

Free expression: copyright



Copyright has been called “ an engine of free expression” because copyright provides economic incentives to person’s creative works to promote free speech (expression). However, some also argues that copyright is “ an obstacle to free expression” as permission from a copyright owner is compulsory and may have to pay a licence fee when using other person’s work.

Historically, copyright and free expression has been regarded as separate parts. Both have constitutional underpinnings, and protection of artistic and intellectual freedom originates in the First Amendment. When considering whether monopoly control by authors, artists, and media corporations unduly restricts the ability of other authors, artists and corporations to copy, share, criticize, parody, or build upon copyrighted works, the Supreme Court has said that the two systems are not really in tension but complement each other. (Heins, 2003)

This essay covers the argument for both sides of copyright; “ an engine of free expression” and “ an obstacle to free expression” or at least, copyright is no longer “ an engine of free expression”. A number of journals, articles and books are used to support these arguments. Then, concludes how accurate the statement “ copyright has been called an engine of free expression” is.

If there was no copyright, information would be distributed differently. There would probably be patrons of the arts, both governmental and private, and the content of that art would be shaped by patrons’ preferences. Also, without copyright the coordination difficulties and free riding problems would

make it difficult for the less wealthy to aggregate their resources and fund creativity. Conversely, copyright encourages creators/inventors toward works that may prove popular with some market segment. The desire to give a mass audience what it will pay for, while not dispositive of content, makes a significant difference in many creative decisions. Copyright encourages the creation and dissemination of the speech of those who seek economic incentives, decreasing the relative voices of those who create for personal satisfaction. (Tushnet, 2000)

The Court has explained that “copyright’s purpose is to promote the creation and publication of free expression,” and in 1985 the First Amendment (consists of the first 45 words of the Bill of Rights, ratified in December 1791, that protect the freedoms of religion, speech, press, assembly and petition. It serves as the blueprint for freedom of expression and religious liberty. (Paulson, n. d.)) stated that “...it should not be forgotten that the Framers intended copyright itself to be the engine of free expression.” (Horowitz, 2009) These statements explain how copyright and the First Amendment accomplish the same goal – the dissemination of new ideas – through distinct means. Copyright pushes the dissemination – by providing an incentive to create new expression – while the First Amendment removes the obstacles in the way of that dissemination. (Hart, 2010)

Therefore, copyright, in short, promotes freedom of speech.

For example, Netanel, in his guest-blogging: Copyright’s Paradox (2008), said that “Copyright’s economic incentive for the creation and dissemination of original expression is just one way that copyright promotes speech.” and says that the copyright’s effect is both qualitative and quantitative. For

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example, it supports a sector of authors and publishers who look to the market, not government patronage, for financial sustenance and who thus gain considerable independence from government influence. Moreover, he explains that copyright does not further free speech merely by providing pecuniary incentives and support. It also “ symbolically reinforces certain values and understandings that underlie our commitment to free speech.”. He concludes that by encouraging authors, copyright gives the law’s imprimatur to the social and political importance of individuals’ new original contributions to public discourse.

On the other hand, there are some views that copyright restricts the free expression. In the nineteenth century, unlike today where the principal beneficiaries of copyright protection are recording companies, film producers, and other media corporations, they were individual authors and dramatists. During that century copyright was protected for a relatively short time before the work entered the public domain: in the United Kingdom, fourteen years (with a possible renewal for a further fourteen years) under the Statute of Anne of 1709, or subsequent to legislation in 1842, the author’s life plus seven years. After that period works could be freely copied, so the right had much less impact on freedom of expression than it does now when the standard term of copyright is life plus seventy years. Further, during the nineteenth century, copyright was for the most part protected against literal copying, and not against translations and adaptations, where the copier, at least to some extent, adds creative or original features in the preparation of the infringing work. (Barendt, 2005, p. 252) So, contrast to the nineteenth century, today we have a lot of restrictions on our expression

with the copyright. Moreover, although the standard term of copyright is life plus seventy years, there is a case where this was broken. With the Sony Bono Act, Congress extended America's already hefty copyright terms across the board for 20 years, thereby freezing the public domain at its 1928 dimensions. (Heins, 2003)

Moreover, as copyright creates private monopolies in expression, a copyright holder can prohibit or permit the use of his/her copyrighted expression, or demand a licence fee. Also it is concerned that copyright does not limit the dissemination of ideas or the spread of news and information, but only the use by others of the expression of the holder of copyright. Melville Nimmer, a distinguished writer on many areas of free speech law as well as a great copyright lawyer, contended that in this way First Amendment concerns were met by copyright legislation. The conclusion is unsatisfactory as it does not do justice to the point that sometimes it is important for an infringer to use the very words or other distinctive expression of the copyright holder, if he is effectively to communicate his ideas, perhaps the sentiment that the quoted or parodied work is meretricious. Nimmer himself did not think the distinction worked where an idea and its expression are inseparable, as in a news photograph. Reproduction of film of the assassination of President Kennedy or of the famous photograph of the My-Lai massacre in Vietnam necessarily used a distinctive form of expression in order to communicate the character of the particular news event. (Barendt, 2005, p. 249)

From the book ' Copyright's Paradox' (2008), Netanel said " Copyright does provide an economic incentive for speech. But it may also prevent speakers from effectively conveying their message and challenging prevailing views."

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Netanel explains this with a best-selling novel ‘The Wind Done Gone’ by Alice Randall as an example. Randall uses the setting and character of Margaret Mitchell’s ‘Gone with the Wind’, from the viewpoint of a slave. Contrast to Mitchell, Randall focuses on miscegenation and slaves’ calculated manipulation of their masters. However, Mitchell’s heirs brought a copyright infringement action against Randall’s publisher. Although the Eleventh Circuit Court of Appeals immediately vacated the injunction, a Georgia district court preliminarily enjoined the Randall’s novel’s publication due to “unabated piracy”. Netanel added that “It held that by barring public access to Randall’s “viewpoint in the form of expression that she chose,” the trial court’s order acted “as a prior restraint on speech,” standing sharply “at odds with the shared principles of the First Amendment and copyright law.”” He also added that “Indeed, while Randall eventually emerged victorious, not all courts have proven as solicitous of First Amendment values as the Eleventh Circuit panel that lifted the ban on her novel.”

Netanel, again, in his guest-blogging: Copyright’s Paradox (2008), throws a question, “in the digital age, does copyright law still serve as the engine of free expression?” He explains that, in the Internet many of original expressions are distributed without any claim of copyright by its author (or at least without any effort to use copyright to prevent copying). Many Internet speakers are volunteers, happy to exchange and express their views without any expectation of monetary remunerations. Others make their creative expression available for free to enhance their reputation or sell related products. In addition, he suggested that the claim that copyright is “engine of free expression” must rest on an argument about copyright’s incremental

speech benefits. He argues that if we are to believe that copyright continues to be necessary to promote free speech, we must posit that (1) the copyright incentive generates the creation and dissemination of original expression over and above the rich array of speech that would be available even without copyright and (2) this additional copyright-incented expression has independent First Amendment value. – The First Amendment value means it enables citizens to express their thoughts and beliefs in a free society.

(Paulson, n. d.)

As he argues in his book ‘ Copyright’s Paradox’, copyright does have those (as stated above) incremental benefit. Many works require a material commitment of time and money to create, for example, numerous full-length motion pictures, documentaries, television programs, books, products of investigative journalism, paintings, musical compositions, and highly orchestrated sound recordings constitute such sustained works of authorship. It is generally far too expensive and time-consuming to create such works, let alone create with the considerable skill, care, and high quality that the best of such works evince, to rely on volunteer authors. Nor are alternative, non-copyright business models necessarily more desirable than copyright. For example, we might not want our cultural expression to be populated with product placement advertising or devalued by treating it as a mere give-away for selling other products. Netanel also added that many of these types of works have considerable First Amendment value. He said “ while copyright is no longer THE engine of free expression (if it ever was the sole engine), it remains a vital underwriter of free speech” (Netanel, 2008). By saying this, he recognizes that, although the copyright cannot be said to

be an “ engine of free expression”, it is still an important factor in promoting the free speech.

In conclusion, it is clear that copyright has been “ an engine of free expression”. The Court explained that “ copyright’s purpose is to promote the creation and publication of free expression” and the First Amendment stated that “ Framers intended copyright itself to be the engine of free expression”. Giving economic incentive is the one way of promoting free expression. Turchnet (2000) and Hart (2010) argue that copyright encourages the creation and dissemination of the speech of those who seek economic rewards, decreasing the relative voices of those who create for personal satisfaction. Also Netanel, in his guest-blogging: Copyright’s Paradox (2008), argued same statements. Moreover, he explained that copyright also symbolically reinforces certain values and understandings of that underlie our commitment to free speech.

However, some argues that copyright is not “ an engine of free expression”. Barendt (2005) explained that there are more protections for copyrights than before so it made people harder to express their ideas. Also Netanel (2008) said copyright can prevent speakers from effectively conveying their message and challenging prevailing views. He gives an example of novel “ The Wind Done Gone” by Alice Randall to support his arguments. Although the court later void the injunction, a Georgia district court preliminarily enjoined the Randall’s novel’s publication due to “ unabated piracy” In here, the court’s order acted as a prior restraint on speech, and opposite to the First Amendment and copyright law. Barendt (2005) also argued that as copyright creates private monopolies in expression, a copyright holder can

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prohibit or permit the use of his/her copyrighted expression, or demand a licence fee.

Therefore, we should not say the statement that copyright is “ an engine of free expression” is accurate as it has opposite arguments with evidences (; level of accuracy is low). As long as it promotes free expression (or speech) it can be said that the copyright is “ an engine of free expression” but prior to that, copyright law should be loosen so that people can more freely express their ideas/speech effectively. Also, the Court needs to well-understand the meaning of First Amendment and copyright laws to prevent cases like Alice Randal’s. This way, the statement will be more accurate. So we should not only protect copyright owners too much, rather we should allow people to use some concepts or meanings of others’ (copyright owners’) to build/create “ new expressions” effectively.