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Keynote Address: Censorship in the Guise of Authorship: Harmonizing Copyright and the First Amendment

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KEYNOTE ADDRESS

CENSORSHIP IN THE GUISE OF AUTHORSHIP: HARMONIZING COPYRIGHT AND THE FIRST AMENDMENT

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Greetings from what I call the "digital circuit"—the Ninth Circuit spans the west coast from San Diego, a center of the wireless world, to Silicon Valley and San Francisco's Market Street, where Uber and Twitter thrive, onward to the Portland tech corridor with Intel, and all the way through Seattle's tech-rich environment, where Microsoft, Amazon, and many others have their headquarters. Inland, our circuit covers Idaho, where Micron had its roots, and the growing tech centers in Arizona and Nevada. Some say we are the "Hollywood circuit," and others say the "left coast circuit," but I think that the moniker of "digital circuit," or "tech circuit," is particularly appropriate for this lecture.

It is almost a cliché to say that copyright and the First Amendment are both in tension *and* in synergy with each other.[1] While this observation is broadly true, its specific implications are often muddled. I suggest that the most discussed tension between copyright and the First Amendment—sometimes dubbed "crowding out"[2]—is overblown. Instead, we should focus on a more real and pressing tension. That tension is the growing number of claims that invoke copyright protection to remedy a broad array of personal harms—such as invasion of privacy—and in the process tromp on the First Amendment. In simple terms, a trumped up copyright claim cannot justify censorship in the guise of authorship.

I will first sketch the background of the copyright/First Amendment debate and then turn to *Garcia v. Google*,[3] a case that highlights the

* Judge, United States Court of Appeals for the Ninth Circuit. This article is adapted from remarks delivered on September 25, 2015, at the Chicago-Kent Supreme Court IP Review. Judge McKeown thanks her law clerk, Dan Walters (Michigan 2012), for his research assistance.

1. *See, e.g.*, Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 WASH. & LEE L. REV. 831, 833 (2010); David S. Olson, *First Amendment Interests and Copyright Accommodations*, 50 B.C. L. REV. 1393, 1395 (2009).

2. *See, e.g.*, David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281, 281 (2004).

3. Garcia v. Google, Inc., 786 F.3d 733 (9th Cir. 2015) (en banc).

censorship tension. I want to touch on several other examples percolating in the federal courts and suggest why copyright is becoming a go-to tool to remedy invasions of privacy and other harms. Finally, I will return to copyright and First Amendment basics and reflect on what they teach us about this censorship tension.

I. THE TENSIONS IN COPYRIGHT

The longstanding rationale of copyright is that it incentivizes the creation of new expression by guaranteeing a limited monopoly on the reproduction of expressive works.[4] Of course, there are other rationales as well. By definition, the limits on reproduction in copyright put boundaries on speech.[5] Yet the Supreme Court has said that "copyright itself can be the engine of free expression."[6] Traditionally, however, for free speech principles we look to the First Amendment, which says in categorical terms that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[7]

In the face of these potentially competing values, scholars have long argued that there is an inherent conflict that smothers speech when intellectual property rights gain too much traction. Professor McGowan of the University of San Diego—who does not embrace the theory—explains it this way: public expression can be "crowded out" by the ever-expanding scope of copyright coverage.[8] This pressure, the argument goes, constrains diversity of speech and hampers a robust public domain. Melville Nimmer identified "definitional balancing" and the "idea/expression dichotomy" as answers to this conflict, and lawyers and scholars remain wedded to this effort to balance between competing values at stake in each legal regime.[9]

4. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (calling copyright an "engine of free expression"); *see also* Olson, *supra* note 1, at 1395–96 ("[A]lthough copyright does give exclusive rights to authors, these rights incentivize authors to produce many more works than would be produced absent the copyright regime. Thus, the argument goes, copyright law, on net, greatly encourages the production of speech.").

5. Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 165–66 (1998) ("Copyright law restricts speech: it restricts you from writing, painting, publicly performing, or otherwise communicating what you please. If your speech copies ours, and if the copying uses our 'expression,' not merely our ideas or facts that we have uncovered, the speech can be enjoined and punished, civilly and sometimes criminally.").

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

7. U.S. CONST. amend I.

8. McGowan, *supra* note 2, at 281.

9. Neil Weinstock Netanel, *First Amendment Constraints on Copyright after* Golan v. Holder, 60 UCLA L. REV. 1082, 1085–86 (2013) (citing Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1189–1200 (1970)).

In practice, the results of giving effect to this balance have been anything but balanced—courts have routinely rejected this version of the conflict argument. According to one study that looked at over thirty published copyright/speech cases for a 35-year period—between 1967 and 2002—in all but two of those cases, courts rejected this conflict thesis on various bases.[10] With few exceptions, the ship has sailed on the "crowding out" argument.

Case in point: in 2003, the Supreme Court was asked, metaphorically, to "Free Mickey Mouse," and invalidate a dramatic extension of the copyright term.[11] Instead the Court wrote in *Eldred v. Ashcroft* that "copyright's limited monopolies are compatible with free speech principles,"[12] and noted that "copyright law contains built-in First Amendment accommodations."[13] The Court ultimately concluded that "when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."[14]

Returning to the same theme almost a decade later in *Golan v. Holder*,[15] the Court held that Congress did not violate the First Amendment by extending copyright protection to works previously in the public domain. Again, the Court referenced the "traditional contours" of copyright protection and identified the idea/expression dichotomy and the fair use defense as "built-in" First Amendment accommodations."[16]

These "built-in" accommodations are indeed well equipped to further some of the most important values animating the First Amendment. The idea/expression dichotomy is intended to insulate "ideas" from copyright protection and give statutory protection only to the expression or representation of ideas.[17] This division helps ensure discourse *about* ideas—which is a core concern of the First Amendment. One might argue with where courts have drawn the line, but it is a line with some definition and fair predictability.

10. Michael D. Birnhack, *Copyright Law and Free Speech after Eldred v. Ashcroft*, 76 S. CAL. L. REV. 1275, 1281 (2003).

11. *Free Mickey Mouse*, The Economist (Oct. 10, 2002), http://www.economist.com/node/1378700 (last visited Nov. 30, 2015).

12. 537 U.S. 186, 219 (2003).

13. *Id*.

14. *Id*. at 221.

15. 132 S. Ct. 873 (2012)

16. *Id*. at 890 (citation omitted).

17. Netanel, *supra* note 9, at 1085–86.

The fair use defense[18] likewise promotes free speech and new expression—it permits the use of copyrighted material for limited and transformative uses.[19] But this defense defies line drawing. Although the Supreme Court identified fair use as a First Amendment "accommodation,"[20] even decades ago one court called it one of the most "troublesome" doctrines in terms of application.[21] Academics have characterized it as "billowing white goo"[22] or "naught but a fairy tale."[23] Even so, this view is not uniform. Professor Pamela Samuelson argues that "fair use law is both more coherent and more predictable than many commentators have perceived."[24] One thing is for sure: the statute delineating the fair use factors might be described as a "mini lawyers' relief act," given the millions of dollars spent divining its application.

Perhaps it is not surprising, then, to hear from Professor Christopher Eisgruber—an outsider to copyright law but an insider to free speech jurisprudence—that there is something puzzling about the purported tension between copyright and the First Amendment:

> There is a good reason why courts have traditionally regarded copyright law as consistent with the Free Speech Clause. Most of Free Speech law rests on a concern about [government suppressing political or sensitive speech, such as speech on sex & religion]. Copyright is not censorious in this way . . . . Copyright does not pick and choose among ideas and subject-matters. Smutty pictures and subversive tracts get copyright protection along with reverent hymns and patriotic speeches.[25]

Eisgruber's statement largely rings true, and his observation helps us understand why cases like *Eldred* didn't go anywhere. But in my view, there is another story to tell. Copyright as censorship *does* exist, and it *is* different.

18. *See* 17 U.S.C. § 107 (2012). The statutory fair use factors include the "purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes," the "nature of the copyrighted work," the "amount and substantiality of the portion used in relation to the copyrighted work as a whole," and the "effect of the use upon the potential market for or value of the copyrighted work." *Id*.

19. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (describing the transformative use factor as inquiring whether the work "adds something new"); *see also* Seltzer v. Green Day, Inc., 725 F.3d 1170, 1176 (9th Cir. 2013) (calling "transformation" the "key factor in fair use").

20. Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

21. Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939).

22. Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587 (2008).

23. David Nimmer, *"Fairest of Them All" & Other Fairy Tales of Fair Use*, 66 L. & CONTEMP. PROBS. 263, 287 (2003).

24. Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2541 (2009).

25. Christopher L. Eisgruber, *Censorship, Copyright, and Free Speech: Some Tentative Skepticism About the Campaign to Impose First Amendment Restrictions on Copyright Law*, 2 J. ON TELECOMM. & HIGH TECH. L. 17, 18–19 (2003).

What has been lost in the debate about "Freeing Mickey" is that there is *another* manifestation of tension between copyright and the First Amendment—one that presents a far more compelling case for judicial intervention to protect freedom of speech from prior restraint and censorship. I refer to the use of copyright injunctions to impose what amounts to prior restraints on offensive, unpopular or sensitive speech. These kinds of cases look, feel and smell like the real First Amendment cases. They are fundamentally about censorship of unpopular speech.

II. ILLUSTRATING THE FIRST AMENDMENT TENSION: *GARCIA V. GOOGLE*

I turn now to *Garcia v. Google*, an illustrative case that was decided by the Ninth Circuit en banc last spring,[26] to demonstrate in concrete fashion the ways that copyright is being used to promote censorship of ideas, as well as the judicial response.

Cindy Lee Garcia was paid $500 for a bit part in what she thought was an adventure film; she had two lines and five seconds of screen time.[27] Without doubt, she was bamboozled by the filmmaker, who claimed he was creating an action-adventure thriller set in ancient Arabia.[28] Instead, the filmmaker dubbed over her few lines and turned the film into an anti-Islam movie called *Innocence of Muslims*.[29] When a 14-minute trailer of the film was translated into Arabic in September 2012 and uploaded on YouTube, it sparked outrage and violent protests across Middle East.[30] The video has even been linked to the Benghazi attack, although that point is hotly disputed.[31] The film was called "amateurish"[32] and "offensive."[33] Most viewers would agree it was a ham-handed attack on Islam, but should it have been banned under copyright law?

26. Garcia v. Google, Inc., 786 F.3d 733 (9th Cir. 2015) (en banc). In the interest of full disclosure, I authored the en banc opinion in this case.

27. *Id*. at 737.

28. *Id*.

29. *Id*.

30. *Id*. at 737–38.

31. *Id*. at 738.

32. Michael Joseph Gross, *Disaster Movie*, VANITY FAIR (Dec. 27, 2012), http://www.vanityfair.com/culture/2012/12/making-of-innocence-of-muslims (last visited Nov. 30, 2015) (describing the film as "[e]xceptionally amateurish, with disjointed dialogue, jumpy editing, and performances that would have looked melodramatic even in a silent movie").

33. Max Fisher, *The Movie So Offensive that Egyptians Just Stormed the U.S. Embassy Over It*, THEATLANTIC (Sept. 11, 2012), http://www.theatlantic.com/international/archive/2012/09/the-movie-so-offensive-that-egyptians-just-stormed-the-us-embassy-over-it/262225/ (last visited Nov. 30, 2015).

Garcia first filed suit against both the filmmaker and Google in California state court under various tort theories—defamation, hate speech and right of publicity among them—and got nowhere.[34] The state court refused to issue a takedown order, ruling that Garcia was not likely to succeed on the merits.[35]

Five months after the film had been uploaded to YouTube, Garcia turned to federal court and asked the court to order removal of the film from Google's sites under a theory of copyright infringement.[36] The district court denied the injunction based on the weak copyright claim and the absence of irreparable harm.[37] The initial Ninth Circuit panel, over a dissent, reversed the denial of the injunction and concluded that Garcia had a "fairly debatable" copyright claim in her five-second performance, and that threats against her were cognizable as irreparable harm.[38]

The panel first issued a secret takedown order—saying that Google had to remove all copies of *Innocence of Muslims* within 24 hours and couldn't disclose the existence of the order. It then revised the takedown order to include only versions of the film featuring Garcia's performance. Despite the court's dubious role as film editor, the result was no surprise—the entire film remained off the Internet.

The Ninth Circuit reheard the case en banc. The en banc court (10-1) affirmed the district court—dissolving the injunction against airing the film. Judge Kozinski, the lone dissenter, echoed the opinion he authored on behalf of the initial panel. The central reason for the majority's decision: Garcia was not likely to succeed on her copyright claim and she had shown no copyright harm.[39] Three important takeaways emerge from the legal analysis: 1) handwaving does not make a copyright; 2) copyright remedies must fit copyright principles; and 3) a weak copyright claim cannot trump the First Amendment.

Turning to the first of these points—copyright protection rests on a precise statutory scheme and you can't just wave your hands and say something seems like it should be copyrightable. To begin, Garcia's five-second performance is not a work, separate and apart from the film in which it appears. One can't "cherry pick" bits and pieces from a unitary work.

34. Garcia v. Google, Inc., 786 F.3d 733, 738 (9th Cir. 2015) (en banc).

35. *Id*.

36. *Id*. She also revived her state law claims against the film maker in the complaint, although her request for injunctive relief was only on the copyright claim. *Id*.

37. *Id*.

38. Garcia v. Google, Inc., 766 F.3d 929, 935 (9th Cir. 2014), *rev'd en banc*, 786 F.3d 733.

39. *Garcia*, 786 F.3d at 745.

Garcia's theory would make "swiss cheese" of copyright law—the practical result would be fragmenting a movie into thousands of copyrights.[40] Fight scenes in *Lord of the Rings* or the crowds in *Ben Hur* come to mind.[41]

The Copyright Office—to which the court deferred[42]—denied Garcia's effort to register a copyright, saying its "longstanding practices do not allow a copyright claim by an individual actor or actress in his or her performance contained within a motion picture." While the Copyright Act doesn't define "works of authorship," it was clear that Garcia was not the "author" of her fleeting performance.[43] The film maker, not Garcia, fixed her performance, and Garcia certainly didn't authorize the fixation.[44] The parties disputed whether there was a work for hire agreement, but that question was not presented on appeal, and so did not factor into the analysis. But, of course, in many situations, these copyright disputes in the movie world are governed by such agreements.

A second important lesson is that there was no irreparable harm in the copyright sense. Indeed, there was a fundamental mismatch between Garcia's claimed harm (death threats and reputational harm) and the purpose of the copyright laws (to stimulate creative expression, not to protect secrecy).[45] In criminal law lingo—the punishment didn't fit the crime. The court was very sympathetic to Garcia's plight, but copyright laws were not the right vehicle for her legitimate beef: "Although we do not take lightly threats to life or the emotional turmoil Garcia has endured, her harms are untethered from—and incompatible with—copyright and copyright's function as the engine of expression. In broad terms, 'the protection of privacy is not a function of the copyright law . . . .'"[46]

American copyright law generally doesn't embrace moral rights, i.e. reputational harm, or the right to be forgotten,[47] although the latter principle

40. *Id*. at 742.

41. *Id*. at 742–43.

42. *Id*. at 741–42.

43. *Id*. at 743–44.

44. *Id*.*; see also* 17 U.S.C. § 101 (2012) ("A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.").

45. *Garcia*, 786 F.3d at 745.

46. *Id*.

47. Martina Hinojosa, *Challenges for Emerging Art Forms under the Visual Artists Rights Act*, 11 J. TELECOMM. & HIGH TECH. L. 433, 438–40 (2013) (noting that, in the United States, "moral rights are difficult to construe," but recognizing that there is *some* tradition of moral rights protection in various pockets of copyright law).

was recently validated by the European Court of Justice.[48] Perhaps Garcia would have had a better outcome and her privacy interests would have been treated differently had she been in Europe. She may also have fared better if her claim for an injunction had not been limited to a copyright theory. At the end of the day, though, the essence "of Garcia's harm [was] untethered from her commercial interests as a performer,"[49] which is the primary interest that copyright protects if it protects her claimed work at all.

Finally, the most significant principle from the case is that a weak copyright claim cannot hijack the First Amendment. The initial order to remove the film from YouTube was both a mandatory injunction and a prior restraint of speech—remedies that face high legal hurdles, are particularly disfavored and put a "heavy burden" on the plaintiff to overcome.[50] In the end, the court concluded that the First Amendment implications were too important to ignore. We held that "[t]he takedown order . . . gave short shrift to the First Amendment values at stake. The mandatory injunction censored and suppressed a politically significant film—based on a dubious and unprecedented theory of copyright. In so doing, the panel deprived the public of the ability to view firsthand, and judge for themselves, a film at the center of an international uproar."[51]

III. A LITIGATION COTTAGE INDUSTRY

Garcia's case does not stand alone—it is one among many where plaintiffs invoked copyright to halt personal attacks. Recently, high-profile data breaches or email hacks have prompted victims to look to copyright law for protection of their image or reputation. Let me offer two case vignettes as examples: Exhibit A and Exhibit B. Together, they echo the same principles as *Garcia*, but with two different outcomes. Of course, this result should be no surprise—facts matter.

Exhibit A: This case, *Bollea v. Gawker Media*, stems from the high-profile legal fight between Hulk Hogan and Gawker, the news and gossip website, and it highlights the principle from *Garcia v. Google* that copyright

48. *See* Google Spain SL v. Agencia Espanola de Proteccion de Datos (AEPD), Case C-131/12, ECLI:EU:C:2014:317 (May 13, 2014).

49. *Garcia*, 786 F.3d at 746.

50. *Id.* at 747.

51. *Id.*; *see also* Garcia v. Google, Inc., 786 F.3d 727 (9th Cir. 2015) (Reinhardt, J., dissenting from the denial of emergency rehearing en banc) (arguing that the court should have had an emergency en banc hearing to avoid irreparable harm to First Amendment rights rather than awaiting the en banc hearing in due course).

is not the answer to your privacy prayers.[52] Gawker posted a sex tape of Hulk Hogan having an affair with a mistress. Hogan first pursued a preliminary injunction under a copyright theory in federal court. He wanted the video pulled off Gawker's website. The federal district court in Tampa, Florida, denied Hogan's request for an injunction because the only harms were personal harm and harm "to his professional image due to the 'private' nature of the Video's content."[53] Those claims are not "irreparable harm in the context of copyright infringement."[54] The episode so far mirrors the *Garcia v. Google* case. Hogan moved his focus to his already-filed state court invasion of privacy/emotional distress claims.[55] He had more success there: in 2013, the state court granted Hogan's request for a preliminary injunction and ordered Gawker to remove the tape.[56] Hogan is seeking $100 million in damages. The case remains pending.[57]

Exhibit B: The next case, *Monge v. Maya Magazines*,[58] highlights two of the principles from *Garcia v. Google*—the obligation to follow the statutory provisions of copyright law (in this case the fair use principles) and the intersection of the First Amendment and copyright law—in a suit that was more about privacy than innovation.

Two music pop stars sued a magazine—*TV Notas*—for copyright infringement after the magazine printed photos of their secret Las Vegas wedding. The whole story had the feel of a "telenovela."[59] The previously unpublished photos were obtained from a disgruntled former driver who found the photos on a pen drive in an ashtray in the car.[60] The district court held for the magazine on fair use grounds, saying the photos were newsworthy.[61] The Ninth Circuit reversed, concluding that the commercial publication was not transformative and could not be considered "fair use"

52. Bollea v. Gawker Media, LLC, 913 F. Supp. 2d 1325 (M.D. Fla. Dec. 21, 2012).

53. *Id*. at 1327.

54. *Id*.

55. Peter Sterne, *Gawker in the Fight of Its Life with Hulk Hogan Sex-Tape Suit*, POLITICOMEDIA BETA (Jun. 12, 2015), http://www.capitalnewyork.com/article/media/2015/06/8570075/gawker-fight-its-life-hulk-hogan-sex-tape-suit (last visited Nov. 30, 2015).

56. *Id*.

57. Diana Falzone, *Trial Date Set in $100 Million Hulk Hogan vs. Gawker Lawsuit*, FOX411 (Jul. 30, 2015), http://www.foxnews.com/entertainment/2015/07/30/hulk-hogan-gawker-trial-date-set/ (last visited Nov. 30, 2015).

58. Monge v. Maya Magazines, Inc., 688 F.3d 1164 (9th Cir. 2012). In the interest of full disclosure, I authored the opinion in this case.

59. *Id*. at 1168.

60. *Id*. at 1169.

61. *Id*. at 1170.

(the copyright status of the photos was not before the court on appeal and was left to the district court to consider on remand).[62]

This was not an easy case, especially because the magazine claimed that the newsworthiness of the photos trumped the copyright interest. But like in all cases—facts matter, and application of the fair use factors favored the singers.[63]

Although fair use is not a "get out of jail free card" for news organizations,[64] the court must be very sensitive to the First Amendment dimensions of the newsworthiness defense. Nonetheless, the court's charge is to look at the fair use factors as a whole. A court cannot sidestep the fair use statutory criteria: i.e., the "purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes," the "nature of the copyrighted work," the "amount and substantiality of the portion used in relation to the copyrighted work as a whole," and the "effect of the use upon the potential market for or value of the copyrighted work."[65]

In a case like *Monge*, one can fairly question whether fair use provides a sufficient "internal safety valve"[66] for First Amendment values. My colleague in dissent thought not. The dissent noted the censorial nature of the copyright action, arguing that celebrities could now "invoke copyright protection to prevent the media's disclosure of any embarrassing or incriminating works by claiming that such images were intended only for private use."[67]

These are but two of a steady stream of cases in federal courts where one side invokes copyright to protect personal interests and the other side counters that copyright is tantamount to censorship. Other examples include the following:

- A woman challenged *Hustler*'s publication of her wet T-shirt contest photo. The Sixth Circuit upheld the jury's rejection of the fair use defense, despite the newsworthiness of the article.[68]
- A Miami businessman and partial owner of the Miami Heat filed a copyright infringement suit against a blogger who apparently made

62. *Id*. at 1173–77.

63. *Id*. at 1184.

64. *Monge*, 688 F.3d at 1183.

65. 17 U.S.C. § 107 (2012).

66. Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 STAN. L. REV. 1, 4 (2001).

67. *Monge*, 688 F.3d at 1184 (M. Smith, J., dissenting).

68. Balsley v. LFP, Inc., 691 F.3d 747 (6th Cir. 2012).

it his mission to criticize the businessman and posted an unflattering image of him. The blogger initially won on a summary judgment motion raising a fair use defense.[69] The trial court's decision garnered attention in the First Amendment blogosphere, where the headline read "Copyright as Censorship."[70] The Eleventh Circuit recently affirmed the trial court, concluding that "[d]ue to [the businessman's] attempt to utilize copyright as an instrument of censorship against unwanted criticism, there is no potential market for his work."[71]

- Another recent case was aptly described by law professor Rebecca Tushnet when she said, "If hard cases make bad law, it may also be that sometimes jerks make good law."[72] A student at Liberty University posted videos of the former dean that were intended to expose the former dean's "dishonesty."[73] The dean first filed a takedown notice with YouTube.com and then filed a copyright infringement lawsuit.[74] The embattled dean previously claimed to have been raised in a jihadi Muslim community and converted to evangelical Christianity. Those claims turned out to not be true.[75] The dean lost his university position, and he also lost his copyright claim in court.[76]

IV. COPYRIGHT AS THE GO-TO TOOL

Why, you might ask, has copyright become the go-to legal tool to prevent the spread of damaging or offensive information on the Internet? For starters, the Internet is a game changer in this field. By its nature, the Internet is a platform for political and civic speech ensuring frequent and emotional clashes over the spread of information. To say the Internet is ubiquitous understates its reach. With more than 3 billion users worldwide[77]—more

69. Katz v. Chevaldina, 900 F. Supp. 2d 1314 (Fla. 2012).

70. David Post, *Copyright as Censorship? Katz v. Chevaldina*, WASH. POST (May 11, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/11/copyright-as-censorship-katz-v-chevaldina/ (last visited Nov. 30, 2015).

71. Katz v. Chevaldina, No. 14-14525, slip op. at 11 (11th Cir. 2015), https://www.eff.org/files/2015/09/17/katz_opinion.pdf (last visited Nov. 30, 2015).

72. Rebecca Tushnet, *Fair Use Twofer: Motion to Dismiss and Summary Judgment for Critical Uses*, REBECCA TUSHNET (May 15, 2014), http://tushnet.com/2014/05/15/fair-use-twofer-motion-to-dismiss-and-summary-judgment-for-critical-uses/ (last visited Nov. 30, 2015).

73. Caner v. Autry, 16 F. Supp. 3d 689, 693 (W.D. Va. May 14, 2014).

74. *Id*.

75. *Id*. at 692.

76. *Id*. at 692, 714–15.

77. INTERNET USERS, http://www.internetlivestats.com/internet-users/ (last visited Nov. 30, 2015).

than 1.44 billion on Facebook monthly[78]—the potential for copyright infringement (and creativity) is unlimited, and the potential damage to reputation and loss of privacy is often incalculable. The Internet knows no borders. So, in many respects, the lid comes off the traditional principles of territorial jurisdiction, national privacy laws, and other long-established jurisprudence, such as third-party infringement.

In addition to these reasons, I suggest six other factors influencing the growing use of copyright to protect privacy interests and censor damaging information.

A. The Digital Millennium Copyright Act (DCMA)

The DMCA[79] is a very potent statute—Internet content providers receive a safe harbor from liability if they remove content after receiving a takedown notice,[80] so there is a powerful incentive for them to accede to those demands. This is a unique and often effective mechanism to remove unfavorable content from the Internet. Of course, Internet content providers do not always accede to those demands—*Garcia v. Google* is a good example. Google/YouTube refused to comply with the multiple takedown notices filed by Garcia.[81]

B. The Power of the Copyright Act

Assertion of a copyright claim results in federal question jurisdiction[82]—i.e., a free pass into federal court. In contrast, most privacy-based tort harms arise under state law and there may be no federal jurisdiction, depending on the citizenship of the parties. Significantly, copyright is essentially a strict liability regime; there is no need to show any intent to infringe on the part of the defendant.[83] For a successful plaintiff, the

78. Emil Protalinski, *Facebook Passes 1.44B Monthly Active Users and 1.25B Mobile Users; 65% Are Now Daily Users*, VENTURE BEAT (Apr. 22, 2015), http://venturebeat.com/2015/04/22/facebook-passes-1-44b-monthly-active-users-1-25b-mobile-users-and-936-million-daily-users/ (last visited Nov. 30, 2015).

79. Digital Millennium Copyright Act of 1998, Pub. L. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C. & 28 U.S.C.).

80. 17 U.S.C. § 512 (2012).

81. Garcia v. Google, Inc., 786 F.3d 733, 738 (9th Cir. 2015) (en banc).

82. 28 U.S.C. § 1331 (2012) (providing for original jurisdiction in federal court over "all civil actions arising under the Constitution, laws, or treaties of the United States").

83. Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361, 1370 (N.D. Cal. Nov. 21, 1995) (noting that "copyright is a strict liability statute"); *but see* CoStar Grp., Inc. v. LoopNet, Inc., 373 F.3d 544, 558 (4th Cir. 2004) (discussing the ways that the Internet has put pressure on the strict liability regime of the Copyright Act).

damages are substantial and can add up very quickly. The Act provides for up to $30,000 for infringement of a single work, and that number can also go up to $150,000 if the infringement is willful.[84]

All of this means that the Copyright Act is a powerful tool, whatever the motive for filing suit. As the Electronic Frontier Foundation stated: "Stern threats making vague claims about 'stolen intellectual property' are often effective even if there's no legal merit to them. In part that's because copyright law's penalties are so far out of proportion to any actual harm."[85]

C. Pitfalls of the Fair Use Defense

As discussed earlier, the fair use factor-based test is not a model of predictability and is necessarily driven by particular facts in particular cases.[86] This reality puts these cases in play in terms of the uncertainty of the outcome.

D. Availability of Injunctive Relief

Historically, it has not been difficult to show "irreparable harm" in the intellectual property context.[87] For much of the twentieth century, it was possible to waltz into court on a presumption. In a 1955 copyright case, for example, the Second Circuit found that "[w]hen a prima facie case for copyright infringement has been made, plaintiffs are entitled to a preliminary injunction without a detailed showing of danger of irreparable harm."[88]

In 2006, however, the presumption began to erode. The Supreme Court held in *eBay v. MercExchange* that a plaintiff seeking a permanent injunction in a patent case must satisfy the four traditional factors for equitable relief: namely, irreparable injury, inadequacy of money damages, balance of hardships and public interest.[89] The irreparable injury factor could not be presumed. The Supreme Court made it relatively easy for lower courts to extend *eBay*'s logic into copyright cases, as much of its reasoning rested on an analogy between the Patent Act and the Copyright Act.[90]

84. 17 U.S.C. § 504(c) (2012).

85. David Kravets, *Ashley Madison Abusing DMCA "To Put Genie Back in the Bottle," EFF Says*, ARS TECHNICA (Aug. 27, 2015), http://arstechnica.com/tech-policy/2015/08/ashley-madison-abusing-dmca-to-put-genie-back-in-the-bottle-eff-says/ (last visited Nov. 30, 2015).

86. *See supra* notes 18–24 and accompanying text.

87. *See* Lemley & Volokh, *supra* note 5, at 158 (noting that the courts "have come close to eliminating the irreparable injury rule altogether" in the context of the Copyright Act of 1976).

88. Rushton v. Vitale, 218 F.2d 434, 436 (2d Cir. 1955).

89. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

90. *Id.* at 392–93.

One of the earliest circuits to extend *eBay* to copyright was the Fourth Circuit. In *Christopher Phelps & Associates v. Galloway*, the court found that a copyright plaintiff must show irreparable harm to obtain an injunction. The court noted, however, that copyright violations in fact often cause irreparable injury because they deprive the copyright holder of intangible exclusive rights.[91] The Second Circuit extended *eBay*'s holding to the preliminary injunction context in a copyright case brought by J.D. Salinger against another author whose work incorporated Salinger's famous character Holden Caulfield. The court held that, after *eBay*, district courts could no longer rely on the presumption and that plaintiffs needed to present evidence that failure to issue an injunction would actually cause irreparable harm.[92]

Because the presumption of irreparable harm no longer holds sway in copyright cases, litigants are searching for harm, sometimes in the privacy and personal harm arena. A preliminary injunction is a powerful remedy that is often the death knell of the case and may force settlement or abandonment of the case. If the injunction is wrongly issued in a case turning on the First Amendment, free speech may be suppressed without a trial or all the evidence.[93] Thus, even after *eBay*, the use of preliminary injunctions still has great appeal to those who would use copyright as a vehicle to advance privacy interests or who hope to quell speech.

E. Porous and Imperfect Privacy Protections in the United States

The law often moves to fill a gap—just so with litigants trying to fill the privacy gap with copyright. In the United States, we do not have a highly structured and protective privacy regime.[94] Unlike Europeans, who enjoy the coverage offered by the European Union's data and privacy directives,[95] we essentially have no overarching federal "Privacy Law." To be sure, the Fourth Amendment provides important privacy rights in the context of government searches.[96] And the First, Ninth, and Fourteenth Amendments'

91. 492 F.3d 532, 544 (4th Cir. 2007).

92. Salinger v. Colting, 607 F.3d 68, 82 (2d Cir. 2010).

93. Pamela Samuelson & Krzysztof Bebenek, *Why Plaintiffs Should Have to Prove Irreparable Harm in Copyright Preliminary Injunction Cases*, 6 I/S: J.L. & POL'Y FOR INFO. SOC'Y 67, 68 (2010) (observing that the presumption of irreparable harm ignores the defendant's right to free expression, particularly in transformative use copyright cases).

94. Lior Jacob Strahilevitz, *Reunifying Privacy Law*, 98 CAL. L. REV. 2007 (2010).

95. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. L 281/31; Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector, 2002 O.J. L 201/37.

96. U.S. CONST. amend. IV.

privacy penumbra has been invoked in limited contexts.[97] While some state constitutions offer much broader protection, statutory protection is generally scattershot and focused on specific areas, such as medical information, banking data, data held by the federal government and the like. The result is that copyright injunctions have been used as a proxy for privacy protection.

F. Cultural Shifts

Finally, to a degree, some of the trend in seeking protection under the copyright umbrella may be attributable to a cultural shift in attitudes about free expression. In his book *Trigger Warning*, a British journalist, who at one time wrote for a libertarian Marxist publication, wrote:

> In normal circumstances we in the West now spend far more time discussing how to restrict and outlaw types of speech than how to defend and extend that precious liberty. Almost everybody in public life pays lip service to the principle of free speech. Scratch the surface, however, and in practice most will add the inevitable "But . . . " to button that lip and put a limit on liberty.[98]

There are many examples to back that observation. In the 1980s, the Ayatollah Khomeini issued a *fatwa* for the acclaimed author Salman Rushdie after Rushdie published the allegedly sacrilegious *Satanic Verses*. While many advocates for free speech supported Rushdie, the response was not unequivocal. Likewise, the same views and emotions played out with the more recent tragic events involving the French publication *Charlie Hebdo* and the massacre of its editor and staff. The point is that we don't have cultural homogeneity about the contours of free speech.

Another cultural trend is the evolving and continually shifting view on the importance and role of copyright. It is not unusual to see Napster-generation "pirates" turned advocates for intellectual property, as author Joshua Cohen recently demonstrated. Despite being part of a "test generation" for whom "[e]verything was free . . . or felt free," Cohen now says that "culture has to be paid for, if not with money or even praise, then with time and attention. There are more things to hear and see and read than ever before, but the cheaper it is to get your hands on them, the cheaper your appreciation of them will be."[99] In contrast, others view copyright as

97. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

98. MICK HUME, TRIGGER WARNING: IS THE FEAR OF BEING OFFENSIVE KILLING FREE SPEECH? 15 (2015).

99. *What the Internet's Free Culture Has Cost Us in Art*, PBS NEWSHOUR (Sept. 2, 2015), http://www.pbs.org/newshour/bb/internets-free-culture-cost-us-art/ (last visited Nov. 30, 2015).

crushing creativity.[100] As with the ongoing debate on free speech, the debate over copyright values is heated and intense.

How much the recent copyright-as-censorship cases are driven by societal or cultural trends is an open question, but one worth pondering.

V. CONCEPTUALIZING THE NEW TENSION—BACK TO FIRST AMENDMENT BASICS

In closing, I suggest that we return to copyright and First Amendment basics. Looping back to where I started, the use of copyright law to censor unpopular speech is conceptually distinct from the "crowding out" problem, and it is an issue that deserves our attention.[101] The Supreme Court may have foreshadowed the censorial use of copyright. In *Harper & Row*, the Court hinted that copyright could not become "an instrument to suppress facts," impliedly recognizing that copyright could have a censorial effect on specific instances of offensive speech or unpleasant facts.[102]

The next step is to recognize that the conceptually distinct problem of "copyright as censorship" sounds in the traditional concerns of First Amendment jurisprudence. It is therefore deserving of, and more susceptible to, judicial scrutiny than the more intractable policy debates pertinent to the "crowding out" tension. The intersection of fair use and the First Amendment is fertile ground for judicial and legislative development. Although the Supreme Court singles out fair use as one of copyright's accommodations of the First Amendment, fair use is subject to legitimate challenge because of its imprecise nature and application. The ying and yang of copyright and the First Amendment needs some give in the joints.

Ultimately, copyright cannot be everything to everybody. Our legal system, starting with the Constitution, protects the expression of ideas. No matter how noble and important the values of privacy and protection of reputation, copyright is not the direct vehicle for their vindication.

For now, it is simply my hope to have delivered this important message: Censorship in the guise of authorship and copyright is a trend that calls on us to stand up and take notice. This is not about freeing Mickey Mouse—it is about making sure that copyright's safety valves give full play to a robust First Amendment. The principles and framework are in place—what remains is to insure a robust interpretation and application. That, of course, is why

100. *See* McGowan *supra* note 2 and accompanying text.
101. *See* Eisgruber *supra* note 25 and accompanying text.
102. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985).

we have smart law students, learned professors in the academy, and strong advocates among lawyers. I put that challenge in your good hands.

I leave you with one final thought—in the world of copyright, there is no accounting for the divergence in taste and artistic appreciation. When a group of monkeys took selfies using a camera left by a nature photographer, a news syndicate claimed copyright on the photos on behalf of the British photographer.[103] Smart as they are, it was hard for the monkeys to mount a defense. Now an animal rights group has filed a copyright lawsuit on behalf of the monkeys.[104] My response: so much for monkey business.

103. Justin Wm. Moyer, *Monkey Wants Copyright and Cash from 'Monkey Selfies,' PETA Lawsuit Says*, WASH. POST (Sept. 23, 2015), http://www.washingtonpost.com/news/morning-mix/wp/2015/09/23/monkey-wants-copyright-and-cash-from-monkey-selfies-peta-lawsuit-says/ (last visited Nov. 30, 2015).

104. *Id*.