

Copyright Law and Free Speech on the Internet

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Abstract

As the Internet grows and expands, it begins to play a more prominent role in society, culture, and our individual lives. But sometimes laws and society can't keep up with the wave of technology. Copyright law is one such law: it needs to be reformed on a constant basis in order to keep up with new media such as the Internet. In recent years, changes to copyright law have attempted to apply old models to new media, and have endangered the free-form culture of the Internet. In order to keep the web as an open forum for free speech, compromises must be made between copyright and free speech laws. In this paper I address the various issues surrounding the debate between copyright and free speech in the context of the Internet. I will offer some solutions and goals for the dilemma and discuss copyright law's recent developments and their effects.

Keywords

Copyright law, Internet, free speech, copyright rights, public domain, fair use, Digital Millennium Copyright Act (DCMA), Sonny Bono Copyright Term Extension Act (CTEA), media, public interest, corporations, Constitution, First Amendment, copyright term extension, access, free flow of information.

Introduction

The Internet is a medium of possibility and community, untouched by commercial interests for many of its earlier years. It is open and democratic: anyone can publish their views on the web for all to see. One of the greatest values of the Internet is that it promotes free speech and the exchange of information. We are now in the information age, where technology advances at the speed of light and our lives are becoming increasingly intertwined with the web. As more and more voices have joined into the global commons of the Internet, it has become more commercialized and commerce driven. The commercialization of the web, the speed of technological advances, and the Internet's prominence in our culture has left other areas of society lagging behind, namely the law.

Copyright law is one area that needs updating and reconsidering before being applied to the Internet. Recent attempts to alter copyright law to fit the parameters of this new medium have tended to neglect the free flow of information and Internet users' rights. "Computer mediated communication merges many of our current methods of communication, and transforms the way we produce and exchange knowledge.... Copyright law which governs the production and dissemination of information needs to adjust to this new cyberspace environment," (Elkin-Koren). Any law ruling the Internet needs to take into consideration that this is a far different medium than any other and that it has great potential to foster a

global community and advance humankind as long as it is kept open, free, and democratic.

Copyright law was designed to foster the creation of creative works by granting some control for authors and creators over their works. Copyright is part of the Constitution laid out by the framers in 1776. "The eighth section of Article I grants Congress the power to 'promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive Right to their respective writings and discoveries,'" (Birnhack 61). The goal of copyright law was to ensure that creative works would continue being produced by providing an incentive to authors and creators. It granted limited power to copyright holders, which have been greatly expanded on over the years. Copyright owners are granted several rights over their works: the right to reproduce it, to prepare derivative works based upon it, to distribute copies, to perform it publicly, and to display it publicly. These rights are automatically given when a creative work has been fixed in a tangible form. Registration of copyrights is only necessary before bringing suit.

There are limits to copyright to ensure that free speech is still possible. For instance, facts and ideas are not protected, only expression. The fair use statute is also a limit to copyright, and is evaluated on a case-by-case basis. "The doctrine of fair use developed over the years as courts tried to balance the rights of copyright owners with society's interest in allowing copying in certain limited circumstances. This doctrine has at its core a fundamental belief that not all copying should be

banned, particularly in socially important endeavors such as criticism, news reporting, teaching, and research,” (Tysver). Fair use is not very clear cut, but generally four factors are considered when determining if an action is fair use: the purpose and character of the use, the nature of the copyrighted work, the portion of the work used, and the effects on the potential market of the work.

Copyright has evolved slowly throughout history, and has recently had a hard time catching up with technology. Copyrights on the Internet have been treated in much the same way as those in print media, even though the medium is vastly different. It has recently been applied to digital media in the Digital Millennium Copyright Act of 1998 and the terms of copyright extended in the Sonny Bono Copyright Extension Act. These extensions and other developments in the law have brought to light copyright law’s tensions with freedom of speech, especially when applied to the Internet.

The Conflict Between Copyright and Free Speech

“There is an inherent tension between copyright laws and freedom of speech. Copyrights restrict the ability of people to disseminate speech.... The First Amendment seeks to maximize the dissemination of information,” (Chemerinsky). This tension has become even more pronounced in recent years, although the framers did not intend for the two areas of law to cause such friction. They intended for copyright to be the engine of free speech, but recent developments have given more favor to copyright owners than to the public. Many continue to

argue that there is no conflict between copyright and free speech (and this no-conflict argument has become the official opinion of most courts) but it is becoming increasingly apparent that there is.

What has led to the tension between copyright law and free speech? There are several factors and recent developments that have put more power in the hands of copyright owners and less in the hands of users. "The rights accorded to authors are stronger than ever before, their duration has been extended, and they have conquered the digital environment...as the public domain keeps enclosing, it becomes clearer that our freedom of speech is affected," (Birnhack 3). When copyright laws were first passed in 1790, limited rights were given for a period of 14 years. Copyrights were more difficult to obtain and information entered the public domain after enough time had passed for the author to profit from the work. Over the years copyright law has been amended and changed, expanding rights protected, extending the term of protection, and applying rights to new media. One of the most recent extensions was the Sonny Bono Copyright Term Extension Act of 1998. "Congress has extended existing copyright terms 11 times in the past 40 years. The CTEA extended copyright protection limits from 50 years to 70 years after an author's death. The act also extended the protection of works-for-hire made by corporations to 95 years," (Mayfield). With all these extensions on the copyright side of the conflict, there have been no extensions of freedom of speech and little attention given to public interests. "The Act adds an additional twenty years to the terms of copyrights, both prospectively for works not yet created and retroactively

for works already protected by copyright law. The result is that many works that would have become part of the public domain will continue to be protected by copyright law and thus have their dissemination restricted," (Chemerinsky). This is a far stretch from the original terms set by our founding fathers.

The Digital Millennium Copyright Act of 1998 also extends copyright. It attempts to extend copyright into new digital media and to prevent infringement by prohibiting anyone from providing information that can be used to circumvent technological protection measures on digital files. By extending the powers of copyright into the realm of the Internet, the DCMA threatens the flow of information and free speech. This Act did not rewrite the law for a new medium, but attempted to apply the current laws to it; effectively treating the Internet like a book or magazine. "Free speech depends on free flow of information and, in the digital world, where no access is possible except by copying, complete control of copying would mean control of access as well. Restricted access to copyrighted digital works inhibits the democratization of information and knowledge and results in a less informed public," (Carter). Researchers, programmers, scientists, and journalists have challenged the DCMA in several cases because it restricts their ability to access information and do their jobs. The DCMA has the potential for abuse and should be revisited to fit with the Internet and users' rights.

The music industry is one area that this conflict has arisen. Teaching is another. When limits are placed on information to prevent copyright infringement, those whose use of copyrighted work is considered fair use suffer. Defining fair use

more clearly may help in some cases. As the law is now, there is too much potential for abuse. Often, for example, the owner of a copyright is not the person who created the work, but a publisher or producer that benefits from the rights. How is this promoting progress in art and science? Large corporations, record companies, and media outlets are controlling more and more creative expression. This expression is part of all our lives and can drive further creation if the public could just get access to it.

Adapting copyright law to fit the free market of the Internet may require a new way of thinking about the exchange of information and the balance between benefiting creators and allowing for free speech. The expansion of copyright law in recent years is alienating the law from its original purpose. Globalization, technology, and communications have changed the way we learn, communicate, and share in our culture. Copyright is falling behind.

The potential exists for copyright law, as it moves from promoting progress to rewarding authors, not only to undercut its own ability to promote progress but also to unnecessarily restrict free speech.

Copyright holders who are allowed to severely restrict access...prevent future authors from building on what has already been done and creating their own new works. ...Artistic and commercial expression, like political speech, facilitate self-actualization, contribute to democracy, enable the free enterprise system, and aid the search for truth. (Carter).

How this Conflict Affects the Internet

It is apparent that copyright law needs some adjustment to be applied to the Internet. As a public medium, it should remain open to communication, sharing of information, and learning, not just commercialization and e-commerce. The foundations of the Internet lie in free expression, where the foundations of copyright law also lie. Bridging the gap between free speech and copyright law on the Internet will require a rethinking of ideas of public space and private ownership. Ultimately it may lead to an Internet that is truly a global commons.

“Computer mediated communication may, thus, open up an opportunity for larger numbers of users to effectively participate in the exchange of information.

Consequently, the purpose of copyright law, promoting learning and knowledge, is no longer served exclusively by providing incentives to publishers, and protecting the market for works. The ‘progress of science and useful arts’ as mandated by the US Constitution, may require, in cyberspace, direct exchanges among users,” (Elkin-Koren). When faced with new media, lawmakers need to focus on the law’s original intent and benefit to society.

The Internet has caused concern for many copyright owners because it gives access to a large global audience, and often the use of such works cannot be controlled. But blocking all access to works denies the public of valuable information, entertainment, and fair uses such as education. A compromise needs to be reached between copyright owners and the public. The flow of information,

discussion, and creative expression is essential to our democratic culture and has become a part of our daily lives. The Internet offers incredible opportunities for the advancement of society. Copyright law has given a disproportionate advantage to copyright holders, many of whom aren't actually the creators of their protected works. The rights of users need to advance along with the rights of owners.

Addressing the Conflict and New Directions

There are several ways a compromise can be reached between freedom of speech and copyright laws. It is time that the First Amendment is considered in copyright cases and legislation to ensure that commercial interests do not trample on freedom of speech. Realizing that there is a conflict between free speech and copyright law is the first step to resolving them. Copyright law needs to adapt to technology, society, and public life. The Internet is a new environment that copyright law has not properly addressed. Communication on the Internet “fundamentally transforms the creation and dissemination of information. This new environment changes the underlying assumptions of copyright law. One of these changes is the transformation of the public/private distinction so central to copyright law,” (Elkin-Koren). Copyright’s scope in digital media needs to be limited to protect free speech and give people access to information.

The debate between free speech and copyright law will not be an easy one to resolve. Shortening the terms of copyright protection could be one way of making sure there is plenty of information in the public domain to allow for free

expression and promote creativity based on other works. It would also prevent some of the abuses on copyrights that are happening today. Also, fair use needs to be more clearly defined and expanded to allow for education, research, critique, political comment, news reporting, and other fair uses.

Whatever conclusion is reached, there are several goals to keep in mind. One, of course, is to balance the incentives given to authors and creators with the rights of others to freely express themselves and access information. Another should be aligning copyright law with its original intent: to promote progress and encourage free speech. As the Internet is addressed as a new medium for copyright law, it should remain open to all as a powerhouse for creativity and speech. It should remain a resource that anyone can use and have access to. The Internet began as an open-source medium for communication; commercial interests and overbearing laws should not threaten its potential to create global connections and foster learning and opportunity.

Conclusion

We live in a time characterized as the “information age.” It is an era in which technology advances speedily and for the first time, communication and free expression can circle the globe in no time. The World Wide Web has opened countless doors for people to connect to each other and the world around them in a whole new way. It has also changed our understanding of public and private space and the sharing of information. But copyright law has failed to keep up with

our advancement and has neglected its true purpose, encouraging speech and creativity. Expansions to copyright law in recent years have stressed the profit of copyright owners over the use of information by the public. Recent changes to the law have alienated it from its intended purpose and failed to address new challenges and media effectively. The result has been a negative effect on free speech. The Internet holds the possibility of allowing people to gather information and express themselves. If copyright law does not address the nature of communication in this new medium, our free speech rights could be at stake.

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