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# Copyright as Censorship - Part II

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*2010 marks the 300th anniversary of the Statute of Anne, the English legislation that ushered in the modern era of copyright law. The Statute of Anne is celebrated for a number of reasons, and perhaps foremost among them is its rejection of copyright as an instrument of censorship. In a previous essay in this series, I discussed one way in which copyright law historically acted as an instrument of censorship: its refusal to grant protection to works that courts judged immoral. In this essay, I discuss copyright's role in facilitating a different kind of censorship: lawsuits in which a copyright owner seeks to suppress expression rather than facilitate it.*

Suppose a news magazine wants to publish an article about former president Gerald Ford. The article will reveal fascinating, previously unknown details about Ford's ascension to the presidency and his controversial decision to pardon Richard Nixon. The article's account is undeniably true, but Ford nevertheless objects. A lawsuit is filed and a federal court rules the magazine's publication illegal.

This sounds crazy. Wouldn't such a ruling be a clear violation of the magazine's First Amendment rights of free speech and free press? Ordinarily, yes. But what I have described is in fact a well-known and not particularly controversial copyright case, in which the publisher of Ford's memoirs successfully sued *The Nation* magazine for publishing an unauthorized sneak peek of his upcoming autobiography. A ruling that would be inconceivable when viewed through a First Amendment lens becomes run-of-the-mill when copyright law is invoked.

How do courts in copyright cases avoid First Amendment restrictions? How is it that they routinely issue "prior restraints" on speech – *i.e.*, by enjoining publication of articles, movies, music, and other forms of expression? The answer is that such rulings ultimately promote speech, rather than suppress it (or so the argument goes). Copyright protection allows authors to market their expression, and profit from it. Any imposition on a copyist's speech is outweighed by the incentivizing benefit to the copyright owner, who also has something to say.

Indeed, the Ford case is the source of the Supreme Court's famous statement that the Framers of the Constitution "intended copyright itself to be the engine of free expression." And the ruling was not terribly offensive to First Amendment values, given that the newsworthy information was to be released within a matter of weeks anyway – this time with Ford's approval. It was more a matter of speech delayed than speech denied.

Yet flaws in copyright law's design create room for true censorship. Unlike Ford, some authors bring copyright claims not because they want to release their expression to the public on their own terms, but because they want to keep their expression from the public altogether. Although in theory copyright is supposed to encourage authors to market their expression – to share it with the public – in practice it bestows its protection without requiring any commitment to publish. A diary sitting in a locked drawer has as much copyright protection as a best-selling novel. This was not always the case; in the old days, authors had to publish their works in order to receive federal copyright rights. But today copyright attaches instantly and automatically to even simple forms of expression.

When this easily acquired protection combines with the ready availability of injunctions (and supracompensatory damage awards) in copyright cases, the result is a copyright regime that can keep information from reaching the public at all. Examples abound. Concerned about his image, rap star Eminem enjoined a magazine from publishing the lyrics to racist songs that he wrote in his youth. The Church of Scientology invoked copyright protection to shield its scripture from public examination and criticism. The famously reclusive author J.D. Salinger prevented the publication of a biography containing excerpts and paraphrases of his writings. Dunkin' Donuts used the threat of copyright infringement to shut down an online forum for complaints about the company. In each of these examples, copyright was used as an instrument of censorship – with the government playing the role of willing accomplice through its exercise of judicial power.

Perhaps the parties in these cases deserve some sympathy. Perhaps they should have the right to hide their dirty laundry from the public. But if there is an injury to be articulated here, it is different from the economic loss that results from the usurpation of one's right to profit from one's own expression. In other words, it is not the kind of injury that copyright should remedy. It is instead more akin to a violation of privacy. Looking to copyright law's property-rights regime for a remedy thus makes little sense, as Samuel Warren and Louis Brandeis pointed out more than 100 years ago in their seminal article, *The Right to Privacy*:

> *[W]here the value of the production is found not in the right to take the profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all, it is difficult to regard the right as one of property, in the common acceptation of that term.*

Copyright is ill-suited to deal with such concerns. Its constitutional goal is to promote the dissemination of information, not retard it – "to increase and not to impede the harvest of knowledge" (to quote the Ford case yet again). It accordingly operates under the assumption that the author wishes to disseminate his or her work to the public for a fee, and that the only thing standing in the way is the threat of unauthorized and uncompensated copying.

In theory, copyright law has some mechanisms to mediate this tension between privacy and the public interest. One example is the fair use doctrine, but it is unpredictable and thus unreliable; certainly it did not preclude censorship in any of the examples above. Another is the idea/expression dichotomy, which allows the public to use an author's ideas without authorization – e.g., through paraphrasing, rather than verbatim copying. But even paraphrasing does not always save the defendant, and it is often no substitute for the actual words. (An accusation that Eminem penned racist lyrics will be unconvincing if the accuser cannot quote them.)

Copyright once had a different way of dealing with these privacy issues: It left them to state law. Under what was known as common-law copyright, states vindicated the confidentiality and privacy of unpublished expression, leaving federal law to deal with published works. But when Congress decided to do away with publication as a federal copyright prerequisite, it both put an end to this state system and gave a marketable property right to private forms of expression never intended for any market.

In the end, then, two solutions to this form of censorship present themselves. The first is for courts to be more attentive to the role that fair use and the idea/expression dichotomy should play in lawsuits whose goal is to suppress expression rather than encourage it. The other is to go back

to the good old days: Attach federal copyright protection only to published expression, leaving state privacy law free to revive its concerns for unpublished works. Either approach would be better than the current state of affairs.