

Chaos on the Internet and the Constitutional Compromise

When it comes to understanding the law it seems that everything begins and ends with the Constitution. So it should come as no surprise that this venerable document created in 1789 is the battleground for the raging debate about what if any limitations there should be on dissemination of copyrighted materials on the Internet.

Article 1 Section 8 of the Constitution empowers Congress:

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

This language has come to be called "The Copyright Clause" but it doesn't create a copyright law. Instead it directs Congress to encourage innovation (promote the useful arts) by providing an incentive for artists to create (secure exclusive rights). And the task of finding a way to balance these potentially conflicting goals is left to Congress. Analyzing the history of that process is essential to understanding the debate about how and on what terms, Information should be available on the Internet.

Let's start by looking at this clause more closely. Why "Limited Times"? Because at some point every creator should have unrestricted access to Mozart and Beethoven (and Charley Parker and Miles Davis), to encourage their own creativity. What is a "Limited time"? The copyright term in the U.S. is now 70 years after the death of the author for works created after 1978 and a period of 95 years from date of copyright registration for works created before then. That's a long way from the original 14 years (plus a 14 year renewal) in the first Copyright Law in England in 1709. Some claim this is too long. But this longer term was adopted by Congress to keep step with the rest of the world and the Supreme Court has ruled it consistent with the Constitution's "limited term". And a recent New York Times article even advocated that intellectual property rights like other property rights should last forever.

Note also that the Constitution protects only "Writings" of an author. Thus ideas cannot be protected, only the way they are expressed in a "Writing". Creative people should be encouraged to develop ideas even those of others. So no one can stop you from composing a minor blues in ¾ time (an idea). It just can't sound too much like the one Wayne Shorter called "Footprints".

There have been two complete revisions of the Copyright Law, (the most recent in 1978) plus numerous amendments along the way which can be viewed in the context of fulfilling the Constitutional charge to Congress of maintaining balance between the author's rights and promoting innovation. Some have described it as the balance between an incentive to create and loss of access. In other words, if you have control over your song or book, you can set the terms for access by others. If you couldn't do that, you couldn't prevent others from getting it for free. Therefore you'd have to find another way to make a living and consequently wouldn't have time to write that great song or novel. That's of course the issue in cases like Napster and other illegal "file sharing services" where the Supreme Court had no difficulty determining that the illegality overrode the legitimate desire for access. But the law recognizes that this is a delicate balancing act. And when it comes to the Internet, the relatively slow moving law is hard pressed to keep up with the instantly changing world of Cyberspace.

In 1998 Congress passed the DMCA (Digital Millennium Copyright Act) which addressed the problem faced by a huge portal like AOL being potentially liable for an inadvertent infringement like a subscriber's email which attached a music file of a copyrighted song. The DMCA provides a "Safe Harbor" to protect an intermediary like AOL who has no control over the infringing activity and gains no direct financial benefit from it. But when Viacom sued Google (the owner of YouTube) for a billion dollars claiming there were 150,000 Viacom videos on its site, Google tried to invoke the DMCA safe harbor defense. The case is still pending but it seems a huge stretch to believe that Congress intended for the DMCA protection to extend to a video "sharing" site with everything from amateur videos to the latest Hollywood releases.

Fair Use under the Copyright Act recognizes the legitimate interests of scholars, critics and even satirists to have access to proprietary materials without having to ask permission from rights holders as long as the purpose is worthwhile. In that regard it can be viewed as another example of Constitutional compromise. One example is when the new work is 'transformative'. If someone uses a protected work but transforms it into something else creative it might be permitted as a fair use with no permission being necessary. This was one of the findings in the landmark, Supreme Court '2 Live Crew' case where a parody version of Roy Orbison's "Pretty Woman" was considered potentially a fair use requiring no permission or compensation because it transformed the original in a satirical way without wholly appropriating the original. This even though the unauthorized version was "for profit" and generated significant income in which the Orbison interests didn't share. One word of caution in this area. These cases involving satire are tricky to predict. Each one is decided on the basis of a unique set of facts and there's really no way to guarantee how it will come out.

The lawsuits and heated discussion will continue amid the dizzying array of innovative technology. For instance, what happens when you hear something you like on your satellite radio and immediately download it to your iPod? And though loading your own CD collection onto your iPod is perfectly legal, loading it onto your friend's device is not.

The Internet is no different than any other venue or market for buying and selling our products and services, except that it is much easier for our creative labors to be appropriated without permission or compensation. But a copyright litigator friend remarked to me on this point, "When guns were invented it made it easier to kill people but that didn't make it legal."

The Constitution set out the basis for Copyright protection limited in time and form within the context of balancing it with promoting the arts for the public good. It established Congress as the vehicle to deal with its proper administration. And even though stretched to the limits by the Internet, it works very well. Author's rights are reasonably well protected yet there has been no lack of innovation.

The Constitutional compromise of 1789 will survive the Internet shock wave but any workable resolution among conflicting, legitimate interests must be within a defined, if flexible, legal framework.