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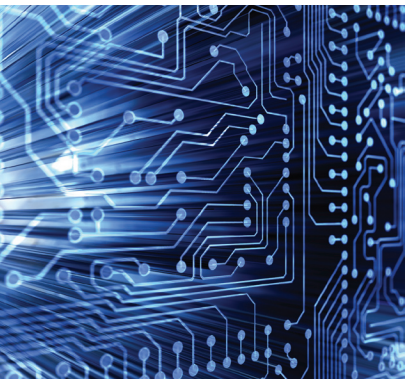
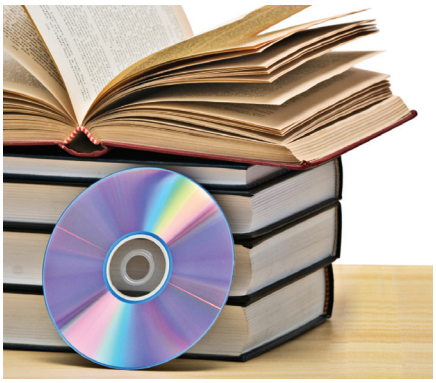

The Internet Does Not Reset the Copyright-Free Speech Balance

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The Internet Does Not Reset the Copyright-Free Speech Balance

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While free speech is a fundamental right, it is frequently misconstrued in the popular imagination. The First Amendment protects against *government* restrictions on speech; it does not provide a general right of free speech as against private actors. The power of the Internet as a global speech platform amplifies misunderstandings. Perhaps in part because of high profile First Amendment cases related to the Internet, a meme has developed that free speech trumps all other legal rights in cyberspace—including copyright. In this view, grabbing content from all over the Internet and posting it to one's web page is simply constitutionally protected free speech. Buttressing this is the belief among some that aggregating the content of others is a way to construct one's own virtual identity. Additionally, some believe that if content on the Web *can* be easily copied, as a technological matter, then it must be legal to copy and reuse it in any manner one sees fit. But the Web does not magically release copyrighted content from the exclusive rights its owners have long enjoyed in the physical world. Nor does its accessibility on the Web automatically make it freely reusable, any more than the access enabled by publication in the physical world justify a claim to reuse of the material by the public.

It is problematic enough that some individual Internet users mistakenly believe that free speech rights trump all other legal rights, but a number of companies are leveraging this erroneous meme into a business model. Websites and apps that profit from widespread copyright infringement are exhorting users to "express yourself" through a set of tools aimed at collecting and reusing materials from around the web. These services admittedly serve a fun and valuable function by allowing those who do not create their own content to be "curators" of others' content. However, the enjoyment and "self-expression" enabled by these sites does not excuse copyright infringement any more than the expressive value of more traditional creative works excuses their authors from claims of copyright infringement. The same contours of the free speech-copyright interface that have been applied to traditional creators apply to Internet "curators."

This Policy Brief argues that the First Amendment and copyright law maintain the same complementary relationship in cyberspace that they have in physical space, as best illustrated by cases involving appropriation art. The Brief proceeds by first reviewing the well-established Supreme Court rulings that copyright accommodates the First Amendment through the idea-expression distinction and fair use. It then analyzes landmark Internet free speech cases to underscore that they all involved *state* action that is not relevant to private enforcement of copyright. Finally, the Brief discusses cases involving appropriation art. It concludes that the First Amendment is no more in conflict with copyright on the Internet than it is in the physical world.

The Free Speech-Copyright Interface in the Physical World

Questions about the possible limitation of copyright by the First Amendment have existed at least since Melville Nimmer's seminal 1970 article, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*[1] However, the Supreme Court has consistently rejected the existence of any conflict. One reason it has done so is because both authors' rights and free speech rights are secured in the Constitution—in the IP Clause and in the First Amendment, respectively. Had these two doctrines been in direct conflict, it seems unlikely the Framers would have included both rights in the same founding document—especially with no suggestion as to how to mediate the conflict.

In *Harper & Row Publishers v. Nation Enterprises*,[2] the Supreme Court explained the harmony between copyright and free speech, recognizing copyright as the "engine" of free expression:

> *In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing*

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> *a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.*[3]

Thus, copyright does not hinder speech—to the contrary it encourages it (as well as its publication and dissemination). Further, copyright's limitation to the particular *expression* of an idea means that the idea itself is free for all others to express in their own way. Ditto for facts. So you are free to express the same ideas, facts, and even abstract narrative storylines as I have done: you just cannot use my exact words.

More recently, copyright was challenged on First Amendment grounds in *Eldred v. Ashcroft.*[4] The case was a challenge to Congress' extension of the copyright term under the Sonny Bono Copyright Term Extension Act of 1998 ("CTEA").[5] The plaintiff argued that this extension violated his free speech rights by interfering with his business of scanning and placing books online as soon as their copyright terms expired. First, he claimed that the CTEA violated the "for limited times" restriction on Congress' power in the IP Clause to create exclusive rights for writings.[6] The theory was that, while the CTEA provided an extension of these limited times, Congress passed it just as a group of highly valuable copyrights were about to expire. This allegedly showed a willingness of Congress to keep passing extensions of such valuable copyrights each time they would near their end, so that they would become de facto perpetual rights. Second, he asserted that copyright could hinder free speech and so should be viewed as a kind of private regulation of speech subject to heightened scrutiny by the courts.[7]

Not one of the three levels of courts that heard the case—district court, appellate circuit court, and Supreme Court—accepted plaintiff's constitutional arguments. Regardless of whether future repeated extensions by Congress might become a problem, "a regime of perpetual copyrights 'clearly is not the situation before us.'"[8] Congress had extended copyright terms under earlier copyright regimes and these had not been overturned by the courts on constitutional grounds either. Likewise, even though the Court seemed to question the wisdom of Congress' passage of the CTEA, it refused to apply heightened scrutiny: "CTEA is a rational enactment; we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they might be."[9] Ultimately, the Court adopted the *Harper* position that copyright and the First Amendment do not conflict, but rather complement each other.

Finally, in last year's *Golan v. Holder*, the Supreme Court again affirmed that the idea/expression distinction as well as the doctrine of "fair use" (as will be discussed later) acted as built-in limitations on copyright that resolved any potential conflict with the First Amendment.[10] The case concerned passage of the Uruguay Round Agreements Act which implemented an international treaty granting copyright to foreign works that were then unprotected in the United States. Similar to plaintiff's arguments in *Eldred*, the *Golan* plaintiffs argued that the congressional action violated both the IP Clause and their free speech rights. The Supreme Court rejected the de facto perpetual copyright argument already disposed of in *Eldred*: "As in *Eldred*, the hypothetical legislative misbehavior petitioners posit is far afield from the case before us."[11] Similarly, the Supreme Court rejected the free speech abridgment argument rejected in *Eldred*. The *Golan* Court cited both *Harper* and *Eldred* to rely on the "engine of free expression" formulation of copyright that, together with the "built-in First Amendment accommodations" of idea/expression and fair use, meant Congress' actions did not violate plaintiffs' free speech rights.[12]

Accordingly, the Supreme Court has consistently rejected any notion that copyright and the First Amendment are in tension. This has primarily been tested in the context of plaintiffs who were intentionally seeking to copy or perform works of others with no claim of transformative use or an additional element of creativity.[13] In this way, Nimmer's seminal article made the important point that free speech is about *self-expression*: if I am simply copying someone else's expression, I am not really engaging in self-expression.

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Internet First Amendment Cases Involve Government Action, Not Private Enforcement of Copyright

A significant part of why the "free speech trumps copyright in cyberspace" meme developed may be the high-profile decisions upholding Internet free speech rights in cases such as *Reno v. ACLU*[14] and *Ashcroft v. ACLU*.[15] However, these cases addressed *government actions* directly restricting speech. This makes clear the fundamental tenet of the First Amendment: like the other provisions of the Bill of Rights, it is directed at protecting citizens from over-reaching government laws and regulations (i.e., "state action"). If there is no state action, then there is no violation of individual rights. Thus, if I prevent you from speaking by a physical action or threat, I have not violated your First Amendment free speech rights, because I am not acting on behalf of the government. You may have other criminal and civil legal actions against me, of course, but not a First Amendment action. The government can act through three mechanisms impacting free speech: legislation, executive actions or regulations, and judicial injunctions or awards. This section briefly reviews key cases involving the different mechanisms to show that they involved state action and do not limit private enforcement of copyright.

Reno, Eldred, Ashcroft, and *Golan* were challenges to congressional action. While all four were free speech cases, only two of them actually involved copyright. *Eldred* upheld Congress' passage of the CTEA, while Golan upheld the Uruguay Round Agreements, both as discussed above. By contrast, *Reno* struck down a provision of the Communications Decency Act of 1996,[16] while *Ashcroft* struck down the Child Online Protection Act.[17] Neither of these were part of the Copyright Act. And, none of the four cases involved private copyright enforcement.

Actions by federal, state, or local executives have been successfully challenged when they limit speech. For example, in *Mainstream Loudoun v. Board of Trustees of the Loudon County Library*, the District Court for the Eastern District of Virginia found the use of filters on computer terminals in a public library violated plaintiffs' free speech rights by limiting what they could access and read.[18] But, none of these kinds of cases involve private enforcement of copyright, rather they are limited to challenging state action.

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The third mechanism of state action—judicial injunctions or awards—can be construed as state action for First Amendment purposes, but does not limit use of the courts for private copyright enforcement. In *Yahoo! v. La Ligue Contre Le Racisme*, for example, Yahoo sought a declaratory judgment that a French ruling restricting it from making available Nazi-themed materials in France could not be enforced in the United States. Yahoo was concerned that it might have to limit access across all jurisdictions because it could not determine with certainty the country of access for all of its users. Further, its servers were in the U.S. and so it would have to limit access from those servers. The district court granted Yahoo's motion for summary judgment, finding that a court action enforcing the French judgment would violate Yahoo's First Amendment rights.[19] Crucially, however, the French judgment was *not* based on a copyright claim, but instead on French law prohibiting exhibition of Nazi propaganda and articles for sale.[20] The Court of Appeals for the Ninth Circuit reversed the district court, finding that the question was not yet ripe.[21] Thus, in principle, a court's order restricting speech in a case brought by a private party could trigger First Amendment rights. But because the Supreme Court has consistently ruled that copyright and the First Amendment are not in conflict, a court order enforcing copyright cannot violate an infringer's free speech rights—even though there is state action arguably "restricting" speech.

Another source of possible confusion is the debate over whether the Internet is a "public forum" analogous to the town square in which speech must generally be allowed. Thus, *Reno* and *Ashcroft* hold that Congress must be very careful regarding limits on speech on the Internet. There are also cases about whether and how the public must have access to the Internet generally as a public forum.[22] But these are cases about government *restrictions of access* to information otherwise publicly available on the Internet. Actions by private parties are a very different matter, because of the lack of state action.

Nevertheless, supporters of free speech rights in private establishments might point to the Supreme Court decision

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in *PruneYard Shopping Center v. Robins*.[23] In that case, the Court affirmed a California Supreme Court decision that a privately-owned shopping mall was still subject to state constitutional speech rights for members of the public and thus had to allow such speech where it was peaceful and orderly. However, this case should not be over-read. It did not overturn the earlier Supreme Court decision in *Lloyd Corp. v. Tanner* that held the public had no *federal* First Amendment rights in a privately-owned shopping mall.[24] The difference was that in *PruneYard* the free speech rights emanated from the *California* Constitution. Thus, the U.S. Supreme Court's ruling in *PruneYard* was only that a *state* could impose stronger free speech rights than those available under the federal First Amendment.[25] It was not that shopping malls were subject to *federal* First Amendment rights.

To date, I am unaware of analogous actions based on California or other state constitutional law free speech rights against websites. However, even if such claims could be brought, they would likely not be effective as a defense in a copyright infringement suit. Because the Copyright Act is federal law, it should trump conflicting state constitutional rights under the Constitution's Supremacy Clause. That is, even though the states are able to impose stronger rights than those imposed under the federal Constitution, those rights cannot be in *conflict* with the U.S. Constitution (or federal statutes promulgated under it).

Remixes, Mash-ups, and Web "Curators"

Another argument made by those advocating a conflict between copyright and free speech contends that remixes, mashups, and other such works pose a special free speech problem. They posit that modern self-expression often uses the content of others as a cultural touchstone to construct identity or to ground expression in a certain context. Many take this argument even further to contend that "curation" is now self-expression, where individuals collect materials from around the Web to place them into a certain point of view or context, bringing a different or clearer meaning to them. These individuals are engaging in Nimmerian "self-expression," but doing so through the content of others, repackaged so as to imbue the individual's vision or commentary. This position fails, however, because such usage has long existed in the physical world and has not changed the Supreme Court's views on how copyright law accommodates free speech rights through the idea/expression distinction and fair use.

Courts have long used the doctrine of fair use[26] to address remixes, mash-ups, and curatorial uses in physical world applications such as "appropriation art," and even the "newsworthiness" issue at the heart of *Harper*. While appropriation art originally fared badly in one earlier notable copyright infringement case,[27] it has more recently found some protection under fair use.[28] Both major early cases were decided by the Court of Appeals for the Second Circuit ("Second Circuit") and involved the work of the controversial appropriation artist Jeff Koons. In the most recent statement on the matter, the Second Circuit reversed the district court injunction against the equally controversial appropriation artist Richard Prince for his use of photographs from Patrick Cariou's published book.[29] The district court had declined to find a fair use defense because Prince's work did not parody or comment directly on Cariou's work, and because Cariou lost at least one potential gallery show allegedly because Prince had a high profile gallery showing of the appropriated works. But the Second Circuit held that this application of the fair use factors was too narrow and that a work could be transformative even without parody or direct commentary on the original. Thus, it found 25 of the 30 unauthorized uses to be fair, and remanded for the district court to review the remaining five under the clarified fair use factors.

Much more can be said about fair use and appropriation art, and an entire book could be written on the topic of fair use. But the point here is simply that fair use is a robust doctrine that ably acts as one of the "built-in First Amendment accommodations" of the Copyright Act. In particular, it is spot-on for determining whether the unauthorized appropriation of another's copyrighted

expression for one's own expression is a fair use exempt from normal copyright infringement remedies. Given the clear strong analogue between the nature of appropriation art in the physical world and in the virtual world, the existing case law suffices. Nothing about cyberspace changes the analysis.

At the same time, most of the unauthorized uses of copyrighted works on the Internet are not even intended to be transformative. The works are copied simply because the "curator" likes them. In some cases, an unexpected juxtaposition of works could put any or all of them into a new context. But without a clear transformative vision or meaning, this is likely not enough to constitute fair use. And in any event, because idea/expression and fair use accommodate free speech issues, there is no First Amendment action available when a private copyright owner seeks to enforce her copyrights: the defense is limited to a fair use analysis.

Conclusion

While there seems to be an online cultural meme that Internet users have free speech rights that trump copyright, there is no legal support for this belief. Certainly no cases directly on point have supported this notion. And the clear analogues from appropriation art cases in the physical world hew closely to the established copyright fair use analysis. This follows from the Supreme Court's consistent message that the First Amendment and the Copyright Act are not in conflict, but are instead complementary. Copyright incentivizes the creation and dissemination of published expression, while the First Amendment restrains the government from limiting it. Copyright does not limit the free expression by others of shared ideas or facts because of the idea/expression distinction. To the extent someone needs to use or reference another's copyrighted works to express an entirely different point, or to comment on or parody the copyrighted work, the fair use doctrine provides a means to do so. Nothing about the Internet, social media, or modern senses of creative expression changes this analysis. Commercial websites that play on this invalid meme are doing a disservice to their users and to copyright owners. In their rush to attract ever more users, and pump ever more commoditized content through their sites, these firms are inducing or contributing to widespread infringement under the guise of "free speech."

ENDNOTES

1 17 U.C.L.A. L. REV. 1180 (1970)

2 471 U.S. 539 (1985).

3 *Id.* at 558.

4 537 U.S. 186 (2003).

5 Pub. L. 105-298, 112 Stat. 2827 (1998).

6 The IP Clause is also known as the "Progress Clause," "Copyright Clause," or "Patent Clause." It is one of the enumerated powers granted Congress under Art. I, Sec. 8.:
Congress shall have 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.
U.S. CONSTITUTION, Art. I, § 8, cl. 8.

7 For Constitutional issues, courts apply different levels of scrutiny to the action in question. Under the lowest level of review, the law or action must simply rationally advance a legitimate government purpose. At the opposite end of the spectrum, the law or action must be narrowly tailored to affect a compelling government interest. In between are various levels of intermediate review.

8 537 U.S. at 209. Further, "nothing before this Court warrants construction of the CTEA's 20-year term extension as a congressional attempt to evade or override the 'limited times' constraint." *Id.*

9 *Id.* at 208.

10 132 S. Ct. 873 (2012).

11 *Id.* at 885. The Court's statement was in large part based on the fact that Congress was conforming the copyright statute to the specific dictates of a treaty the United States had duly entered into.

12 *Id.* at 889-91.

13 Admittedly, performers of a work, such as musicians, can bring creativity to their interpretation of the composition being performed. But they still believe themselves to be performing that work, and not creating a new one.

14 521 U.S. 844 (1997).

15 542 U.S. 656 (2004).

16 Telecommunications Act of 1996, Title V, § 502, Pub. L. 104-104, 110 Stat. 133 then codified as 47 U.S.C. § 223(d)(1).

17 112 Stat. 2681-736, then codified at 47 U.S.C. § 231.

18 2 F.Supp.2d 783 (E.D. Va. 1998); 24 F.Supp.2d. 552 (E.D. Va. 1998).

19 Yahoo! v. La Ligue Contre Le Racisme, 169 F. Supp. 2d. 1181 (N.D. Cal. 2001).

20 *Id.* at 1184 (citing Section R645-1 of the French Criminal Code).

21 Yahoo! had made access policy changes of its own volition and the French plaintiffs were satisfied with them, asserting to the court that they would not pursue enforcement of the French judgment against Yahoo!. Yahoo! v. La Ligue Contre Le Racisme, 433 F.3d 1199 (9th Cir. 2006), *cert. denied* La Ligue Contre Le Racisme et Antisemitisme v. Yahoo!, Inc., 547 U.S. 1163 (2006).

22 *See Mainstream Loudoun* discussed *supra*.

23 447 U.S. 74 (1980).

24 407 U.S. 551 (1972).

25 Intriguingly, the shopping mall argued that *its* First Amendment rights were violated, because the speech of the anti-Zionist advocates at issue might be attributable to it. The Supreme Court rejected this on the grounds that it was unlikely the public would make this association.

26 The fair use doctrine is codified at 17 U.S.C. § 107. It directs courts to use four factors in determining whether an unauthorized use is "fair," which the acts as a defense to an otherwise infringing copy. The four factors are: i) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; ii) the nature of the copyrighted work; iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and iv) the effect of the use upon the potential market for or value of the copyrighted work. *Id.*

27 *See, e.g.,* Rogers v. Koons, 960 F.2d 301 (2d. Cir. 1992) (finding controversial appropriation artist Jeff Koons liable for infringement of plaintiff photographer's photo "Puppies" through Koons' sculpture "String of Puppies" concededly made as a copy of the photo, albeit allegedly as fair use parody or commentary).

28 *See, e.g.*, Blanch v. Koons, 467 F.3d 244 (2006) (finding same appropriation artist Jeff Koons' collage art work entitled "Niagara," which included an unauthorized copy of plaintiff photographer's image of sandal-clad feet from a Gucci ad, to be "transformative" and unlikely to have an effect on the market for the original work such as to qualify as a fair use).

29 Cariou v. Prince, 714 F.3d 694 (2d. Cir. 2013).

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