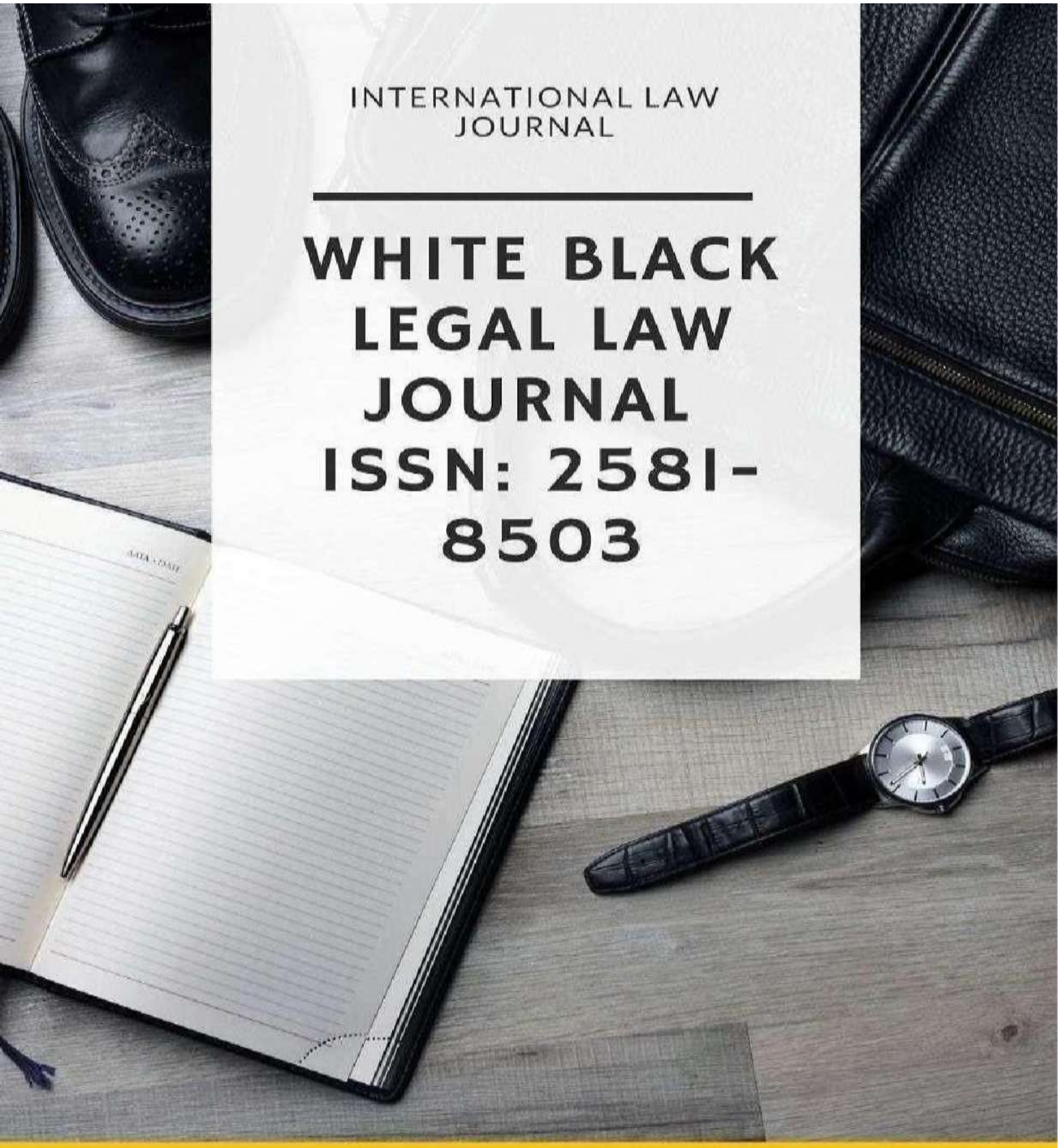

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CONSTITUTIONAL LIMITS ON IP ENFORCEMENT: A STUDY OF THE RIGHT TO FREEDOM OF EXPRESSION AND COPYRIGHT LAW

AUTHORED BY - NEETHU SAJIMON, JESTY K AJAY & AMAL S MOHAN

ABSTRACT

Given the significant growth of copyright law in recent years, the conflict between copyright law and the First Amendment is particularly important. The length of authors' rights has been increased, they are now stronger than before, and they have taken control of the digital world, where they have enlisted auxiliary security measures. It becomes increasingly evident that our freedom of speech is impacted as the public domain continues to expand. These findings do not imply that the conflict between free speech and copyright laws cannot be resolved. However, it does suggest that there is some incompatibility that needs to be clarified.

THE MODERN VIEW OF COPYRIGHT AND FREE EXPRESSION

Freedom of expression and copyright have frequently been seen as complimentary and compatible ideas. The Supreme Court in Harper & Row Publishers, Inc. v. Nation Enteprises, for instance, described copyright law as the "engine of free expression." The Court believed that imposing copyright infringement liability on a left-leaning news magazine for publishing passages from Gerald Ford's upcoming memoirs did not justify private censorship. Because copyright incentives would guarantee that Ford's memoirs concerning the Nixon pardon would be read by the general public through the regular course of the market, it was in line with First Amendment principles. By giving independent authors and artists the ability to earn a livelihood from their work, copyright promotes democratic discourse. Among the academics whose work examines copyright's significant contributions to freedom of expression in the modern era is L. Ray Patterson.[1] Since copyright protection only covers an author's "expression," not the "ideas" or information the work may contain, the general consensus holds that copyright and the First Amendment are compatible. The same concepts or information drawn from a protected work may always be reused by other authors in a later work, provided

[1] L. Ray Patterson, *Free Speech, Copyright and Fair Use*, 40 VAND. L. REV. 1 (1987). *See also* sources cited *infra* notes 5-17.

that the ideas or information are presented differently.

The possibility of private censorship in copyright is significantly reduced by this theory. A second copyright theory that has helped make copyright and the First Amendment compatible is fair use. For instance, an appellate court rejected an attempt by reclusive billionaire Howard Hughes to use the copyright in a magazine article about his life to prevent the publication of an unapproved biography, concluding that the biographer had used the article fairly. In a similar vein, the copyright holder of the well-known song "Pretty Woman," Acuff-Rose Music, attempted to prevent Two Live Crew, a rap group, from distributing a rap parody of the song. The Supreme Court believed that the parody was an example of critical commentary that should be allowed under the fair use doctrine. Courts have used fair use in these and other instances to stop copyright from being used to suppress content that the copyright owner did not approve of. The idea/expression distinction and fair use have occasionally fallen short of maintaining the level of harmony between copyright and free expression principles that society considers acceptable. For instance, some courts questioned whether the fair use defence could be applied to unpublished works following the Supreme Court's Harper & Row ruling.

CONCENTRATION IN THE COPYRIGHT INDUSTRIES

In the pre-modern period of copyright, a handful of London booksellers controlled a significant portion of the Stationers' Company and the distribution of informative writings. 6. The major copyright industry actors have been increasingly concentrated in the last decades of the 20th century, particularly in the publishing (e.g., Reed Elsevier) and entertainment (e.g., AOL-Time-Wamer and Disney) sectors. As if their interests were the only ones deserving of attention, major players in the copyright industry have had remarkable success in recent years in pushing a copyright maximalist agenda in the national policy arena.[2] The fact that bolstering intellectual property rights does not always benefit all artists should raise some concerns about this. Large vertically integrated content producers primarily benefit from increasingly strict copyright laws, whereas small businesses and individual artists are at a disadvantage. Freelance writers' attempts to negotiate equitable contracts with large media companies who want authors to transfer all rights to their works in exchange for a one-time payment are further hampered by the consolidation of the copyright industry.

[2] *James* Boyle, *The Politics of Intellectual Propery: Entironmenta'smf or the Net?*, 47 DUKE L.J. 87 (1997).

PROFIT MAXIMIZATION, RATHERTHAN LEARNING, BECOMES THE DOMINANT VALUE

The goal of the Stationers' copyright regime in the premodern era was to preserve monopolies in their "copies" in order to increase member enterprises' revenues. Since the goal of copyright in the modern era was to encourage learning, the rights granted were likewise restricted. However, dominant firms in the copyright industries act as though the purpose of copyright law is and should be to maximise revenues for the benefit of rights holders, rather than providing just enough protection to create incentives for investments in creative endeavours. In the modern era, the utilitarian rationale for copyright predominated, with the goal of copyright law being to provide enough rights to provide adequate incentives to induce creators to innovate. Hollywood film studios want to capitalise on any remaining value in their films, even though they have recovered their investments in them numerous times. The Congressional decision in 1998 to extend the copyright term of existing works for an additional twenty years is a clear example of how the utilitarian justification for allowing artists limited rights in their works has been replaced by pure rent-seeking behaviour by dominant industrial groups.

EXCESSIVE PRICING

Similar to the pre-modern age, complaints regarding the exorbitant cost of copyrighted works have been widespread in the post-modern era. For instance, universities have voiced their disapproval of the exorbitant costs of scientific, technical, and medical publications offered by Reed Elsevier and other publishing behemoths.[3] Major recording companies who were accused of fixing the prices of CDs with sound recordings reached an agreement to resolve the issue by giving overcharged consumers vouchers. Naturally, setting a clear price for one's goods is in line with the profit-maximizing approach that is preferred by large copyright industry companies and is a natural byproduct of market concentration in these key areas. In the modern era, when more industry participants were competing with one another, there were fewer worries about exorbitant price. Compulsory licensing is one solution to issues brought on by exorbitant prices and other market failures. Although some academics have brought up the possibility of enforcing legal licenses, compulsory licenses, or obligations to license on fair and reasonable terms as a means of addressing this issue, these options have been conspicuously absent from public discourse regarding intellectual property in the United States

[3] Stanley Chodorow & Peter Lyman, *The Future of Scholary Communication, in THE* MIRAGE OF CONTINUITY (Brian Hawkins & Patricia Battin, eds. 1998).

in recent years.

PERPETUAL COPYRIGHTS

Copyrights were everlasting in the premodern age. In the modern age, copyrights had a limited lifespan that allowed authors to profit from any financial value their work may have had while also enhancing the public domain. In order to prevent early Mickey Mouse films and other commercially successful works from the 1920s and 1930s from becoming public domain, Congress extended the length of copyrights in existing works in the postmodern era. As Peter Jaszi so wryly noted, this implies that copyright in the postmodern era might be headed towards becoming everlasting once more this time on the installment plan. In its Eldred v. Arbcroft ruling, the Supreme Court upheld Congress's authority to extend copyright terms for already-existing works, provided that the additional period is not indefinite.[4] This judgement did not call into question the appropriateness of extending copyright terms. The use of digital rights management (DRM) technologies to safeguard works whose copyrights are about to expire poses a threat to the public domain in addition to copyright term extensions. When the copyright expires, technical mechanisms that restrict access and use won't stop (assuming no additional extensions). Furthermore, DRM technologies are being utilised to regulate public domain works' usage and access.

THE SUBSIDENCE OF TIE AUTHOR AND THE RISE OF THE WORK

Similar to the Statute of Anne, the U.S. Constitution designates "authors" as the individuals to whom exclusive rights may be granted in order to advance scientific advancement. In the modern day, authors were considered important contributors to the process of knowledge creation that copyright was intended to encourage. In addition to the exclusive rights that gave them authority over commercial exploitations of their works, authors also profited from limiting rules like fair use that let them expand on the work of their forebears. Like in the pre-modern era, the focus of post-modern copyright is on "the work," "the copyright," and "the rights holder," as opposed to the "author." The interests of rights holders are significantly more advanced by the post-modern copyright regime than those of individual authors. For instance, by pursuing legislation to label sound recordings as "works for hire" so that individual creators would not be able to exercise statutory termination of transfer rights, the major recording labels have systematically advanced their interests at the expense of numerous individual performers.

[4] Eldred v. Ashcroft, 123 S. Ct. 769 (2003).

Even though the United States would seem to be required to protect these rights by virtue of its accession to the Berne Convention, the film industry has so far resisted attempts by directors, cinematographers, and screenplay writers (co-authors of motion pictures) to obtain statutory protection for moral rights that should allow these authors to preserve the integrity of their creations.

THE EXPANSION OF EXCLUSIVE RIGHTS AND THE EROSION OF FAIR USE AND OTHER COPYRIGHT LIMITATIONS

Authors have virtually few legal rights under the current copyright legislation. Authors of newly created books, maps, and charts were the only ones eligible for exclusive rights, which allowed them to print, reproduce, and sell their creations for a period of fourteen years. Both the breadth of exclusive rights and the subject matter of copyright have grown during the last 200 years. Even though the majority of the exclusive rights under U.S. copyright law are restricted to "public" acts distribution, performance, and display the most frequently invoked of these rights, the right to reproduce a work in copies is not as restricted.[5] However, until recently, it was generally believed that non-commercial and private copies were either fair use or otherwise outside the jurisdiction of copyright owners. "Advances in digital technologies have made copies very easy and cheap to make; more significantly, when works are in digital form, access to and use of the information they contain requires making copies in the random-access memory of a computer." Because of this, the copyright industries are working harder to control private and non-commercial copying of copyrighted works and to ensure that they have the sole right to access and utilise digital versions of copyrighted works due to the reproduction right of copyright law.

THE DECLINE OF ORIGINALITY AS A MEANINGFUL CONSTRAINT ON PUBLISHER RIGHTS

The availability of copyright protection in the pre-modern era was independent of the "originality" of the works for which copyright was asserted. "In the modern era, works had to have a spark of creative" originality "in order to qualify for copyright protection." The 1991 Feist v. Rural Telephone ruling by the U.S. Supreme Court upholds the contemporary understanding of "originality" as a significant restriction on publishers' copyright claims.

[5] U.S.C. **%** 106(3)-106(5) (distribution, performance, and display rights); 106(1) (reproduction right)

Unoriginal works, like phone directories' white pages listings, could take a lot of time, money, and effort to create and might qualify for some protection under unfair competition laws. Nonetheless, the Supreme Court maintained that unoriginal information compilations cannot be granted copyright under the Constitution. The U.S. Congress has been asked to develop a new type of copyright-like protection for information compilations that do not meet the requirements for copyright protection since the Feist ruling. Reed Elsevier and other major participants in the global information business have firmly backed these new regulations. " Furthermore, some digital media companies have been asserting that digital versions of works in the public domain are protected by copyright.

STRATEGIES FOR COUNTERING POST-MODERN COPYRIGHT

The social, political, and economic environment in which post-modern innovations are taking place is just one of the numerous ways that the post-modern period of copyright can be distinguished from the pre-modern era. It would be overly alarmist to imply that post-modernism has completely encapsulated copyright law or that copyright law will soon separate from freedom of expression principles because some members of the judiciary, including some Supreme Court justices, still adhere to modern copyright principles. This broader environment, which includes the open architecture of the Internet, which makes it possible for almost anyone to become a publisher, and the growth of information technologies that enable the creation of new works and the sharing of information, may be what saves modern copyright. However, it would be foolish to ignore the trend towards a resurgent interest in pre-modern ideas and take no action to stop it. A revitalised and updated conversation about "modern" copyright notions, such fair use, and the clarification of standards and guidelines for protecting modern copyright from post-modern infringements are two of the strategic measures required to stop post-modern advances.

In well-known instances like A&M Records, Inc. v. Napster, Inc. and Universal City Studios, Inc. v. Corley, proponents of "modern" copyright ideas have attempted to do this through amicus filings. The trial court's interpretation of the Supreme Court's ruling in Sony Corp. of Am. v. Universal City Studios, Inc. was criticised by amici in the Napster case, for instance, as was the scope of the preliminary injunction, which essentially would have required Napster to demonstrate that each digital music file shared using its peer-to-peer software was a non-infringing copy. In Corley, Amici challenged the constitutionality of the DMCA's anti-

circumvention rules insofar as they preclude fair use for technically protected works and questioned how they applied to a journalist who, while covering a controversy surrounding a decryption program, linked to websites where the program could be found.

CONCLUSION

In order for copyright law to uphold the contemporary custom of peacefully coexisting with principles of freedom of speech, people who value this legacy must remain vigilant in tracking the development of copyright and associated laws and practices in the business sector. Postmodernism has advanced significantly. The fight is far from done, though. L. Ray Patterson's groundbreaking research has demonstrated how unsupportive, if not antagonistic, the pre-modern copyright system was to the principles of free speech. Similar concerning trends can be seen in post-modern developments. Without a doubt, the history of copyright will serve as a preface to its future. The main concern is whether postmodern structures and practices that threaten free expression norms comparable to those of the pre-modern copyright system will become more prevalent in the law, or if modern copyright principles will continue to dominate.

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