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THE CHALLENGES OF FOLLOWING GOOD ADVICE ABOUT COPYRIGHT AND THE FIRST AMENDMENT

ALFRED C. YEN*

Judge McKeown’s perceptive essay describes how the use of “copyright as censorship”¹ threatens free speech in a way that copyright has not before. Accordingly, Judge McKeown argues that courts should apply careful First Amendment scrutiny to lawsuits in which the plaintiff sues under copyright, not to protect the commercial value of a copyright, but to accomplish censorship. The clear implication is that many of these claims should fail.² She exhorts professors, students, and advocates to think through the implications of her observation.³ I would like to respond to Judge McKeown by suggesting that her advice can truly influence the future of copyright only if judges take the advice to heart—even to the point of discrediting some existing case law.

Copyright as censorship differs from ordinary copyright, not in the form of the complaint, but in the reasons for bringing a lawsuit. This distinction gives Judge McKeown’s argument considerable force. Ordinary copyright plaintiffs sue to protect incentives to create. This connects directly to the utilitarian purposes for copyright—namely promotion of the arts—and justifies why protecting the plaintiff’s interests is worth the potential loss of speech.⁴ If copyright law prohibits the defendant from speaking (i.e. creating or disseminating an allegedly infringing work), we lose the defendant’s speech. However, society gains because we preserve the economic incentives that spurred the plaintiff’s creation in the first place. Without these incentives, neither the plaintiff’s original work nor the defendant’s derivative speech would have existed anyway. Society

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1. See Hon. M. Margaret McKeown, *Censorship in the Guise of Authorship: Harmonizing Copyright and the First Amendment*, 15 CHI.-KENT J. INTELL. PROP. 1 (2015).

2. See *id.*

3. *Id.* at 16–17.

4. U.S. CONST. art. I, § 8, cl. 8 (authorizing Congress to pass copyright laws “[t]o promote the Progress of Science and useful Arts”); see also *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1997) (explaining purpose of copyright is to stimulate creation of new works); *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349–50 (1991) (explaining purpose of copyright is to promote the progress of art).

therefore has some comfort that in these situations, copyright is speech enhancing.⁵

By contrast, censoring plaintiffs do not use copyright to protect copyright incentives. Instead, they sue to protect personal interests that bear little relation to income streams associated with the exploitation of copyright rights. For example, censoring plaintiffs sue to silence speech they consider distasteful,⁶ to protect privacy,⁷ or to avoid public ridicule.⁸ In these situations, censoring the defendant's speech does little to preserve the plaintiff's incentives to create. Enforcing the plaintiff's copyright claim therefore does nothing to ensure creation of the plaintiff's work. Society loses the defendant's speech, but it is unlikely that incentives for other speech offset this loss. Accordingly, it makes sense to worry that copyright as censorship reduces speech.

If we accept the proposition that courts should reject copyright claims brought for the wrong reasons, it is quite likely that some copyright claimants will try to hide their motives. They will sue for reasons of censorship, but pretend that they want to protect incentives. Although some pretexts will be easy to identify, courts following Judge McKeown's advice will eventually find cases where the reasons for the plaintiff's suit are unclear. How courts handle these ambiguous situations will greatly affect how much the First Amendment restrains copyright claims of doubtful value.

To get a sense of this, let us consider some law borrowed from another First Amendment area involving motive—namely, the regulation of non-obscene adult entertainment. Because this speech is not obscene, it receives full First Amendment protection.⁹ Nevertheless, local hostility to

5. See Melville Nimmer, *Does Copyright Abridge First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1186 (1970); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 982, 991 (1970).

6. See *New Era Publications Intern., v. Carol Pub. Group*, 904 F.2d 152 (2d Cir. 1990) (copyright suit to enjoin publication of book portraying founder of Scientology in unflattering terms); *New Era Publications Intern., v. Henry Holt & Co.*, 873 F.2d 576, 579 (2d Cir. 1989) (addressing a copyright lawsuit against publishers of biography criticizing founder of Scientology).

7. See *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1177 (9th Cir. 2012) (addressing a copyright lawsuit against magazine that published photos of a secret celebrity wedding); *Bond v. Blum*, 317 F.3d 385, 395 (4th Cir. 2003) (dealing with a copyright lawsuit to prevent use of plaintiff's unpublished book manuscript in a court proceeding because manuscript contained facts unfavorable to plaintiff); *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987) (bringing a copyright lawsuit to enjoin publication of book about Salinger because book paraphrased Salinger's unpublished letters).

8. See *Garcia v. Google, Inc.*, 786 F.3d 733, 745 (9th Cir. 2015) (actress bringing suit to remove movie from YouTube because her role in movie exposed her to threats and ridicule).

9. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 251 (2002) (holding First Amendment protects speech that is neither obscene nor the product of sexual abuse); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981) ("Nor may an entertainment program be prohibited solely because it displays the nude human figure. 'Nudity alone' does not place otherwise protected material outside the mantle of the First Amendment.").

adult entertainment sometimes encourages municipalities to ban or otherwise limit adult entertainment in ways different from other entertainment.¹⁰ Those who run adult businesses often challenge such regulation on First Amendment grounds.¹¹

Courts generally assess the constitutionality of laws regulating speech by asking whether the law is content-based.¹² According to the Supreme Court, a law is content-based if it “applies to particular speech because of the topic discussed or the idea or message expressed.”¹³ Courts apply strict scrutiny to content-based regulation of speech, which generally leads to a finding of unconstitutionality.¹⁴ By contrast, lower levels of scrutiny apply to laws that are not content-based. Courts are more likely to find these “content-neutral” regulations constitutional, because they only affect speech incidentally.¹⁵ This distinction makes sense because content-based regulations imply that the government has chosen to suppress one message while favoring others.¹⁶

10. See Charles D. Perry, *Since 2013, Horry County Spent More Than \$200K Regulating Adult Entertainment*, MYRTLEBEACHONLINE, Jan. 30, 2016, <http://www.myrtlebeachonline.com/news/local/article57380153.html>; Janet Begley, *Fellsmere Approves Ordinances Regulating Adult Entertainment*, TCPALM, Aug. 7, 2015, <http://www.tcpalm.com/news/fellsmere-approves-ordinances-regulating-adult-entertainment-ep-1220195554-332115052.html>; *Waterford Ordinance to Regulate Adult Entertainment*, YOURERIE.COM (last updated Nov. 5, 2014), <http://www.yourerie.com/news/news/waterford-ordinance-to-regulate-adult-entertainment>.

11. See *BBL, Inc. v. City of Angola*, 809 F.3d 317 (7th Cir. 2015) (suit contending that zoning and licensing ordinances preventing operation of adult-entertainment clubs featuring semi-nude dancing violated First Amendment); *Entertainment Productions, Inc. v. Shelby County*, 721 F.3d 729 (6th Cir. 2013) (suit arguing that local ordinance regulating adult-entertainment establishments violated the First Amendment); *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 630 F.3d 1346 (11th Cir. 2011) (action claiming that ordinance regulating sexually oriented businesses violated First Amendment); *Showtime Entertainment, LLC v. Town of Mendon*, 769 F.3d 61, 82–83 (1st Cir. 2014) (plaintiff successfully claiming that city zoning bylaws violated First Amendment); *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 295–96 (5th Cir. 2003) (suit claiming that ordinance regulating adult-entertainment businesses violated First Amendment).

12. See *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O’Connor, J., concurring) (“The normal inquiry that our doctrine dictates is, first, to determine whether a regulation is content based or content neutral . . .”).

13. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).

14. See *id.* at 2227 (holding content-based laws must satisfy strict scrutiny); *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2667 (2011) (“[I]t is all but dispositive to conclude that a law is content-based”); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid”).

15. See *City of Renton v. Playtime Theatres*, 475 U.S. 41, 49 (1986) (content neutral laws reviewed as time, place, and manner restrictions); *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (content-neutral regulation is constitutional if it serves significant government interest and leaves open alternative channels for speech).

16. See *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (government “has no power to restrict expression because of its message, its ideas, its subject matter, or its content”); *Town of Gilbert*, 135 S. Ct. at 2226–27 (government has no power to restrict speech based upon message conveyed).

To see this, consider first a city ordinance prohibiting the display of any sign tending to bring a foreign government into public disrepute. This law singles out speech for suppression on the basis of its content, and it strongly suggests that the ordinance exists to censor politically controversial speech. Such behavior is surely odious to the First Amendment.¹⁷

By contrast, consider next a law that prohibits “any congregation of three or more persons within 500 feet of a foreign embassy.”¹⁸ This ordinance might restrict speech activity (perhaps by preventing numerous sign-holders from standing near a foreign embassy), but it is less likely to violate the First Amendment because it does not discriminate against speakers on the basis of their content.¹⁹ This suggests a benign motive for the regulation, such as public safety,²⁰ thereby weakening any First Amendment challenge.

The foregoing implies that the First Amendment prohibits laws that single out adult entertainment for unfavorable treatment, and indeed, many cases reach this precise conclusion.²¹ However, some municipalities have realized that they may be able to avoid First Amendment strict scrutiny by claiming that they did not enact seemingly content-based ordinances for the purpose of censoring adult entertainment. This involves the contention that the government has moved to regulate secondary effects associated with adult entertainment, and not the speech itself.²²

In perhaps the most well known of these cases, the City of Renton passed a zoning law that restricted adult businesses to certain highly

17. *See* *Boos v. Barry*, 485 U.S. 312, 334 (1988) (provision making it unlawful to display within 500 of a foreign embassy any sign tending to bring the foreign government into “public disrepute” is content-based regulation violating the First Amendment).

18. *Id.* at 315.

19. *Id.* at 329–32 (provision making it unlawful “to congregate within 500 feet of any [embassy, legation, or consulate] and refuse to disperse after having been ordered so to do by the police” is constitutional).

20. *Id.* at 331.

21. *See* *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (holding that a municipality may not prohibit nude dancing); *Showtime Entertainment, LLC v. Town of Mendon*, 769 F.3d 61 (1st Cir. 2014) (finding zoning bylaws regulating adult entertainment establishments unconstitutional); *R.V.S. v. City of Rockford*, 361 F.3d 402 (7th Cir. 2004) (holding ordinance requiring certain adult entertainment establishments to obtain special use permits unconstitutional); *Wil-Kar, Inc. v. Village of Germantown*, 153 F. Supp. 2d 982 (E.D. Wisc. 2001) (finding law requiring adult establishments to obtain special license is content-based and unconstitutional); *Clarkson v. Town of Florence*, 198 F. Supp. 2d 997 (E.D. Wisc. 2002) (holding prohibition against nude dancing unconstitutional);

22. *See* *Young v. American Mini-Theaters*, 427 U.S. 50, 71–73 (1976) (accepting argument that zoning law imposing special rules on adult theaters attempted to preserve character of neighborhoods and not censor speech); *City of Renton v. Playtime Theatres*, 475 U.S. 41, 48 (1986) (accepting contention that zoning ordinance singling out adult businesses for less favorable treatment tried to prevent crime, protect trade, maintain property values, and preserve the quality of neighborhoods).

undesirable locations.²³ This made it difficult to open a viable adult business, and Playtime Theaters sued.²⁴ On its face, Renton's zoning would appear to be content-based regulation. The law singled out a specific form of entertainment for treatment less favorable than other non-adult businesses received.²⁵ It is therefore easy to conclude that the law was simply an effort to suppress adult speech—a classic form of censorship.

The City of Renton responded to this problem by claiming that it did not intend to suppress adult speech. The city claimed instead that it was trying to prevent crime by regulating the placement of businesses that contributed to these problems.²⁶ This benign purpose allowed the Court to review Renton's law without using strict scrutiny, and this led to a finding of constitutionality.²⁷

For purposes of my essay, it is important to understand that the Court could have rejected Renton's argument as a red herring designed to camouflage deliberate censorship. After all, it is difficult to imagine that Renton did not know and approve of what its zoning would do to adult businesses. Forcing Renton to justify these effects under strict scrutiny would have sent an important signal to municipalities that attempts to hide censorship would probably fail. The result would have been a relatively strong barrier against deliberate suppression of speech.

By agreeing with Renton and holding the zoning constitutional, the Supreme Court greatly weakened the ability of the content-based/content-neutral distinction to prevent purposeful censorship of speech. Now, any time that the government engages in content-based regulation, it can consider hiding that censorship underneath an argument that the true purpose was to avoid some more generalized social ill. These arguments may not always succeed, but to the extent they occasionally do, they embolden those who would censor and make it harder for victims of censorship to get relief.

I believe that courts trying to follow Judge McKeown's advice will encounter similar challenges in copyright. Indeed, it is pretty clear that judges have already confronted cases involving disguised censorship, and

23. *City of Renton*, 475 U.S. at 44 (1986).

24. *Id.* at 53 (noting plaintiffs' contention there were no commercially viable sites for an adult theater in Renton, although Supreme Court disagreed).

25. *Id.* at 44.

26. *See id.* at 48 (finding that city acted for purpose of preventing crime, protecting business, and preserving property values).

27. *Id.* at 49–55 (reviewing ordinance as time, place, and manner restriction and finding ordinance constitutional).

they have sometimes failed to use the First Amendment the way Judge McKeown suggests.

For example, in *Salinger v. Random House*, the defendant paraphrased a number of J.D. Salinger's unpublished letters as part of a biography about the author.²⁸ Salinger sued for copyright infringement, and the defendant countered with a claim of fair use.²⁹ Judge McKeown's observations strongly suggest that Salinger should have lost this case. He had no intention of publishing his letters,³⁰ so any connection to the preservation of copyright incentives was weak. Additionally, Salinger was a well-known recluse³¹ who took aggressive action to keep people from writing about him.³² Despite this, Salinger prevailed.³³ Moreover, in ruling against fair use, the Second Circuit claimed that the preservation of copyright incentives was an important reason for its decision.³⁴

A prominent case like *Salinger* could considerably blunt the force of Judge McKeown's advice. To me, Salinger was the kind of plaintiff who Judge McKeown thinks should fail. Accordingly, the Second Circuit's decision stands for the proposition that speculative claims about copyright incentives should prevail, even when plaintiffs have pretty clear censorship motivations. Granted, there are cases that stand for the opposite proposition—namely, that copyright does not favor attempts to censor.³⁵ Nevertheless, *Salinger*'s continued presence as “good law” emboldens those who wish to censor by providing a legal roadmap for circumventing First Amendment concerns about censorship.³⁶

28. 811 F.2d 90, 93 (2d Cir. 1987).

29. *Id.* at 94.

30. *Id.* at 99 (noting Salinger disavowed any intention of publishing the letters during his lifetime).

31. See Vanishing Act: J.D. Salinger, TIME.COM, http://content.time.com/time/specials/packages/article/0,28804,1902376_1902378,00.html (last visited February 7, 2016) (listing Salinger as one of the top 10 most reclusive celebrities).

32. See W.W., *Copywrongs: J.D. Salinger's miserly legal legacy*, THE ECONOMIST, Jan. 17, 2011, <http://www.economist.com/blogs/prospero/2011/01/copywrongs> (last visited February 7, 2016) (describing Salinger's “litigious streak” and lawsuits brought by Salinger).

33. 811 F.2d at 100 (finding Salinger was entitled to preliminary injunction).

34. *Id.* at 99 (identifying Salinger's potential change of mind about publishing his letters in measuring effect of defendant's use on the market for Salinger's letters).

35. See *New Era Publ'ns Int'l, ApS v. Carol Publ'g Group*, 904 F.2d 152 (2d Cir. 1990) (addressing copyright suit to enjoin publication of book portraying founder of Scientology in unflattering terms); *Shloss v. Sweeney*, 515 F. Supp. 2d 1068 (N.D. Cal. 2007) (refusing to dismiss declaratory relief action against defendant accused of using threat of copyright action to censor book about James Joyce).

36. For an example of *Salinger*'s influence, consider the case of *New Era Publications, International ApS v. Henry Holt & Co., Inc.*, 873 F.2d 576 (2d Cir. 1989), in which the Second Circuit found valid a copyright claim brought by a plaintiff against the author and publisher of an unflattering biography. Although the force of this finding was largely blunted by the application of laches, the apparent acceptance of using copyright for censorship remains.

The foregoing shows that, for all its conceptual power, Judge McKeown's prescription will have, or could have, fairly minimal influence over copyright law unless courts recognize that they must be skeptical when plaintiffs claim not to have censorship motives. If they fail to apply such skepticism and discredit precedent like *Salinger*, plaintiffs who want to censor will sue for copyright infringement, because the possibility of a *Salinger*-type result creates, at the very least, leverage for a censorship-friendly settlement.

Personally, I think that such an outcome would be unfortunate. Copyright already has frequently been extended at the expense of speech, and I think that these extensions have brought relatively little incentive for creation in return.³⁷ Judge McKeown's observations are important because they hold the potential for limiting, or even reversing, such developments. I hope that future courts heed her advice.

37. See *Eldred v. Ashcroft*, 537 U.S. 186, 243-266 (2003) (Breyer, J., dissenting) (identifying how copyright term extension creates effectively no incentive for creation of new works).