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In Defense Of Copyright Law: The Founding Fathers Had It Right



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In this digital age, demand for information has increased exponentially. The ability to digitize information and make it available to the masses is no doubt a benefit but it has not come without a cost. Along with the right to privacy, the greatest victim of the digital age may be the Copyright Act. With the advent of the “transformative use” test and the belief that greater access to information benefits society, the notion that authors should be paid for their work is becoming antiquated.

Yet, we must not forget that it is this very notion, inscribed into the Constitution by our Founding Fathers, that is the engine of the digital age. The genius of the Founding Fathers was the recognition that the “Progress of Science and useful Arts” was promoted by paying authors for their work, not by taking their work from them and providing it to others at no cost. But we now live in a time where the willful misappropriation of entire works is sanctioned by courts as “fair use” because the works are used in a manner that provides benefit to the public. The belief that paying authors for their work somehow hinders innovation and that fostering dissemination of information is the real purpose of the Copyright Act directly contradicts the vision of the Founding Fathers and should be rejected.

This belief also runs counter to the respect for private property rights established in the Bill of Rights. Numerous provisions of the Bill of Rights seek to prohibit the federal government from invading the private rights of the citizenry. Private property is deemed worthy of protection as the Fifth Amendment expressly provides that private property shall not be taken for public use without “just compensation.” That the intellectual property rights of authors are now being taken by large corporations for the public benefit rather than the government does not distinguish the need for just

compensation. It makes the need greater. While the government at least exists for the benefit of all citizens, a private corporation exists only for the benefit of its shareholders. The public good of a corporation’s shareholders is not always the same as the public good of the rest of the nation.

Nor should the concept of fair use be used to override the fundamental principle that authors should be paid for their work. Fair use is intended to be a limited exception to this general rule, not a wholesale exclusion. Precisely because information can now be so easily copied and so readily transferred, it is even more important that the fair use test be narrowly construed to satisfy its intended purpose. Yet, rather than relying on the statutory four-factor test established by Congress, the *sine qua non* for fair use is now whether the secondary use is transformative. If you can convince a court that the use is transformative (whatever that means), then you will prevail in your action, regardless of the other factors. Fair use is now an amorphous concept that benefits creativity in lawyering much more than creativity in art.

It is not only the wholesale expansion of the fair use test that endangers the enforcement of copyrights. This change in attitude toward copyright enforcement is evident in other recent court decisions too. The possibility of a fair use defense must now be considered before issuing takedown notices, and recent case law has begun awarding fees against plaintiffs who lose infringement actions. The copyright holder now seems to be perceived as a malevolent monopolist, seeking to prevent the dissemination of ideas and information, rather than the creative artist, seeking to protect their work from theft in order to earn a living. Although I recognize that content creators come in all shapes and sizes, in our zeal to slay the corporate dragons who attack every perceived infringer without mercy, no matter how inconsequential, we must not forget that the Copyright Act is a two-way street, meant also to protect seemingly inconsequential authors from the corporate behemoths who willfully misappropriate their work in the name of progress. By making it more difficult to enforce the Copyright Act for one, we also place insurmountable burdens on the other.

I do not mean to appear a Luddite, seeking to prevent the spread of ideas and information that will benefit society, but I still believe the Founding Fathers had it right. The best means of promoting science and the useful arts is by securing payment for creators rather than allowing their creations to be shared by all for the public good without compensation. Ernest Hemingway once said that “All modern American literature comes from one book by Mark Twain called Huckleberry Finn.” Although Huck Finn was copyrighted, a great canon of American literature has flowed from it since publication. The system works as the Founding Fathers envisioned.

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