INTELLECTUAL PRIVACY AND CENSORSHIP OF THE INTERNET

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Good morning. I would like to thank the *Constitutional Law Journal* for inviting me to be here today.

I am not a First Amendment lawyer. I am not really a constitutional lawyer, so why am I here? I think that after having heard Dan Burk's presentation, you should realize that intellectual property lawyers need to be First Amendment lawyers as well. You have all heard the aphorism that the Internet interprets censorship as a malfunction and routes around it.[1] You also may have heard that censorship on the Internet is a terrible thing; in particular, you may have heard this in the context of debates about pornography on the Internet or hate speech on the Internet. I would like to suggest to you today, however, that the single most prevalent problem involving censorship on the Internet has to do with the protection of intellectual property.

If you think about it, intellectual property protection, and particularly copyright protection, is a form of censorship. That doesn't necessarily make it a bad thing. We have intellectual property laws for very specific reasons: to stimulate inventiveness and creativity, and ultimately to encourage the production of useful inventions and creative works.[2] Although the extent to which intellectual property is actually necessary to produce these results is an unanswered empirical question, it's pretty widely accepted that the intellectual property laws at least contribute to producing more inventiveness and creativity than might otherwise exist. Nonetheless, intellectual property laws, and in particular copyright laws, do censor speech in a way. If you have a copyright in your original expression, one of the things that means is that, generally speaking, other people can't reproduce it without your permission.[3] That's a

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[1]The saying was coined by John Gilmore of the Electronic Frontier Foundation. *See* James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 178 & n.3 (1997).

[2]*See* U.S. Const. art. I, § 8, cl. 8.

[3]*See* 17 U.S.C. § 106(1).

form of censorship enforced by federal law. So, to be a copyright lawyer is always in some sense to be a First Amendment lawyer.

There are doctrines in copyright law designed to accommodate First Amendment concerns. One can't, generally speaking, duplicate someone's protected expression, but copyright doesn't protect the ideas, facts, methods of operation, or scientific principles that may be contained in that expression; these things are considered to be part of the public domain.[4] The courts have recognized that, if it were any other way, copyright would inhibit quite a lot of speech, which would create First Amendment problems.[5] Similarly, the fair use doctrine provides that in some cases one can duplicate another's creative expression — not just the facts and the ideas, but the original creative material as well — if the circumstances warrant it.[6] The idea-expression distinction and the fair use doctrine are thought to reconcile concerns about inhibiting too much speech with a felt need to grant proprietary protection to certain types of speech.[7]

How does the Internet change any of this? Proposed amendments to the copyright law that are designed specifically to apply to digital works, and in particular to works distributed via the Internet, may well alter the balance that currently exists between proprietary rights and First Amendment concerns. These amendments concern so-called copyright management technologies, which are secure digital systems that protect against unauthorized uses of a digital work.[8] Such systems now exist as prototypes, and they are potentially capable of operating at a very fine level of granularity.[9] For example, we're

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[4]*See* 17 U.S.C. § 102(b); Feist Publications, Inc. v. Rural Tel. Serv., Inc., 499 U.S. 340 (1991); Baker v. Selden, 101 U.S. (11 Otto) 99 (1879).

[5]*See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enterprises, Inc., 471 U.S. 539, 556-60 (1985).

[6]*See* 17 U.S.C. § 107; *see, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

[7]*See, e.g., Harper & Row*, 471 U.S. at 556-60.

[8]*See* Julie E. Cohen, *Some Reflections About Copyright Management Systems and Laws Designed to Protect Them*, 12 BERKELEY TECH. L.J. 161, 161-62 (1997); Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981, 983-87 (1996).

[9]*See, e.g.*, Jon Bing, *The Contribution of Technology to the Identification of Rights, Especially in Sound and Audio-Visual Works: An Overview*, 4 INT'L J.L. & INFO. TECH. 234 (1996); Mark Stefik, *Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing*, 12 BERKELEY TECH. L.J. 137 (1997); International Federation of Reproduction Rights Organizations, Committee on New Technologies,

all familiar with the notion of copy-protection — a technical device that prevents us from making a copy of a piece of software. Copyright management technologies are similar, but much more sophisticated. We're talking about something that might count each time one opens one's copy of the protected work, and levy an electronic debit. It might levy fractional charges if one wanted to read or print only an excerpt, rather than the whole work. Copyright management systems can be designed to do pretty much whatever the copyright owner wants to do. Once it's possible to set up the electronic debiting system to work in conjunction with the technological protection, copyright management systems can become fully operational. The proposed amendments to the Copyright Act would add another layer of protection on top of that layer of technological protection, by making it illegal and in some cases even criminal for readers to tamper with those protective mechanisms, or to remove any of the information attached to the digital file to identify the copyright owner and specify the terms of use.[10]

How might these proposed amendments affect the copyright-First Amendment balance? They might do so in two ways. The first of these ways relates to what I call the right to read anonymously, which I have written about in a previous article.[11]

Copyright management systems contemplate not only regulating and billing for uses of digital works, but also storing the information that these activities generate. This would include information about what works particular individuals have purchased and what parts of those works they're reading or copying.[12] These databases would be much like the databases that many other merchants maintain now, except that from the individual's point of view there's a substantial difference, I think, between someone's knowing that one likes to buy Tropicana orange juice and Ivory soap, on the one hand, and what ideas and information one considers to be important, on the other. One might, for example, be looking for material about HIV infection, or about a shoe fetish.

Digital Rights Management Technologies <http://www.ncri.com/articles/rights_ management/>.

[10]*See* Digital Millennium Copyright Act of 1998, S. 2037, 105th Cong., 2d Sess. (passed by the Senate, May 14, 1998); WIPO Copyright Treaties Implementation Act, H.R. 2281, 105th Cong., 1st Sess. (reported to the House and referred jointly and sequentially to the Committees on Commerce and Ways and Means, May 22, 1997).

[11]Julie Cohen, *A Right to Read Anonymously*, *supra* note 8. The paper is also available on the Internet via the Social Science Research Network Web site's "cyberlaw" page. *See* <http://www.ssrn.com/>.

[12]*See* Cohen, *Some Reflections*, *supra* note 8, at 183-85.

This seems to be the kind of thing that might make at least some of us uncomfortable, in ways that revealing our grocery preferences might not.

Clearly, this sort of monitoring raises privacy concerns. That's not what I want to talk about. Rather, I want to suggest that, separate from the question of privacy generally and the question of the exact contours of any constitutional right of privacy, there is support in First Amendment jurisprudence and First Amendment theory for what we might call a right of intellectual privacy.

Taken as a whole, the Supreme Court's First Amendment decisions suggest that the Court views anonymity in a variety of contexts as central to the free exercise of the First Amendment rights of speech and association. The anonymous political leafleting cases, most recently the *McIntyre* case, talk about the centrality of anonymity to political speech, which is one of the core kinds of speech that the First Amendment protects.[13] The McCarthy-era cases, although they go both ways, contain language about the illegitimacy of probing into the reading activities of public employees, or into the contents of mail received via the United States Postal Service.[14] Another line of cases, many of which also date from the McCarthy era and the civil rights era, concern disclosure of membership lists. In these cases, the Court made clear that because in some cases membership in or association with a particular group might be controversial, it would shelter that right of association, and require some showing of need before disclosure could be compelled.[15] Finally, even in the pornography cases, particularly *Stanley v. Georgia*, there is language disapproving invasion of the privacy of a person's home library, and inquiring what that person reads in the privacy of his or her own home.[16] These cases are compromised to a degree by later cases that say it is unlawful to transport pornography across state lines, or to possess certain kinds of pornography at all.[17] Nonetheless, I think that the general principle still holds true: the Court has recognized that it would greatly chill freedoms of expression and association if the contents of a person's intellectual life could be laid bare.

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[13]McIntyre v. Ohio Elections Comm., 115 S. Ct. 1511 (1995); *see also* Talley v. California, 362 U.S. 60 (1960).

[14]*See* Schneider v. Smith, 390 U.S. 17 (1968); Lamont v. Postmaster General., 381 U.S. 301 (1965); Sweezy v. New Hampshire, 354 U.S. 234 (1957) (plurality)

[15]*See* Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

[16]394 U.S. 557 (1969).

[17]*See* Osborne v. Ohio, 495 U.S. 103 (1990); United States v. Twelve 200-Foot Reels of Super 8mm. Film, 413 U.S. 123 (1973); United States v. Orito, 413 U.S. 139 (1973).

Similarly, one can look to the major strands of First Amendment theory and find support for the notion that one should be able to cultivate one's intellectual proclivities within a zone of privacy. If one is of the school of thought that believes that the main purpose of the First Amendment is to promote political expression, and only to a lesser degree to promote other kinds of speech, it's immediately clear that anonymity is essential to that vision.[18] *McIntyre* says as much with respect to speech.[19] Reading is the flip side of that coin. How can one know which ideas and opinions one finds persuasive or congenial until one knows what is out there? And how can one know what is out there without exploring? Maybe there are some things we would not explore if somebody was keeping a list, and our employers or our neighbors could gain access to it.

Other scholars have rejected this approach to the First Amendment, and argue that the First Amendment represents a broader guarantee of human autonomy and self-actualization.[20] Everything that I have said about the importance of allowing a zone of intellectual privacy is equally true under this approach. What I have talked about is a process of constructing the self. Reading and listening and viewing help determine who one wants to be, what one wants to believe, and with whom one wants to associate.

Finally, there are those who prefer not to travel either of those theoretical roads, and prefer a more process-oriented theory of the First Amendment. According to this vision, the First Amendment exists to provide a zone of safety for a "marketplace of ideas," within which ideas can battle it out, and the best and truest will emerge victorious.[21] Even under this theory of the First Amendment, anonymity plays a central role. The knowledge that someone, somewhere, might be keeping a list of what one reads could seriously bias the market. Maybe people would allocate their dollars and their attention differently if someone were keeping such a list. We could not be sure that the market in operation is the same market that would exist if no lists were kept, and people had the freedom to make their reading decisions anonymously.

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[18]*See, e.g.*, CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (2d ed. 1995).

[19]McIntyre v. Ohio Elections Comm., 115 S. Ct. 1511, 1519 (1995); Mills v. Alabama, 384 U.S. 214, 218-29 (1966); New York Times v. Sullivan, 376 U.S. 254, 269-70 (1964).

[20]*See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989).

[21]The origin of this view in modern First Amendment jurisprudence is Justice Holmes's dissenting opinion in Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting). *See, e.g.*, BAKER, *supra* note 21, at 6-22 (describing the origins of the marketplace theory, its application by the Court, and criticisms of the theory that have been developed in the academic literature).

This argument relates to what Ed Cavazos talked about earlier this morning: the notion that public discourse involves a certain amount of homogenizing pressure. When speakers express opinions that are too extreme, they receive feedback that edges them toward a more mainstream position. Maybe that's a good thing when it comes to setting public policy. On the other hand, what I said about biasing the market holds true as well. We need to give people time to test out the various ideas that are out there, and to make considered decisions about both personal consumption issues such as pornography and larger public policy issues, before we try to decide what public opinion is and what public policy should be. A zone of anonymity within which to make these inquiries and personal decisions is critical.

At this point, you may be thinking that the First Amendment doesn't reach private conduct, and that all I've told you so far is that private content owners may be implementing technological measures to keep lists of what we read. That's troubling, but what does the First Amendment have to do with it? It may be that the First Amendment can't reach that conduct, although I think there is an argument that might be made that it does.[22] I do think, though, that when Congress amends the copyright law to penalize so-called tampering or circumvention of these copyright management systems, including tampering by readers who want to preserve their anonymity, that raises clear First Amendment concerns.[23]

Think now about *New York Times v. Sullivan*.[24] Libel lawsuits are private disputes, but the enforcement of defamation law is a public act that implicates the First Amendment. The First Amendment, in consequence, has things to say about what defamation law can and cannot do. Because, as I have explained, the copyright law is so intimately bound up with speech, amendments to the copyright law also implicate the First Amendment. Before we make any such changes, we should think about their ramifications for the various rights that fall under the umbrella of First Amendment protection.

Of course, if we conclude that enforcement of the proposed changes would affect the exercise of First Amendment rights, there are additional tests that must be applied to determine whether there is a constitutional violation. We have to ask, among other things, whether the government has any legitimate concerns with identifying readers, and whether there are any less restrictive

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[22]This argument is a subject for another occasion. For now, it is sufficient to note that it would require substantial reconceptualization and revision of the state action doctrine. *See, e.g.*, Paul Brest, *State Action and Liberal Theory — A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296 (1982).

[23]*See* Cohen, *A Right to Read Anonymously*, *supra* note 8, at 1019-24.

[24]376 U.S. 254 (1964).

means of doing so.[25] In the article that I mentioned earlier, I argued that the government does not have such concerns as to most readers, and that less restrictive means exist to satisfy the concerns that the government actually has.[26]

The second way in which the proposed changes to the Copyright Act will affect the copyright-First Amendment balance concerns the conditions of access to information. I would like to suggest that the impending changes in the physical and legal conditions of access to copyrighted works require us to consider whether there is an affirmative right of access to information, or to certain kinds of information.

Given that the Court has been very wary of saying that there are affirmative rights to anything under the Constitution,[27] why am I suggesting that there are, and what does that have to do with copyright and copyright management systems? I have talked about the ways in which copyright doctrine accommodates First Amendment concerns. The idea-expression distinction and the fair use doctrine are designed to make sure that in granting proprietary rights in speech, we don't impede the speech of later speakers by removing essential building blocks from the public domain. Copyright management technologies threaten both of these doctrines.

Both the fair use doctrine and the idea-expression distinction take as a core assumption a certain physical state of information. When these doctrines were created, there was no technological protection against copying.[28] There were no photocopiers, of course, but one could sit down and copy a work by hand if one chose to do so. The copyright law simply did not contemplate the kind of technology that would bar *all* copying. Now, in strictly technical terms, that's a bit of an oversimplification. Obviously, one could sit in front of one's computer screen and transcribe its contents by hand. What one could not do without permission, however, is to print or copy a paragraph and excerpt it in a critical review. More important, one could not do this if, in order to gain access to the work in the first place, one had to click one's acceptance of terms in a digital license agreement, and to agree not to reuse the copyrighted expres-

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[25]*See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989); United States v. O'Brien, 391 U.S. 367 (1968).

[26]Cohen, *A Right to Read Anonymously*, *supra* note 8, at 1024-30.

[27]*See, e.g.*, DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[28]Both doctrines originated in nineteenth-century court decisions interpreting the version of the Copyright Act then in force. *See* Baker v. Selden, 101 U.S. (11 Otto) 99 (1879) (idea-expression distinction); Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (Story, J.) (fair use doctrine).

sion or the noncopyrightable information in any way.[29] Even if theoretically permitted under the fair use doctrine or the idea-expression distinction, such reuse would be a breach of contract. Similarly, the reverse engineering of software could be barred by a combination of technology and contractual provisions prohibiting decompilation, even though courts have made clear that decompilation is a fair use of the creative content because it is necessary to gain access to the unprotected elements of the software: its ideas and operating principles.[30]

Suddenly, through a combination of digital technology and contract, the fair use doctrine and the idea-expression distinction have become things that exist at the whim of the individual copyright owner. That is an extremely troubling thought, if one considers the original purpose of these doctrines, which I have described as (at least in part) that of accommodating First Amendment concerns about censorship. It seems odd that we would contemplate amending the copyright law to make it easy for private parties to create a situation in which copying and reuse simply are not possible, even where necessary to enable what has always been considered protected speech. Given that we know, because of *New York Times v. Sullivan*, that we could not constitutionally amend the defamation laws to lower the standards for establishing libel or slander of a public figure, can we allow Congress to amend the copyright law to make it so easy for the fair use doctrine and the idea-expression distinction to disappear? I suggest that the answer is, clearly, no.

The fair use doctrine has always been raised as a defense. The status of the idea-expression distinction is more ambiguous, but it typically is raised defensively in infringement litigation. Copyright owners, particularly those promoting the use of copyright management systems, are fond of saying that all use of another's creative expression is presumptively infringing, but that in certain cases one might have a defense that excuses one's conduct. If one understands copyright as animated by the First Amendment as well as by utilitarian concerns about stimulating creativity, I believe that this view becomes problematic. Rather, we need to consider whether, even though courts are reluctant to recognize affirmative rights, there is a certain minimal amount of access to information that people need to have in order to participate in public discourse and to be functioning citizens — as well as, in some cases, to be future creators of copyrighted works. If that access requires tampering with or

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[29]*See* U.C.C. Art. 2B, §§ 2B-310, -715, -716 (proposed draft April 1998); *see generally* Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. ___ (forthcoming 1998) (discussing whether as a matter of contract law, privacy law, and copyright law such contracts should be permissible).

[30]*See, e.g.*, Bateman v. Mnemonics, Inc., 79 F.3d 1532 (11th Cir. 1996); Sega Enterprises, Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992).

circumventing copyright management technologies, so be it. Alternatively, considerations of access might require that copyright management systems be designed to allow certain types of reuse, or that certain terms in non-negotiated mass-market contracts be disallowed.[31]

I think that this argument finds, although implicitly, some textual support in the structure of Constitution. The copyright clause is in the body of the Constitution, and the First Amendment modifies the entire text, including Article I, section 8, clause 8.[32] I also believe that First Amendment doctrine does not rule out this result. Although there is a First Amendment right not to speak,[33] it would be strange to say that a copyright owner who has held a work out for public purchase can then invoke his or her First Amendment right not to speak as a basis for refusing the kind of access that the idea-expression doctrine and the fair use doctrine are intended to guarantee.[34] We are not talking about private diaries here, but about works that are placed on the market for strangers to consume.

In one sense, the argument for an affirmative right of access to information is a reach, and I recognize that. In another sense, though, it is both timely and compelling, because we now have a state of technological affairs that makes it necessary to think about this question for the first time in our history. As I said at the start, it seems strange that all the fuss about censorship of Internet speech is focused on things like pornography when the scope of intellectual property protection may have such enormous effect on the information each of us sees, and on the circumstances under which we see it. Particularly given the direction in which copyright management technologies and copyright law seem to be moving, I believe that it would be a good idea to refocus the debate about Internet speech to address these issues, which are so central to our lives. Thank you.

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[31]*See, e.g.*, Cohen, *Self-Help*, *supra* note 29 (discussing enforceability of mass-market license terms, enforced by copyright management systems, that conflict with copyright); Mark Stefik & Alex Silverman, *The Bit and the Pendulum: Balancing the Interests of Stakeholders in Digital Publishing*, 7 AM. PROGRAMMER 1 (1997) (considering design alternatives for copyright management systems).

[32]U.S. Const. art. I, § 8, cl. 8.

[33]*See* Wooley v. Maynard, 430 U.S. 705 (1977).

[34]*See* Cohen, *A Right to Read Anonymously*, *supra* note 8, at 1015-19; Robert A. Kreiss, *Accessibility and Commercialization in Copyright Theory*, 43 UCLA L. REV. 1 (1995).