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Copyright and Free Expression: Engine or Obstacle

Graeme B. Dinwoodie, *Chicago-Kent College of Law*

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COPYRIGHT AND FREE EXPRESSION: ENGINE OR OBSTACLE?

Commentator

Prof. Graeme B. Dinwoodie*

As André Lucas has already explained, copyright has the potential both to be an engine of free expression and an obstacle to free expression. Thus, rather than try and answer what is inevitably a very fact-specific question, I am first going to raise some variables and antecedent questions that might affect the answer that we give. That is, what are the conditions that must pertain before we say that copyright is an obstacle to free speech (or an engine of free speech)? Second, I will briefly consider how well we can formally or directly incorporate doctrines developed in the context of free speech jurisprudence into copyright law (assuming that we believe this necessary, having detected copyright acting as an obstacle rather than an engine).

1. THE CONDITIONS OF FREE EXPRESSION

1.1. How Free is Free?

Might copyright be an obstacle to free speech if the use of, or access to, a work is permitted only on condition of paying compensation or compliance with some other contingency? That is, how free must speech be to be truly free? If we accept the premise that a particular act controlled by the copyright owner should be something that third parties should be able to do in order to exercise free speech rights, should it matter that the third party must pay to do so? This issue is implicitly raised by some of the scholarship on copyright and free speech in the 1970s (and again in the 1990s), which appeared to focus on the potentially adverse effects of injunctive relief, and which viewed damages or compulsory licenses as less

* Professor of Law, Associate Dean and Director, Program in Intellectual Property Law. Chicago - Kent College of Law.

threatening to a climate of free speech. If payment is not a threat to free speech, then we need only modify our rules on injunctions. The way we answer this question affects the extent to which the availability of licenses (compulsory or voluntary) can ameliorate impediments and allow us to navigate between engines and obstacles.

Non-monetary conditions also appear in licenses. If a recording artist wishes to use the statutory compulsory license to make a cover version of a recorded musical work, she can do so only if the basic melody of the music is not changed. If we look at prominent US litigation, the pernicious (and content-specific) nature of the conditions imposed by voluntary licenses becomes apparent. For example, the owners of the copyright in *The Wind Done Gone* would contemplate the licensing of derivative works... but only if the sexuality of certain characters was not questioned. In the *Campbell* case that went to the US Supreme Court twelve years ago, Acuff-Rose may well have licensed the recording of a different version of Roy Orbison's work... but not to a recording artist like *2 Live Crew*, whose style and reputation did not comport with the tastes of Acuff-Rose.

To the extent that the speech interests require access to a work, as opposed to the right to make derivative versions, the same set of questions might cause concern about the availability of a work in a particular format. Must works be accessible in hard copy? In digital form? In braille? In a form that will interoperate on a range of hardware?

1.2. Uncertainty

Is uncertainty over one's ability to speak without fear of legal liability an impediment to free speech? This argument increasingly forms part of the critique of the fair use doctrine as a sufficient safeguard of expressive interests in the United States. And to be sure, uncertainty can chill expressive conduct. How seriously we take this argument might affect the *form* of the devices (for example, rules or standards) by which we place limits on copyright in order to effectuate speech interests.

Uncertainty is of course a problem for all sides in this debate. It raises costs, and the magnitude of its effects is thus a function in large part of capacity to absorb costs. Yet, what is seen as uncertainty can easily be recast as a climate of flexibility. Moreover, if there is one set of doctrine that is more uncertain than fair use (or the idea/expression distinction) it is, to my mind, rules in the United States surrounding the First Amendment. If, as I discuss later, we seek to resolve expressive dilemmas by direct incorporation of rules

from free speech jurisprudence, I think uncertainty is a thin reed on which to rest the speech critique.

1.3. Corporate Control

As the US National Report details, some of the speech critiques of copyright in the United States have focused on the extent to which particular corporations have acquired substantial concentrations of copyright ownership. To quote the US Report more fully:

> "continual additions to the copyright monopoly, Professor Lawrence Lessig argues, do nothing to promote creation, only handing more power to a few corporations in control of our culture. Lessig see this as changing copyright from an engine of free speech to a restraint upon it".

This is, however, a complaint about (if I may adapt a distinction drawn by the European Court of Justice in another context) the exercise of copyright, rather than its existence. Complaints (however legitimate) about the inequitable distribution of wealth, or the concentration of market power, are, I would suggest better handled by other forms of social regulation and other bodies of law. Surely, a return to more intrusive media regulation and aggressive antitrust enforcement have a role to play. Copyright is a relatively egalitarian form of property once broader social inequities (e.g., in education and in health) are minimized. We all possess the tools of production. Parenthetically, and paradoxically, one response to the concentration question would be to re-assert the wisdom of an authors' rights-based system of copyright, impose author-centric rules on ownership, and restrict alienability of property. But I rather doubt that is Professor Lessig's objective and some of these changes (i.e., inalienability) would perversely undermine the egalitarian character of copyright by limiting the capacity of the impecunious individual to distribute works and/or receive value for his work product.

1.4. Speech Interests as Individual Rights or Systemic State Objectives

Is copyright an impediment to free speech if it restrains a particular use of a work by a particular person in a particular context, or is it sufficient to resolve speech concerns that the expressive acts are permitted by some third party? That is, do we assess the question more systemically rather than on a case by case basis? This choice, which a couple of lower US courts have raised in the context of determining the capacity of the "progress" language in the

enabling Copyright Clause of the US Constitution to limit the protection available to particular works, parallels in my mind the division between US and European notions of free speech. To simplify somewhat, American free speech attitudes appear premised on the assumption that more speech will ultimately result in good speech, whereas Europeans are more willing to prohibit some forms of speech in the conviction that good speech will create a climate in which more speech can occur. Copyright on the whole corresponds with European notions of speech: it restricts certain speech in the belief that the system as a whole will be speech-positive.

How copyright answers this question will affect, for example, whether we believe that "identity exemptions" (which afford rights to particular institutions, such as libraries or newspapers or educational institutions) are sufficient to help resolve speech concerns. Or, are "purpose exceptions" required to vindicate individual speech rights that inhere in us all? If speech concerns suggest that the Google Book Project should be supported, is it sufficient to give the right to make it happen to public libraries or should a private, commercial actor such as Google be able to assert either its individual expressive interest or its claimed capacity more effectively to serve the speech interest of individuals?

2. BORROWING FROM FREE SPEECH JURISPRUDENCE

Let me turn now briefly to my second topic, namely, if we did decide that speech concerns warranted our direct incorporation of doctrines taken from free speech jurisprudence into copyright law, how well would that work? I have three short points on this question.

First, are the distinctions drawn by speech jurisprudence distinctions that we would like copyright law to replicate? For example:

* are we more concerned with content-based restrictions (such as the sexuality restrictions imposed by the Mitchell estate)?
* do we think that political speech is more crucial than commercial speech? US fair use doctrine reflects this to some extent already in its attention to commercial use, but by the same token, the US courts have told us that "copyright celebrates the profit motive" (reflecting the impoverishment of values arguably caused by the influence of law and economics)

* are time, place and manner restrictions to be assessed differently – if so, then this might help answer the question I raised earlier regarding "identity exceptions"

* are the works of public figures to be subjected to lesser protection, just as the reputations of public figures are regarded as appropriate subjects of greater scrutiny in libel law; the US Supreme Court appeared not to make this assimilation in *Harper & Row* two decades ago.

Second, more fundamentally, first amendment jurisprudence probably should *not* map to the contours of copyright because copyright law is pursuing a number of values that include but are not limited to the effectuation of speech values.

Third, and again briefly, I am concerned that the character or source of claimed speech values make it harder to resolve and compromise competing claims. In particular, speech advocates tend to raise two sources to justify speech interests trumping copyright claims, namely, international human rights norms, or national constitutional norms, both fundamental norms in different ways. It is always harder to compromise fundamental norms, especially if one recognizes that copyright is also an individual right explicitly recognized in leading international human rights documents and that property interests in general typically receive some form of protection in national constitutions.

Moreover, to the extent that the norms u[illegible]re grounded in foundational national law, this substantially complicates the international lawmaking that increasingly will determine the scope of authors' rights. One might fairly retort that national values are especially valuable in an era of global homogenization, but the *entrenched* (and thus hard-to-change) nature of many of these norms is unhelpful as nations seek to mediate the competing demands of global markets and local identity.

To the extent that the source of the speech interest invoked is an international norm, such as in the Universal Declaration, one must confront the question why the entire balancing of rights should not be framed by the competing international obligations of TRIPS and other international instruments? But this aggressive internationalism too is hardly a recipe for policymaking flexibility (nor, ironically, a philosophical position normally advocated by critics of copyright who typically have been dismissive of the normative significance of international obligations).

3. CONCLUSION

There are obviously a host of questions that we need to ask about the nature of "free speech" before we answer the question posed to this panel. But it seems incontrovertible that there is some danger that overbroad copyright protection might imperil legitimate free speech objectives. As a result, copyright law clearly has to be developed with an eye to free speech values and speech objectives.

But I believe that the best and most effective way to incorporate those values is by copyright law dealing with them, as it always has, as a policy matter requiring constant attention. There are, I would argue, only limited gains to be made (and perhaps some costs to be suffered) by formally and precisely incorporating within copyright law the rival and typically fundamental doctrines of free speech. Those fundamental values of national constitutional law and international law are intended to police only the outside margins of copyright law. More subtle devices will be more likely to navigate carefully the rather difficult waters cohabited by speech and copyright values.