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Appreciating Intellectual Property Rights on Constitution Day

by

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This fall, Congress is considering legislation to reform our copyright and patent laws. Indeed, the House of Representatives' Judiciary Committee is embarking on what it calls a "listening tour" to gather the views of copyright stakeholders. The "listening tour" is all well and good.

But as members of Congress consider how to best secure intellectual property rights in the digital age, they should "listen" — or at least make sure they are familiar with — what the Founders had to say about intellectual property rights. Indeed, Constitution Day — Sept. 17 — provides an opportune moment for recalling the Founders' understanding of natural rights that impelled them to authorize Congress to secure copyrights and patent rights.

Digital production and distribution technologies present new opportunities for entrepreneurship and economic growth. But these advances also pose challenges to protecting intellectual property rights. Online theft of intellectual property costs the American economy \$300 billion or more each year. And the very notion of intellectual property rights is under attack from some quarters, even those who otherwise consider themselves constitutionalists.

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But intellectual property rights are firmly rooted in the Constitution. Article I, Section 8, Clause 8 — the intellectual property (IP) clause — 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." The IP clause is grounded in the Founders' understanding of the nature of copyrights and patent rights.

Most significantly, the IP clause reflects the Founders' classical liberal understanding that each person has a natural right to the fruits of his or her own labor. Echoing John Locke, James Madison wrote in his 1792 *National Gazette* essay, "On Property," that private property "in its larger and juster meaning ... embraces every thing to which a man may attach a value and have a right." As Madison explained, "a man has property in his opinions and the free communication of them," and that which his own labor, "by the sweat of his brow," has created. And, as Madison concluded, "government is instituted to protect property of every sort."

The IP clause embodies the precept that "Authors and Inventors" have a right to enjoy the fruits of their own labor. The Founders thereby made securing intellectual property rights a constitutional imperative.

The IP clause is unique in expressly charging the federal government to protect private property. States typically set the baseline rules for the acquisition, use and transfer of private property. Prior to the Constitutional Convention, states adopted general laws protecting patent rights in inventions, and 12 states had adopted laws protecting rights of "literary property." But the Founders understood that giving Congress the task of defining the terms of copyrights and patent rights would best secure intellectual property and enhance the nation's social and economic well-being.

In "Vices of the Political System of the United States" (1787), Madison wrote that the states suffered from "the want of uniformity in the laws concerning literary property." During the Constitutional Convention, Madison drew heavily from his "Vices" memorandum. On Aug. 18, 1787, he proposed to the Convention that Congress have the power "to secure to literary authors their copy rights for a limited time." The Convention delegates expanded and refined Madison's proposal into what became the IP clause. And in *The Federalist* Paper No. 43, Madison explained that lodging the power of protecting copyrights and patent rights in Congress would be highly useful to authors, inventors and the public good.

The first Congress took up the Constitution's charge to protect intellectual property rights, passing the Copyright and Patent Acts of 1790, which President George Washington signed into law. Both laws were supported by Madison, the leader of House of Representatives. Indeed, many members of the first Congress served at the Constitutional Convention or at state ratifying conventions. Thus, the first Congress is often called the "Constitutional Congress." Inclusion of copyrights and patent rights protections in the Constitutional Congress's historic legislative agenda reinforces the Founders' regard for intellectual property.

If outright theft of intellectual property and ideological downgrading of copyrights and patent rights have one thing in common, it is unwarranted dismissal of fundamental rights. The Founders considered copyright and patent right protections important enough to put into the

Constitution. Remembering the work of the Philadelphia Convention on Constitution Day should prompt Congress, in considering copyright and patent law revisions, faithfully to carry out its constitutional duty to secure the intellectual property rights of authors and inventors.

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