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Copyright and Federal Supremacy

Prof. James Gibson, University of Richmond School of Law

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The extent of federal power over our lives has been much in the news recently, what with the Supreme Court holding days of hearings on whether the [Affordable Care Act](#) is an unconstitutional exercise of Congress's power under the Commerce Clause. Like the ACA, copyright regulation is federal, but it derives its constitutional authority from a different part of the Constitution, known as the [Patent and Copyright Clause](#), which gives Congress the power "[t]o 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."

Congress's power to enact copyright legislation is therefore uncontroversial. Where controversy sometimes arises, however, is on the question of whether that power is unique to Congress, or whether the states share it. (In this way, the question of federal copyright power is similar to the question in another high-profile Supreme Court case this term, [Arizona v. United States](#), in which Arizona claims that federal immigration regulation does not preclude state regulation.)

On the issue of shared power, the Patent and Copyright Clause has nothing to say. Only the Constitution's generally applicable [Supremacy Clause](#) speaks to the issue, and it says (among other things) that congressional laws take precedence over state laws. What this means, simply stated, is that states are free to enact copyright laws of their own unless Congress has said otherwise.

That seems simple enough. And indeed, in some cases it is clear that a state regulation conflicts directly with federal regulation, and is thus preempted under a Supremacy Clause analysis. Consider the exclusive right of public performance: Federal copyright law gives authors control over the public performance of their works. So a songwriter can sue a band that plays her song in public without a license. Now suppose a state passed a law giving bands the right to play songs in public *without* getting a license. Such a state law would directly conflict with the federal law, and thus the state law would have to give way.

In other cases, however, it is difficult to tell whether a true conflict exists. Consider again the public performance right that federal copyright confers on authors. But this time, suppose a state decides to regulate *private* performances. For example, suppose Virginia passes a law forbidding anyone from singing a song in the shower without a license. Does federal copyright law preempt such a regulation? There is certainly no direct conflict, because the federal right addresses only *public* performances. But the failure of Congress to address private performance can be interpreted in two ways.

First, Congress's failure to regulate private performances could mean that Congress simply doesn't care about private performances. That is to say, it does not view such conduct as sufficiently important to merit national regulation. Under this interpretation, states can regulate private performances if they want; it's no skin off Congress's nose.

But there's a second plausible interpretation: Sometimes Congress's failure to regulate certain conduct is the result of a carefully considered legislative decision that the conduct should *remain unregulated*. Copyright law is full of such judgments, because it represents a balancing act between the rights of authors to exploit their works and the right of the public to have access to

those works. In other words, some conduct is left unregulated – that is, falls outside the copyright owner’s control – because allowing people to engage in that conduct is considered an important part of the balancing act that is federal copyright law.

So maybe Congress meant to allow citizens to sing copyrighted songs in the privacy of their own showers. Perhaps that is part of the trade-off that the public gets in exchange for giving authors the right to control *public* performances. If that’s the case, a state attempt to regulate singing in the shower really does conflict with federal law, and should be preempted.

Now, no state has actually forbidden singing in the shower.¹ But many states have laws so broad that their coverage can overlap with copyright, presenting preemption issues. Last month a federal district court confronted just such a state law in [WNET v. Aero Inc.](#) Defendant Aero Inc. captures broadcast television and retransmits it over the Internet. Unsurprisingly, the owners of the copyrights in the retransmitted programs sued Aero for infringement of copyright’s federal public performance right. But they also sued for violation of New York’s unfair competition law, based on Aero’s “commercially exploiting [the television] programming and broadcasting infrastructure without authorization.”

Aero moved to dismiss the unfair competition count, arguing that Congress tacitly intended the federal public performance right to define and delimit liability for unauthorized performances – regardless of whether that liability was based on state or federal law. Last week the court granted the motion, noting that “Congress’s careful definition of what constitutes a public performance, and its decision not to create exclusive property rights to privately perform copyrighted works further suggests that preemption should bar Plaintiffs’ unfair competition claim.” Either it’s federal copyright infringement, or it’s legal; there’s no in-between for New York.

Copyright law – it keeps a lower profile than health care regulation and immigration, but when it comes to federal power, it holds its own.

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¹. Notwithstanding my wife’s fervent lobbying efforts.