

6-27-2016

Fair Use's Unfinished Business

Rebecca Tushnet
Georgetown Law

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/ckjip>

Part of the [Intellectual Property Law Commons](#)

Recommended Citation

Rebecca Tushnet, *Fair Use's Unfinished Business*, 15 Chi. -Kent J. Intell. Prop. 399 (2016).
Available at: <https://scholarship.kentlaw.iit.edu/ckjip/vol15/iss2/3>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Journal of Intellectual Property by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.

FAIR USE'S UNFINISHED BUSINESS

REBECCA TUSHNET*

It's an honor and a pleasure to have the chance to say a few words about Judge M. Margaret McKeown's *Censorship in the Guise of Authorship: Harmonizing Copyright and the First Amendment*.¹ In the past, I've written extensively about my preferred view of the general relationship between copyright and the First Amendment.² Here, I will confine myself to a few variations on Judge McKeown's important themes.

I. OVERBROAD COPYRIGHT CLAIMS AND THE ENHANCED DAMAGE OF OVERBROAD DMCA CLAIMS

First, Judge McKeown is absolutely right to emphasize that overbroad copyright claims asserted to stifle free speech continue to be a significant problem.³ Although *Garcia v. Google, Inc.* presented unusual facts, I think that the trouble goes deeper than Judge McKeown acknowledges. Ordinary theories of copyright have been used to suppress political speech ranging from a successful suit against an unauthorized translation of Hitler's *Mein Kampf* designed to awaken Americans to the threat posed by Nazi ideology⁴ to less weighty, but still notably successful, lawsuits against political uses of music inconsistent with composers' beliefs.⁵

Overbroad takedown notices under the Digital Millennium Copyright Act ("DMCA") add to the trouble, proving a cheap quasi-injunction that doesn't even require the claimant to go to court to take a work out of public

* Professor, Georgetown Law.

1. Hon. M. Margaret McKeown, *Censorship in the Guise of Authorship: Harmonizing Copyright and the First Amendment*, 15 CHI.-KENT J. INTELL. PROP. 1 (2016).

2. Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Campaign Finance Reform, Hate Speech and Pornography Regulation, and Telecommunications Regulation*, 42 B.C.L. REV. 1 (2000).

3. McKeown, *supra* note 1, at 2; *see, e.g.*, *Katz v. Google*, 802 F.3d 1178, 1182 (11th Cir. 2015) (finding use of photo to criticize subject of photo was fair use); *Galvin v. Illinois Republican Party*, No. 14 C 10490, 2015 WL 5304625, at *7 (N.D. Ill. Sept. 9, 2015) (holding use of photograph to make political point was fair use); *Dhillon v. Does 1-10*, No. C 13-01465 SI, 2014 WL 722592, at *1, *6 (N.D. Cal. Feb. 25, 2014) (same).

4. *Houghton Mifflin Co. v. Noram Publ'g Co., Inc.*, 28 F. Supp. 676, 678 (S.D.N.Y. 1939).

5. *See, e.g.*, *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1164 (C.D. Cal. 2010); *Browne v. McCain*, 612 F. Supp. 2d 1125, 1131, 1133 (C.D. Cal. 2009).

circulation.⁶ Paul Sieminski, WordPress's general counsel, testified recently that due to the effectiveness of DMCA takedowns, abuses of the process are increasing.⁷ Google's Transparency Report reveals numerous examples addressed to Google, but most intermediaries do not make transparency reports available, and thus the full scope of the problem is unknown.⁸ An analysis of fifty million takedown notices submitted to Google determined that, at a lower bound using the most forgiving measures, 8.3% had serious technical errors, and an additional 1.3% had serious substantive errors that could have been prevented at little or no cost to senders.⁹ These percentages represent nearly five million erroneous notices.¹⁰ Many of the worst offenders were repeat players in Google's Trusted Sender program.¹¹

Another recent, random sample of takedown notices, taken from a set of over 108 million requests submitted to the Lumen archive over a six-month period, reached similar conclusions:

Nearly 30% of takedown requests were of questionable validity. In one in twenty-five cases, targeted content did not match the identified infringed work, suggesting that 4.5 million requests in the entire six-month data set were fundamentally flawed. Another 15% of the requests raised questions about whether they had sufficiently identified the allegedly infringed work of the allegedly infringing material. The analysis further identified significant questions related to the availability of potential fair use defense, complaints grounded on improper (non-copyright) claims, and requests sent to defunct web sites.¹²

6. McKeown, *supra* note 1; see, e.g., Susan Park, *Unauthorized Televised Debate Footage in Political Campaign Advertising: Fair Use and the DMCA*, 32 SOUTHERN L.J. 29, 30–38 (2013) (offering examples at the national and local levels); *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech*, CENTER FOR DEMOCRACY & TECHNOLOGY (Sept. 2010), https://cdt.org/files/pdfs/copyright_takedowns.pdf (offering further examples).

7. *Hearing on Section 512 of Title 17: No. 113-86 Before the Subcommittee on Courts, Intellectual Property, and the Internet*, 113th Cong., 3, (2014) (testimony of Paul Sieminski), http://judiciary.house.gov/?a=Files.Serve&File_id=B343EABE-0BF1-44E9-8C85-B3478892B8E1.

8. Google Transparency Report, http://www.google.com/transparencyreport/removals/copyright/faq/#abusive_copyright_requests (last visited Apr. 11, 2016).

9. Daniel Seng, "Who Watches the Watchmen?": *An Empirical Analysis of Errors in DMCA Takedown Notices*, 32, 45 (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2563202.

10. *Id.*

11. *Id.* at 6.

12. Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, *Notice and Takedown in Everyday Practice*, 2 (2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628.

Disturbingly, “one in fourteen (7.3%) of takedown requests raised questions of potential fair use defenses,”¹³ mostly having to do with remixes and other potentially transformative works.¹⁴

Unfortunately, reckless takedown notices occur in all sorts of circumstances. Even in 2015, content owners are taking down uses they have themselves authorized.¹⁵ In other cases, content owners send takedown notices based on fragmentary phrases or common words that happen to match the titles of their—and many other—works.¹⁶ Overbroad matching algorithms lead copyright owners to send takedown notices targeting mere reporting on their works, and even to demand takedowns of links to their own websites.¹⁷ Notice filers may make preposterous claims, reasoning that intermediaries have little incentive to risk their § 512 protection by scrutinizing them carefully and that individual users are unlikely to

13. *Id.* at 12.

14. *Id.* at 95.

15. *See, e.g.*, Jordan Pearson, *NBC's Bogus Copyright Claim Got Canada's 'Mr. Robot' Premiere Yanked from Google*, VICE, Sept. 4, 2015, <http://motherboard.vice.com/read/nbcs-bogus-copyright-claim-got-canadas-mr-robot-premiere-yanked-from-google>; Adam Rosenberg, *'Pixels' Copyright Notices Took Down the Studio's Own Trailer*, MASHABLE, Aug. 9, 2015, http://mashable.com/2015/08/09/pixels-dmca/?utm_cid=mash-com-fb-main-link_1/2; Clicky Steve, *Automated DMCA Fail: When Bots Go Bad*, TRANSPARENCY REPORT, April 9, 2015, <http://transparency.automattic.com/2015/04/09/Automated-Dmca-Fail-When-Bots-go-Bad/> (discussing widely used rights enforcement agency Attributor.com's takedown of copyright owner's own website); *see also* Annalee Newitz, *How Copyright Enforcement Robots Killed the Hugo Awards*, IO9, Sept. 3, 2012, <http://io9.com/5940036/how-copyright-enforcement-robots-killed-the-hugo-awards> (discussing automated takedown of licensed footage that suppressed a larger broadcast).

16. *See, e.g.*, Mike Masnick, *A Glimpse of the Future Under SOPA: Warner Bros. Admits It Filed Many False Takedown Notices*, TECHDIRT, Nov. 10, 2011, <https://www.techdirt.com/articles/20111110/10135116708/glimpse-future-under-sopa-warner-bros-admits-it-filed-many-false-takedown-notices.shtml>.

17. *See, e.g.*, Emil Protalinski, *Why Automated DMCA Takedown Requests Are Asinine: HBO Asked Google to Censor Links to HBO.com*, THE NEXT WEB, Feb. 13, 2013, <http://thenextweb.com/media/2013/02/03/why-automated-dmca-takedown-requests-are-asinine-hbo-asked-google-to-censor-links-to-hbo-com/#!zrspT> (HBO provided takedown notices about 8 HBO links, as well as links to pages on Perez Hilton's blog, Pinterest, MTV.com, and IGN.com that carried stories about the HBO content at issue); GOOGLE TRANSPARENCY REPORT, FAQ, <https://www.google.com/transparencyreport/removals/government/faq/> (last visited Mar. 10, 2014); GOOGLE TRANSPARENCY REPORT, http://www.google.com/transparencyreport/removals/copyright/faq/#abusive_copyright_requests (last visited Apr. 11, 2016) (“A major U.S. motion picture studio requested removal of the IMDb page for a movie released by the studio, as well as the official trailer posted on a major authorized online media service. A U.S. reporting organization working on behalf of a major movie studio requested removal of a movie review on a major newspaper website twice.”); Emil Protalinski, *Microsoft Accidentally Asked Google to Censor BBC, CBS, CNN, Wikipedia, and Even the US Government*, THE NEXT WEB, Oct. 7, 2012, <http://thenextweb.com/microsoft/2012/10/07/microsoft-accidentally-asked-google-to-censor-bbc-cbs-cnn-wikipedia-and-even-the-us-government/#!zrtZO> (similar); Emil Protalinski, *Automated DMCA Takedown Requests Are Awful: Microsoft Asked Google to Delete Bing Links, and It Did*, THE NEXT WEB, Oct. 8, 2012, <http://thenextweb.com/microsoft/2012/10/08/automated-dmca-takedown-requests-are-awful-microsoft-asked-google-to-delete-bing-links-and-it-did/#!zrt0o> (similar).

counternotify.¹⁸ For example, a physician claiming a copyright in his signature sent a takedown notice for a document related to the suspension of his license to practice medicine.¹⁹ Businesses also submit improper takedowns in order to suppress discussion of their products or those of their competitors.²⁰

Still other takedowns are motivated by politics, not copyright interests. For example, critics of the Argentinian and Ecuadorian governments have received DMCA takedown notices, and so have reporters on the controversy over the takedowns.²¹ WordPress alone has documented numerous instances of politically motivated takedowns.²² A parody using a video game was recently taken down after Donald Trump's campaign retweeted it.²³

The problem of politically motivated takedowns worsens during campaign seasons, when takedown requests can suppress the most effective and cheapest means of communicating political messages, because the DMCA counternotification process *requires* a delay of at least ten business days before the counternotification becomes effective and the challenged material is restored.²⁴ Unless an intermediary is willing to forego the

18. See, e.g., Timothy Geigner, *Tumblr Complies With DMCA Takedown Requests From A Self-Proclaimed Future-Alien From Another Planet*, TECHDIRT (Jun. 23, 2015), <https://www.techdirt.com/articles/20150618/14264131389/tumblr-complies-with-dmca-takedown-requests-self-proclaimed-future-alien-another-planet.shtml> (discussing successful takedowns filed by human purportedly acting on behalf of an alien from the future); see also Rob Pegoraro, *Trying to Ban Links to Software Is the DMCA Joke That Never Gets Old*, PROJECT-DISCO.ORG, July 19, 2013, <http://www.project-disco.org/intellectual-property/071913-trying-to-ban-links-to-software-is-the-dmca-joke-that-never-gets-old> (discussing takedowns directed at software disliked by content providers).

19. *Hearing on Section 512 of Title 17: No. 113-86 Before the Subcommittee on Courts, Intellectual Property, and the Internet*, 113th Cong., 5, (2014) (testimony of Katherine Oyama), http://judiciary.house.gov/?a=Files.Serve&File_id=BE93D452-945A-4FFF-83EC-B3F51DE782B3.

20. *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1198 (N.D. Cal. 2004); see also Paul Alan Levy, *A Bogus DMCA Takedown from Apple*, CONSUMER LAW & POLICY BLOG, Nov. 21, 2013, <http://pubcit.typepad.com/clpblog/2013/11/a-bogus-dmca-takedown-from-apple.html>; Matt Schruers, *Observations on DMCA Reform and Notice & Takedown Abuse*, PROJECT-DISCO.ORG, May 23, 2013, <http://www.project-disco.org/intellectual-property/052313observations-on-dmca-reform-and-notice-takedown-abuse/> (“Academic research published some years ago using a limited dataset found that ‘over half—57%—of [DMCA takedown] notices sent to Google to demand removal of links in the index were sent by businesses targeting apparent competitors.’”).

21. Adam Steinbaugh, *Ares Rights Adopts Matrotyshka Doll Approach to Censorious DMCA Takedown Notices*, ADAM STEINBAUGH'S BLOG ABOUT LAW AND TECHNOLOGY, Sept. 2, 2014, <http://adamsteinbaugh.com/2014/09/02/ares-rights-adopts-matrotyshka-doll-approach-to-censorious-dmca-takedown-notices/>.

22. Paul Sieminski, *Striking Back Against Censorship*, WORDPRESS, Nov. 21, 2013, <http://en.blog.wordpress.com/2013/11/21/striking-back-against-censorship/>.

23. Mass Effect political video taken down after Trump retweeted it, <https://www.techdirt.com/articles/20160405/05560634102/ea-dmca-trump-mass-effect-mashup-video-claiming-trump-re-tweeting-it-made-use-political.shtml>.

24. Schruers, *supra* note 20; see, e.g., *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech*, CENTER FOR DEMOCRACY & TECHNOLOGY, Sept. 2010, https://www.cdt.org/files/pdfs/copyright_takedowns.pdf (documenting overly aggressive copyright

protections of the DMCA against secondary liability—and most are not—a fair use can therefore be suppressed at the time of its greatest importance. Radio personality Michael Savage was thus able to suppress material criticizing his statements about Muslims, and cripple the critic's planned media blitz, including expensive ads in *The New York Times* that provided links to the DMCA-suppressed video—or would have, except that audiences could see nothing but the notice that a takedown had occurred if they followed the links.²⁵

The DMCA's inflexibility about the time a takedown must stay in effect means that fair use can't serve its crucial, First Amendment-protective function when it comes to political speech. As the Supreme Court explained in a different context,

It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence. The need or relevance of the speech will often first be apparent at this stage in the campaign. The decision to speak is made in the heat of political campaigns, when speakers react to messages conveyed by others. A speaker's ability to engage in political speech that could have a chance of persuading voters is stifled if the speaker must first commence a protracted lawsuit.²⁶

The problem of political misuses of the DMCA is likely to increase in the future given the importance of remix relying on existing footage, usually without authorization, in political campaigns. A study of remix found that political videos that became hits were often from nontraditional political actors.²⁷ Typical party-sponsored political messages got 55,000 views, while citizen-designed political messages averaged 807,000 views.²⁸ Ads created by other entities, “mostly media companies, small news organizations, groups of bloggers, or small video production groups),” averaged over 2.5 million views; of the most viral videos, “only a fifth of them were produced by the campaigners, and in all cases they were not typical ads, but edited footage.”²⁹

The required takedown period of at least ten business days is not the only harm inflicted by misguided DMCA notices. Recipients of misguided

claims under the Digital Millennium Copyright Act that inappropriately stifle political speech on the Internet).

25. See John Tehranian, *The New Censorship*, 101 IOWA L. REV. 245 (2015).

26. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 334 (2010).

27. LIMOR SHIFMAN, MEMES IN DIGITAL CULTURE 125 (2014).

28. *Id.*

29. *Id.*

notices often can't afford to fight back or don't know they can fight back. They may mistrust the ways that the notice-sender might use the personal information that a counternotification requires; this is especially true with improper takedowns of politically or culturally critical fair uses.³⁰ Separately, most takedowns target search engines under § 512(d), and there is no obvious way to provide the original sources with any notice. Even if the targeted speakers somehow learn that their content has been de-indexed, there is no obvious way for them to counternotify, since § 512 does not require a counternotification process for link removals under § 512(d).³¹

As a result, along with defending the substance of fair use, courts must also police the misuse of DMCA notices. Given persistent principal-agent problems in takedown practice, where copyright owners delegate enforcement to entities with little interest in accuracy, the law must provide incentives for greater care.³² As Daniel Seng concludes in his empirical study of takedown notices, if it costs next to nothing for a reporter to fire off a million notices to take down an infringing work, it will fire off a million notices to do so, regardless of accuracy or precision, as it improves its chances of succeeding in the takedown. And it can do so with impunity, because it is largely protected from any collateral damage which it may cause.³³ Section 512(f) of the DMCA provides for liability for senders of bad faith takedowns, but its use has been relatively limited until recently. As the Ninth Circuit properly held in 2015, failure to consider fair use before sending a takedown can provide the requisite bad faith.³⁴ However, much remains to be worked out before § 512(f) provides a real deterrent to abusive takedowns.

II. THE PROPER FUNCTION OF COPYRIGHT

Relatedly, Judge McKeown argues that anti-criticism and privacy-protection uses of copyright are generally inconsistent with copyright's fundamental purpose.³⁵ Copyright's goal is not simply to maximize utility. That would be a tall order for any law. Instead, copyright tries to maximize

30. See Sieminski, *supra* note 22 ("This tradeoff doesn't work for the many anonymous bloggers that we host on WordPress.com, who speak out on sensitive issues like corporate or government corruption.").

31. See generally, Seng, *supra* note 10 (noting that this absence of procedural protection contributes to the infrequency of counternotices).

32. *Id.* at 35–36.

33. *Id.* at 36–37, 48.

34. *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1150 (9th Cir. 2015).

35. McKeown, *supra* note 1, at 2.

something else, but what exactly that is—authorship, expression, or economically incentivized expression—remains less than perfectly defined. Judge McKeown's useful distinction between harm and copyright harm is another way of framing the question of copyright's purpose.³⁶ If not all harm caused by unauthorized uses of copyrighted works is *copyright* harm, then copyright must have a distinguishing function. If copyright does not have a distinctive purpose, by contrast, then it is a right that can be asserted for any reason and used as spackle to fill gaps that may exist in other legal regimes.

We should easily be able to conclude that, if an unauthorized copy was also defamatory, the harm wrought by the defamation should not count as harm for purposes of weighing against fair use. The Supreme Court has also indicated that harm to an author caused by criticism or mockery, though real, is not the kind of harm copyright guards against.³⁷

But what about privacy? I agree with Judge McKeown that copyright should not be used to substitute for true privacy protection—for example, against “revenge porn,” whose harms differ substantially from those of ordinary copyright infringement.³⁸ However, copyright has been linked with privacy in various ways, including by Brandeis and Holmes in their famous article defending the creation of a general right to privacy. They interpreted common-law copyright in unpublished works as a privacy protection measure.³⁹ The Supreme Court has similarly endorsed a privacy-like rationale in copyright cases, referring to an author's right not to speak.⁴⁰ However, it is important to understand the limits of this rationale, even on its own merits. To the extent that copyright protects an author's choice not to speak because a work isn't ready, or intended for public view, that protection goes to the author's interest *as an author*. In other words, the interest ought to be understood as one relating to the expression contributed by the author as a creator, not to anything factual in the work. Facts are not protected by copyright. Likewise, any interests of the *subject* of the work as the person about whom the work communicates are not copyright interests, though they may well be important personhood interests. Their protection must lie in the law of defamation and privacy, rather than in copyright.

36. *Id.* at 11.

37. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591–92 (1994).

38. See Rebecca Tushnet, *How Many Wrongs Make a Copyright?*, 98 MINN. L. REV. 2346, 2352 (2014).

39. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 200–01 (1890).

40. *E.g.*, *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559–60 (1985).

This distinction between potential authorial privacy interests and factual/subject privacy interests helps explain which privacy interests are clearly inappropriate considerations in fair use cases. Howard Hughes, for example, failed to suppress a biography by buying up the copyrights in articles used in that biography; his interest was not truly an author/owner's interest, but merely a subject's.⁴¹ Similarly, the Eleventh Circuit recently found fair use of a photograph whose subject had bought the copyright in the photo in order to sue one of his critics.⁴² Identifying the target of criticism served as transformative fair use of the photo; the harm that the subject/copyright owner might suffer was perhaps dignitary, but it wasn't related to anything about his authorship or ownership. So too in *Garcia*, as Judge McKeown explains, the harm to Garcia flowed not from her interests as author and performer, but from the unprotectable fact of her (fraudulently induced) participation in *Innocence of Muslims*.⁴³ There was no match between the threats she received as a result of her participation and her substantive copyright claim.

Due to this distinction between harm and copyright harm, I must respectfully disagree with Judge McKeown that the decision in *Monge v. Maya Magazines, Inc.*,⁴⁴ which she also authored, is distinguishable from *Garcia* in terms of the harm involved.⁴⁵ In *Monge*, two musicians sued a magazine for copyright infringement for printing photos of their secret Las Vegas wedding. They had not intended to distribute the photos, which confirmed the existence of their marriage.⁴⁶ But where was the harm to the copyright owner's interest *as an author* in the dissemination of these photos, as opposed to the subjects' privacy interests as subjects? Judge McKeown relied on the overstatement in the 1984 case of *Harper & Row* that "every commercial use is presumptively an unfair exploitation,"⁴⁷ even though this statement was explicitly repudiated by the Supreme Court in the 1994 case of *Campbell v. Acuff-Rose*. In *Campbell*, the Supreme Court made clear that

41. *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307, 309 (2d Cir. 1966).

42. *Katz v. Chevaldina*, No. 14-14525, slip op. at 11 (11th Cir. Sept. 17, 2015).

43. McKeown, *supra* note 1, at 5-8.

44. 688 F.3d 1164 (2012).

45. McKeown, *supra* note 1, at 9.

46. *Monge*, 688 F.3d at 1169.

47. *Id.* at 1176; McKeown, *supra* note 1, at 16 (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984))). *But see Monge*, 688 F.3d at 1172 (acknowledging, before applying the fair use factors, that this statement was not good law).

most fair uses would be commercial, and that transformativeness rather than commerciality was the touchstone of fair use.⁴⁸

The always thoughtful Professor Jane Ginsburg has cautioned against limiting the concept of harm in copyright cases:

If a showing of harm is to become an element of many or most infringement claims, whether directly through copyright reform, or through the expanding back door of fair use, then it will be important for courts to develop a capacious understanding of what “harm” means. If the unauthorized use in itself no longer establishes the harm, so that the violation is not mere trespass to a property right, but something more, then the additional element must account comprehensively both for economic and non-economic harm to authors and rightowners.⁴⁹

Ginsburg is reacting to proposals that harm should become a more important part of infringement cases, especially in evaluating fair use defenses.⁵⁰ She is concerned about preserving new and currently undeveloped markets for authors, as well as non-pecuniary interests tied to an author’s “vision” of her work and the “integrity” of her creation. “The fundamental purpose of copyright is to foster an environment of respect—both material and moral—for authorship conducive to creative endeavors.”⁵¹ I disagree that many such non-pecuniary interests deserve protection by copyright law, at least with respect to published works. In a free speech culture as robust as the United States’, where insults to dignity are generally nonactionable in the absence of defamation, authors should have to slug it out with the rest of us, as unpleasant as that may be. However, even if Ginsburg is correct, her emphasis on non-pecuniary interests of the author *as author* may still exclude many of the interests Judge McKeown and I agree ought to be off-limits.

Ginsburg’s argument also raises the question of whether copyright is “property.” She would like to see it treated as such, analogizing to trespass to land, where any invasion is actionable even absent a showing of harm. But trespass to land isn’t the only way property can be governed. Trespass to chattels generally requires harm to be actionable. Nuisance law requires harm and a balancing of the equities; real property protected by nuisance

48. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994).

49. Jane Ginsburg, *Copyright: No Longer a Property Right?*, MEDIA INSTITUTE, Nov. 24, 2015, <http://www.mediainstitute.org/IPI/2015/112415.php> (footnote omitted).

50. See, e.g., Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L. J. 1175, 1188 (2010) (recommending “that copyright owners be required to prove commercial harm when they make claims of infringement other than those involving exact or near-exact copies that operate in the same market as the allegedly infringed work”).

51. Ginsburg, *supra* note 49.

rules is still property.⁵² And even land protected by a trespass rule requires us to know the boundaries of the land to be protected—the “boundaries” of a copyrighted work are often very much up for debate. The label “property,” in fact, answers very few of the questions that we might care about in copyright, such as whether Garcia ought to have a cause of action against Google.

And this leads to a related point Judge McKeown makes about fair use as a First Amendment bulwark.⁵³ In one view, fair use constrains the scope, or limits the boundaries, of copyright rights so that they don’t unduly interfere with others’ rights to speak freely. As Judge McKeown notes, fair use can be fairly uncertain, which doesn’t seem all that consistent with First Amendment demands for certainty. But then again, if you closely examine other First Amendment areas, such as public forum doctrine or obscenity, they aren’t all that certain either. Moreover, fair use has in fact developed over time to be broadly predictable. Scholars have identified categories of fair uses that provide reasonable certainty, and professional bodies have adopted best practices in fair use to guide practitioners in fields ranging from education to filmmaking to choreography; and insurers now accept fair use determinations in documentary filmmaking, indicating that fair use is serving as a good-enough protection in many circumstances.

Judge McKeown also repeats Christopher Eisgruber’s claim that copyright isn’t censorious, because it doesn’t involve content discrimination by the government.⁵⁴ One reason government doesn’t bring copyright cases is that the federal government is excluded from owning its own works by the Copyright Act, an exclusion that itself serves free speech goals.⁵⁵ In other countries, where governments do have copyright in government works, government censorship is possible.⁵⁶ Moreover, there is currently a battle over whether state and local codes that govern everyday life can be locked behind paywalls, so that ordinary citizens are not necessarily free to see and

52. See, e.g., David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652, 682 (2010).

53. McKeown, *supra* note 1, at 6.

54. *Id.* at 4 (quoting Christopher L. Eisgruber, *Censorship, Copyright, and Free Speech: Some Tentative Skepticism About the Campaign to Impose First Amendment Restrictions on Copyright Law*, 2 J. TELECOMM. & HIGH TECH. L. 17, 18 (2003)).

55. See 1 PAUL GOLDSTEIN, STELLA W. & IRA S. LILLYCK, *COPYRIGHT: PRINCIPLES, LAW AND PRACTICE* § 2.5.2, 87–98 (1989).

56. See David Fewer, *Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada*, 55 U. TORONTO FAC. L. REV. 175, 197 (1997) (discussing the use of copyright by Canada, Australia, and the United Kingdom to suppress publication of government documents).

use them without paying.⁵⁷ But more importantly, every copyright case involves the government in deciding whether speech ought to be suppressed, and the First Amendment is therefore implicated, even without a government plaintiff. Defamation cases weren't brought by the government as such, and *New York Times v. Sullivan* is still a foundational First Amendment case.⁵⁸

Courts can be sensitive to First Amendment considerations while still recognizing that the economic incentive provided by copyright rights can regularly be enough to justify sanctions against pure, substitutionary copies. This brings us back to the question of the purpose of copyright: when it's limited to providing incentives for economically-motivated expression, and when fair use is sufficiently robust, the First Amendment is satisfied.

III. OTHER LESSONS FROM *GARCIA V. GOOGLE*

Judge McKeown also wrote the opinion for the en banc Ninth Circuit in *Garcia v. Google*,⁵⁹ and uses that as a jumping-off point for her incisive observations on the use of copyright law to obtain non-copyright objectives. Another lesson that might be taken away from *Garcia*, however, is that American copyright law hesitates to threaten large corporations. Authorship in individual performers who didn't sign ironclad contracts—especially when paired with the DMCA's ability to create immediate quasi-injunctive relief through takedown notices sent, for example, to Comcast or Netflix—would have created profound industry uncertainty. The Second Circuit was equally explicit about those risks when it ruled, similarly to the ultimate result in *Garcia*, that performers did not have separate copyright rights in performances in motion pictures.⁶⁰ This concern for copyright owners over personal or individual interests is a consequence of the laser focus of American copyright law on economic interests, and not, I think, an unintended one.

Judge McKeown notes that *Garcia*'s claim might well have come out differently in Europe, and that the considerations would also have been different if she brought a non-copyright claim such as false light.⁶¹ She notes the “[p]orous and [i]mperfect [p]rivacy [p]rotections in the United States,”⁶²

57. See *American Society for Testing & Materials v. Public.Resource.Org, Inc.*, 78 F. Supp. 3d 534 (D.D.C. 2015).

58. 376 U.S. 254, 305 (1964) (establishing strict First Amendment constraints on defamation claims by public figures).

59. *Garcia v. Google, Inc.*, 786 F.3d 733, 736 (9th Cir. 2015) (en banc).

60. 16 Casa Duse, LLC v. Merkin, 791 F.3d 247, 250 (2d Cir. 2015).

61. McKeown, *supra* note 1, at 8.

62. *Id.* at 14.

but the real issue for Garcia was intermediary liability, rather than direct liability. Even a comprehensive privacy law covering the filmmaker's acts towards Garcia would not have changed the outcome in *Garcia*. Indeed, Garcia already had a number of claims against the filmmaker that seem indisputably valid. However, Section 230 of the Communications Decency Act provides blanket immunity for intermediaries like YouTube for non-intellectual property claims.⁶³ Section 230 has a huge channeling effect in the U.S., driving plaintiffs to seek ways to define their problems as intellectual property claims.

Garcia could also have tried a false endorsement claim, arguing that her presence in the altered film implied her endorsement of the views expressed therein. Absent the strong First Amendment protection that has developed for traditional forms of media, she could probably at least state a claim. Had she appeared in a video game instead of a short film, she might even have prevailed on a right of publicity claim.⁶⁴ These considerations make clear that, to the extent that we are interested in the First Amendment implications of suppressing *Innocence of Muslims* or other works, we need to ensure that other causes of action are also limited by First Amendment considerations, as defamation and privacy claims have been.

IV. FINAL THOUGHTS: CULTURAL CHANGE AND COPYRIGHT

Judge McKeown identifies significant cultural shifts in the public view of copyright, with increased public concern about its possibly censorious uses.⁶⁵ But, culture needed to change to catch up to the massive expansion of copyright law over the past few decades, both in terms of how people experience copyrighted works in ways that increasingly implicate statutory rights and in terms of what counts as infringement. As Professor Jessica Litman has cogently explained, when copyright rights get bigger, exceptions to those rights, including fair use, should also get bigger in order to preserve the same general structural relationship of free speech to privately owned speech.⁶⁶ A mansion with only the same number of windows as a one-story

63. In the 9th Circuit, though not elsewhere, state law right of publicity claims are also preempted in furtherance of § 230's goal of national uniformity. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003).

64. See *Davis v. Electronic Arts Inc.*, 775 F.3d 1172, 1175–81 (9th Cir. 2015) (holding that use of football players' likenesses in video game was not protected against right of publicity claims by the First Amendment).

65. McKeown, *supra* note 1, at 15.

66. Jessica Litman, *Campbell at 21/Sony at 31*, 90 WASH. L. REV. 652–84 (2015).

cottage would be awfully dark. The same can be said for fair use, an important bringer of light to culture.