



2000

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Recommended Citation

Eric B. Easton, *Annotating the News: Mitigating the Effects of Media Convergence and Consolidation*, 23 U. ARK. LITTLE ROCK L. REV. 143 (2000).

Available at: <https://lawrepository.ualr.edu/lawreview/vol23/iss1/9>

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ANNOTATING THE NEWS: MITIGATING THE EFFECTS OF MEDIA CONVERGENCE AND CONSOLIDATION

*Eric B. Easton**

Our goal is to have every one of our hard news programs fully convergent, fully interactive and flexible in both old and new media. Bob Murphy, ABC News.¹

I would prefer ABC not to cover Disney ABC News knows that I would prefer them not to cover [Disney]. Michael Eisner, Chairman, Walt Disney Company.²

I. INTRODUCTION

Convergence and consolidation—the promise and the power. What a breathtaking paradox we face as we enter the twenty-first century. Never before has our ability to inform the public been greater. Breaking news from anywhere in the world appears on television screens in minutes. Supporting documents, first-person accounts, government reaction, public opinion—all follow in a torrent on personal computer screens. As the two screens converge, as the two streams of information become one, we are about to realize the promise of a nearly perfect technology for journalism—a technology capable of delivering the news at any desired level of detail, from highly mediated to raw and bleeding.

That is, except for one problem: we are ignored by much of our potential audience. Of those who do attend, many, perhaps most, despise us because we are “the media” existing not to serve the public interest, but our own. We are not Lincoln Steffens or Edward R.

* Associate Professor, University of Baltimore School of Law. I must confess to writing this essay as a law professor whose concept of the First Amendment is informed by more than 20 years as a practicing journalist. Even though I turned in my press card some years ago, I have tried to bring a journalist's perspective and voice to this topic. The editorial “we” that creeps into my language suggests a presumption that other journalists are of similar mind on the issues covered here. My apologies to those who are not.

I would also like to express my appreciation to Professor Richard Peltz of the University of Arkansas at Little Rock for inviting me to participate in this symposium and to the scholars, journalists and friends who made the symposium such a rewarding experience. Thanks to my Baltimore colleagues Professors Michael Meyerson and Lynn McLain, who read and critiqued this essay, as well as my research assistant Sam Collings and the students in my Cyberspace Law Seminar. They share fully in the credit for whatever may be useful about this essay; I am solely responsible for the rest.

1. Richard Tedesco, *ABC News Tests Net*, BROADCASTING & CABLE, Jan. 3, 2000, at 87.

2. Elizabeth Lesly Stevens, *Mouse•ke•fear*, BRILL'S CONTENT, Dec. 1998/Jan. 1999, at 95 (quoting Eisner's interview on National Public Radio's *Fresh Air*, Sept. 29, 1998).

Murrow; we are not even William Randolph Hearst or Joseph Pulitzer; we are General Electric and Walt Disney, selling ovens, cartoons, and, oh yes, the news. And as we buy and sell each other, we become bigger, wealthier, more powerful, and, ultimately, more corrupt. In our struggle to cling to our audience, we eschew hard news, wallow in feel-good features, become boosters for local government, and betray the public. No wonder they hate us.

This essay is a personal inquiry into the nature of media technology, law, and ethics in an era marked by the convergence of media that have been largely separate—print, broadcast, cable, satellite, and the Internet—and by the consolidation of ownership in all of these media.³ What inventions, practices, and norms must emerge to enable us to take advantage of this vast new information-based world, while preserving such important professional values as diversity, objectivity, reliability, and independence?⁴

Part II of this essay describes my underlying premise that the solution lies partly in an Internet-based system of documentation and annotation. I argue that the greatest threat to that vision is an unconstitutionally broad reading of copyright law. Part III explores the doctrinal implications of the Copyright and Patent Clause and the First Amendment's penumbral "right to know," both of which are crucial to reducing this threat. Part IV offers concrete examples to demonstrate the practical effect of combining these two constitutional provisions. Finally, Part V suggests that even this creative use of constitutional law will not be enough to protect our values from the exigencies of the modern media market. I argue that we must also take a new look at employment relationships and ethical principles with a view toward ensuring that we carry our highest ideals and aspirations into the new century.

3. Nothing more clearly epitomizes this trend than the proposed acquisition of Time-Warner by America Online, Inc. See America Online, Inc., *Press Release, AOL & Time Warner Will Merge to Create World's First Internet-Age Media & Communications Company* (visited July 11, 2000) <<http://media.web.aol.com/media/search.cfm>>. Another example is the so-called "strategic alliance" between NBC News/MS-NBC and *Washington Post/Newsweek*. See Mike Hoyt, *With 'Strategic Alliances,' the Map Gets Messy*, COLUM. JOURNALISM. REV., Jan./Feb. 2000, at 72.

4. See generally American Society of Newspaper Editors, *Journalism Values Institute* (visited July 11, 2000) <<http://www.asne.org/works/jvi/jviconte.htm>>; JACK FULLER, *NEWS VALUES: IDEAS FOR AN INFORMATION AGE* (1996).

II. INTERNET-BASED SOLUTION

I begin with the assumption that the development of a global, universally accessible Internet offers the best counterweight to the consolidation of mainstream media in the hands of a relatively few multibillion-dollar, multinational corporations.⁵ As long as the infrastructure and architecture of the Internet remain free and open to all,⁶ the technology that allows each person to become a publisher will yield ways of enhancing the diversity of voices when a media oligopoly would homogenize, distort, or even silence them.⁷

Next, imagine a world, not too far in the future, where television news is delivered digitally through a "box" that also carries telephone service and Internet connections.⁸ As the traditional journalist offers her mediated version of the day's news, links to supplementary information and contrasting views are also appearing on the screen—some posted by the underlying media company, others by organizations or individuals that you have chosen to trust.⁹

5. See, e.g., DEAN ALGER, *MEGAMEDIA: HOW GIANT CORPORATIONS DOMINATE MASS MEDIA, DISTORT COMPETITION, AND ENDANGER DEMOCRACY* (1998); Project on Media Ownership, *Welcome to PROMO* (visited July 11, 2000) <<http://www.midwestbookseller.com/guest.html>>. But see Paul Farhi, *How Bad Is Big*, *AM. JOURNALISM REV.*, Dec. 1999, at 29.

6. See, e.g., LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999). "We can build, or architect or code cyberspace to protect values that we believe are fundamental, or we can build, or architect, or code cyberspace to allow those values to disappear." *Id.* at 6. But see David Post, *What Larry Doesn't Get: A Libertarian Response to Code and Other Laws of Cyberspace* (visited July 11, 2000) <<http://www.temple.edu/lawschool/dpost/Code.html>>.

7. In some cases, antitrust law may provide structural safeguards for First Amendment values, although care must be taken lest this become a back door for the kind of government regulation that I argue should be rejected. See, e.g., *Associated Press v. United States*, 326 U.S. 1, 20 (1945) ("Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 657 (1994) ("The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas."). Application of antitrust law to media mergers and acquisitions is beyond the scope of this essay.

8. See generally Don West, *2000 Millenniavision*, *BROADCASTING & CABLE*, Jan. 3, 2000, at 38.

9. By "trust," I do not necessarily mean "agree with," but, rather, "find reliable for the purpose intended." The inventor of the World Wide Web, Tim Berners-Lee, has called trust the greatest prerequisite for a web-like society. "The criteria a person uses to assign trust can range from some belief held by their mother to a statement made by one company about another. The Freedom to choose one's own trust criteria is as important a right as any." TIM BERNERS-LEE, *WEAVING THE WEB* 126 (1999). See also

You watch the news interactively, pausing the digital video signal long enough to read some portion of the original documents, view some hostile commentary, and make up your own mind. The viewer, not the media empire, controls the message.

Documentation and annotation are essential tools for ensuring a diversity of voices and other values that are fundamental to this vision of the new media environment. Documentation, support for the mediated news story posted by the original provider, not only offers additional information but, more importantly, reinforces the consumer's confidence in the validity of the journalist's work product. Many mainstream news broadcasts and newspaper articles already carry the message that additional information is available through the broadcaster's or publisher's web site. The quotation that begins this essay refers to an ABC experiment in precisely this kind of documentation, ultimately in an interactive television environment.¹⁰ Documentation may be a technological challenge, but presents no particular legal problem.

Annotation, on the other hand, includes supporting or contradictory references, endorsement or criticism, posted by a competing news service, an interested individual or organization, or information consumers themselves. Long a staple of Usenet newsgroups, annotation is perhaps the defining feature of the Internet as a medium for mass communication.¹¹ Already, people jump onto the Internet when a major news story is breaking, surfing the web on their personal computers while CNN is blaring from the television set.¹² An interactive media web site might well include online links, discussion boards, or chat rooms that can provide at least the illusion of annotation.¹³

Like documentation, annotation is a mechanism for disseminating information and testing its reliability. But it is a far more powerful tool when, and then precisely because, it comes from diverse sources, beyond the control of "the media." Indeed, critical annotation might be

ESTHER DYSON, *RELEASE 2.0* 251-53 (1997).

10. See Tedesco, *supra* note 1. See also Rachel Alexander, *Take Me Out to the Web Site*, WASH. POST, May 14, 2000, at A1 (describing Internet-enhanced television sports coverage).

11. See generally ED KROL, *THE WHOLE INTERNET* 127-154 (1992).

12. For example, one can get a Serb perspective on events in Kosovo from Media and Publishing Center of Serbian Orthodox Diocese of Raska and Prizen, *Kosovo.com* (visited July 11, 2000) <<http://www.kosovo.com>> or an Albanian perspective from Alb-Net Group, *Kosova Crisis Center* (visited July 11, 2000) <<http://www.alb-net.com/index.htm>>.

13. See, e.g., Tedesco, *supra* note 1.

just the antidote to the gossip, sensationalism, and inaccuracies that audiences complain about so often today. More than self-selected documentation, trusted annotation can instill confidence when the story is right or correct the record in real time.

Annotation could take any number of different forms. I have already mentioned the online links, discussion boards, or chat rooms supplied by the underlying information provider and the simultaneous annotation that occurs when people surf the web to verify or amplify breaking news they see on television or read in the newspapers. Another model for the convergent media environment is exemplified by a growing family of Internet-based software tools variously described as “distributed portals”¹⁴ or “browser assistants.”¹⁵ Among the new products are uTOK,¹⁶ Kenjin,¹⁷ flyswat¹⁸ and ThirdVoice.¹⁹ ThirdVoice was one of the earliest of these tools, and has already undergone one complete makeover.

Originally, ThirdVoice called itself a “free browser companion that allows you to post notes that fuse your own ideas with Web content—adding perspective and stimulating discussion.”²⁰ Once a user downloaded ThirdVoice software, she could post a note to any page on the web. This note, or annotation, could be made visible to all or a select group of ThirdVoice users. Such postings did not physically alter the target web site, at least not as stored in its host server, and they remained invisible to the visitor who was not equipped with ThirdVoice software.

Modest experimentation with ThirdVoice revealed somewhat finicky software and relatively few annotations; revenue opportunities were not obvious. Today, the software is less finicky, the number of annotations is practically limitless, and revenue opportunities abound.²¹

14. Bob Metcalfe, *Bob Metcalfe's Report from DEMO*, INFOWORLD.COM (visited July 11, 2000) <<http://www.infoworld.com/articles/op/xml/00/02/09/000209opmetcalfeflash.xml>>.

15. Jennifer Tanaka, *The Web's Best Friends*, NEWSWEEK, Mar. 13, 2000, at 70-72.

16. See uTOK, Inc., *Welcome to uTOK!* (visited July 11, 2000) <<http://www.uTOK.com>>.

17. See Autonomy Systems Limited, Inc., *Kenjin* (visited July 11, 2000) <<http://www.kenjin.com/kenjin.html>>.

18. See Flyswat, Inc., *Flyswat—Answers on the Fly* (visited July 11, 2000) <<http://www.flyswat.com/>>.

19. See ThirdVoice, Inc., *ThirdVoice* (visited July 11, 2000) <<http://www.thirdvoice.com/>>.

20. From a previous version of <<http://www.thirdvoice.com>>, no longer available.

21. ThirdVoice's “partners” include, among others, *U.S. News and World Report* and investment advisers Motley Fool. See ThirdVoice, Inc., *Leading Internet and Media*

Now, when Third Voice users surf the web with the software turned on, they will see their favorite web pages annotated with bright orange lines underscoring key words. Clicking on one of those underscored words—typically companies, places, celebrities, etc.—will shrink the underlying web page and launch a smaller window to the right of the first. That window contains a variety of predetermined links that lead to more information about the key word. It may also contain messages posted by other Third Voice users who have visited the underlying page. Users are encouraged to create their own “active words,” instantly annotated with a built-in search engine and, if desired, the user’s own commentary.

Once perfected and popularized by ThirdVoice or some other company, the technology could be built into every browser and transform the way the web is used.²² One can easily imagine a version of this kind of technology being used to challenge the accuracy of news stories, the integrity of political campaign advertising, or the quality of entertainment programming. One can imagine postings that link to supporting or supplementary data, in real time or after careful deliberation, by experts, stakeholders, or ordinary people. One can imagine an entire industry dedicated to facilitating these annotations.

And one can easily imagine a copyright infringement lawsuit. Even though the underlying web page is not altered, the annotated web page, as it appears on the user’s computer screen, could arguably be considered an infringing derivative work.²³ The annotations have no meaningful existence absent the underlying web page, whose owner has no control over the appearance of those orange hyperlinks on the visitor’s computer screen, nor over the information and opinion they invoke.

Companies Partner with ThirdVoice to Extend Brands and Connect with Consumers Online (visited July 11, 2000) <http://www.thirdvoice.com/about/030100_release.htm>.

22. See Michael J. Miller, *Whatever Happened to Just Plain Browsing?*, PC MAGAZINE (visited July 11, 2000) <<http://www.zdnet.com/pcmag/stories/opinions/0,7802,2447598,00.html>>.

23. This hypothetical was posed in Stacey L. Dogan, *Copyright in Cyberspace: Exclusive Rights and Infringement*, in *LEARNING CYBERLAW IN CYBERSPACE* (Lydia Pallas Loren ed., 1999), available at <<http://www.cyberspacelaw.org>>.

A “derivative work” is a work based upon one or more preexisting works, such as a translation, . . . abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work.”

17 U.S.C. § 101 (Supp. 1998). “Subject to certain limitations, the owner of the copyright in underlying work has the exclusive right to prepare or authorize the preparation of derivative works based on the copyrighted work.” 17 U.S.C. § 106(2) (1994 & Supp. 1998).

ThirdVoice has not yet been legally challenged, but some Web masters have already expressed irritation with the software in postings linked to the ThirdVoice home page.²⁴ Under conventional copyright analysis, a

24. A conversation that appeared on the ThirdVoice site under the heading "Great software, but....," but is no longer available, demonstrated this point:

Initial Posting: "I love the innovation behind this software, and think it's great that feedback can come so easily. However, without a governing procedure for this software, it can become quite annoying to the webmaster. Perhaps if the client side application would only show notes if the web site didn't have something banning them?"

Derek: "That would be GREAT! I do like the idea of these notes, and if webmasters had at least some control over what shows up at their page, these notes could be embraced by the who[le] internet community!"

Joshua: "Webmasters do not have the right to delete those notes. If Webmasters were able to do it, well, I can predict that more than 90% of the notes on the webpage will be deleted. Furthermore, ThirdVoice merely adds another level of webpage that allows us as consumers or human beings who are born with the right to freedom of speech to express our opinions. If I am not mistaken, you must be the webmasters of many webpages, right? Question: Can anyone tell me to shut up? Your answer will be 'can' if you agree that webmasters should have the right to delete our notes."

Derek: "I don't want to be able to delete notes (unless they are blatant flames . . .). Never happened on my message boards, but I wouldn't be surprised if some flamer decided it'd be cool to go talk trash about every site he could. That wasn't what I was meaning, anyway. I was talking about having control over having the notes appear on your pages at all. Maybe just a snippet of javascript that would not let ThirdVoice post notes on the site. That is not taking away your freedom of speech, because the content of the page is MINE. I own it, in a way, when people post notes on my page, they are taking away my freedom of speech, or press—whichever one it is for the web. Anyway, since I doubt ThirdVoice will ever do anything, this is kind of pointless . . ."

Argentum: "Actually, since the notes aren't on your page, you have no control over them, either legally, or otherwise. They are kept on ThirdVoice's server, I'd assume, so you have no choice as to what is put on that server. (It doesn't belong to you.)"

Joshua: "The court will decide whether ThirdVoice has trespassed webmasters' territory. What I mean is that, whenever we as ThirdVoice users want to read the notes posted by other ThirdVoice users, we have to retrieve them from the server of thirdvoice.com. Have we or other ThirdVoice users really posted notes or trespassed the territory of webmasters? It seems to me that we just write some notes and paste it on a wall that does not belong to the webmasters. Take for example, if I am against any policy of the government and decide to take to the street, I put my opinions on a placard. Does this placard belong to the one I am protesting against? One day, courts will decide on that."

Derek: "But if you make the notes show on the page, you are then editing

hypothetical Third Voice infringement case would be a close call.²⁵

I argue that it should not be a close call at all, that the Copyright and Patent Clause, coupled with the First Amendment right to know, requires the courts to read more narrowly the economic rights of the owner of a web site that has been annotated,²⁶ or to read more expansively the fair use rights of the annotators, the visitors, and those who make annotation

my page. There are a bunch of red squares [the first version of ThirdVoice used red 'twisties' to link to comments] on my site. I don't want that, would you? I'm not arguing against the notes being next to the page, in the left side of your browser window. What I'm against is when the red squares are added to the page. There are design elements that could be really messed with! I like the idea of this community of people who can make a comment about sites. I use message boards for that reason! I just don't want my page to look any different than the way I designed it."

Joshua: "You won't discover the difference if you are not using ThirdVoice. Disable or uninstall ThirdVoice if you think that the notes posted by ThirdVoice users are really annoying to your eyes. Likewise, if other users of ThirdVoice find the note markers are annoying, they will disable or uninstall ThirdVoice too. So, do you have any better suggestions to tell TV users that other TV users have posted their notes on a webpage? Shall we replace the note markers with American flags?"

Derek: "I'm done with this conversation. I don't have time to argue about this."

Original HTML on file with author.

25. See *Twin Peaks Prod. v. Publications Int'l, Ltd.*, 996 F.2d 1366 (2d Cir. 1993) (holding that a "guide" to the television series *Twin Peaks*, which summarized the original teleplays and added commentary, a trivia quiz, and biographical and other information, was an infringing derivative work). There are no definitive holdings that address web pages, but the computer-based video game industry has provided two Ninth Circuit opinions that demonstrate just how uncertain this law can be. Compare *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965 (9th Cir. 1992) (holding that a device that could alter some of the features of a Nintendo game without permanently altering the computer code in the game cartridge was not a derivative work and did not violate the copyright held by Nintendo) with *Micro Star v. FormGen, Inc.*, 154 F.3d 1107 (9th Cir. 1998) (holding that software that could alter some of the features of a FormGen game without permanently altering the original code was a derivative work that likely infringed FormGen's copyright). This article does not attempt to determine whether ThirdVoice infringes or, more likely, contributes to the infringement of underlying web sites when users visit the site with the software "turned on." See *infra* note 84. It is enough to suggest that some courts may so hold.

26. In addition to the right to create a derivative work, the Copyright Act provides copyright owners with exclusive rights to reproduce, distribute, publicly perform and display the works in which they own the copyright. 17 U.S.C. § 106(2) (1994 & Supp. 1998).

possible.²⁷ This kind of technology is vital to restoring the balance between public access to information and the private interests of information providers in an era of convergence and consolidation. First, though, I explore the evidence for the proposition that Congress does not have the authority to grant copyrights that constrict, rather than expand, the free flow of information, and that courts have the obligation to enforce that principle.

III. IMPLICATIONS OF THE COPYRIGHT AND PATENT CLAUSE AND THE "RIGHT TO KNOW"

The search for a doctrinal justification for the above assertion logically begins with the Constitution itself, particularly its Copyright and Patent Clause: "Congress shall have the power to promote the progress of science²⁸ and useful arts, by securing for limited times to authors and inventors the exclusive right to use their respective writings and discoveries."²⁹ At first blush, the elucidation of purpose in this clause should provide a solid basis for this argument. According to Professor Pollack, however, neither the text, nor its history, nor the interpretive case law compels such an outcome.³⁰ Coupled with the First Amendment, and especially its penumbral right to know, however, this clause may require the government to tailor its grant of copyright protection to promote the free flow of information and to withhold such protection when the flow of information would be unduly restricted.³¹

27. Fair use is a limitation on the exclusive rights of copyright owners. "[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright." 17 U.S.C. § 107 (1994). The act contains a nonexclusive list of factors to be considered in determining whether a use is fair, including the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use upon the potential market for or value of the original copyrighted work. See *id.* See also discussion *infra* Part III.

28. By "science," the framers doubtless had in mind the Latin "scientia," or knowledge. See William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 910 n.18 (1997).

29. U.S. CONST. art. I, § 8, cl. 8.

30. See Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47, 65-66 (1999).

31. See *id.* at 72. Professor Pollack's article specifically concerns legislation introduced under Congress's Commerce Clause authority, but there is no reason why

A. Copyright and Patent Clause

There is, indeed, precious little evidence that the Copyright and Patent Clause itself goes beyond a mere statement of policy to serve as an enforceable limitation on Congress's power to grant copyrights.³² The textual argument for imposing such a limitation would point to the first clause, "[t]o promote the [p]rogress of [s]cience and the useful [a]rts,"³³ as the singular enumerated power given to Congress. This would comport with the structure of the rest of Article I, section 8, which empowers Congress "[t]o lay and collect taxes,"³⁴ "[t]o borrow money,"³⁵ "[t]o regulate commerce,"³⁶ and so on. The rest of the clause, "by securing for limited times . . .,"³⁷ i.e., by enacting copyright and patent laws, merely describes how this should be accomplished. Therefore, the argument might go, promotion of knowledge is the only legitimate purpose of copyright law, and any interpretation of copyright law that, on balance, diminishes the store of public knowledge must be invalid.

When one looks at the meager history of the clause, however, one finds that the first version of this clause proposed to the Constitutional Convention read, "To secure to literary authors their copy rights for a limited time."³⁸ The language was changed on the recommendation of the Committee of Eleven without further debate.³⁹ One could argue that the final version repre-

the essence of her analysis would not apply equally to legislation introduced directly under the authority of the Copyright and Patent Clause. She writes:

I posit a right to know in the form of a duty by the government not to block access to information. Congress does not have the power to use the Commerce Clause to create a right to exclude others from information (i.e., a quasi-property right) if that right (i) deters the progress of science and the useful arts, (ii) limits the freedom of the press, (iii) limits the right to petition the government, or (iv) limits the freedom of discussion through speech. The mutually reinforcing Intellectual Property Clause and First Amendment may not be bypassed merely by stating that a statute is enacted pursuant to the Commerce Clause.

Id.

32. For a more complete discussion, see Patry, *supra* note 28, at 910-14.

33. U.S. CONST. art. I, § 8, cl. 8.

34. U.S. CONST. art. I, § 8, cl. 1.

35. U.S. CONST. art. I, § 8, cl. 2.

36. U.S. CONST. art. I, § 8, cl. 3.

37. U.S. CONST. art. I, § 8, cl. 8.

38. See JAMES MADISON, RECORDS OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787 at 563 (Charles C. Tansill ed., 1989).

39. See *id.* at 666-67.

sented a rethinking of that mandate, or merely cosmetics borrowed from the Statute of Anne.⁴⁰ Neither the Statute of Anne nor the United States Constitution, however, enshrines "the encouragement of learning" or the "promotion of the progress of science" as the sole justification for awarding copyrights. The language of reward is everywhere as prominent as the language of incentive,⁴¹ and Madison himself saw these private and public interests as coincident.⁴²

Of course, Madison was selling a product. Lord Macaulay would later view these interests, not as coincident, but as existing in rough equilibrium. Copyright was the least objectionable way to remunerate authors, certainly as compared to patronage, in order to ensure a supply of good books. "For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good."⁴³ The American case of *Wheaton v. Peters*,⁴⁴ decided a few years before Macaulay's speech, seems also to emphasize the public

40. See Act 8 Anne, c. 19 (1710) (Eng.). Unquestionably the precursor of American copyright law, the statute was subtitled, "An Act for the encouragement of learning, by vesting copies of printed books in the authors or purchasers of such copies, during the times therein mentioned." See J.A.L. STERLING, *WORLD COPYRIGHT LAW* 9-10 (1998).

41. Indeed, the preamble to the Statute of Anne reverses the emphasis of its subtitle:

Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing . . . books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families; for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books; may it . . . be enacted . . .

Id. at 996. Justice Story was of similar mind as he lamented the impoverishment of authors while the "world has derived immense wealth from their labors":

It is, indeed, but a poor reward, to secure to authors and inventors, for a limited period only, an exclusive title to that, which is, in the noblest sense, their own property; and to require it ever afterwards to be dedicated to the public. But, such as the provision is, it is impossible to doubt its justice, or its policy, so far as it aims at their protection and encouragement.

JOSEPH STORY, *A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES* 118 (1840).

42. "The utility of this [copyright and patent] power will scarcely be questioned The public good fully coincides . . . with the claims of individuals." THE FEDERALIST NO. 43, at 271 (James Madison) (Clinton Rossiter ed., 1961).

43. Lord Macaulay, *Speech Delivered in the House of Commons*, 3 Feb. 1841, in PROSE AND POETRY 731, 733-37 (G. Young ed., 1967).

44. 33 U.S. (8 Pet.) 591 (1834).

over the private interest by confining the plaintiff's rights to the terms of the federal copyright statute.⁴⁵

Later cases support that reading. "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors," Chief Justice Hughes wrote in 1931.⁴⁶ "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration," wrote Justice Douglas in 1947.⁴⁷ "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"⁴⁸

But even if the foregoing establishes the priority of the public interest in incentive over the private interest in reward, it does not bring us to a self-executing Constitutional mandate. Professor Jaszi suggests that

legislative and judicial attempts to apply this rhetorically satisfying formula to actual cases immediately confront questions that defy empirical analysis: How much of a reward is appropriate in exchange for a given amount of public availability? How long should a copyright endure? And how intense should copyright protection be if it is to provide adequate incentive without producing unnecessary restrictions on access?⁴⁹

Nowhere is the inadequacy of the Copyright and Patent Clause as a guide to policy making more apparent than in Justice O'Connor's oft-quoted assertion that the "Framers intended copyright itself to be an engine of free expression."⁵⁰ While this statement might seem merely a continuation of the rhetoric cited above, it is instead the predicate for what amounts to an assertion that statutory construction and not constitutional analysis, that Congress and not the Supreme Court, will determine the scope of

45. See LAWRENCE M. FRIEDMAN, HISTORY OF AMERICAN LAW 257 (1985).

46. Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1931).

47. United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1947).

48. Mazer v. Stein, 347 U.S. 201, 219 (1954).

49. Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 464.

50. Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 558 (1985).

any limitation the Clause imposes.⁵¹ In the end, we are left with Professor Pollack's insight that the constitutional mandate for reconsidering copyright protections in the digital era lies in the nexus of the Copyright and Patent Clause and the First Amendment's "right to know."⁵²

B. The First Amendment Right to Know

Unfortunately, the right to know is itself problematic. Some of the nation's finest First Amendment scholars have found in the right to know an invitation to direct governmental regulation to preserve the diversity of voices and other values threatened by consolidation in the media market.⁵³ The touchstone for these scholars⁵⁴ is the 1969 case of *Red Lion Broadcasting Co. v. FCC*.⁵⁵ In that case, the Supreme Court upheld the constitutionality of the FCC's fairness doctrine, specifically its requirement that broadcasters provide free air time for reply to anyone who was personally attacked during the discussion of a public controversy.⁵⁶ Justice White's emphasis in *Red Lion* on the "paramount" right of the viewers and listeners became the mantra of those advocating government intervention in the arena of free speech.⁵⁷

51. Justice O'Connor continues:

In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright.

Id. at 560.

52. See generally Pollack, *supra* note 30 and accompanying text.

53. See, e.g., OWEN FISS, *THE IRONY OF FREE SPEECH* (1996); LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* (1991); Cass Sunstein, *The First Amendment in Cyberspace*, 104 *YALE L.J.* 1757 (1995). See also J.M. Balkin, *Frontiers of Legal Thought II: The New First Amendment: Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 *DUKE L.J.* 375, 395; JAY JENSEN, *LIBERALISM, DEMOCRACY AND THE MASS MEDIA* (1959).

54. They are variously referred to as legal realists, neoliberals, post-modernists, and civic republicans.

55. 395 U.S. 367 (1969).

56. See *id.* at 390.

57. *Id.*

Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It

Because this paramount right to know belongs not only to individuals, but to the public at large, it can (or, perhaps, must) be vindicated by government intervention when private interests threaten to stifle the free flow of information. And that, or so the theory goes, is precisely what is happening today. Through mergers and acquisitions, private media companies have so consolidated their hold on the mainstream media that they have effectively frozen out dissenting or unorthodox voices and compromised editorial integrity in the quest for the almighty dollar.

Journalists feel the impact of consolidation even earlier than the general public. When we see such phenomena as *60 Minutes*' spiking an important story at the behest of merger-minded corporate lawyers,⁵⁸ or the *Los Angeles Times*' splitting ad revenues with the subject of a major feature story—without informing its reporters⁵⁹—we all die a little inside. At the local level, the used car scam exposé that never got printed has become a cliché, and the evening "news" story that promotes network entertainment programming is now *de rigueur*. We don't need to be told that convergence and consolidation jeopardizes our most deeply held values.

Even in the new media arena, we are beginning to see the impact of convergence and consolidation. Last year, AOL championed a Portland, Oregon, ordinance requiring AT&T (which had previously acquired cable giant TCI) to open its cable-based platform for broad-band Internet access to all Internet service providers.⁶⁰ This year, AOL—having become a prospec-

is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not be constitutionally abridged either by Congress or by the FCC.

Id. (internal citations omitted).

58. See, e.g., Jonathan Alter, *Blowing Smoke at CBS*, NEWSWEEK, Dec. 4, 1995, at 45; Howard Kurtz, *Details of Unaired Tobacco Story Emerge*, WASH. POST, Nov. 18, 1995, at A3.

59. See, e.g., William Prochnau, *Down and Out in L.A.*, AM. JOURNALISM REV., Jan./Feb. 2000, at 58.

60. See generally Brief of Amicus Curiae The openNET Coalition, AT&T Corp. v. City of Portland (9th Cir. 1999) (No. 99-35609).

tive cable giant itself through the acquisition of Time-Warner—called off its lobbyists in Maryland and Virginia, where open-access legislation had been introduced.⁶¹ Even when the two firms announced a “memorandum of understanding” pledging to allow open access,⁶² legislators conducting hearings on the merger expressed serious misgivings.⁶³

Yet we know instinctively that government intervention is not the solution. Our blood boils when we learn that the government has bribed our corporate bosses to insert anti-drug messages into entertainment scripts and thus “buy down” low-cost public interest advertising commitments—commitments that would not have been made in the first place but for vestigial government regulation of broadcasting.⁶⁴ “Could the government pay the networks to slip idle comments into *ER* about the virtues of a particular health care policy?”⁶⁵ First *ER*, then *20/20*, then the *Evening News*?

That instinct tends to make us more comfortable with another group of scholars who sees government regulation as antithetical to the essential autonomy of the press.⁶⁶ These scholars find

61. See Peter S. Goodman and Craig Timberg, *AOL Ends Its Push for Open Access*, WASH. POST, Feb. 12, 2000, at A1.

62. See America Online, Inc., *AOL & Time Warner Announce Framework for Agreements to Offer AOL Service & Other ISPs on Time Warner Broadband Cable Systems* (visited July 12, 2000) <<http://media.web.aol.com>>.

63. See Ariana Eunjung Cha & Peter S. Goodman, *AOL, Time Warner Try to Allay Fears*, WASH. POST, Mar. 1, 2000, at E1. “‘The most significant danger to the promise of the Internet is the possibility that a single company or a handful of companies control who can access or develop applications and content,’ said committee Chairman Orrin G. Hatch (R-Utah).” *Id.* Those misgivings were only intensified recently when Time-Warner, in a contract dispute with Disney, briefly refused to carry ABC broadcast signals on several of its cable outlets. See Steve McClellan & John M Higgins, *Disney Triumphant*, BROADCASTING & CABLE, May 8, 2000, at 8.

64. See Daniel Forbes, *Prime Time Propaganda* SALON (visited July 12, 2000) <<http://www.salon.com/news/feature/2000/01/13/drugs/index.html>>. See also Charles Krauthammer, *A Network Sellout . . .*, WASH. POST, Jan. 21, 2000, at A29.

65. See House Subcomm. on Telecommunications, Trade and Consumer Protection, *The White House, the Networks and TV Programming, Oversight Hearing, Prepared Statement of Robert Corn-Revere* (visited July 12, 2000) <<http://com-notes.house.gov>>.

66. See, e.g., LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION* (1991); C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989). See also Thomas G. Krattenmaker & Lucas A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719 (1995); Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193 (1996); Steven Helle, *Essay on the Bill of Rights: Whither the Public's Right (Not) to Know? Milton, Malls, and Multicultural Speech*, 1991 U. ILL. L. REV. 1077.

support in the Supreme Court's rapid retreat from *Red Lion*, a retreat that culminated in *Miami Herald Publishing Co. v. Tornillo*.⁶⁷ In that case, the Supreme Court struck down a Florida statute requiring newspapers to provide a right of reply that was constitutionally indistinguishable from the fairness doctrine upheld in *Red Lion*, except that the context was newspapers, rather than television. Because these scholars accept the premise that a right to know necessarily invites government regulation, however, they tend to reject or severely limit the concept.⁶⁸

My own survey of the cases suggests that the Supreme Court has repeatedly recognized the existence of the right to know, even while leaving its scope and limits fuzzy. Any number of cases recognize at least the limited right to prevent government interference with a willing speaker's liberty,⁶⁹ but only *Red Lion*

67. 418 U.S. 241 (1974).

68. See, e.g., POWE, *supra* note 66, at 257 ("The right to know is not a right; it's a slogan. Furthermore, it is a dangerous slogan, because it instantly invites inquiry into the actual performance of a newspaper. Instead of giving the press more rights, it runs the risk of denying the press its most sacred possession, its autonomy."); BAKER, *supra* note 66, at 67.

69. See, e.g., *First Nat. Bank v. Bellotti*, 435 U.S. 765, 791 n.31 (1978) (striking down a state law limiting corporate contributions to referendum campaigns, asserting that the "First Amendment rejects the 'highly paternalistic' approach of statutes . . . which restrict what the people may hear"); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (striking down limits on campaign spending on the ground that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"); *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) (per curiam) (striking down regulations governing the censorship of prisoner correspondence, holding that both sender and recipient derive "a protection against unjustified governmental interference with the intended communication" from the First and Fourteenth Amendments); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969); *Stanley v. Georgia*, 394 U.S. 557 (1969) (striking down a Georgia law that imposed criminal penalties for mere possession of obscene materials); *Marsh v. Alabama*, 326 U.S. 501, 508-09 (1946) (reversing the conviction of a Jehovah's Witness for distributing literature on the sidewalks of a company-owned town, on the ground that the First and Fourteenth Amendments prohibit censorship of the information the residents of the town need to be properly informed, good citizens); *Thomas v. Collins*, 323 U.S. 516, 534 (1945) (reversing the conviction of a union organizer for speaking to a group of workers without the required state license, on grounds that the license requirement imposed an unconstitutional "restriction upon Thomas's right to speak and the rights of the workers to hear what he had to say."); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (upholding the right of individual householders to receive advertisements distributed door to door); *Pierce v. Society of Sisters of Holy Names*, 268 U.S. 510 (1925) (holding that the liberty interest protects the right of parents to educate their children in private schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that the right to receive information, including foreign language training, is a protected "liberty interest" under the Due Process Clause). But see *Zemel v. Rusk*, 381 U.S. 1, 16 (1965) (rejecting a "right to know" argument to

and other broadcasting cases⁷⁰ hold that this right to know invites government intervention to suppress the right of some to speak in order that other voices may be heard.⁷¹

Significantly, three important cases find a right to know that is independent of anyone's right to speak. In *Lamont v. Postmaster General*,⁷² the Supreme Court appeared to vindicate a First Amendment right to receive information without regard to the rights of the speaker—unless one stretches the First Amendment right to speak to the government of the People's Republic of China. Nor were speakers' rights considered in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,⁷³ although willing First Amendment speakers were obviously waiting in the wings.⁷⁴ Finally, in *Richmond Newspapers v. Virginia*,⁷⁵ the court found a right to receive information despite unwilling private and government speakers.⁷⁶ Thus, the notion that a First Amendment right to know exists independently of the right to speak is supported by more than obiter dicta.

That is important because, if there is no independent right to know, then the right to know is limited in its effect to preventing government interference with a willing speaker.⁷⁷ But if the right

challenge restrictions on travel to Cuba).

70. See, e.g., *CBS v. Democratic Nat. Comm.*, 412 U.S. 94 (1973) (holding that the First Amendment did not compel broadcasters to take paid editorial advertising, but apparently leaving open the possibility that the First Amendment would not prevent the FCC from imposing such a requirement in the public interest).

71. In fact, several cases explicitly contradict this proposition. See *Board of Ed. v. Pico*, 457 U.S. 853, 867 (1982) (rejecting a school district's unfettered discretion to remove books from school libraries, citing the "right to receive ideas [as] a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press and political freedom"); *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, 9-10 (1986) (vacating a Commission order requiring a utility company to disseminate the literature of a ratepayers' organization, relying in part on *Tornillo's* proscription against curtailing one speaker's right to speak in favor of another's).

72. 381 U.S. 301 (1965) (striking down a federal statute requiring a request in writing as a prerequisite to the delivery of unsealed mail from abroad containing Communist propaganda material).

73. 425 U.S. 748 (1976) (striking down Virginia's ban on advertising the prices of prescription drugs).

74. See *id.* at 756 n.14. The putative "willing speakers" were the national or regional discount drugstores that wanted to advertise prescription drug prices in Virginia. *Id.*

75. 448 U.S. 555 (1980) (affirming the right of the public to attend criminal trials).

76. See *id.* at 559. Originally, the defendant filed the motion to exclude the public from the courtroom, the prosecution did not oppose it, and the judge approved it. See *id.*

77. See *Baker*, *supra* note 66, at 67-69.

to know is enforceable without reference to any speaker, then it can provide a powerful tool for protecting the public interest in the free flow of information by preventing the government from granting intellectual property rights that would have the opposite effect.

This proposition flows from the work of a new generation of scholars who were prompted to take a hard look at the relationship between the First Amendment and intellectual property rights by the legislative over-reaching of corporate copyright owners eager to protect their economic interests in the digital environment.⁷⁸ The targets of these scholars include the proposed Uniform Commercial Code Article 2B, now circulating among state legislatures as the Uniform Computer Information Transactions Act ("UCITA");⁷⁹ the Digital Millennium Copyright Act;⁸⁰ and the proposed Collections of Information Antipiracy Act ("CIAA").⁸¹ In each case, traditional First Amendment "safety

78. See, e.g., Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519 (1999); Pollack, *supra* note 30.

79. See National Conference of Commissioners of Uniform State Laws, *Uniform Computer Information Transaction Act* (visited July 12, 2000) <<http://www.law.upenn.edu/bll/ulc/ucita/cita10st.htm>>. See also Carol A. Kunze, *UCITA Online* (visited July 12, 2000) <<http://www.ucitaonline.com>>.

80. 17 U.S.C. § 1201-1205 (Supp. 1998) (prohibiting the circumvention of technological measures designed to prevent access to or infringement of copyrighted material or tampering with copyright management information).

81. In 1998, the House of Representatives passed the CIAA, which was then introduced, but died, in the Senate. There are presently two legislative proposals for database protection in the 106th Congress: H.R. 354, Collections of Information Antipiracy Act, sponsored by Rep. Howard Coble (R-N.C.); and H.R. 1858, the Consumer and Investor Access to Information Act, sponsored by Rep. Tom Bliley (R-Va.). Both were awaiting floor action at this writing. See Thomas, Legislative Information on the Internet, *H.R. 354* (visited July 12, 2000) <<http://rs9.loc.gov>>; Thomas, Legislative Information on the Internet, *H.R. 1858* (visited July 12, 2000) <<http://rs9.loc.gov>>.

valves"—including the first sale doctrine⁸² and fair use⁸³—have been weakened or eliminated by copyright owners who recognize and fear the power of the Internet to facilitate copying and distribution of protected information products.

Because the first sale doctrine and fair use are mechanisms for preserving the public interest in works of authorship against the private interests of the copyright owners, their diminishment implicates both the Copyright Clause's grant of authority for Congress to "promote the progress of science" and the First Amendment right to know. These constitutional provisions, taken together, require that the courts narrowly construe the Copyright Clause's grant of authority and subject any expansion of that authority to heightened scrutiny. Any grant of copyright authority that constricts the free flow of information to the public must be struck down unless it is narrowly tailored to serve a compelling governmental interest. Alternatively, judicial remedies may be fashioned to protect the public's interest while avoiding direct constitutional adjudication. Such remedies might include an expansive reading of the fair use defense, or a narrow reading of such affirmative rights as the right to copy, distribute, or make derivative works. In Part IV, we will consider what this means for preserving First Amendment values when they are most seriously threatened by protected First Amendment actors: the media owners themselves.

IV. CONCRETE EXAMPLES

To see how this principle might work in practice, consider the pending case of *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry*.⁸⁴ In that case, the United States District Court for the District of Utah has granted a preliminary injunction barring the

82. See 17 U.S.C. § 109(a) (1994). "Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." *Id.* The "first sale doctrine" enables the purchaser of a newspaper, for example, to give it to a friend, place it in a library, or post clippings on a bulletin board. See *id.* An online distributor of that same newspaper could deprive the purchaser of any such right by selling read-only access—and potentially inhibit the dissemination of information.

83. See 17 U.S.C. § 107 (1994). See also *supra* note 27.

84. 75 F. Supp. 2d 1290 (D. Utah 1999).

defendant from linking to web sites that contained allegedly infringing copies of a religious book published by the Church of Jesus Christ of Latter-day Saints.⁸⁵ The plaintiff owns the copyright in the book, while the defendant operates a ministry—and web site—dedicated to “document[ing] problems with the claims of Mormonism and compar[ing] LDS doctrines with Christianity.”⁸⁶

The court held that plaintiff was likely to establish at trial that certain unidentified defendants, unaffiliated with the Utah Lighthouse Ministry (“ULM”), directly infringed plaintiff’s copyright by posting portions of the *Church Handbook of Instructions* on three web sites.⁸⁷ Finding that the plaintiff had not shown that ULM contributed to *that* infringement,⁸⁸ the court nevertheless held that—by linking to the infringing sites and encouraging visitors to use those links—ULM might well be liable for contributing to infringement by any third parties who might browse the infringing web sites.⁸⁹

The court gave short shrift to defendants’ arguments that their First Amendment rights would be infringed by a preliminary injunction. “The First Amendment does not give defendants the right to infringe on legally recognized rights under the copyright law,”⁹⁰ the court said. “The court, in fashioning the scope of injunctive relief, is aware of and will protect the defendants’ First Amendment rights.”⁹¹ The court’s entire analysis under the “public interest” prong of the injunctive relief test consisted of a single sentence: “Finally, it is in the public’s interest to protect the copyright laws and the interests of copyright holders.”⁹²

85. See David Carney, *Tech Law Journal, Summary of Intellectual Reserve v. Utah Lighthouse Ministries (LDS Copyright Case)* (last modified Dec. 29, 1999) <<http://www.techlawjournal.com/courts/llds/Default.htm>>.

86. See Utah Lighthouse Ministry, *Welcome to the Official Website of Utah Lighthouse Ministry* (visited July 12, 2000) <<http://www.utlm.org>>.

87. See *Utah Lighthouse*, 75 F. Supp. 2d at 1293.

88. See *id.* at 1294.

89. See *id.* at 1294-95. Any visit to the infringing material would constitute a direct infringement, the court held, because the material would be copied into the visitors’ random access memory. See *id.* See also *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993). In the case of *ThirdVoice*, *supra* text accompanying notes 15-26, the derivative work would be created (if at all) in the visitor’s random access memory. *ThirdVoice* would simply facilitate that process.

90. *Id.* at 1295.

91. 75 F. Supp. 2d at 1295.

92. *Id.*

Although ULM had not yet raised the affirmative defense of fair use, another recent decision offers little encouragement. In *Los Angeles Times v. Free Republic*,⁹³ the United States District Court for the Central District of California granted plaintiffs' motion for summary adjudication rejecting defendants' fair use defense. Plaintiffs included the Los Angeles Times and The Washington Post Company; defendant Free Republic is a politically conservative, web-based opinion forum on which registered visitors post news articles and comment on them.⁹⁴

With respect to the first fair use factor, the purpose and character of the use, the court found nothing transformative in the added comments of visitors to the site⁹⁵ and gave little weight to defendants' argument that the site's primary purpose was "to facilitate the discussion, criticism and comment of the registered users" that follows the posting.⁹⁶ Instead, the court concluded that the site was "commercial"—regardless of Free Republic's profit or nonprofit status or motives—because "[t]he fact that the articles are posted on the web page allows visitors to review archived material without paying the fee they would be charged if they visited plaintiffs' web sites."⁹⁷

The court conceded that the second fair use factor—the nature of the copyrighted work—cut in favor of the defendants when the works are news articles.⁹⁸ But it ruled that the third factor—the amount and substantiality of the use—favored the plaintiffs when entire articles were copied.⁹⁹ The court declined to accept defendants' argument that full-text copying was essential to the purpose of the use, finding it merely conclusory.¹⁰⁰ Finally, the court found that "the availability of the papers' news articles in full text on the Free Republic site fulfills at least to some extent the demand for the original works and diminishes plaintiffs' ability to sell or license their articles."¹⁰¹ Thus, despite defen-

93. No. 98-7840 (C.D. Cal. Nov. 9, 1999).

94. See *id.*, slip op. at 1. See also Benkler, *supra* note 78 at 357; Free Republic, L.L.C., www.FreeRepublic.com *Conservative News Forum* (visited July 12, 2000) <<http://www.freerepublic.com/>>.

95. See *Free Republic*, No. 98-7840, slip op. at 12.

96. *Id.* at 16-19.

97. *Id.* at 19.

98. See *id.* at 21.

99. See *id.* at 24.

100. See *id.*

101. *Free Republic*, No. 98-7840, slip op. at 26.

dants' claim of a positive impact on plaintiffs' web site "hits" and corresponding advertising revenue, the court found the fourth factor—potential market impact—favored the plaintiffs.

In considering defendants' independent First Amendment argument, the court held that even a generous interpretation of defendants' rights would be defeated by the fact that users could post summaries of or links to the copyrighted articles.¹⁰² "While defendants and users of freerepublic.com might find these options less ideal than being able to copy entire news articles verbatim, their speech is in no way restricted by denying them the ability to infringe on plaintiffs' exclusive rights in the copyrighted news articles."¹⁰³

Neither case deviates from traditional copyright analysis, and, while one might differ with one or more of either judge's conclusions, there is no apparent abuse of discretion. Yet both decisions have the effect of negating or sharply reducing the endorsement and annotation functions that will become vital to realizing the informing and educating potential of the new medium I predicted above. A heavier First Amendment weight on the scale would have tipped both decisions in favor of the public interest.

V. MEDIA PROFESSIONALISM

Reinterpreting copyright law to narrow the definition of derivative works, or broaden the scope of fair use, will not solve all the problems of consolidation and convergence. For example, it will not improve the quality of the underlying news product. The important but sensitive news story that has been spiked or sanitized because of the government's potential embarrassment or the publisher's financial interests cannot become the predicate for further analysis and comment.¹⁰⁴

102. See *id.* at 28 (citing MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, 1.10[D] (1999), for the proposition that the First Amendment allows otherwise infringing copies where "copying of the expression is essential effectively to convey the idea expressed").

103. *Free Republic*, No. 98-7840, slip op. at 28.

104. As this essay was being finalized for publication, the *Boston Herald* suspended a reporter who alleged that his editors censored his coverage of FleetBoston, which advertises regularly in the newspaper and holds the \$20 million mortgage on the Herald Building. The paper called it an "internal disciplinary matter." David L. Greene, *Suspension of Boston Reporter Raises the Specter of Censorship*, BALTIMORE SUN, May 4,

It can, however, clear the way for annotations that affirm and reinforce good journalism, while fixing mistakes, filling gaps, and countering biases that find their way into the mainstream media. Relieved of the threat of legal action,¹⁰⁵ we can expect a rich mix of annotations from readers and subjects, from interested parties and disinterested experts, even from competitors and independent journalists.

While we wait for this golden age to materialize, for bold action from legislatures that have been cowed by the software and motion picture industries into exalting intellectual property rights above all other values, and from courts that increasingly view reporters as public enemy number one, we need to rethink our own roles in this new media environment and join together in collective action to preserve the integrity of our craft.

We have already formed associations—such as the Society of Professional Journalists¹⁰⁶ and the American Society of Newspaper Editors¹⁰⁷—that aspire to safeguard our commitment to ethical journalism in the face of owners and publishers who would tear down the walls that separate editorial from advertising departments or erect new walls to protect the interests of corporate owners. We have also created unions or guilds that protect us from material retaliation for ethical assertiveness. But we can and must do more.

We must begin to recreate our relationship with our employers for an era when journalists are often far removed from the owners of the media. That distance was not nearly so great when A.J. Liebling wrote that “[f]reedom of the press is guaranteed only to those who own one.”¹⁰⁸ While no one would deny a

2000, at 3A.

105. Alas, that may take some time. Even where courts have rejected intellectual property claims that impede free speech (and defy common sense), attorneys are still using the threat of legal action to intimidate critics. *Compare* Lucent Technologies v. LucentSucks.com, 2000 U.S. Dist. LEXIS 6159 (E.D. Va. May 3, 2000) (dismissing Lucent’s complaint under the Anti-Cybersquatting Consumer Protection Act, 15 U.S.C. § 1125) with Letter from Sarah B. Deutsch, Bell Atlantic Network Services, Inc., to Emmanuel Goldstein, 2600 Enterprises, May 5, 2000 (asserting that the domain name Goldstein registered—verizonreallysucks.com—infringes on Bell Atlantic trademarks and violates anti-cybersquatting legislation) 2600 Magazine, *News Archives* (visited July 12, 2000) <<http://www.2600.com/news/2000/0508.html>>.

106. See Society of Professional Journalists, *Ethics in Journalism* (visited July 12, 2000) <<http://www.spj.org/ethics/>>.

107. See ASNE, *supra* note 4.

108. A. J. LIEBLING, *THE PRESS* 32 (Pantheon Books 1981) (1975).

General Electric or Disney their constitutional freedom from government regulation with respect to their media interests, no one should imagine that these corporate entities are the repositories of all that we mean by a "free press." Journalists must find a way to assert the independence we need to fulfill our obligation to society.

While we have long eschewed the concept of "professional," for a variety of valid reasons, not the least of which is another invitation to regulation,¹⁰⁹ we can perhaps find a journalistic analogy to the academic freedom that permeates the relationship between teacher-scholars and their institutions.¹¹⁰ Both reporter and professor are, at once, employees who serve specific masters and free agents who serve the public interest in accord with a sacred set of principles. We must undertake collective action to protect that latter role in the new era.

The tenure system that has served academics so well in this regard does not seem realistic for journalists. Publishers, and perhaps journalists as well, have even resisted the idea of a universal set of ethical standards as an infringement upon press freedom.¹¹¹ But where the alternative may be government regulation, and the public is at best indifferent, if not hostile, perhaps a new ethical manifesto is in order. Such a manifesto would outline the substantive responsibilities of employers of journalists with respect to editorial integrity. We cannot legally impose such a manifesto on our employers as long as they are First Amendment actors, but we can exert collective pressure to induce the major players to adopt it.

VI. CONCLUSION

Technology, law and ethics all have a role to play in the new media world. Technology will provide the means by which we can correct some of the problems with homogenized journalism. Law—in time—will recognize the need to allow those technological tools to flourish unencumbered by outdated notions of

109. See Robert Drechsel, *The Paradox of Professionalism: Journalism and Malpractice*, 23 U. ARK. LITTLE ROCK L. REV. 181, 190 (2000).

110. See BAKER, *supra* note 66, at 253-55.

111. See, e.g., Mark Fitzgerald, *Ethics Codes Out of the Closet*, EDITOR & PUBLISHER, Oct. 16, 1999, at 10. See also Bill Kirtz, *Play it Again, Bill*, EDITOR & PUBLISHER, Feb. 28, 2000, at 17, 19 (interview with Bill Kovach).

intellectual property rights. But in the end, the very best journalism will depend upon an ethical understanding among reporters, editors, publishers, and corporate owners. The public has a right to the independence of journalists vis-a-vis the media empires that employ them. The journalist, not the corporate owner and certainly not the government, is the best guarantor of a free press going into the twenty-first century.

