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An Economic Analysis

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1. Introduction

In its judgement in the case of *Harper & Row v. Nation Enterprises*,¹ the U.S. Supreme Court held that The Nation Magazine had infringed on Harper & Row's copyright in the as-yet unpublished memoirs of former U.S. President Gerald Ford when it published an excerpt, supplied by an unauthorized source, without license. In fact Harper & Row had negotiated an agreement with Time Magazine to publish excerpts, but when the Nation's "scoop" was published, Time canceled its article and refused to pay Harper & Row the balance of its account. The Nation attempted to persuade the court that its publication was fair use, and that the constitutional principle of freedom of expression should be applied. But the court declined to do this, and warned "it should not be forgotten that the Framers [of the U.S. Constitution] intended copyright itself to be the engine of free expression."²

The U.S. Constitution grants 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 writing and discoveries."³ Likewise Britain's first copyright statute was "A Bill for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors, or Purchasers, or such Copies, during the Times therein Mentioned."⁴ In each country there was at least the appearance that the lawmakers saw copyright as something to encourage, rather than suppress, expression. Even prior to the copyright statutes, Milton's *Areopagitica* contained arguments against censorship and in favour of copyright. Yet in this age there seem to be more frequent conflicts between the laws of copyright and the principle of freedom of expression.

This essay is not concerned with the constitutionality of various aspects of copyright.⁵ Rather, it is an attempt to draw together economic analysis of copyright and freedom of expression. It will suggest that in some aspects copyright protection over the past century has become over-broad, and that the costs in terms of lost freedom of expression and in transaction costs from expanding copyright's domain have not been matched by offsetting benefits.

The analysis is focused on two examples. First, drawing from some recent Canadian cases, it will be shown that copyright's expansion to corporate symbols (usually covered by trademark law) has imposed some significant losses in terms of freedom of expression. Second, the analysis considers the case of parodies, more heavily discussed in the academic literature than the first case.

The tentative conclusion will be that the root of the problem is the over-extension of the concept of *property* into the world of copyright.

2. Why Freedom of Expression?

One approach to the question of freedom of expression is to claim that the ability to express oneself without restriction is valuable simply as a human liberty: freedom for freedom's sake. This does not mean that there is never a rationale for restriction on speech – on yelling “Fire!” in a crowded theatre when there is no fire, or threatening grievous bodily harm – but simply that it is not necessary to justify the value of speech in terms of its being an instrument to a different goal.

A second approach, which I will call republican, is that expression serves the goal of maintaining a vigorous democracy, a healthy civic life.⁶ One of the most famous judicial statements of this view is from U.S. Supreme Court Justice Brandeis:

Those who won [American] independence ... believed that freedom to think as you will and to speak as you think are means indispensable to the discovery of and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty...⁷

A third approach to the value of freedom of expression is that it serves the cause of uncovering truth. Turning to another U.S. Supreme Court Justice, Oliver Wendell Holmes:

...when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached through free trade in ideas – that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.⁸

When Richard Posner (1986) applied economic analysis to the question of freedom of expression, he took care not to get caught in the idealism that often surrounds American academic writing on the subject:

What I shall not assume ... is that freedom of speech is a holy of holies which should be exempt from the normal tradeoffs that guide the formation of legal policy.⁹

With this statement Posner recalls his Chicago colleagues Director (1964) and Coase (1974, 1977) who wondered why markets for speech should be treated differently from any other markets. Coase and Director argued that the two kinds of markets

shouldn't be analysed differently, but suggested that there is a potential bias in academic treatment of the subject: it is human nature to believe that other people's behavior should be subject to regulation, but not one's own. Since academics trade in the marketplace of ideas, they are much more likely to think regulation is a good thing in markets for goods and services rather than in expression.

Posner is less concerned with why anyone would think that freedom of expression is something not subject to tradeoffs, than with applying economic analysis to the question. He adopts a version of a Learned Hand rule. Speech should be regulated if and only if the cost of the regulation is less than the expected harm of the speech, where the latter is the product of the probability that the speech would actually cause harm and the degree of harm that would occur in that event, all appropriately time discounted. The cost of regulating speech is the sum of two parts: the social loss of suppressing valuable ideas or expression, and the legal-error costs in trying to distinguish which speech warrants suppression.

It should be noted that the "economic analysis" being undertaken is simply an application of cost-benefit analysis. Although Posner's formula is superficially the same as that applied by Hand, the interest from an economics viewpoint is quite different. The Hand tort rule is so often cited in textbooks in law and economics because it is a wonderful example of efficiency in a legal judgment. If negligence is defined by whether the cost of marginal efforts to reduce the probability of an accident exceeds the expected benefits, in terms of avoided losses, from such efforts, then the caretaker's costs and benefits of care are made to coincide with social costs and benefits, and a potential externality is internalized. But Posner's formula for the analysis of freedom of speech is

not about internalizing social costs and benefits, or the creation of correct incentives – it simply compares the costs and benefits of allowing certain kinds of speech (see Rushton (2000) for further discussion).

That being said, the application of cost-benefit analysis principles can still be enlightening. For example, courts tend to be most unwilling to suppress political speech, and the economic analysis suggests this is with good reason. Posner points out that the cost of suppressing political speech is high because it enables governments to secure a monopoly on power when they can be exempt from criticism, and government is the most dangerous form of monopoly. Further, because it has so many external benefits, political speech is the most likely form of speech to be under-produced. In terms of the costs of legal error, Posner notes that most contentious political speech is highly critical of the very system of which judges are a part. Since their impartiality will therefore be in question they must take extra care in making decisions, and so should err on the side of no regulation. This will be especially true when the expression takes the form of art, and so is especially hard to evaluate.¹⁰

Posner's views can be summarized thus:

Ideas are a useful good produced in enormous quantity in a highly competitive market. The marketplace of ideas of which Holmes wrote is a fact, not merely a figure of speech. As a practical matter it is this marketplace, rather than some ultimate reality, that determines the "truth" of ideas. For we say that an idea (for example, that the earth revolves around the sun) is true not because it's *really* true – who knows? – but because all or most of the knowledgeable consumers have accepted ("bought") it. This pragmatic conception of truth is very damaging to efforts to suppress ideas or to forbid their expression or dissemination. No one has a pipeline to ultimate reality. Such truths as we possess are forged in a competitive

process that is distorted if potential competitors – unpopular or repulsive ideas – are forcibly excluded.¹¹

In a critique of Posner's economic approach to freedom of expression, Hammer (1988) warns of applying the cost-benefit technique of regulation when the relevant magnitudes are so subject to dispute. And while the quotation above from Posner might suggest that he exercises a reasonable degree of caution, a recent paper by Eric Rasmussen (1998), applying economic analysis to one particular type of regulation of expression – flag burning – shows how economists can get on the wrong track when they place too much faith in the ability of economists to assess these most difficult ethical questions. In asking whether there should be prohibitions against the desecration of venerated symbols, Rasmussen asserts that we simply need measure what individuals would be willing to pay to avoid desecration:

If someone would pay \$3,000 to avoid flag burning, that is the amount of the desecration externality. The economist need not judge whether \$3,000 is too much or too little. It is simply data.

...The point is crucial because both sides will claim their tastes are privileged. Jones [who wants to desecrate the flag] will say the Smithians' [who venerate the flag] disutility is illegitimate in a free country, and the Smithians will say that Jones's pleasure from desecration is sinful. The economic approach allows for an objective analysis that depends on the empirical facts rather than special pleading.¹²

Rasmussen is not the first economist to suggest that we can solve tremendously difficult ethical questions "objectively" by attaching numbers to the analysis. But it is especially worrying in this case given the complexity of the issues of freedom of expression, especially, as in this case, freedom of political expression.

The case that inspired Rasmussen to write his essay on flag desecration involved a man charged for burning the American flag on the steps of the Dallas City Hall.¹³ The U.S. Supreme Court found that flag burning was constitutionally protected expression. However, Justice Rehnquist, in his dissent, suggested the following:

Only two terms ago in *San Francisco Arts and Athletics, Inc. v. United States Olympic Committee*, the Court held that Congress could grant exclusive use of the word “Olympic” to the United States Olympic Committee. ...As the Court stated, “when a word [or symbol] acquires value ‘as the result of organization and the expenditure of labor, skill, and money’ by an entity, that entity constitutionally may obtain a limited property right in the word [or symbol].” Surely Congress or the States may recognize a similar interest in the flag.¹⁴

Rehnquist’s statement provides a link between the question of freedom of expression and copyright. Essentially, if an organization wishes to suppress some sorts of criticism of the organization, or possible uses of symbols or words which are not critical but which may induce associations in the public mind, the way to suppress these expressions is by claiming a copyright. The word “olympic”, or the stars and stripes, become intellectual property. But how did it come to pass that copyright could be applied this way?

3. Copyright or Intellectual Property?

In Posner’s (1992a) text *Economic Analysis of Law*, he discusses copyright in his chapter on property. After taking students through the analysis of the static and dynamic efficiencies that arise from the creation of rights in real property, he remarks that “the economist experiences no sense of discontinuity in moving from physical to intellectual

property.” (p. 38). But even if we do not sense a discontinuity, the links between real property and copyright are not straightforward.

A seminal essay by Demsetz (1967) sets out the costs and benefits of the establishment of a regime of property rights. The benefits from privatizing a commons come from the internalization of the costs and benefits of using a particular resource. The costs come from the difficulties of defining and assigning initial rights, and in enforcing those rights. As Demsetz makes clear, it will not always be efficient to establish private property rights in each resource.¹⁵

As L. Ray Patterson (1987) argues, copyright did not begin as property.¹⁶ The root cause of modern conflicts between copyright and freedom of expression arise because copyright moved from being a *regulatory* mechanism, in the public interest and designed to encourage distribution of works (“the engine of free expression” as the judges in *Harper & Row* put it), to being a *proprietary* mechanism. Characterizing copyright as property is misleading, because it causes us to adopt the norms of property law in an unanalysed way. When in their economic analysis of copyright Landes and Posner (1989) write that “[s]triking the correct balance between access and incentives is the central problem in copyright law,” (p. 326), it is hard to disagree. But Patterson places the burden of proof on those changes in the law that would restrict access:

...in creating a work an author harvests his ideas from the public domain. Copyright, which protects the expression of these ideas, is an encroachment on the public domain and can be justified only if it provides the public with some form of compensation.¹⁷

Nimmer (1970) suggests that the conflicts between copyright and freedom of expression can be resolved with a rigorous application of the distinction between an idea,

which is not protected by copyright, and an expression of an idea, which is. This satisfies the need for public access to ideas and their ability to express them, regardless of which of the ends of freedom of expression we most value, and it also provides encouragement for expression. However, he goes on to assert that when only the expression is meaningful, as in graphic works, he would favor the copyright interest, since this encourages creation in such works, and they are not really a part of democratic debate anyway.¹⁸

But graphic works and images and keywords *are* a part of democratic debate. There is a political aspect to the use of symbols in critical literature. But as “fair use” comes to be more narrowly defined and codified, property rights are established in images which have, with the hopes and intentions of their inventors, become a part of our language, from the golden arches of McDonald’s to the ears of Mickey Mouse. When proprietary rights are established in such symbols purely in order to stifle critical literature, then the “correct balance” referred to by Landes and Posner has been tipped.

4. Applications

4.1 Corporate Symbols

James Boyle warns that:

A free speech discourse that imagines that the only threat to vigorous public discourse is direct censorship by the state is blind to the multiple ways that state-granted property rights fence off the public domain, even directly restrain certain kinds of “speech.” In America, you are not *allowed* to call your games the Gay Olympics.¹⁹

In Canada there have been numerous cases where it has been held that a labor union is infringing the copyright of its employer when the union, in its own literature,

uses the employer's trade symbol. Constitution-based claims of freedom of expression cannot be invoked. In one instance a union was prevented from using the familiar (to Canadians) triangular logo of the hardware store chain Canadian Tire in its pamphlets.²⁰ In *Canada Safeway Ltd. v. Manitoba Food and Chemical Workers, Local 832*, in which the union made unauthorized use of the stylized "S" used by the grocery store chain Safeway, it was held that "there is no right under the guise of free speech to take or use what does not belong to [you]."²¹ Likewise, an interlocutory injunction was issued against the labor union using the stylized head of a rooster and signature of the Quebec restaurant chain St-Hubert, on its buttons, stickers and pamphlets.²² St-Hubert was unsuccessful in seeking relief under Canada's *Trade Marks Act*, since the defendants had not used the trademark in competition with the plaintiffs goods and services. But it was found that there was copyright infringement. The defendants invoked constitutional protections of freedom of expression, without success: "Cet argument n'est pas fondé. Une ordonnance d'injonction ne priverait aucunement les défendeurs d'informer le public de leurs revendications."²³

It must be admitted that one *could* refer to a corporation without the use of its logo, and instead rely on Times New Roman font. But clearly the message is substantially diluted. It is the *goal* of the marketing departments of Canadian Tire, Safeway, and St-Hubert that their logos become part of our language, that a red letter "S" in a particular shape will have North Americans think of Safeway. Our ability to communicate with each other through literature is unquestionably diminished if corporations can control others' use of those images.

Turning finally to a dispute involving Michelin tire, the Canadian Auto Workers' union use of the cuddly cartoon character "Bibendum" in the unfamiliar role of "boss's henchman about to stomp two workers into submission"²⁴ was found to be copyright infringement. This was in a pamphlet advocating a unionization drive. The judgment in this case uses a definition of fair use of copyrighted material that emphasizes a particular meaning of "fair":

The term "fair dealing" is not defined in the *Copyright Act* [of Canada] but I accept the Plaintiff's submission that the overall use of copyright must be "fair" or treat the copyright in a good faith manner. The *Collins Dictionary* defines "fair" as "free from discrimination, dishonesty, etc. just; impartial". ...[E]ven if parody were to be read in as criticism, the Defendants would have to adhere to the bundle of limitations that go with criticism, including the need to treat copyright in a fair manner. The Defendants held the "Bibendum" up to ridicule.²⁵

In this case fair use has gone from a legitimate right of the public to make copies or make use of works so long as they do not infringe the specifics of copyright, to an obligation to use materials in an impartial way.

On what grounds could we justify the prevention of the use of corporate symbols in the text of a pamphlet for the purposes of criticism? There is no justification on economic grounds. The injunctions against the use of corporate logos in the cases discussed are not based on any kind of balancing of costs and benefits, but instead are justified in property rights-based terms: "There is no right under the guise of free speech to take or use what does not belong to [you]."²⁶ Copyright becomes intellectual property.

In his essay on freedom of expression, Posner (1986) notes that labor disputes have few external effects, so there is a low amount of harm if bad speech is allowed and a

low value from good speech. Given this, the dominant variable in the cost-benefit assessment is the possibility of legal error, and he suggests that this alone is “a decisive ... argument against regulation.” (p. 41). But in the cases above there seems to be little judgement of this kind; instead there is a picture of theft of corporate property. This is hardly a picture of copyright being the engine of free speech.

Suppose we imagine that there is something to Justice Brandeis’ argument that freedom of expression furthers the goal of democratic participation and dialogue.²⁷ It is clear that these rulings in Canadian courts have significantly hampered labor’s ability to communicate with the public, by taking from it the ability to use the most effective means of identifying its grievances. For many workers, labor action is one of their main opportunities to enter into public dialogue, to say something to the public and to try to change people’s minds. But copyright has developed a form that prevents them from doing this.

4.2 Parody

In an extension to the economic analysis of copyright, Posner (1992b) considers the economic aspects of parody.²⁸ He would allow fair use when the parodied object is the *target* of the parody, since there is unlikely to be a voluntary license granted by the original creator to use the object, even though the social benefits of allowing the parody outweigh the costs. However, using the parody as a *weapon* against something other than what is being parodied would not be fair use. He notes that this restriction might curtail freedom of expression since the creator of parodies would face transaction and royalty costs. “But, as we do not suppose that writers should be allowed to steal papers and

pencils in order to reduce the costs of satire, neither is there a compelling reason to subsidize social criticism by allowing writers to use copyrighted materials without compensating the copyright holder.” (p. 73). While he goes on to note that there is a difference between pencils and expressions, since pencils are rival and expressions are non-rival goods, the comparison raises an important issue. Why is there no “compelling reason” to allow parodists to use copyrighted material? One of the results of the model of Landes and Posner (1989) is that increased copyright protection is only ever justified if it would lead to an increase in the number of works. This places a heavy burden on an advocate of any restriction on fair use to demonstrate that incentives will be positively enhanced (and enhanced in a way so valuable as to exceed all the costs of restricting the available use of the work).

We also need to recall Posner’s cost-benefit analysis of freedom of expression. The likelihood of legal error in distinguishing parodies that target a work and parodies that employ a work to attack something else is very high. If we consider some of the better-known parody cases of recent years – an underground comic book using Walt Disney cartoon characters in very uncharacteristic ways,²⁹ a rap version with changed lyrics of a popular Roy Orbison song,³⁰ a post-modern artist incorporating kitschy postcards in a sculpture³¹ – it is impossible to distinguish ridicule directed at the copied work from that directed at the culture that produced and buys it.³² Further, such cultural criticism as is contained in these parodies should be considered “political” speech, which further raises the costs if there is judicial error.

As in the labor disputes described in the previous section, the root of the problem in the parody cases seems to be that notions of *ownership* are guiding thinking about

copyright rather than notions of the best balance between incentives and access to works.

Jeremy Waldron puts it well:

If one were to pursue an analogy with real property, one might get the idea ... that Mickey Mouse was supposed to be the private domain of his creator, analogous to Walt Disney's home or a piece of land that he owned, and that all he was asking was that the courts should compel others to respect the "Keep Out" signs that defined the boundaries of his property. But of course any such analogy would be ludicrous. The whole point of the Mickey Mouse image is that it is thrust out into the cultural world to impinge on the consciousness of all of us.

We see this happening in the attempt of every advertiser to make the brand name of his product "a household word," to so inscribe his intellectual property in the mind of every consumer as to make it a part of their everyday vocabulary. ...It becomes ludicrous to continue insisting on the original proprietor's right to control their use.³³

5. Conclusion

Copyright and freedom of expression are each aspects of Holmes' marketplace of ideas, and the original copyright statutes were designed to encourage the publication and distribution of valuable ideas and expression. Economists are right to take the approach that both copyright and freedom of expression should be held subject to the various trade-offs they bring with them and which lawmakers must balance.

The argument of this paper is that the more copyright is thought of as intellectual property akin to real property, the more that analyses of copyright take the view that "ownership is ownership is ownership,"³⁴ the more we lose sight of the necessary balance. When author Margaret Atwood addressed the Canadian parliamentary committee during debates on the most recent copyright reform, she said:

It is too often forgotten that intellectual property is property and that taking it without permission is theft.

...Reproducing intellectual property without permission from its owner amounts to theft, and I do not feel my government should legalize theft.³⁵

But what exactly is being “forgotten” here? How did fair use become theft? We must find a way to return copyright to being the engine of free expression.

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¹ 471 U.S. 539 (1985).

² *Ibid.*, at 558.

³ U.S. Const. art. I, §8, cl. 8.

⁴ *Statute of Anne, 1710* (U.K.), 8 Anne, c. 19.

⁵ See Hugenholtz (2000) for a survey of recent cases in Europe, and Nimmer (1970), Patterson (1987), or Patterson and Birch (1996) for analysis of American constitutional aspects of the copyright/expression conflict.

⁶ Advocates of this view include Sandel (1996) and Sunstein (1993).

⁷ *Whitney v. People of the State of California* 274 U.S. 357 (1927) at 375. Whitney was an organizer with the Communist Labor Party, charged under the Syndicalism Act. The Court upheld the conviction. Brandeis concurred: although he disagreed with the Court and was "unable to assent to the suggestion ... that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right..." he did agree that there was evidence of a conspiracy to "commit present serious crimes", which warranted prosecution. (p. 379).

⁸ *Abrams v. United States* 250 U.S. 616 (1919) at 624. Abrams was circulating leaflets calling for a general strike and attacking capitalism, during a time when the U.S. was at war. The Court affirmed the conviction, with Holmes dissenting.

⁹ Posner (1986, p. 6).

¹⁰ See Hamilton (1996) for an argument that art requires the most stringent protection from suppression, since it provides the opportunity to imagine worlds different from the status quo in ways that ordinary speech cannot.

¹¹ Posner (1992a, p. 665).

¹² Rasmussen (1998, p. 249).

¹³ *Texas v. Johnson* 491 U.S. 397 (1989).

¹⁴ *Ibid.*, at 429-430, quoted by Boyle (1996, pp. 147-8).

¹⁵ Also see Carol Rose (1996).

¹⁶ See Patterson (1968), Kaplan (1967), Goldstein (1994), or Mark Rose (1993) for detailed histories of the origins of copyright.

¹⁷ Patterson (1987, p. 7).

¹⁸ Nimmer would, however, make an exception for photographs and films of newsworthy events.

¹⁹ Boyle (1996, p. 148). Boyle is referring to the case *San Francisco Arts & Athletics Inc. v. U.S. Olympic Comm.* 483 U.S. 522 (1987), where the court held that as of 1978 one needs the permission of the U.S. Olympic Committee to make use of the word “olympic”, even though, as Boyle points out, the Committee could in no ordinary sense of the word be considered the “authors” of the term.

²⁰ *Canadian Tire Corp. Ltd. v. Retail Clerks Union Local 1518 of United Food and Commercial Workers Union* 7 C.P.R. (3d) 415 (1985).

²¹ 73 C.P.R. (2d) 234 (1983) at 237.

²² *Rotisseries St-Hubert Ltee v. Le Syndicat des Travailleurs(euses) de la Rotisserie St-Hubert de Drummondville (C.S.N.)* 17 C.P.R. (3d) 461 (1988).

²³ Ibid., p. 476.

²⁴ *Cie Générale des Établissements Michelin-Michelin & Cie v. C.A.W.-Canada* (1996) 71 C.P.R. (3d) 348 (Fed. T.D.) at 384.

²⁵ Ibid.

²⁶ *Safeway*, supra note 21.

²⁷ Supra note 7. Also see Netanel (1996) and Benkler (1999) for an analysis of copyright based on the principles of civic republicanism.

²⁸ There is a large number of papers in the legal literature on the question of parody, and the reader is referred to them for more detailed discussion: Light (1979), Merges (1993), Winslow (1996), and Yen (1991).

²⁹ *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978).

³⁰ *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994).

³¹ *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992); see the discussion of this case in the essay by Fiona Macmillan in this volume.

³² This point is noted by Merges (1993) and Winslow (1996).

³³ Waldron (1993, p. 883).

³⁴ Taken from Sub-Committee on the Revision of Copyright, Standing Committee on Communications and Culture (Government of Canada, 1985, p. 9).

³⁵ Standing Committee on Canadian Heritage, Evidence, pp. 3-6.