

**The Constitutional  
Foundations of  
Intellectual Property**



# The Constitutional Foundations of Intellectual Property

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*A Natural Rights Perspective*

Randolph J. May

Seth L. Cooper



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**Randolph J. May**

For my children, Joshua and Brooke, and my grandchildren,  
Samantha, Ciaran, Benjamin, and Francis

**Seth L. Cooper**

For my wife, Gretchen



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# Preface

We both consider ourselves lifelong students of the Constitution and its history. But not only students. In the realms in which we toil at the Free State Foundation, a think tank devoted to promoting free market, limited government, and rule of law principles, we strive to defend constitutional rights. And we seek to educate others as to why it is important to defend those rights.

In that regard, a central aim of this book is to defend intellectual property rights and to explain the reason why they are worth vigorously defending. In one sense, of course, intellectual property (“IP”) rights should be defended simply by virtue of the fact that, indeed, they *are* rights explicitly secured by the Constitution. Article 1, 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.” As the reader will discover throughout the chapters in this book, Congress has exercised the power granted by the Constitution many times by adopting successive copyright and patent laws. Indeed, shortly after the Constitution’s ratification, the First Congress adopted laws in 1790 to secure and protect both copyrights and patents.

But aside from defending IP rights simply because they are *in and secured by* the Constitution, many of the chapters in the book explicate *why* our Founders thought IP rights sufficiently important that our foundational governing charter should grant Congress the express power to secure them. This book will make amply clear—if the book’s title has not done so already—that the Constitution’s framers, or at least key ones, considered property rights, including intellectual property rights, to be rooted in the idea of natural rights. As we explain more fully in the Introduction which immediately follows, by “natural right” we mean an inherent right of human nature, that is, a right that belongs to all individuals simply because they are human beings.

Here it is enough to say that the Declaration of Independence, asserting as it does that certain “self-evident” truths are consonant with “the Laws of Na-

ture and of Nature's God," embodies the natural rights approach we embrace in this book. In our view, when the Founders adopted the Constitution in Philadelphia in 1787, and when the American people through their state conventions ratified it, a natural rights perspective was woven into at least part of the fabric of our constitutional inheritance. And, as will be seen, a commitment to the protection of property rights, including intellectual property rights, is fully consistent with—indeed, required by—a proper understanding of our constitutional order and the obligations of civil society established by such order. Absent acting to secure IP rights, the government would fail in its principal objective of securing what the Declaration of Independence calls our “unalienable Rights,” among them “Life, Liberty, and Pursuit of Happiness.”

In an important sense, this volume is, in part, an intellectual history of the idea that intellectual property rights are at their core inalienable, natural rights deserving of recognition and protection. This intellectual history stretches from John Locke in the seventeenth century to Abraham Lincoln and Reconstruction in the nineteenth—which, by the way, leaves room for further work to carry the endeavor forward. John Locke, the prominent seventeenth century English philosopher, was a major influence on the thinking of our Founders. As Locke explained in a famous passage in his landmark *Second Treatise of Government*:

[E]very man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.

Stated plainly, Locke understood each person to possess a natural right to the fruits of his or her own labor which the civil society established by government was obligated to protect.

Now flash forward all the way to Abraham Lincoln's time. While Lincoln was fonder of quoting America's Founders than he was of Locke, it is difficult to miss the Lockean philosophical bent in Lincoln's own words, for example, when he said, “each individual is naturally entitled to do as he pleases with himself and the fruit of his labor.” It is a short leap from this expression of the idea of a natural right to ownership in the property arising from an individual's own labor to Lincoln's sentiment praising patent laws on the basis that they add “the fuel of interest to the fire of genius.” Or, to the same effect, in the more colloquial Lincoln: “I always thought the man that made the corn should eat the corn.”

We would like to think that a book such as this one, exploring as it does the foundations of important rights secured by the Constitution, is always timely

and important if it brings to bear some fresh insights concerning the subject matter. And especially if it does so in a way that scholars, policymakers, and the general public alike will find useful and accessible. But, frankly, while the historical period covered by the book only runs through the age of Lincoln, we acknowledge that one real impetus for writing the book arises from the revolutionary influences and impacts of today's digital age.

Without the need for elaboration here, the digital revolution, and the new technologies and business models that it has spawned, undeniably have created new platforms for authors, artists, inventors, and other creators to use to distribute their works and products to the public. In the age of the Internet, these digital platforms allow for such distribution, in most cases, to occur more quickly (virtually instantaneously), more widely (nearly everywhere across the globe), and more economically (often at a near-zero cost) than at any prior time. Overall, the benefits to individuals and society, both social and economic, resulting from the digital revolution and the rise of the Internet are incontrovertibly enormous.

But there are also dark sides to the rise of the Internet and other digital technologies as distribution platforms—and one of them is the ongoing problem of the piracy of a substantial amount of intellectual property. By most accounts, the economic losses from the theft of intellectual property, mostly property subject to copyright, run into billions of dollars per year. It is outside the purpose of this book to address the size and scope of the well-documented piracy problem. But it most assuredly is within the book's purpose—indeed, it is a central aim—to provide a counter to the contemporary “downgrading” or denigration of IP rights in some quarters simply because, it seems, so much information is now readily available on the Internet and can be so easily copied and distributed and recopied and redistributed, *ad infinitum*. This diminishment of IP rights is made easier, if not generated, at least in some minds, perhaps even in the subconscious of some minds, by sloganeering of the oft-repeated “information wants to be free” variety. For digital age dilettantes who find the “information wants to be free” mantra appealing, it is but a short step to convince themselves that theft of intellectual property online is no big deal. Or, worse still, that it is not really theft at all.

But this “IP theft is no big deal” way of thinking represents a very troubling development because it facilitates an unmooring of the protection of intellectual property from its constitutional foundations. The mode of thinking that somehow views IP rights as less deserving of protection than other rights the Constitution authorizes to be secured denigrates not only IP rights but the larger constitutional order. We would be remiss if we did not observe, with some dismay, that many who otherwise proclaim their devotion to constitu-

tionalism and protection of individual rights somehow blithely put IP rights in a different category, less deserving of protection.

So, at bottom, we hope this volume will prove useful to those who want to understand the constitutional foundations of intellectual property and to those who wish to educate others. It should prove especially informative to those who wish to understand the natural rights perspective that, in our view, is integral to a proper appreciation of the foundational principles that are pertinent to IP rights protection. We believe that readers, whether academics, students, policymakers, or just ordinary citizens, will find the book not only useful and informative, but interesting as well, with its blend of history, biography, philosophy, and jurisprudence.

We wish to acknowledge the efforts of the Free State Foundation's Kathee Baker for her excellent assistance throughout the preparation of this manuscript. Kathee's labors range from the more mundane typing and formatting to proofreading and editorial assistance, all tasks crucial to making this a book of which we are proud. As always, Kathee's assistance has been rendered not only without complaint, but with good cheer, and for that we are grateful. We also thank Free State Foundation staff member Michael Horney for his editorial assistance.

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