secrets, are not addressed. By "copyrights" we mean the just legal claims of authors or other creative artists in their original creative works. And by "patent rights" we mean the just legal claims of inventors in their useful, novel, and non-obvious discoveries.

Pursuant to the Intellectual Property Clause, and the laws of Congress enacted thereunder, the exclusive rights of intellectual property owners are secured for specific terms of years. Intellectual property rights are "exclusive" in that they secure to their owners all rights to engage in certain uses of their creative works or inventions, to prevent all others from such uses, to receive any and all financial rewards generated by their intellectual property, and to trade or sell their rights to third parties. For copyright owners, U.S. law secures their exclusive rights to reproduce or make copies of their original works, to prepare derivative works based on their original works, and to distribute copies of their works through sales, leases, and rental agreements. Additionally, owners of copyrighted works such as sound recordings, movies, and dramas also enjoy exclusive rights over public performances of their works. And for patent owners, the law secures their right to exclude all others from making, using, selling, or importing their inventions. Under current U.S. law, once a creative work is fixed in a tangible medium of expression, copyright protection



terms run for the life of the creative artist plus an additional 70 years. And for patented inventions, protection terms secured under current law run for 20 years from the date the patent application is filed at the U.S. Patent and Trademark Office.

Importantly, the deep respect for private property that prevailed among the American Founders included the right to acquire and part with property by consent. Furthermore, respect for copyrights and patent rights, as well as the close connection of those rights to contractual liberty, was reinforced by constitutional provisions such as the Contracts Clause and the Fifth Amendment's Due Process Clause, as well as by early Supreme Court jurisprudence applying social compact principles and protecting the vested rights of individuals. Additionally, in exercising its constitutional power to secure protections to copyright owners and patent owners, the early Congresses established what would become a longstanding policy favoring liberty of contract regarding the acquisition, use, and sale of intellectual property rights. And, finally, the Article I, Section 8, Clause 3 Commerce Clause granted Congress power to regulate commerce with foreign nations and among the states, thereby providing a source of protection for the rights of American intellectual property owners overseas and removing local obstructions to the free trade of copyrighted works and patented inventions within the United States.

The system of political economy established by and through the Constitution's structure, specific textual provisions, and philosophical presuppositions thus anchors our understanding of intellectual property rights: Copyrights and patent rights are property rights in creative works and inventions secured exclusively to individual owners by legal protection, the rights and uses of which are forms of exchangeable capital in interstate and international markets.

Because the Intellectual Property Clause is an integral part of the Constitution, Congress has an obligation to secure copyrights and patent rights. As we explain in this book, current U.S. copyright law fails to adequately protect the value and integrity of copyrighted works from infringement and piracy enabled by digital technologies. Copyright owners and copyright-intensive industries are vital engines of economic prosperity in our Digital Age economy, but the law needs to be updated and reformed to curb effectively the hundreds of billions in losses annually caused by bad actors—copyright violators—in America and overseas. In our view, efforts to modernize U.S. copyright law to address new challenges ought to begin with careful consideration of the system of constitutional political economy that has proved uniquely hospitable to the rise of free market enterprise in general, and to the development of markets for valuable forms of intellectual property in particular.

Another source of guidance for copyright modernization is history, including important events and figures of the past. In prescribing policies that will put copyright protections on a more secure footing in the Digital Age, this book looks to both principle and history, and it incorporates practical judgments based on current and likely future circumstances.

As previously mentioned, our earlier book, *The Constitutional Foundations of Intellectual Property*, traced copyrights and patent rights in American constitutionalism to their philosophical roots in principles of natural rights. That book was intended to deepen the respect of the reader for the constitutional grounding and legitimacy of intellectual property rights. Its focus was exclusively on domestic protections for intellectual property rights. And it did not address contemporary public policy issues or debates about copyright or patent reform. Rather, that book's timeframe roughly spanned the first century of our nation's existence, dating from the Declaration of Independence through the Reconstruction era.

*Modernizing Copyright Law for the Digital Age: Constitutional Foundations for Reform* builds on our prior book in important ways—although readers need not be familiar with what has come before in order to understand what follows here. Of course, by carrying the story forward generally from the Reconstruction era to the present day, this book—all about “modernizing copyright law”—is much more topical than the first one in the sense of addressing current issues and offering policy recommendations tailored to today's marketplace and technological environment, albeit grounded in the context of American constitutionalism and its political economy.

In light of the constitutional foundations of copyrights and patent rights and their close connections to concepts such as private property, contracts, and market exchange, Chapters 1 through 6 delve into various subjects involving intellectual property such as international trade, public contracts, private contracts, compulsory licensing and rate regulation, antitrust, and so-called “moral rights.” Aside from extending the chronological scope of the topics addressed to the present day, this book takes a wider political-legal scope than its predecessor by examining the role of international agreements as well as domestic law in securing protections for American intellectual property owners. International copyright protection issues are addressed in Chapters 1, 6, and 10. This book also takes a wider scope by addressing shortcomings in existing U.S. copyright law and recommending specific policy changes to modernize the law. Chapter 3 and then Chapters 7 through 10 discuss steps that Congress can take to reform and update copyright policy regarding music royalties, administration, civil enforcement, criminal enforcement, and international

protections. And while the chapters in this book are thematic, there is also a general chronological progression in the material from earlier chapters to the later ones, although there are exceptions and the progression is not intended to be an absolute straight timeline.

The chapters that follow were originally published as separate essays in the Free State Foundation's *Perspectives from FSF Scholars* series. They have been updated and revised in preparing for the publication of this book in order to ensure its topicality. The end of each chapter contains a list of "Works Cited" to provide scholars, students, policymakers, and lay readers with the authorities we have referenced. Of course, the synthesis of constitutional principles, history, and practical judgments presented in this book goes far beyond those cited authorities. A short Conclusion summarizes the book's recommended policy prescriptions for modernizing U.S. copyright law and better securing the exclusive rights of creative artists in the Digital Age.

Finally, we thank, once again, the Free State Foundation's Kathee Baker. As has been the case with our previous books, Kathee's excellent editorial assistance throughout the preparation of this manuscript has proved invaluable. And, as always, Kathee's labors have been accomplished not only without complaint, but with good cheer.

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