Copyright's Paradox

CHAPTER ONE

Introduction

A "Largely Ignored Paradox"

THE U.S. SUPREME COURT has famously labeled copyright "the engine of free expression."[1] Copyright law, the Court tells us, provides a vital economic incentive for the creation and distribution of much of the literature, commentary, music, art, and film that makes up our public discourse.

Yet copyright also burdens speech. We often copy or build upon another's words, images, or music to convey our own ideas effectively. We cannot do that if a copyright holder withholds permission or insists upon a license fee that is beyond our means. And copyright does not extend merely to literal copying. It can also prevent parodying, remolding, critically dissecting, or incorporating portions of existing expression into a new, independently created work.

Consider *The Wind Done Gone,* a recent, best-selling novel by African American writer Alice Randall. Randall's novel revisits the setting and characters of Margaret Mitchell's classic Civil War saga, *Gone with the Wind,* from the viewpoint of a slave. In marked contrast to Mitchell's romantic portrait of antebellum plantation life, Randall's story is laced with miscegenation and slaves' calculated manipulation of their masters. As Randall explained, she wrote her novel to "explode" the racist stereotypes that she believes are perpetuated by Mitchell's mythic tale.[2] Perhaps Randall could have vented her rage in an op-ed piece, street corner protest, or scholarly article instead. But what more poignant way to drive her point home than to write a sequel that turns Mitchell's iconic story on its head?

Mitchell's heirs did not suffer Randall's adulterations gladly. They brought a copyright infringement action against Randall's publisher, and a Georgia district court preliminarily enjoined the novel's publication, castigating Randall's upending of Mitchell's classic as "unabated piracy."[3] Yet the Eleventh Circuit Court of Appeals soon vacated the preliminary injunction. 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."

Copyright is thus a potential impediment to free expression no less than an "engine of free expression." Copyright does provide an economic incentive for speech. But it may also prevent speakers from effectively conveying their message and challenging prevailing views. 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.

In a seminal article from 1970, Melville Nimmer, the leading copyright and First Amendment scholar of his day, aptly termed the copyright–free speech conflict a "largely ignored paradox."[4] At that time, those who valued creative expression happily favored both strong copyright protection and rigorous judicial enforcement of First Amendment rights without perceiving any potential tension between the two.

That sanguine view, first questioned by Professor Nimmer, has now been shattered by a spate of widely debated lawsuits. The battle over *The Wind Done Gone* led op-ed pieces across the nation to ponder whether copyright unduly chills minority voices. When the Supreme Court rejected Web publisher Eric Eldred's constitutional challenge to the Sonny Bono Copyright Term Extension Act—which gave copyright holders another twenty years of protection for existing books, movies, songs, and other works—the *New York Times* headlines proclaimed a "corporate victory, but one that raises public consciousness."[5] The American Civil Liberties Union stepped in to defend artist Tom Forsythe against Mattel's copyright and trademark infringement action over Forsythe's photographs of naked Barbie dolls attacked by household appliances—photographs, the artist stated, that were designed to lay bare the "objectification of women" and "perfection-obsessed consumer culture" that the Barbie character embodies. Princeton University computer science professor Edward Felten petitioned a court to affirm his First Amendment right to present his research at an academic conference after a recording industry trade association threatened that the presentation would subject him to liability under the Digital

Millennium Copyright Act (DMCA). Martin Luther King's heirs provoked concerted media protest when they sued CBS for copyright infringement over the network's documentary on the civil rights movement that included some of its original 1963 footage of King delivering his seminal "I Have a Dream" speech. Diebold Election Systems, a leading producer of electronic voting machines, sent copyright infringement cease-and-desist letters to three college students and their Internet service providers in a vain attempt to quash the Internet posting of internal company e-mails revealing technical problems with the machines' performance and integrity. Publishers and authors sued to prevent Google and several major research libraries from making vast repositories of books and other printed material available to Internet users for online search. Millions of users of peer-to-peer file-trading networks, like Grokster, Kazaa, and the original Napster, have been given cause to consider whether assembling and exchanging a personalized mix of one's favorite music recordings (or a creative "remix" of segments of various recordings) is an exercise of expressive autonomy or the deplorable theft of another's intellectual property. The *New York Times Magazine* ran a cover story on this emerging "copyright war," encapsulating the tumultuous crosscurrents both in the article's perplexed, interrogatory title, "The Tyranny of Copyright?" and in its unmistakably declarative notice, "Copyright 2004 The New York Times Company."[6]

Why has the conflict between copyright and free speech come so virulently to the fore? What values and practices does it put at stake? How should the conflict be resolved? These are the principal questions this book seeks to answer.

At its core, copyright has indeed served as an engine of free expression. In line with First Amendment goals, the Constitution empowers Congress to enact a copyright law in order to "Promote the Progress of Science," meaning to "advance learning." Copyright law accomplishes this objective most obviously by providing an economic incentive for the creation and dissemination of numerous works of authorship. Yet copyright promotes free speech in other ways as well. As it spurs creative production, copyright underwrites a community of authors and publishers who are not beholden to government officials for financial support. Copyright's support for authorship may also underscore the value of fresh ideas and individual contributions to our public discourse.

But copyright has strayed from its traditional, speech-enhancing core, so much so that in its present configuration and under present conditions, copyright imposes an unacceptable burden on the values that underlie First

Amendment guarantees of free speech. As the Supreme Court has emphasized, the First Amendment aspires to the "widest possible dissemination of information from diverse and antagonistic sources."[7] Yet copyright too often stifles criticism, encumbers individual self-expression, and ossifies highly skewed distributions of expressive power. Copyright's speech burdens cut a wide swath, chilling core political speech such as news reporting and political commentary, as well as church dissent, historical scholarship, cultural critique, artistic expression, and quotidian entertainment. And copyright imposes those speech burdens to a far greater extent than can be justified by applauding its "engine of free expression" role.

The primary, immediate cause for copyright's untoward chilling of speech is that copyright has come increasingly to resemble and be thought of as a full-fledged property right rather than a limited federal grant designed to further a particular public purpose. As traditionally conceived, copyright law strikes a careful balance. To encourage authors to create and disseminate original expression, it accords them a bundle of exclusive rights in their works. But to promote public education and creative exchange, it both sharply circumscribes the scope of those exclusive rights and invites audiences and subsequent authors freely to use existing works in every conceivable manner that falls outside the copyright owner's domain. Accordingly, through most of the some 300 years since the first modern copyright statute was enacted, copyright has been narrowly tailored to advance learning and the wide circulation of information and ideas, ends that are very much in line with those of the First Amendment. Copyright holders' rights have been quite limited in scope and duration and have been perforated by significant exceptions designed to support robust debate and a vibrant public domain. Indeed, as courts have repeatedly suggested, it is copyright's traditional free speech safety valves—principally the fair use privilege, copyrights' limited duration, and the rule that copyright protection extends only to literal form, not idea or fact—that have enabled copyright law to pass First Amendment muster.

In recent decades, however, the copyright bundle has grown exponentially. It now comprises more rights, according control over more uses of an author's work, and lasting for a longer time, than ever before. If copyright law remained as it was in 1936, the year Margaret Mitchell wrote *Gone with the Wind,* Mitchell's copyright would have already expired, and Randall could have written her sequel without having to defend a copyright infringement lawsuit.[8] Under copyright law as it stood when Martin Luther King delivered "I Have a Dream," King would have likely been held to dedicate his speech to the public domain, leaving CBS and anyone else free to incorporate King's words in historical accounts of the civil rights era.[9] Prior

to the Digital Millennium Copyright Act of 1998, Professor Felten's paper on digital music encryption would have fallen entirely outside the reach of copyright law. Had he presented his findings before the DMCA took effect, he would have had no need to invoke the First Amendment to protect his right to speak.

There are a number of interrelated causes for copyright's ungainly distension, including relentless copyright industry lobbying, judges' inconstant application of copyright's traditional free speech safeguards, and the prevalence of a "clearance culture" in which distributors regularly require that authors obtain copyright licenses even for uses of others' expression that are likely noninfringing.[10] Whatever the cause, as copyright expands, its fundamental character changes. As "engine of free expression," copyright law's traditional aim has been to provide sufficient remuneration so that authors and publishers will create and distribute original expression. Copyright holders have enjoyed exclusive rights in their works, but those rights have been narrowly tailored in line with the understanding that they serve primarily to provide a public benefit. In concert with copyright's expansion, however, copyright is increasingly treated more akin to conventional property than a finely honed instrument of expressive diversity.

The preeminent eighteenth-century English jurist, Sir William Blackstone, depicted property as an individual's "sole and despotic dominion . . . over the external things in the world, in total exclusion of the right of any other individual in the universe."[11] In actual fact, property rights come in varied shapes and sizes and are subject to policy-laden limitations. Nonetheless, Blackstone's hyperbolic, individual-as-sovereign formulation reverberates within the libertarian ethos of American culture to heavily influence the way we think about "property." As such, it sets the default assumption for demarcating property rights.

So it is with copyright. Property rhetoric, whether invoked reflexively or strategically, has tended to support a vision of copyright as a foundational entitlement, a broad "sole and despotic dominion" over each and every possible use of a work rather than a limited government grant narrowly tailored to serve a public purpose. Examples begin with Blackstone himself, who argued that copyrights are common-law "property" and should thus last in perpetuity. In similar fashion, today's motion picture industry lobbyists insist that Congress must mandate technological controls that would override fair use in order to "protect private property from being pillaged." And courts brand as "theft" any unauthorized use of a copyright holder's work, including even uses like Alice Randall's that contain considerable independent creative expression and critique.

The more copyright embraces the features and rhetoric of conventional property, the more it serves not just to spur Margaret Mitchell's creation of *Gone with the Wind* but to bolster her heirs' efforts to control how that work is presented and perceived well over half a century later. The result is a sharpening conflict between copyright and free speech.

The copyright–free speech conflict cuts across traditional and emerging electronic media alike. Yet digital technology adds a vast new dimension. Armed with personal computers, digital recording devices, and the Internet, millions of people the world over can cut, paste, and recombine segments of existing sound recordings, movies, photographs, and video games to create new works and distribute them to a global audience. Such creative appropriation has given birth to entire new art forms: remixes, mashups, fan videos, machinima, and more. It has also spawned an acrimonious debate about copyright's place in the digital age, pitting entertainment media bent on stamping out massive "digital piracy" against individuals who increasingly perceive copyright as an undue and unworthy impingement on their liberty and expressive autonomy.

Copyright law was designed to create order in the publishing trade, to prevent ruinous competition when unscrupulous firms engage in wholesale commercial piracy. So how does copyright law apply in an age in which millions of individuals are both authors and publishers? How is copyright to respond when anyone can easily make perfect copies of existing works, as well as cut, paste, edit, remix, and post them on YouTube, MySpace, FanFiction .net, Machinima.com, and a multitude of other Web sites online? The incumbent copyright industries understandably view these ubiquitous acts as a mortal threat, worse even than the commercial piracy of old. They argue that more extensive copyright protection and enforcement mechanisms are required to combat the nefarious "culture of contempt for intellectual property" that courses through the Internet.[12]

The industries have met a receptive ear in Congress and the courts. And evoking Blackstone, the industries insist that if they are to serve the digital marketplace, they must enjoy the effective and enforceable right to assert hermetic control—even greater control than was previously imaginable—over their movies, music recordings, and books. They must have the legal entitlement, if they wish to exercise it, to seal their content in tamper-proof containers and charge every time an Internet user reads, views, or hears a work online. To that end, the motion picture, recording, and publishing industries have begun to use digital encryption to control and meter access and uses of their content, and have successfully lobbied Congress to prohibit

the circumvention of those technological controls even to engage in fair use.[13]

The industries have looked to traditional copyright to tame the Internet beast as well. They have sued thousands of individual file traders, as well as companies that facilitate peer-to-peer file trading. And motion picture studios and record labels are now taking on the remix culture of YouTube and MySpace. As I write these words, those sites are targets of lawsuits brought, respectively, by Viacom and Universal Music, characterizing them as iniquitous dens of "user-stolen" intellectual property.

At the other end of this Kulturkampf are scholars, bloggers, archivists, and activists who view the Internet as a precious opportunity to remake our public discourse. These commentators celebrate digital technology's capacity to unleash the power of individuals' speech and drastically reduce our dependence on the mass media for information, opinion, and entertainment. And—much to copyright industries' consternation—they tolerate file trading and herald individuals' creative appropriation and remixing as "the art through which free culture is built."[14] Some activists suggest, indeed, that the Internet will realize its full free speech potential only if copyright is banished from its realm. In this view, at its very best, copyright is irrelevant to the profuse and richly diverse array of expression that individuals regularly post on the Internet without any intention of preventing others from copying and borrowing as they wish. At worst, copyright and technology controls threaten to reshape the Internet into something like an expanded multichannel cable television or celestial jukebox, a platform for the one-way transmission of content from mass media conglomerates to passive consumers.

Real-world developments are rapidly overtaking some of the extreme positions that have been staked out. First and foremost, the sheer magnitude and global reach of peer-to-peer file trading, the explosive growth of Web sites featuring user-created content, and the freely copying and remixing mind-set of a generation of Internet users have thus far surpassed the copyright industries' ability to curtail, much less control. As a result, we are starting to see some cracks in the industries' opposition to freewheeling Internet culture. Warner Music, for instance, broke ranks with other major labels to license YouTube to show both Warner Music videos and user-created clips that incorporate Warner music. And after threatening to sue YouTube for "tens of millions of dollars," Universal Music followed in Warner's footsteps (but shortly thereafter sued MySpace). The YouTube deals reflect a growing blurring of Internet culture and traditional media: Rupert Murdoch bought MySpace, Simon & Schuster has signed book deals with fan fiction writers, newspaper Web sites feature numerous blogs and online

reader discussion groups, and NewsCorp and NBC Universal announced plans to make TV and movie clips available for user sharing and remixing on their online video site.[15]

It is too soon to tell whether these moves will culminate in the copyright industries' acquiescent embrace of remix culture or an industry campaign to clip its wings. Much may depend on the outcome of the pending YouTube and MySpace litigation. Certainly, though, the battles that have raged in the space between digital anarchy and digital lockup will continue in new contexts, new media, and new uses of copyrighted expression.

This book takes First Amendment values as its lodestar for navigating that contested space. Copyright, I argue, should be delimited primarily by how it can truly serve as an "engine of free expression." Copyright's scope, duration, and character should be shaped to best further the First Amendment goals of robust debate and expressive diversity. Copyright law and policy can rightly accommodate other goals as well, including maximizing economic efficiency, securing authors' interest in creative control, and providing incentives for technological innovation. But overall, it is First Amendment values that should dominate and inform copyright.

My claim for employing free speech as the dominant metric to assess copyright law rests on two principal pillars. First, as a matter of normative principle, free speech concerns *should* play a central role in shaping copyright doctrine. Copyright law has the capacity to both promote and burden speech and thus implicates values that lie at the heart of our liberal democratic society. It behooves us to give those values considerable, if not overriding, weight in copyright law and policy.

Second, viewing copyright through a free speech lens makes clear, where other approaches do not, that determining copyright's character and reach *necessarily* rests on questions of speech and media policy. How broad and enduring should copyright holders' exclusive rights be? When should copyrights give way to fair use? In what circumstances should copyright holders' proprietary veto over unlicensed uses be replaced by a right of reasonable compensation? Our answers to such questions heavily impact the types of speech and speakers who will have a voice in our public discourse. They tip the scales between market and nonmarket expression and, often, between mainstream and dissident speakers. The free speech lens lays bare those trade-offs.

The First Amendment lodestar can helpfully guide us not only in assessing current copyright doctrine, but also in adapting copyright law to the rapidly changing conditions wrought by digital technology. Copyright can

continue to serve as an engine of free expression in the digital arena. But to do so, copyright must be narrowly tailored to further its speech-enhancing objectives, no less than in traditional, off-line media. Contrary to what some entertainment industry lobbyists would have us believe, copyright is not ultimately about securing strong property rights. Rather, copyright's fundamental ends, like those of the First Amendment, are to "Promote the Progress of Science" by spurring the creation and widespread dissemination of diverse expression. To the extent exclusive rights in original expression best serve those ends, copyright doctrine should provide for proprietary rights. But to the extent property rights in expression unnecessarily stand as an obstacle to free speech, they should be limited in scope and duration or even jettisoned in favor of less constraining and less censorial mechanisms for securing authorship credit and remunerating producers and purveyors of original expression.[16]

My argument and analysis unfold in three parts. The first grounds my claim that our current bloated copyright imposes unacceptable burdens on speech. I begin in chapter 2 by providing concrete illustrations of why we should care, of how copyright often prevents speakers from effectively conveying their message. In chapter 3, I turn, more analytically, to our basic understandings of "free speech" and "First Amendment values." Given those understandings, copyright is properly said to burden "free speech" in some ways but does not truly implicate free speech concerns in some others. Finally, in chapter 4, I document the most troublesome areas of copyright expansion that fuel the copyright–free speech conflict.

The second part juxtaposes copyright's conflicting roles as engine of free expression and impediment to free expression. In chapter 5, I elucidate copyright's traditional "engine of free expression" role and consider whether copyright still serves that function given the profusion of nonmarket expression on the Internet. In chapter 6, I identify several distinct, if interrelated, ways in which copyright burdens speech. Those speech burdens include copyright holders' deliberate silencing of certain expressive uses of their works, speaker and distributor self-censorship in the face of copyright holder overreaching, prohibitively costly copyright license fees and transaction costs, and copyright law's buttressing of media concentration. Along the way, I show that even the influential school of economic analysis of copyright—which purports to consider only economic efficiency—must, by its very terms, ultimately devolve to making value judgments of speech policy. Chapter 7 then counters arguments that a proprietary, Blackstonian copyright would actually foster expressive diversity.

The third part presents a blueprint for addressing the copyright–free speech conflict. I argue in chapter 8 that a correct and consistent reading of the First Amendment would impose certain external constraints on copyright holder prerogatives, at the very least to ensure that copyright law's internal free speech safety valves live up to their task. Finally, in chapter 9, I present some proposals for modifying copyright law to better protect and promote First Amendment values beyond what is required as a matter of First Amendment doctrine. Copyright and free speech will always stand in some tension. But there are ways in which the copyright–free speech conflict can be ameliorated, in which copyright can continue to serve as an engine of free expression while maintaining ample room for speakers to build on copyrighted works to convey their message, express their personal commitments, and fashion new art.