

Congress Should Protect the Rights of American Creators with Site-Blocking Legislation

Adam Mossoff

KEY TAKEAWAYS

Piracy websites engage in rampant, global-scale theft of copyrighted movies, songs, and other works by American creators.

Site-blocking laws enacted by many U.S. allies have proven effective in protecting copyrights and promoting legitimate online commercial services.

Congress should enact site-blocking legislation to secure the rights of creators against large-scale piracy of the fruits of their productive labors.

The United States has long been a global leader in creative and cultural works. The U.S. creative industries export throughout the world American art, values, and way of life through movies, television shows, music, video games, books, and a plethora of other creative works. In 2021, this accounted for \$230.5 billion in exports, exceeding by far the value of exports in many other sectors of the U.S. innovation economy, such as aerospace (\$93.3 billion), agriculture (\$131.8 billion), chemical manufacturing (\$161.4 billion), and biopharmaceuticals (\$92.5 billion).¹ The creative industries are a major driver of economic growth and jobs, adding \$1.8 trillion to the U.S. gross domestic product (GDP) and employing 9.6 million Americans in 2021.²

The immense productivity of the creative industries is due to the foresight of the Framers, who authorized Congress in the Constitution to secure to authors an

This paper, in its entirety, can be found at <https://report.heritage.org/lm349>

The Heritage Foundation | 214 Massachusetts Avenue, NE | Washington, DC 20002 | (202) 546-4400 | heritage.org

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

“exclusive right” for a limited time to the fruits of their creative labors—a type of property right called a copyright.³ Along with other political and legal innovations wrought in the Founding Era, such as the security provided to free speech under the First Amendment, the creative industries flourished and eventually became the global economic powerhouse they are today. In the digital and mobile revolution, with easy, ubiquitous access to a myriad of different online platforms, Americans have more access than ever before to new (and even past) television shows, movies, and other creative works.

But the story does not end here with the classic, fairy-tale ending. The ease of creation, commercial distribution, and access of new artistic and cultural works has been accompanied by rampant, global-scale online theft of these creative works. Large-scale, commercial piracy websites engage in massive copyright infringement. In just the film and television sectors of the creative industries, there were more than *17 billion* visits to piracy sites in the U.S. in 2018—more than any other country in the world (including China and Russia).⁴ This number is certainly higher today. This threatens to hamper the virtuous cycle in the creative industries of investment and commercial development of new creative products and services that results in economic growth and new jobs—the hallmark of American creative industries for two centuries.

It is time for Congress to update the copyright laws to the new technological capabilities of the internet in the third decade of the 21st century. Many democratic allies of the U.S., such as Australia, India, South Korea, the United Kingdom, and others, have enacted narrow, targeted “site-blocking” laws.⁵ These laws set forth procedures for their courts or agencies to block access to piracy websites for internet users residing within a country’s legal borders. Studies have shown that, when these laws are enacted, user traffic to piracy websites and platforms that have been blocked drops between 80 percent and 90 percent.⁶

Site-blocking orders have been issued in these countries for years without either cries from legitimate commercial operators of websites that they have been wrongly blocked or any evidence that blocking traffic to piracy websites has “broken the internet,” rhetoric pushed more than a decade ago by some internet companies like Google and by policy organizations and professors supported by these companies.⁷ To the contrary, where site-blocking laws exist, such as in Australia, South Korea, and the United Kingdom, they have properly protected creators’ property rights, as well as strengthened free markets by protecting legitimate digital services from unfair and illicit competition by piracy websites engaging in large-scale infringement.

Congress should enact site-blocking legislation to better secure the rights of American creators and companies against pirates who exploit the global reach of the internet to steal the fruits of their productive labors. This *Legal Memorandum* explains how and why it is long past time for the U.S. to join with its many democratic allies with market economies in securing these same fundamental property rights. First, it sets forth the first principles in both law and economics that should frame all policy and legal discussions about intellectual property rights like copyright. It details why the Framers authorized Congress in the Constitution to protect copyright, and how the protection of reliable and effective property rights in creative works has driven the thriving creative industries in the U.S. Second, it briefly explains how and why the U.S. has become an outlier in securing copyrights in the modern internet. Third, it explains what site blocking is and how it is implemented. Last, it responds to some criticisms that claim that site blocking poses a threat to free speech or violates due process.

Copyright: A Fundamental Property Right Congress Should Protect

It is always best to discuss first principles before engaging in a legal or policy discussion. In this regard, it is significant that the American Framers recognized themselves the importance of copyrights (and patents) by authorizing Congress to enact laws to secure to creators and inventors for limited times an “exclusive right”—a property right—in the fruits of their productive labors. There has always been a theoretical debate about whether copyrights and patents are valid property rights or invalid monopoly grants, especially given that the historical source of copyrights and patents were royal monopoly privileges granted by the English crown in feudal England. As explained in a previously published *Legal Memorandum*, the authoritative sources of public meaning in the Founding Era and in the early American Republic evidence that copyrights and patents are property rights.⁸

In *The Federalist* No. 43, James Madison, often referred to as the Father of the Constitution, justifies and explains the express grant of power to Congress in the Constitution—along with the power to create federal courts, to create money, and to create an army and a navy—to secure the “exclusive right” in a copyright.⁹ In justifying what has come to be referred to as the Copyright and Patent Clause in Article 1, Section 8, Clause 8 of the U.S. Constitution, Madison states that “[t]he copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors.”¹⁰

At the time of the *Federalist Papers*, it was widely understood that a right at common law generally secured a natural right,¹¹ and an “exclusive right” is a property right.¹² In his famous *Commentaries on the Laws of England*, which heavily influenced the Framers, Sir William Blackstone writes that “the right, which an author may be supposed to have in his own original literary compositions” is a “species of property” because it is “grounded on labour and invention.”¹³ In his influential legal treatise in the early Republic, *Commentaries on American Law*, New York judge James Kent discusses copyrights and patents under the title, “Original Acquisition by Intellectual Labor.”¹⁴ Although Chancellor Kent’s treatise was not published until 1826, he worked as a lawyer with Alexander Hamilton and was involved with Hamilton in the political and legal debates in New York in the 1780s and 1790s. In his *Commentaries*, Kent explains that “literary property” is a form of “property acquired by one’s own act and power.”¹⁵ Both authors and inventors “should enjoy the pecuniary profits resulting from mental as well as bodily labor.”¹⁶

A Property Right. Such statements about copyright (and patents) were commonplace among judges, lawyers, and Members of Congress.¹⁷ A few decades later, Justice Joseph Story decided a copyright case that established the legal foundation for the “fair use” doctrine today. (Fair use is a safe harbor from copyright infringement liability for some unauthorized uses of copyrighted works, and it is now codified in § 107 of the Copyright Act of 1976.) In *Folsom v. Marsh*, Story states that copyright is “private property” that is infringed by an act of “piracy.”¹⁸ Justice Levi Woodbury also explained in a patent case that “we protect intellectual property, the labors of the mind...as much a man’s own, and as much the fruit of his honest industry, as the wheat he cultivates, or the flocks he rears.”¹⁹

Given these historical facts and legal precedents, Paul Clement and Viet Dinh explained a few years ago that “from its inception...copyright was seen not merely as a matter of legislative grace designed to incentivize productive activity, but as a broader recognition of individuals’ inherent property right in the fruits of their own labor.”²⁰ As Judge Frank Easterbrook has succinctly stated, “Intellectual property is no less the fruit of one’s labor than is physical property.”²¹

From the first Copyright Act of 1790 through the Copyright Act of 1976, Congress has acted on its constitutional grant of authority to secure this property right to creators. As is the case with all property rights, creators have the exclusive control over the creation, use, and transfer of their works.²² During the past 200 years, as new “works” and distribution methods were invented—such as photographs, movies, record players, mechanical

and digital forms of music formats, radio, and now digital song and movie files—Congress rightly expanded the scope of copyright to secure the same property rights in these creative works as had been already secured in prior creative works.²³

Injunctions. Just as a pirate printer violated a copyright in a book in 1810 by making and selling unauthorized copies of the book, piracy websites today that host infringing works that permit the mass downloading and copying of music, films, articles, and photographs violate the same fundamental property rights secured by the copyright laws. In 1810 and in 2024, a copyright owner should be able to obtain an injunction, not just against each individual act of infringement, but to stop the continuing, ongoing violation of one’s property rights. Copyright piracy, like a squatter in one’s home or a digital thief continually stealing money from one’s bank account or credit card, undermines a creator’s rights to liberty and property to live, work in a profession, and make a living. This is why courts issue injunctions—court orders that someone must stop ongoing or multiple violations of property rights. These injunctions include court orders to end all continuing wrongful commercial activities. Since copyrights (and patents) are property rights, courts have long recognized an injunction is the proper remedy for willful or continuing infringement, just as this remedy is necessary to protect all property rights against deliberate, ongoing, or commercial violations.²⁴

Issued through court proceedings, with a full panoply of procedural protections, injunctions are available to copyright owners to stop infringement, and thus courts could issue them to block access to piracy websites that are sources of copyright infringement in the 21st century on a global scale (literally, not metaphorically). Congress should enact a statutory amendment to the copyright laws to ensure a tailored, effective remedy with proper procedural guardrails for all parties. In this regard, site blocking is similar to past amendments to the copyright laws that have merely improved the protection of preexisting property rights by extending the same protections to new methods of accessing or infringing copyrighted works.²⁵

Site blocking does not create new substantive rights or legal rules; it uses *existing* U.S. court procedures and rules that apply to the violations of *all* property rights and other private rights, such as temporary restraining orders or preliminary injunctions. As opposed to creating new regulatory tribunals or bureaucratic agencies, site-blocking legislation represents precisely what the Framers intended in authorizing Congress to protect copyright by enacting legislation that defines property rights in creative works that are secured by federal courts.

Sowing Confusion. Unfortunately, a subset of libertarians—who advocate for anarchism in the physical world and in the digital domain of the internet—have created confusion about the protection of copyrighted works on the internet.²⁶ But the government’s legal recognition and protection of intellectual property rights like copyrights is the same legal recognition and protection that the government provides for all other property rights. All property rights, whether in a farm, a home, corporate stock, or even in a person’s speech (as the Framers first thought of it²⁷), serve the same function in driving a flourishing free market and growing creative industries and innovation industries that are the source of economic growth, new jobs, and a better life for all citizens.

Unfortunately, these libertarians have sown confusion among many advocates for limited government and free markets about the legitimacy of protecting American creators in the fruits of their productive labors, as was seen in the public debates over the Stop Online Piracy Act (SOPA).²⁸ During the SOPA debates in 2011 and 2012, one heard the strains of this libertarian view of unbounded and unconstrained rights of liberty (what John Locke identified as “license,” which he rightly distinguished from true liberty²⁹). For example, some libertarians argued during the SOPA debate that any protection of intellectual property rights on the internet was “dangerous” because this interfered with an individual’s alleged right to use their computers “freely as they wish to.”³⁰ They argued that piracy is not the problem, as “the threat here to property rights, to individual rights, to internet freedom and freedom of speech and expression and the press comes from copyright itself.”³¹ (See “A Brief History of Copyright, the Internet, and Site Blocking” on p. 9) below for an analysis of what happened in the SOPA debates and how overwrought and misguided rhetoric, which was fueled and promoted by internet companies like Google, impeded Congress from enacting sensible legislation that would have protected copyrights and shut down large-scale piracy websites.)

It is important to note that not all libertarians or classical liberals are anti-intellectual property.³² It is wrong to equate libertarianism or classical liberalism as such with opposition to intellectual property rights. Therefore, one should not be seduced by either overheated rhetoric or the claims of the anarchist strain of the libertarian movement, which seeks to abolish protection for all intellectual property rights.³³

To ensure the continued growth of the creative industries, a flourishing free market, and an online world in the 21st century in which property rights are properly secured to creators and innovators, Congress should continue to do what it has consistently done for over 200 years under its

authorized constitutional powers: It should amend the copyright laws to better secure and protect creators' rights in new forms of creative works that give rise to equally new forms of unauthorized uses of these creative works. From mechanized music for pianos ("piano rolls") to radio to Xerox photocopiers to file-swapping of MP3 music files, Congress and the courts have recognized and protected the property rights of creators in the fruits of their productive labors. It should do so again today by effectively securing the rights of creators against websites that engage in commercial piracy on a global scale, just as many U.S. allies with similar commitments to limited government and the free market have already done.

Copyright: Driving Creative Production and Economic Growth

The protection of copyright against large-scale, commercial piracy websites is not only something that is proper as a matter of law and policy, but it is also essential to promoting economic growth and ensuring continued U.S. global leadership in cultural productions. The Framers of the Constitution, as well as the First Congress in enacting the Copyright Act of 1790, were right to secure and protect copyright as property rights. They were right because the economic principle is true for all property rights: Protecting the fruits of productive labor in property and contract rights is essential to promoting economic growth and a growing, flourishing free market. As the modern Supreme Court has recognized, copyright is "the engine that ensures the progress of science,"³⁴ because "copyright supplies the *economic incentive* to create and disseminate ideas" through the marketplace.³⁵

The connection between protecting reliable and effective intellectual property rights and growing innovation economies and flourishing societies is indisputable. The economic and historical evidence is overwhelming that the protection of patents as property rights within a political system defined by the rule of law and with stable legal institutions like courts is strongly correlated with economic growth and success.³⁶ This evidence also highlights the key role that *injunctions* serve as a backstop in facilitating market transactions and establishing fair market value for all property rights through arms-length commercial negotiations.³⁷ A prior *Legal Memorandum* also detailed this economic evidence, and academic scholarship has presented additional evidence, on the connection between economic growth and the protection of effective and reliable copyrights.³⁸

This is unsurprising. It is the same economic principle that reliable and effective property rights spur investments, market transactions, and, in

the context of intellectual property assets, the creation of new markets in technological and creative products and services.³⁹ Yet confusion abounds about this basic legal and economic principle, in part due to libertarians opposed to intellectual property joining in common cause with Progressives who also attack intellectual property rights (often self-identified as the “copyleft”).⁴⁰ These libertarians, allegedly in defense of the free market, wrongly attack intellectual property rights like copyright as stifling innovation, creativity, and economic growth.⁴¹ Thus, it is necessary to briefly summarize some of the data in support of evidence-based policymaking in protecting the copyrights of American creators against commercial websites devoted to piracy.

Value Creation. In 2021, the creative industries that rely on copyrights as drivers of investments in new works and in the development of new commercial mechanisms for distributing these works added \$1.8 trillion to U.S. GDP.⁴² They employed 9.6 million Americans, accounting for 4.88 percent of the nation’s workforce and 5.53 percent of total private employment. The average annual salary of employees in the creative industries was \$121,583 in 2021, which is 51 percent more than the average annual compensation paid to all U.S. workers that year (\$80,566). Even more important for the purpose of considering how best to address the fundamental problem posed by piracy websites, the creative industries contributed to 52.26 percent of the value added to the U.S. digital economy in 2021, including 48.1 percent of its employment, even though the definition of U.S. digital economy does not include all of the creative industries’ activities.

These general economic data comport with anecdotal evidence. Despite the portrayal of the creative industries by libertarians and copyleft activists as “dinosaurs” that exploit their alleged government-granted “monopolies” in their copyrights to hamper innovation and access to articles, books, movies, and music, there has been an explosion in streaming platforms, digital audio books, print-on-demand services, and many other investments in new technologies to produce and distribute new articles, books, and artistic works.⁴³ With extensive numbers of new TV shows and movies produced and distributed on innumerable digital platforms accessible through mobile devices, it is often said that Americans are currently experiencing a “second golden age of television.” This demonstrates again the key insight of the Framers that copyright will function no differently from how any other property right is utilized by a commercial enterprise in creating and selling products and services in the marketplace.

In this regard, securing copyrights as property rights by courts issuing injunctions to stop mass-scale, commercial infringement is no different in

moral, legal, or economic principles than securing all other property rights against similar violations. According to the same legal and economic principles, copyright owners should be able to obtain site-blocking injunctions against piracy websites, and enacting legislation to better implement this remedy fundamentally promotes the free market. It eliminates the false “competition” of “free” created by easy access to pirated goods. In so doing, it reinforces the incentives to invest in digital distribution and ensures that creators and producers are paid proper market value rates for the fruits of their labors.

Properly securing copyright against piracy websites will ultimately strengthen competition among legitimate digital service providers by addressing the false market failure caused by having to compete with foreign piracy operations. Streaming services should compete on the merits and set prices based on market factors, consumer value, and demand—not artificial considerations like illicit competition from foreign piracy crime rings who paid nothing to develop or obtain the creative works that they are offering to everyone in the world with a computer or smartphone.

A Brief History of Copyright, the Internet, and Site Blocking

As stated above, Congress has consistently and steadily updated the federal copyright laws since the first session of the First Congress enacted the Copyright Act of 1790. It has done so to accommodate the invention of new media for creative works, such as photographs and movies, as well as inventions and other advances in the production and commercial distribution of creative works, such as record players, cassette tapes, and even radio and television broadcast technologies. Yet Congress has not amended or updated the copyright laws to address massive commercial piracy websites that operate on a global scale.

This problem is not primarily one of the technological capabilities that make it too easy to engage in digital piracy and thus too hard to stop it, as is sometimes said to rationalize inaction. The real problem is one of policy and law. Copyright law has evolved and grown since the first Copyright Act of 1790 to secure the rights of creators precisely because technological and economic capabilities in producing, selling, using, and stealing copyrighted works evolved through the Industrial Revolution up through the digital revolution and the internet revolution. Unfortunately, this legal evolution of securing and protecting copyrights ended at the birth of the modern internet almost 30 years ago when Congress enacted the Digital Millennium Copyright Act of 1998 (DMCA).⁴⁴

The DMCA was intended by Congress to make it possible for copyright owners to request and have “taken down” infringing songs, photos, or written materials posted on websites. As explained in an article in 2008:

At its core, the DMCA enables copyright owners to protect their works against theft. The DMCA recognizes that thriving networks and network-based dissemination of information, whether movies or software, need two things: trust and rewards for good actors.... Without the assurances written into the law, copyright holders would have been more than hesitant to distribute their content in digital form, and to cut the deals with the electronics industry that have allowed the decade’s explosion in the portability that is so desired by an increasingly mobile society.⁴⁵

But the DMCA was written at a time when people accessed the internet through telephone wires with information transfer speeds at a mere fraction of the speed of internet access today via fiber optic cables or telecommunication technologies like 4G or 5G. Uploading or downloading songs could take hours in the 1990s, as opposed to the seconds it takes today—and people were not yet attempting to upload movies. Watching or “streaming” a movie was still science fiction.

Today, uploading files representing high-quality artwork, photographs, songs, and entire movies is almost as easy as snapping one’s fingers. The DMCA envisaged individual notices and takedowns of individually infringing files. Today, these infringing files number in the tens, if not hundreds, of millions, especially on piracy websites whose users engage in nonstop uploading from around the globe (at least from jurisdictions lacking site-blocking orders). In today’s context, identifying and requesting individually uploaded infringing digital files to be taken down is massively costly and effectively impossible.⁴⁶ Commentators rightly have likened the DMCA “notice and takedown” system to the classic game of “Whac-A-Mole,” in which a player hammers each individual mole that pops up, but can never hit them all and ultimately loses the game.⁴⁷

This technological evolution in the capabilities of modern-day digital pirates could have been addressed, as new technological piracy had been addressed in the past. But here is where the real problem—the legal problem—arose.

Limiting the DMCA. First, in addition to strictly construing the requirements of the DMCA by requiring copyright owners to submit individual notices for individual files that infringed a copyrighted work, courts severely narrowed the scope of liability for website operators under the DMCA, such

as requiring website owners to have specific, actual knowledge of each individual infringing work.⁴⁸ This effectively neutered the applicability of the DMCA to owners and operators of commercial piracy websites that permit users to upload millions of videos or songs that infringe copyrights, as it would be impossible to prove that the owners have actual knowledge of the contents of each infringing file that was uploaded.

SOPA and the End of Legal Reform. This led to a second legal problem. As noted earlier, Congress first sought to address this new problem of large-scale, commercial infringement by piracy websites with SOPA.⁴⁹ The introduction of SOPA prompted a massive, acrimonious public reaction, driven in part by some Big Tech platform companies, such as Google, eBay, and Amazon, who lobbied against SOPA.⁵⁰ Internet companies, such as Wikipedia, Reddit, Tumblr, and Google, among innumerable others, held an “Internet Blackout Day” to protest SOPA by converting their websites to black backgrounds and calling on their tens of millions of users to oppose SOPA.⁵¹ For its Internet Blackout protest, *Wired* blacked out portions of text with the headline, “Don’t Censor the Web. Tell Congress No on SOPA and PIPA.”⁵² Another common refrain was that SOPA would “break the internet.”⁵³ Congress and the creative industries were unprepared for this coordinated, internet-driven reaction, and SOPA was soundly defeated.⁵⁴

The policy impact of the SOPA kerfuffle and its ultimate defeat is undeniable. It ushered in a decade-long congressional winter for any legislation aimed at better protecting copyrights on the internet. The fearmongering “don’t break the internet” rhetoric became ensconced in the public mind, reinforced by concerns that Members of Congress and other officials did not fully understand the technological revolution represented by the internet. As a result, SOPA effectively became the equivalent of a “four-letter word” whose utterance by opponents of legislation preempted consideration of any bill that would address the already massive and still-growing problem of large-scale, commercial copyright infringement by piracy websites.

Big Tech and Accountability. Ten years after the SOPA debacle, however, it is a very different world on the internet. Due to revelations in recent years about the unauthorized use of user data despite public assertions and assurances to the contrary, as well as the disclosure of collusion with federal officials in censoring of information available to users on their websites, it has become clear that Big Tech companies no longer (if they ever did) wear the white hats they claimed for themselves in 2012 and which many people (naively) accepted.⁵⁵ This has led to a broader reexamination of many of Big Tech’s policy positions and the questioning of what ends these positions truly serve.⁵⁶ This includes copyright.

A robust debate has emerged around the proper standards for platform accountability with a growing consensus that reform is needed to create better incentives for platforms to address real online harms.⁵⁷ Policymakers have rightly begun to reject the reflexive and oversimplified SOPA-era narrative of white-hat internet companies that do no harm in promoting innovation in the public interest as the reason to oppose legislation that will “break the internet”—a welcome and long-overdue development. But this does not mean policymakers will now adopt the right policies moving forward.

The “Streaming Loophole” and the PLSA. Congress should return to first principles—starting with core American values like ensuring reliable and effective property rights as a key pillar of a free market and a flourishing society. For example, Senator Tom Tillis (R-NC) led the successful effort last year to enact the Protect Legal Streaming Act (PLSA), which was incorporated into the Consolidated Appropriations Act of 2021.⁵⁸ The PLSA closed what was known as the “streaming loophole,” as the law punished less severely the piracy of copyrighted works via streaming platforms than the same acts of piracy of other copyrighted works, such as file swapping (called “file sharing”) or copying DVDs.⁵⁹ As a matter of remedies for piracy, there is no reason to differentiate between piracy of the same movie in a DVD or on a streaming platform, and this “streaming loophole” had the unintended effect of incentivizing piracy via streaming versus other forms of piracy, such as mass copying of DVDs.

Congress’s enactment of the PLSA to close the “streaming loophole” is significant in light of the continuing threat to copyright owners by large-scale, commercial piracy websites. First, the relatively easy passage of the PLSA—buoyed by support from some copyright skeptics who had opposed SOPA—indicates how much the ground has shifted since the SOPA fight 10 years ago. Congress can now recognize and enact the reforms necessary to better secure copyrighted works on the internet, especially given the changes in digital capabilities that make possible today large-scale, commercial piracy websites on the internet as compared to the internet of SOPA almost 10 years ago and the DMCA over 20 years ago.

Second, the PLSA harmonized the remedies for digital piracy under U.S. law for large-scale U.S.-based criminal rings, regardless of whether they are engaging in piracy of DVDs or on streaming platforms. The enactment of the PLSA shines a spotlight on the one remaining “streaming loophole” that exists for U.S. copyright owners: the large-scale, commercial piracy websites whose operators are unknown, or the operators and servers are located outside the U.S. in foreign jurisdictions around the world.

While the PLSA closed one statutory loophole in the protection of effective and reliable copyrights against U.S.-based piracy efforts, the challenge posed by large-scale, commercial piracy websites based in other countries remains. These websites are often run by anonymous operators, or sometimes *known* operators, who are based in rogue states or in countries that are uncooperative with the U.S. for a variety of foreign policy reasons. This makes it virtually impossible from a practical standpoint to hold the operators of piracy websites in these countries accountable under U.S. law for their massive infringement of U.S. copyrights.

Site-Blocking Procedures. To address this problem, many of America’s democratic allies, such as Australia, India, South Korea, and the United Kingdom, have adopted over the past decade various legal regimes that provide for narrow, targeted “site-blocking” procedures. These laws authorize local courts or enforcement agencies to cut off—block—access by internet users in their countries from accessing designated large-scale, criminal-enterprise piracy websites. Where site-blocking procedures have been adopted, studies confirm that internet traffic to piracy websites—websites engaged in large-scale, commercial piracy of copyrighted works—falls between 80 percent and 90 percent.⁶⁰ This is the very definition of effective protection of creators’ rights against piracy of the fruits of their productive labors.

The scaremongering, rhetorical hyperbole about “breaking the internet” that was so effective in killing SOPA in 2012 has proven to be demonstrably false in the ensuing decade.⁶¹ Numerous site-blocking processes have been adopted in many countries, and courts and agencies have issued innumerable site-blocking orders, and yet the internet continues to work just fine. The near-certain cascade of failures in the foundational technological architecture of the internet that was predicted to result if site blocking was implemented has failed to materialize.

One important lesson is that Congress and policymakers should no longer listen to the professors, policy organizations, and Big Tech companies who engaged in the scaremongering, anti-SOPA rhetoric when they continue to make similar hyperbolic predictions about new intellectual property legislation. Perhaps sensing they have spent their line of credit with the irresponsible “don’t break the internet” argument, Big Tech companies and their (supported) policy allies now assert more sophisticated arguments against site-blocking legislation.

Chilling Online Speech? One argument is that site blocking opens the door to censorship or chills legitimate online speech. This was also an anti-SOPA argument in 2012, but it did not have the rhetorical force of “don’t break the internet” and thus it did not become the rallying cry for

the anti-SOPA narrative.⁶² Now that “don’t break the internet” has proven false, it is understandable that its original proclaimers would assert anew predictions of censorship and chilling of speech. A decade later, though, the censorship argument has new meaning coming from some Big Tech platform companies. After the recent revelation of some Big Tech companies’ collusion with the federal government in censoring online speech, it is deeply ironic they would make this argument.⁶³ At least some of these companies know exactly of which they speak when they warn of the dangers of online censorship.

Due Process. Another argument by Big Tech and its allies is that site-blocking procedures do not provide enough due process to ensure full protection of the rights of legitimate website owners and operators. But a decade’s worth of experience with site-blocking procedures around the world has proven these new legal and policy predictions to be just as wrong as the original argument that SOPA would “break the internet.” Site blocking has proven highly effective in securing more reliable protection for creators’ rights in digital versions of their creative works—which was the original intent of the DMCA in 1998—while also respecting and protecting democratic values like free speech.⁶⁴ Jurisdictions with site-blocking procedures have better secured copyrighted works in digital format, strengthened the legitimate commercial uses of the internet, and refrained from doing anything to discourage the continued growth of robust and extensive online discourse.

Of course, it is possible to imagine a whole slew of hypothetical abuses of *any* legal procedure or doctrine. Anyone can do this because history is replete with innumerable examples of those with good intentions paving the road to perdition. For these reasons, a site-blocking regime, if adopted in the U.S., must provide strong due process protections and clear safeguards against abuse. That said, a decade of real-world experience in site-blocking procedures has demonstrated that, with appropriate protections in place, site blocking can and does work.

Given the technological changes in the internet since 1998, site blocking fulfills the original promise of the now-ineffective DCMA enacted that same year. Site blocking provides more effective and reliable protection of creators’ rights on the internet, thereby boosting the contribution of the creative industries to economic growth and increased jobs. At the same time, it promotes even more dynamic competition among legitimate online services offering products and services in copyrighted works that no longer face unfair competition from piracy websites offering internet users the illegitimate price of zero for stolen digital goods.⁶⁵

The Increasing Scourge of Online Piracy

The need for site-blocking legislation is pressing. Online copyright piracy has been—and remains—an enormous worldwide problem. The creative industries invest millions of dollars annually combatting online piracy, monies they could be investing in creating new creative works and in developing new commercial mechanisms for distributing these works into the marketplace. The reason for the high cost of combatting online copyright piracy is simple: Intellectual property rights are enforced by their owners through direct notices and private lawsuits; criminal copyright is just one small exception, with only a few cases being pursued each year, in part because it is limited in its application to large-scale criminal enterprises.

For the creative industries, the toil of protecting their copyrights is a massive effort that includes sending annually tens of millions of takedown notices regarding specific infringing files or URLs to hosting sites and search engines, filing lawsuits against pirate websites, and developing technological measures to combat piracy. In the first eight months of 2022, there were 141.7 billion visits to piracy sites for all sectors of the creative industries, a 21.9 percent increase over the same period of 2021.⁶⁶ According to the U.S. Chamber of Commerce, piracy of digital movies and other videos costs the U.S. economy \$29.2 billion and over 230,000 jobs each year.⁶⁷

As noted earlier, the primary tool in combatting online copyright piracy in the U.S. is DMCA takedown notices.⁶⁸ The larger commercial copyright owners and online platforms have built together mostly automated notice-and-takedown systems to address infringing files. Google reports that it has surpassed *7.5 billion* total de-listings of infringing content under the DMCA regime (as of December 2023).⁶⁹ The fact that the numbers are so massive and continue to grow year over year demonstrates only that the DMCA system has become efficient in processing notices.

Since U.S. courts have strictly construed the DMCA to require a single, specific notice to remove a single, specific file, copyright owners are forced to expend innumerable hours and untold amounts of money playing an endless game of digital Whac-A-Mole in which one file is taken down, while one, two, or more distinct files of the same infringing copies of the same copyrighted work immediately pop up to replace it, requiring more individual, specific notices for those specific files.⁷⁰ This interminable process forces creators and companies in the creative industries to expend scarce resources that would otherwise go toward creating new works and new forms of distribution and delivery.

This is not how Congress intended the DMCA system to work.⁷¹ Congress intended this law to both foster creativity and combat piracy online by incentivizing the creation of a classic “private-ordering mechanism” in which the creative industries and Big Tech companies would work together to develop a system of shared responsibility in addressing online copyright infringement. Congress should implement the original goal of the DMCA by adopting a site-blocking regime.

What Is Site Blocking?

Given the rhetoric that site blocking threatens free speech or otherwise chills legitimate expression, it is necessary to explain how it works in the real world. First, there is the technology that is employed in implementing site blocking. Second, there is the legal process by which a site-blocking order is issued. These are interrelated, and each is described below.

Site blocking occurs when an internet user is prevented from accessing a particular website on the internet. In technological terms, an internet service provider (ISP) can implement site blocking through one of several different methods, such as search-result filtering, Domain Name System (DNS) blocking, internet protocol (IP) address blocking, Uniform Resource Locator (URL) blocking, and deep-packet inspection.⁷²

For example, a court could order an ISP to implement a DNS block. Domain names are the readable names that identify particular websites, such as *www.google.com*. On the internet, DNS resolvers convert domain names into the numerical IP addresses that are used by computers to locate and access the websites. For example, the IP addresses for *www.google.com* are 8.8.8.8 and 8.8.4.4, which is how a user seeking to access Google is connected to Google’s website on the internet. ISPs like Verizon or AT&T perform this function for their users as part of their broadband service.

When a DNS block is implemented by an ISP, if a user attempts to connect to a blocked site by typing in the site’s domain name or linking to it from a search, the ISP will not convert the DNS into the site’s IP address. The user will receive a “server not found” or similar error message. Since most piracy websites use dozens of different names to maximize access and to better evade detection by authorities, IP blocking is often paired with DNS blocking so that users cannot simply type in different domain names or a blocked site’s IP address to access a blocked website. In order to be effective, a site-blocking order by a court must be implemented by at least the largest ISPs in that country in order to prevent most of the internet traffic going to the piracy website.

Some internet users or website owners may still attempt to evade DNS blocks through various techniques. An internet user, for example, can use a third-party DNS resolver like Cloudflare, which functions in similar ways as a Virtual Private Network (VPN) except without the added data security of encryption in evading IP or DNS blocks. VPNs are used, for example, by some people who travel to China in order to evade the internet blocks created by the Chinese Communist Party known as the Great Firewall.⁷³ But most internet users are not technologically sophisticated enough to use a DNS resolver to access piracy websites, and if there are sufficient uses of a DNS resolver, courts can also issue blocking orders to reach these third-party services on the internet. Blocked sites can also change their domain names or create “mirror” sites, but this is cumbersome and requires users to learn about the new name or new site. In addition, many countries already issue “dynamic blocking orders” that permit a copyright owner to add to the injunction any new domain names or IP addresses associated with the original blocked site.

Global Track Record of Site Blocking

The U.S. is now the outlier globally when it comes to site-blocking systems and the protection of the rights of creators in the digital fruits of their labors. Some form of site blocking has been implemented in at least 40 countries. A site-blocking legal process has been implemented, for example, in most of the member countries in the European Union, Australia, Canada, Israel, South Korea, and the United Kingdom.⁷⁴

In the United Kingdom, where site blocking was enacted 10 years ago, there have been 23 court cases leading to civil injunctions against 176 piracy websites and over 2,000 domain names.⁷⁵ Australia has had similar success with site blocking, which was enacted as § 115A of its copyright law. In 2018, the Australian government evaluated the effects of § 115A and determined that this site-blocking statute had no unexpected or deleterious impact on the internet; in fact, the government concluded that § 115A should be expanded. The amended § 115A included making site-blocking orders available against a website whose *primary effect*—as opposed to only its *primary purpose*—is copyright infringement and expanding the availability of site-blocking orders to search engines, as opposed to just ISPs.⁷⁶ In addition to copyright, site-blocking orders have successfully prevented access to all manner of online criminal enterprises, including sites that promote and facilitate prostitution, online gambling, and child pornography.⁷⁷

Site-blocking orders in these countries have proven effective in preventing copyright piracy.⁷⁸ One study assessed the effectiveness of site blocking in the United Kingdom and found that site-blocking orders resulted in a 90 percent drop in visits to blocked sites and a 22 percent decline in total piracy among the blocked users.⁷⁹ Similar results have been found in other countries.⁸⁰ Importantly, site-blocking orders not only decrease visits to illegal sites, they correlate with a significant increase in visits to *legal* streaming websites.⁸¹ In sum, there is significant evidence that the widespread adoption of site-blocking systems by many democratic U.S. allies that adhere to rule-of-law principles and provide procedural protections has contributed to a more healthy online ecosystem for accessing and using copyrighted works.

The Procedural and Substantive Implementation of Site-Blocking Systems

It is important to recognize that not all site-blocking occurs solely as a result of a specific court order. This might seem concerning at first blush, especially given the criticism about lack of due process in site-blocking orders, but such concerns are misplaced. Some site blocks are implemented proactively by ISP filters designed to screen out illegal material such as child pornography. In some countries, such as the United Kingdom, the majority of blocked sites are for illegal material screened out via proactive site-blocking techniques.⁸² For a complaint alleging copyright infringement by a large-scale piracy website, however, a site block will occur only by order of a court or appropriate administrative body.

Of course, the legal requirements for issuing a site-blocking order differ from country to country, but there are common requirements applied by courts in most countries, especially by those in the European Union. European national courts generally require a full decision on the merits, or at least a preliminary injunction, in which the court finds that the copyright owner's rights have been infringed by a website. The copyright owner must typically demonstrate that (i) the website is substantially engaged in piracy; (ii) the site block is reasonable and proportionate to the harm caused by the website; and (iii) blocking the website is necessary to stop the infringing conduct, as opposed to another available remedy.⁸³ These courts also generally consider the cost of the blocking order and the impact the block will have on both the site operator and the public at large.⁸⁴ Anyone familiar with the prerequisites for issuing preliminary or final injunctions under U.S. law will notice substantial similarities in these site-blocking proceedings to the legal requirements for these same remedies in U.S. courts, such as balancing harms and consideration of the public interest.

With respect to other substantive or procedural requirements for site-blocking orders in European countries, courts generally do not require a finding of contributory liability by third parties who will implement the site block.⁸⁵ In some countries, blocking orders may be issued without an adversarial court hearing with all parties present (an *ex parte* proceeding), but in practice that is done only in exceptional circumstances.⁸⁶ Moreover, the copyright owner generally must give notice to a website to give the owner a chance to respond to the request of a site-blocking order. As with all civil cases in the European Union, any decision or order is subject to appeal.

Any site-blocking system in the U.S. would be—and should be—subject to similar procedural safeguards and substantive prerequisites. One (perhaps the only) advantage of the outlier status of the U.S. when it comes to site-blocking orders is that it enables the U.S. to learn from, and implement a better site-blocking system based on, the evidence and data of other existing systems. In this respect, the U.S. can engage in evidence-based policymaking in creating a site-blocking system for U.S. courts to protect American creators' rights on the Internet.

A Brief Reply to Some of the Criticisms of Site Blocking

Despite the demise of the rhetorical hyperbole that site blocking will “break the internet,”⁸⁷ Big Tech companies, anti-IP libertarians, and the copyleft have not given up their opposition to site blocking. Yet the procedurally proper and effective site-blocking systems that have been implemented in Australia, the United Kingdom, and the European Union, among other U.S. allies, have resulted in an internet that is anything but “broken.” It is perhaps reasonable to conclude that, while the internet is technologically thriving, the state of public discourse about the internet is indeed broken. No doubt this is due, at least in part, to the anti-SOPA campaign, which demonstrated that overheated rhetoric divorced from facts could succeed against level-headed analysis in defense of fundamental rights like copyright.

Since the attacks on site blocking continue unabated, let me briefly address some of the now dominant criticisms.

Overblocking. One oft-heard concern is overblocking—a site-blocking order that is overinclusive because it limits access to a website or to internet content that was not intended to be blocked. This is a more relevant concern in the context of the site blocks that are implemented privately by ISPs using automated filters. Yet even in these privately implemented site-blocking activities, the rate of overblocking is not statistically significant, occurring in only 2 percent to 6 percent of total cases.⁸⁸

More important, the overblocking criticism about court-ordered site blocking is almost entirely unsupported by the data. This is unsurprising. Courts order site blocks only after proper procedures are followed by the parties and the court, and the court applies the relevant legal requirements in determining whether an injunction-type order blocking access to a website is justified under the law. Moreover, except in exceptional circumstances, courts always seek to have *all* relevant parties appear before them—not just the copyright owner and website owner, but also the relevant ISP that would implement the order.

In sum, court processes leading to site-blocking orders include numerous procedural and substantive safeguards specifically designed to guard against overblocking.⁸⁹ Beyond the safeguards already discussed above, courts can issue—and ISPs can implement—site-blocking orders with surgical precision. For example, if a website contains some pages devoted to pirated material but has other pages that contain legal content, a site-block order can be limited only to the relevant subdomains to target only the webpages with the infringing content.⁹⁰

Of course, a website owner may commingle pirated works with legal works in a single webpage, but this person may not benefit from escaping legal liability by this act of commingling. This is a well-established principle in U.S. property law, which is equally applicable to copyright as a property right. Those who engage in theft or similar violations of other people’s property rights often attempt to escape accountability by hiding or commingling their loot with legitimate assets, such as purchasing a home with embezzled funds commingled with legitimately earned money. In these cases, courts issue injunctions or other similar remedies against the wrongdoer who commingle purloined and legitimate funds to escape accountability.⁹¹ Courts do so on the important equitable principle that a wrongdoer should not profit from his own wrong.⁹²

It is significant that policymakers and legislatures that have enacted site-blocking systems have similarly agreed that, if a website is primarily devoted to copyright infringement and the site block is necessary to prevent continued access to this website, the website owner should not be permitted to escape the consequences of his or her own malfeasance.⁹³ If this was not the case, then every piracy website would simply commingle pirated and legal content, permitting pirates to escape accountability.

Free Speech/Right of Participation in Public Discourse. Of course, authoritarian regimes like China, Iran, and Russia exploit site-blocking technologies to censor and repress their citizens. Site-blocking is a technology, and like any technology, it can be used for legitimate or illegitimate

purposes. Automobiles and airplanes may be used to expand one's range of mobility or for travel to and from one's job, but they also may be used as terror weapons. All automobiles or airplanes are not prohibited because of potential misuse by malefactors. The same principle is equally applicable to site-blocking orders issued by courts.

When a site-blocking remedy is sought in court by a copyright owner to protect a legitimate property right that is being infringed by a piracy website, the resulting site-blocking order is entirely consistent with free speech principles. Courts have rejected the never-ending lawsuits filed over the span of two decades by anti-copyright activists like the Electronic Frontier Foundation, which is still seeking to have the now-ineffectual DMCA struck down as a violation of free-speech rights under the First Amendment.⁹⁴ Any legal challenge against site-blocking legislation that includes the due process protections and substantive requirements that are already used in European courts should meet a similar fate in U.S. courts—as confirmed by the many failed free-speech challenges to the DMCA.

In sum, there is no right to free speech to engage in piracy of copyrighted works. Courts have long recognized that the First Amendment did not repeal, expressly or impliedly, the Copyright and Patent Clause in Article I, Section 8, Clause 8 of the Constitution.⁹⁵ These rulings apply with equal force to digital copyrighted works on the internet. Thus, there is no right to free speech under the First Amendment that permits someone to infringe a copyrighted work by posting an unauthorized copy on a website or permits someone else to infringe this same copyrighted work by accessing, streaming, or downloading this copy from the piracy website.

Effectiveness. Critics of site blocking identify a myriad of ways that internet users and pirate sites can evade the site-blocks orders, arguing that site blocking will be no more effective than the current Whac-A-Mole process of the DMCA notice-and-takedown system. But the ability of some piracy websites or sophisticated internet users to strategically evade a site-blocking order is no more a reason to not implement this legal system than the fact that some people may evade capture or conviction for theft or larceny is not a reason to abandon passing and enforcing laws prohibiting theft. The fact remains that site blocking is a far more effectual system to secure copyrights in digital formats than the system created by the DMCA in 1998; it may not be perfect, but, as the classic cliché goes, we should not let the perfect become the enemy of the good when it comes to implementing much-needed copyright reform.

Moreover, the data of the success of existing site-blocking systems in Europe and elsewhere does not support this cynical argument that

discourages adopting proper laws simply because they will not function with 100 percent efficacy when it comes to protecting all copyrights and punishing all pirates. It is true that some piracy website owners and internet users may evade site-blocking orders. For piracy websites, operators can create new domain names and mirror sites that might not be caught in a static site-block order directed to a particular domain name pointing to a fixed IP address.

But these evasions can be thwarted through dynamic site blocks that are able to evolve to capture any newly created domains and websites. In fact, many EU member states now routinely employ dynamic site blocks in their site-blocking orders given that piracy websites have already attempted to evade static site-block orders.⁹⁶ For internet users, the most common method for evading a site-block to access a piracy website is to use a VPN that cloaks the user's location in a particular country in which a court has issued a site-blocking order. (This is how VPNs work for visitors to China, as described above.) But most internet users are unable or unwilling to use a VPN solely for the purpose of pirating copyrights on the internet. For more sophisticated internet users, blocks that are not limited to particular countries will cover most VPNs due to treaties and rules of comity in respecting foreign court orders. Moreover, as site-blocking systems are adopted in more and more countries, it will become increasingly difficult for internet users to mask their location by selecting a country without a similar site-block order in effect.

Certainly, protecting copyrighted works online is a perennial game of cat and mouse, just as thieves and burglars are in a similar unending race with property owners over protective measures and hacks like lock picks or decryption programs.⁹⁷ Just as no alarm system or door lock will ever work "perfectly" to keep out all invaders, no technology will be able to completely eliminate online piracy of copyrighted works. But as the data demonstrates, site blocks that have been implemented abroad have been quite effective in securing copyrighted works, and the U.S. can and should adopt site blocks with appropriate due process protections to similarly protect American creators' rights.

Conclusion

The U.S. should follow the well-trod path of its closest allies around the world in protecting the fundamental rights of American creators by authorizing U.S. courts to issue injunctions to block access to large-scale, commercial piracy websites. In the modern era, this fulfills the Framers'

plan that Congress act on its express power in the Constitution to protect the fruits of productive labors of authors and creators. It is a fundamental obligation of the federal government to secure the property rights of all innovators and creators—to be “secured” in their “exclusive right,” per the Constitution. This constitutional authorization to secure copyrights is the fountainhead of the global leadership by the U.S. in almost all aspects of modern cultural productions—movies, songs, books, toys, dolls, games, and so much more.

The constitutional and policy justifications for protecting copyrights is supported by rigorous economic evidence and empirical data. These all lead to the conclusion that Congress should protect the rights of American creators on the internet by enacting site-blocking legislation. Large-scale, commercial piracy websites are a scourge that violate the rights of American creators and threaten the continued growth of the U.S. creative industries. These piracy websites are hosted on servers and run by operators in legally inaccessible jurisdictions such as Russia, which makes service of process or even a notice under the DMCA impossible. The DMCA notice-and-takedown regime enacted in 1998 is already practically ineffective in the U.S., and it is a nullity for these foreign-based piracy websites.

In contrast to the overheated rhetoric and scaremongering hypotheticals used by opponents of site-blocking laws, site blocking is a proven, effective legal mechanism in protecting copyrights and promoting legitimate commercial services on the internet.

Adam Mossoff is Visiting Intellectual Property Fellow at The Heritage Foundation, Professor of Law at the Antonin Scalia Law School of George Mason University, and a Senior Fellow at the Hudson Institute.

Endnotes

1. See Robert Stoner & Jéssica Dutra, *Copyright Industries in the U.S. Economy: 2022 Report*, https://www.iipa.org/files/uploads/2022/12/IIPA-Report-2022_Interactive_12-12-2022-1.pdf.
2. See *id.*
3. See U.S. CONST. art I, § 8, cl. 8.
4. See Colin Mann, *Global Piracy Nears 190bn Visits in 2018*, ADVANCED TELEVISION (March 22, 2019), <https://advanced-television.com/2019/03/22/global-piracy-nears-190bn-visits-in-2018/>.
5. See Testimony of Karyn A. Temple on Digital Copyright Piracy: Protecting American Consumers, Workers, and Creators before the House Judiciary Committee, Subcommittee on Courts, Intellectual Property, and the Internet at 2 (Dec. 13, 2023), <https://docs.house.gov/meetings/JU/JU03/20231213/116671/HHRG-118-JU03-Wstate-TempleK-20231213.pdf> (identifying 40 countries with site-blocking laws).
6. See Nigel Cory, *A Decade After SOFA/PIPA, It's Time to Revisit Website Blocking* (Jan. 26, 2022), <https://itif.org/publications/2022/01/26/decade-after-sopa-pipa-time-to-revisit-website-blocking/>; Brett Danaher, Jonathan Samuel Hersh, Michael Smith, & Rahul Telang, *The Effect of Piracy Website Blocking on Consumer Behavior* (June 2, 2015), <https://papers.ssrn.com/abstract=2612063>.
7. See *infra* notes 50–53, and accompanying text (detailing the “don’t break the internet” narrative used to defeat SOPA, a site-blocking bill proposed in 2011, and which was pushed by some internet companies like Google, as well as by professors and organizations with legal and financial connections to these companies).
8. See Adam Mossoff, *The Constitutional Protection of Intellectual Property*, HERITAGE FOUND. LEGAL MEMORANDUM No. 282 (March 8, 2021), <https://www.heritage.org/economic-and-property-rights/report/the-constitutional-protection-intellectual-property>; see also Adam Mossoff, *Article 1, Section 8, Clause 8*, in HERITAGE GUIDE TO THE CONSTITUTION (Josh Blackman & John Malcolm eds., 2024) (forthcoming).
9. See U.S. CONST. art. I, § 8, cl. 8 (“Congress shall have the Power...To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).
10. *Federalist No. 43*, at 271–72 (Clinton Rossiter ed., 1961).
11. See R.H. HELMHOLTZ, *NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE* 96–97 (2015) (“‘The law of nature is part of the common law’ was an oft-repeated refrain [in English courts].... Lord Mansfield [in the eighteenth century] was particularly fond of expressing...that the common law ‘works itself pure by rules drawn from the fountain of justice.’ He meant the law of nature.”); Adam Mossoff, *Statutes, Common Law Rights, and the Mistaken Classification of Patents as Public Rights*, 104 IOWA L. REV. 2591, 2608 n.92 (2019) (identifying “the theoretical connection in the seventeenth and eighteenth centuries between reason, natural rights, and the common law”) (citing primary sources); Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. 953, 981 (2007) (“By the late eighteenth century, it was well known that common law rights were tantamount to natural rights.”) (citing primary sources); see also 1 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 536 (O.W. Holmes, Jr. ed., 12th ed., 1873) (1826) (explaining that the common law is “the application of the dictates of natural justice and of cultivated reason to particular cases”).
12. See 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *2 (“There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”).
13. *Id.*, at *405 (referring here for support for this statement to “Mr. Locke” and citing the *Second Treatise*).
14. 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 497.
15. *Id.*
16. *Id.*
17. See Mossoff, *The Constitutional Protection of Intellectual Property*, *supra* note 8 (describing original, public meaning of the protection of patents and copyrights in the Constitution); Mossoff, *Reevaluating the Patent “Privilege” in Historical Context*, *supra* note 11, at 967–1004 (detailing primary sources on how copyrights and patents were justified according to natural rights theory); see also RANDOLPH J. MAY & SETH L. COOPER, *THE CONSTITUTIONAL FOUNDATIONS OF INTELLECTUAL PROPERTY: A NATURAL RIGHTS PERSPECTIVE* (Carolina Academic Press, 2015) (same); Paul Clement, Viet Dinh & Jeffrey Harris, *The Constitutional and Historical Foundations of Copyright Protection* (IFIF, 2012), <https://cfif.org/v/images/pdfs/constitutional-and-historical-foundations-of-copyright-protection.pdf>.
18. *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841).
19. *Davoll v. Brown*, 7 F. Cas. 197, 199 (C.C.D. Mass. 1845).
20. Clement, Dinh & Harris, *supra* note 17, at 1.
21. Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J. L. & PUB. POL’Y 108, 113 (1990).
22. See 17 U.S.C. § 106.

23. See, e.g., Computer Software Copyright Act of 1980, Pub. L. No. 96–517, § 117, 94 Stat. 3015, 3028 (1980) (resolving conflict in courts that software code is protected under the Copyright Act); Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075, 1075 (1909) (abrogating earlier Supreme Court decision to provide copyright protection for mechanically produced musical compositions).
24. See Adam Mossoff, *The Injunction Function: How and Why Courts Secure Property Rights in Patents*, 96 NOTRE DAME L. REV. 1581 (2021).
25. See Digital Millennium Copyright Act, Pub. L. No. 105–304, 112 Stat. 2860 (1998) (prohibiting the hacking of technical protection measures that secure copyrighted works in digital format).
26. Some of the more prominent libertarian critics of intellectual property, including Murray Rothbard, Jeffrey Tucker, Stephan Kinsella, and Wendy McElroy, are self-described anarchists or “anarcho-capitalists,” which is a theory in libertarianism that markets can and should replace government in providing police, military, courts, and prisons, etc. See *Libertarian Perspectives on Intellectual Property*, WIKIPEDIA (visited Dec. 9, 2023), https://en.wikipedia.org/wiki/Libertarian_perspectives_on_intellectual_property (“Anarcho-capitalists oppose the existence of even a minimal state.”).
27. See John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49 (1996).
28. See Stop Online Piracy Act, H.R. 3261, 112th Cong. 1st Session (Oct. 26, 2011).
29. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 6, at 270 (Peter Laslett ed., 1988) (“[T]hough this be a *State of Liberty*, yet it is *not a State of Licence*, though Man in that State have an uncontroable [sic] Liberty.... The *State of Nature*, has a Law of Nature to govern it which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.”).
30. Stephen Davies, *SOPA and 3 Ways to Think About Intellectual Property* (March 18, 2013), <https://www.libertarianism.org/media/around-web/sopa-3-ways-to-think-about-intellectual-property>.
31. Stephan Kinsella, *SOPA Is the Symptom, Copyright Is the Disease: The SOPA Wakeup Call to ABOLISH COPYRIGHT*, THE LIBERTARIAN STANDARD (January 24, 2012), <https://libertarianstandard.com/2012/01/24/sopa-is-the-symptom-copyright-is-the-disease-the-sopa-wakeup-call-to-abolish-copyright/>.
32. See Adam Mossoff, *Intellectual Property*, in ROUTLEDGE COMPANION TO LIBERTARIANISM (Matt Zwolinski & Benjamin Ferguson eds., 2022) (describing wide range of views on intellectual property that support or oppose it within libertarianism or classical liberalism); Adam Mossoff, *Saving Locke from Marx: The Labor Theory of Value in Intellectual Property Theory*, 29 SOCIAL PHIL. & POL’Y 283 (2012) (explaining Locke’s original justification for intellectual property, including copyright, on the basis of his labor theory of property); Richard A. Epstein, *Liberty Versus Property? Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. REV. 1 (2005) (defending copyright as consistent with a classical liberal theory of government).
33. See STEPHAN KINSELLA, AGAINST INTELLECTUAL PROPERTY (2015) (arguing for the abolition of patents and copyrights).
34. *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003) (quoting *American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, (S.D.N.Y. 1992), *aff’d*, 60 F.3d 913 (2d Cir. 1994)). In *American Geophysical Union v. Texaco*, the district court observed that “[a]uthors recognize that publishers have little incentive to assume the financial risks of publishing unless the publisher is protected from copying. Accordingly, it is commonplace for authors to assign their rights of authorship to publishers.” *Id.* at 27.
35. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (emphasis added).
36. See Adam Mossoff, *Patents, Pandemics, and Price Controls*, HERITAGE FOUND. LEGAL MEMORANDUM No. 285 (May 13, 2021), 3–5, <https://www.heritage.org/economic-and-property-rights/report/pandemics-patents-and-price-controls>; see also JONATHAN M. BARNETT, INNOVATORS, FIRMS, AND MARKETS: THE ORGANIZATIONAL LOGIC OF INTELLECTUAL PROPERTY (2021); DANIEL SPULBER, THE CASE FOR PATENTS (2021); B. ZORINA KHAN, INVENTING IDEAS: PATENTS, PRIZES, AND THE KNOWLEDGE ECONOMY (2020); Stephen Haber, *Patents and the Wealth of Nations*, 23 GEO. MASON L. REV. 811 (2016); Naomi R. Lamoreaux, Kenneth L. Sokoloff & Dhanoos Sutthiphisal, *Patent Alchemy: The Market for Technology in U.S. History*, BUS. HIST. REV. (Spring 2013); RONALD A. CASS & KEITH N. HYLTON, LAWS OF CREATION: PROPERTY RIGHTS IN THE WORLD OF IDEAS (2013).
37. See Adam Mossoff, *The Supreme Court or Congress Must Restore Injunctions for Patent Owners*, HERITAGE FOUND. LEGAL MEMORANDUM No. 267 (June 25, 2020), 9–13, <https://www.heritage.org/economic-and-property-rights/report/the-supreme-court-or-congress-must-restore-injunctions-patent>.
38. See Adam Mossoff, *Radical OSTP Proposal Would Undermine American Research and Sacrifice American Intellectual Property*, HERITAGE FOUND. LEGAL MEMORANDUM No. 263 (May 7, 2020), 2–3, <https://www.heritage.org/economic-and-property-rights/report/radical-ostp-proposal-would-undermine-american-research-and>; Adam Mossoff, *How Copyright Drives Innovation: A Case Study of Scholarly Publishing in the Digital World*, 2015 MICHIGAN STATE L. REV. 955.
39. See generally Haber, *Patents and the Wealth of Nations*, *supra* note 36 (making this point and surveying the economic and historical evidence).
40. The term “copyleft” was first publicly used by Richard Stallman in the 1980s in his work developing open-source software, in which he rejected copyrights and other property-based controls on software. The term has since grown from referring to open-source software into a broader socio-political theory among some Progressives who oppose intellectual property rights like copyright. One example of this broader usage of “copyleft” is Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L. J. 804 (2008).

41. See Adam Mossoff & Mark Schultz, *Intellectual Property, Innovation and Economic Growth: Mercatus Gets It Wrong*, Truth of the Market (Aug. 28, 2014), <https://truthonthemarket.com/2014/08/28/intellectual-property-innovation-and-economic-growth-mercatus-gets-it-wrong/>. Although this essay was published 10 years ago, the authors' conclusion is still directly relevant to the point in this *Legal Memorandum* about libertarians joining with the copyleft in opposing intellectual property rights.

Today, we are in the midst of a full-blown moral panic about the alleged evils of IP. It's alarming that libertarians—the very people who should be defending all property rights—have jumped on this populist bandwagon. Imagine if free market advocates at the turn of the Twentieth Century had asserted that there was no evidence that property rights had contributed to the Industrial Revolution. Imagine them joining in common cause with the populist Progressives to suppress the enforcement of private rights and the enjoyment of economic liberty. It's a bizarre image, but we are seeing its modern-day equivalent, as these libertarians join the chorus of voices arguing against property and private ordering in markets for innovation and creativity.
42. See Stoner & Dutra, *supra* note 1. All data in this paragraph is from this recent edition in this annual report.
43. Publishers of scholarly journals similarly have invested hundreds of millions during the past several decades in creating massive digital archives and easily accessible internet platforms for accessing in digital format hundreds of millions of scholarly articles. See generally Mossoff, *How Copyright Drives Innovation*, *supra* note 38.
44. See Digital Millennium Copyright Act, *supra* note 25.
45. Dan Glickman & Robert Holleyman, *The Copyright Act a Decade Later*, BROAD. & CABLE (Nov. 7, 2008), <https://www.broadcastingcable.com/news/news-articles/copyright-act-decade-later/85386>; see also David Kravets, *10 Years Later, Misunderstood DMCA Is the Law that Saved the Web*, WIRED (Oct. 27, 2008), <http://www.wired.com/2008/10/ten-years-later/> (“Based on first-hand experience, the studios would not have embraced the DVD technology, at least not as quickly as they did.... There was tremendous concern in releasing movies in this greatly improved format that could not be protected against duplication.”).
46. See Bruce Boyden, *The Failure of the DMCA Notice and Takedown System: A Twentieth Century Solution to a Twenty-First Century Problem*, GEO. MASON SCH. L. (Dec. 2013), <https://sls.gmu.edu/cpip/wp-content/uploads/sites/31/2013/08/Bruce-Boyden-The-Failure-of-the-DMCA-Notice-and-Takedown-System1.pdf>.
47. See Devlin Hartline, *Endless Whack-A-Mole: Why Notice-and-Staydown Just Makes Sense*, GEO. MASON UNIV., (Jan. 14, 2016), <https://cip2.gmu.edu/2016/01/14/endless-whack-a-mole-why-notice-and-staydown-just-makes-sense/>.
48. See *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012).
49. See *supra* note 28.
50. See David Goldman, *SOPA and PIPA Attract Huge Lobbying on Both Sides*, CNN MONEY (Jan. 25, 2012), https://money.cnn.com/2012/01/25/technology/sopa_pipa_lobby/index.htm (identifying Google, eBay, Amazon, and ICANN as lobbying against SOPA).
51. See Suzanne Choney, *Google Protests SOPA on Home Page*, NBC NEWS (Jan. 17, 2012), <https://www.nbcnews.com/news/world/google-protests-sopa-home-page-flna117733>; Katitza Rodriguez, *Internet Blackout Day Fires Up Digital Rights Activism Around the World*, ELEC. FRONTIER FOUND. (Jan. 19, 2012), <https://www EFF.org/es/deepinks/2012/01/internet-black-out-day-fires-digital-rights-activism-around-world>.
52. See Ned Potter, *SOPA Blackout: Wikipedia, Google, Wired Protest “Internet Censorship,”* ABC NEWS (Jan. 18, 2012), <https://abcnews.go.com/blogs/technology/2012/01/sopa-blackout-wikipedia-google-wired-join-protest-against-internet-censorship>.
53. See Rodriguez, *supra* note 51 (asserting that SOPA would “break the fundamental architecture of the internet”); Goldman, *supra* note 50 (noting the common refrain that SOPA would “break the internet”); Mark A. Lemley, David S. Levine & David G. Post, *Don't Break the Internet*, STANFORD L. REV. ONLINE (Jan. 4, 2012), <https://papers.ssrn.com/abstract=1978989>. Of note, Google was compelled later in 2012 in the course of separate litigation to disclose that Professor Lemley is “outside counsel to Google,” which was undisclosed in the essay. See Google's Response to Order to Supplement at 2–3, *Oracle Am., Inc. v. Google Inc.*, 872 F. Supp. 2d 974 (N.D. Cal. 2012) (No. 10–03561).
54. See Goldman, *supra* note 50 (“Activists and over 100,000 websites said the measures, known as PIPA and SOPA, would ‘break the internet.’ Within days, proposals that had at first looked unstoppable were dead.”).
55. See Rand Paul, *The Government Is Colluding with Social Media Platforms to Censor Americans*, WASHINGTON EXAMINER (Sept. 24, 2023), <https://www.washingtonexaminer.com/restoring-america/faith-freedom-self-reliance/the-government-is-colluding-with-social-media-platforms-to-censor-americans>; Deepa Seetharaman & Katherine Bindley, *Facebook Controversy: What to Know About Cambridge Analytica and Your Data*, WALL STREET J. (March 23, 2018), <https://www.wsj.com/articles/facebook-scandal-what-to-know-about-cambridge-analytica-and-your-data-1521806400>.
56. See, e.g., Klone Kitchen, *Section 230—Mend It, Don't End It*, HERITAGE FOUND. ISSUE BRIEF No. 6020 (Oct. 27, 2020), 5–7, <https://www.heritage.org/technology/report/section-230-mend-it-dont-end-it> (identifying concerns about politically biased content moderation on internet platforms as a basis for growing distrust in Big Tech).
57. *Id.* (proposing reforms to § 230 to make the law's application better align with its original intent).
58. Pub. L. 116–260, 117th Cong. (Dec. 27, 2020).

59. See Adam Mossoff, Hon. Randall Rader, and Zvi Rose, *Closing the Streaming Loophole*, REGUL. TRANSPARENCY PROJECT OF THE FED. SOC. (July 20, 2020), <https://rtp.fedsoc.org/wp-content/uploads/RTP-Intellectual-Property-Working-Group-Paper-Streaming-Loophole.pdf>.
60. See Nigel Cory, *A Decade After SOFA/PIPA, It's Time to Revisit Website Blocking*, INFO. TECH. & INNOVATION FOUND. (Jan. 26, 2022), <https://itif.org/publications/2022/01/26/decade-after-sopa-pipa-time-to-revisit-website-blocking/>; Brett Danaher, Jonathan Samuel Hersh, Michael Smith, & Rahul Telang, *The Effect of Piracy Website Blocking on Consumer Behavior* (June 2, 2015), <https://papers.ssrn.com/abstract=2612063>.
61. See *supra* note 53, and accompanying text.
62. See *supra* note 52, and accompanying text.
63. See Paul, *supra* note 55.
64. See *supra* note 45 and accompanying text.
65. See Michael D. Smith, *What the Online Piracy Data Tells Us About Copyright Policymaking 5* (Hudson Institute, Apr. 2023), <https://www.hudson.org/intellectual-property/what-online-piracy-data-tells-us-about-copyright-policymaking> (“We found that, in the presence of readily available illicit alternatives, consumers were unwilling to pay for the legal streaming service when their free trial expired.”); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1017 (9th Cir. 2001) (“Having digital downloads available for free on the Napster system necessarily harms the copyright holders’ attempts to charge for the same downloads.”).
66. See *Piracy Data Overview January 2022 to August 2022*, MUSO, <https://www.muso.com/magazine/piracy-data-overview-january-2022-to-august-2022> (last visited Nov. 2, 2023).
67. See David Blackburn, Jeffrey A. Eisenach & David Harrison, Jr., *Impacts of Digital Video Piracy on the U.S. Economy*, THE GLOBAL IP CTR. (June 2019), <https://www.theglobalipcenter.com/wp-content/uploads/2019/06/Digital-Video-Piracy.pdf>.
68. See *supra* notes 44–47, and accompanying text (describing the DMCA and its notice-and-takedown regime for infringing digital files).
69. See *Content Delistings Due to Copyright*, GOOGLE TRANSPARENCY REPORT (last visited Dec. 11, 2023), <https://transparencyreport.google.com/copyright/overview>.
70. See *supra* note 47, and accompanying text (describing the Whac-A-Mole problem from many years ago).
71. See, e.g., *The Copyright Infringement Liability of Online and Internet Service Providers: Hearing on S. 1146 Before the S. Comm. on the Judiciary*, 105th Cong. 1–2 (1997) (statement of Sen. Hatch) (stating that the Internet had the potential to “recklessly facilitate infringement” and that Congress would enact legislation to “best combat the risk of copyright infringement facing content providers on the Internet”).
72. See Nigel Cory, *How Website Blocking Is Curbing Digital Piracy Without “Breaking the Internet,”* INFO. TECH. & INNOVATION FOUND. (Aug. 2016), <https://itif.org/publications/2016/08/22/how-website-blocking-curbing-digital-piracy-without-breaking-internet>.
73. See Yaqiu Wang, *In China, the “Great Firewall” Is Changing a Generation*, POLITICO (Sept. 1, 2020), <https://www.politico.com/news/magazine/2020/09/01/china-great-firewall-generation-405385> (“China’s internet censorship system, colloquially known as the Great Firewall, has existed since 2000, when the Ministry of Public Security launched the Golden Shield Project, a giant mechanism of censorship and surveillance aimed at restricting content, identifying and locating individuals, and providing immediate access to personal records.”).
74. See Temple, *supra* note 5, at 2.
75. See Testimony of Stanford McCoy before the Senate Judiciary IP Subcommittee at 3 (Mar. 10, 2020), <https://www.judiciary.senate.gov/imo/media/doc/McCoy%20Testimony.pdf>.
76. See Parliament of Australia Bills Digest No. 41, 2018–19 (Nov. 9, 2018), https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1819a/19bd041.
77. See Cory, *supra* note 72, at 12.
78. See Smith, *supra* note 65 (reviewing empirical studies in peer-reviewed journals).
79. See Brett Danaher, Jonathan Samuel Hersh, Michael Smith, & Rahul Telang, *The Effect of Piracy Website Blocking on Consumer Behavior*, 44 MGMT. INFO. SVS. Q. 631–59 (2020), <https://papers.ssrn.com/abstract=2612063>.
80. See Cory, *supra* note 60.
81. See Smith, *supra* note 65, at 5 (“[W]hen UK policymakers simultaneously blocked access to 19 pirate sites in 2013 and then an additional 53 sites in 2014, we found that those actions caused consumers to increase their usage of legal subscription services by 7–12 percent.”); McCoy, *supra* note 75, at 4–5 (discussing studies).
82. See Matthew Rowe & Richard King, *An Investigation into the Performance of UK Internet Providers’ Web Filters 9–10* (Jan. 2015), https://eprints.lancs.ac.uk/id/eprint/76435/1/isp_filters_working_paper.pdf.
83. See European Union Intellectual Property Office, *Study on Dynamic Blocking Injunction in the European Union* (March 2021) at 32, https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2021_Dynamic_Blocking_Injunctions/2021_Study_on_Dynamic_Blocking_Injunctions_in_the_European_Union_FullR_en.pdf.
84. See Cory, *supra* note 72, at 20.

85. See *Study on Dynamic Blocking Injunction in the European Union*, *supra* note 83, at 33 n.32.
86. *Id.*
87. See *supra* note 53, and accompanying text.
88. See *Rowe & King*, *supra* note 82, at 17.
89. See *Study on Dynamic Blocking Injunction in the European Union*, *supra* note 83, at 30.
90. See *Cory*, *supra* note 72, at 9.
91. See, e.g., *Paoloni v. Goldstein*, 331 F. Supp. 2d 1310 (D. Colo. 2004) (ordering transfer to plaintiff of condominium purchased with funds acquired from defendant's fraud); *In re Mesa*, 232 B.R. 508 (Bankr. S.D. Fla. 1999) (ordering equitable lien on home in which embezzled funds were invested).
92. See, e.g., *Edwards v. Lee's Administrator*, 96 S.W.2d 1028, 1032 (Ky. 1936) (applying long-standing principle that "a wrongdoer shall not be permitted to make a profit from his own wrong").
93. See *Cory*, *supra* note 60.
94. See *Green v. U.S. Dep't of Justice*, 392 F. Supp. 3d 68, 92 (D.D.C. 2019) (recognizing that the "same analysis is warranted in this case" as was applied by the court in *Reimerdes* and reaching the same conclusion that the DMCA does not violate the First Amendment); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 330 (S.D.N.Y.), *aff'd*, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) ("[T]he DMCA furthers an important governmental interest—the protection of copyrighted works stored on digital media from the vastly expanded risk of piracy in this electronic age. The substantiality of that interest is evident both from the fact that the Constitution specifically empowers Congress to provide for copyright protection and from the significance to our economy of trade in copyrighted materials.... That substantial interest, moreover, is unrelated to the suppression of particular views expressed in means of gaining access to protected copyrighted works. Nor is the incidental restraint on protected expression...broader than is necessary to accomplish Congress' goals of preventing infringement and promoting the availability of content in digital form.").
95. See *Harper & Row Publishers, Inc.*, 471 U.S. at 558 ("[I]t should not be forgotten that the Framers intended copyright itself to be the engine of free expression."); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575 (1977) ("[W]e are quite sure that the First and Fourteenth Amendments do not immunize the media [from copyright liability] when they broadcast a performer's entire act without his consent."); *New York Times Co. v. United States*, 403 U.S. 713, 727 n.* (1971) (Brennan, J., concurring) (recognizing that copyright does not violate the right to free speech secured in the First Amendment); *Iowa State University Research Foundation, Inc. v. American Broadcast Companies, Inc.*, 621 F.2d 57, 61 (2d Cir. 1980) ("The public interest in the free flow of information is assured by the law's refusal to recognize a valid copyright in facts.").
96. See *Study on Dynamic Blocking Injunction in the European Union*, *supra* note 83, at 8.
97. See *Corley*, 273 F.3d at 454 (rejecting First Amendment challenge to the DMCA prohibition on hacking of technical protection measures for digital copyrighted works given that the DMCA is "content-neutral, just as would be a restriction on trafficking in skeleton keys identified because of their capacity to unlock jail cells").