ART AND THE MARKETPLACE OF EXPRESSION

MARCI A. HAMILTON*

How do we engineer a marketplace of ideas to our liking? I think many of us would agree unthinkingly that the appropriate goal in a free society is to effect a marketplace of expression that is wide-ranging and diverse. The question is how. My thesis today is that the Constitution's Copyright Clause constructs the marketplace and that the First Amendment police government interference with that market construction. By expanding our vision from the First Amendment alone to the First Amendment coupled with the Copyright Clause, we can better apprehend what sorts of suppression are possible and, more important which are permissible.

I am inclined to agree with David Rudenstine's choice: if one must trust one or the other, I would place my trust in the market rather than the government.[1] But, I believe that the discussion of the marketplace of ideas in First Amendment doctrine too frequently oversimplifies the issues.

When discussing the freedom of speech, or art, we tend to speak in either/or categories. Speech is either suppressed or free. The government is either oppressor or not. The speaker is either engaging in protected speech or not. Suppression is bad; freedom is good. Government is dangerous; speech is not. We use these either/or categories to construct decision trees to reach answers in particular cases. The problem with the either/or methodology here, as elsewhere, is that it oversimplifies the actual operation of the law and the societal forces underlying the law. My purpose today is to prod discussion by complicating the analysis.

The marketplace of ideas is a subset of the marketplace of expression. The marketplace of *expression* is governed simultaneously by the interlinked forces of the First Amendment and the Copyright Clause. The Copyright Clause sets the ground rules for the market and the First Amendment reinforces the market's inherent limits on government interference with speech.

The marketplace of expression generated by the Copyright Clause's partnership with the First Amendment is considerably more complicated than the dualism of suppression/freedom ad-

* Professor of Law, and Director, Intellectual Property Law Program, Benjamin N. Cardozo School of Law. B. A. 1979 Vanderbilt University; M.A. 1982, M.A. 1984, Pennsylvania State University, J.D.; 1988; University of Pennsylvania.

[1] *See* This volume at 159.

mits. Under the Copyright Clause, the federal government may grant authors of original works the right to keep others from repeating or using their expression for limited times. This is a government-sanctioned right to suppress expression, but it has palpable limits. This power of suppression does not extend to the entire "thing" holding the expression. Only original expression trumps other expression. And the *ideas* in any work cannot be suppressed by government or private individual.

Moreover, the right to suppression does not exist in perpetuity.[2] Once the expression reaches its majority, it is available to all.

The Copyright Clause appears midway in Article I's listing of Congress's enumerated powers. In the midst of clauses granting Congress power to collect taxes, borrow money, coin money, and declare war, the Copyright Clause states: "The Congress shall have power to promote the progress of Science and useful Arts, by securing for limited times to Authors and inventors the exclusive Right to their respective Writings and Discoveries."[3]

The Framers believed that they were crafting an ingenious governmental scheme that would avoid tyranny and therefore engender liberty. There is precious little in the Debates at the Constitutional Convention that would indicate precisely why the Framers inserted the Copyright Clause into the Constitution. The Copyright Clause was passed as a matter of course, prompting no debate, let alone any dissent.[4]

We hardly need Convention history, however, to realize that the *only* way in which the first draft Constitution sent to Congress addressed expression was through the Copyright Clause.[5] It is worthwhile to sit back for a moment to absorb the fact that the Framers endorsed, without question, the notion of government-sanctioned private suppression of expression (copyright law) but they thought that it was unnecessary to mention rights-protection for speech, religion, or any matter touching upon conscience. They inserted the Copyright Clause as though it was an obvious choice for this new polity. But they refused to include a bill of

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[2] The Copyright Clause permits copyright only for "limited times." U.S. CONST. art. I, § 8, cl. 8. Unfortunately, Congress recently formed to industry pressure to increase the term to approximately 100 years. *See* The Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998). Marci A. Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO. ARTS & ENT. L.J. 655 (1996).

[3] U.S. CONST. art. I, § 8, cl. 8.

[4] *See* Journal of James Madison (Sept. 5, 1787), *in* THE RECORDS OF THE FEDERAL CONVENTION of 1787, vol. II, at 505 (Max Farrand ed.) (1986).

[5] *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION 1787, 608 (1981).

rights on the ground that it was unnecessary. Liberty, apparently, would be secure, at least in part, if the federal government were limited to the exercise of enumerated powers, if one of those powers permitted authors to suppress the expression of others for limited times, and if there were no independent articulation of rights against the government. The view should be understood against the backdrop of British history. In England, the Stationers Company, the Crown and the established Church aggressively censored works with the aid of the Star Chamber. The American genius lay in the decision to detangle the powers that worked together to suppress liberty.[6]

Drawing upon the history of publishing and censorship in Britain, one can find three features of the United States Copyright Clause that shape the character of the marketplace of expression that is then policed by the First Amendment. First, the clause tends to decentralize control over expressive works. (Authors, not publishers, the government or an established Church, hold rights.) Second, the clause fosters original works. An expanding array of works is necessary to ensure liberty. Third, the clause encourages the commodification of expressive works. I will focus on the first two factors—decentralization and originality.

Let us return to the question about private ownership of public spaces and what to do. There are now three potential suppressors of a particular artwork: the author of the work, the government, and the private owner of a publicly shared space. The Constitution permits, even encourages, the author to censor or chill others' speech for a limited time. By giving enforceable property rights in her expression, Article I simultaneously makes it possible for her to receive a return on her investment of time, energy, and resources, and encourages her to disseminate her work, making it possible for others to benefit.[7] Moreover, by giving the author power over her original work for a limited period, the clause forces contemporary authors to create their *own* new works, and therefore, engenders more quantity, quality and diversity in the marketplace. In sum, for utilitarian purposes, the clause annoints authors with censorship powers.

The Constitution does *not* grant the federal government the same censorship power over art works,[8] because the government's centralized power is too likely to be used coercively to the detri-

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[6] *See* MARCI A. HAMILTON, COPYRIGHT AND THE CONSTITUTION (forthcoming) (manuscript at 15-17, on file with *Cardozo Law Review*).

[7] *See* U.S. CONST. art. I, § 8, cl. 8.

[8] *Id.*

ment of the people. While the government ought to have free rein to purchase art for its own purposes, it cannot engage in viewpoint discrimination when it finances the creator of the new works.[9]

The utility of the private owner's power to censor presents a harder question. The private owner can operate as both a purchaser, (such as the shopping mall owner who purchases statuary, architectural designs, and graphics to decorate the space), or as a provider of works (in the case of the mall, by permitting artists to sell their works on his premises, or in the case of the Internet, by displaying and distributing copyrighted works). Because works eventually fall into the public domain, older works are largely free while newer works must be purchased. This might argue that new works will not receive airing in these fora and, therefore, intervention-funding, for example, is needed. But the seemingly insatiable appetite for the "new" which is characteristic of American culture and which is a value embedded in our constitutional scheme (and highlighted in the Information Era) is likely to drive such space-owners to use their resources to invest in new works to attract the public. Those works run the gamut from architecture, graphics, and sculpture to motion pictures, concerts, and plays performed on the owner's premises or through the Internet.

The argument that private owners will use their resources in a way that positively contributes to the quantity, quality, and diversity of artworks available to the public turns on the extent of industry *centralization.* As long as there is a meaningful variety of owners, we can expect the mix of art available to the public to be fairly diverse and even interesting. What happens, though, when a single conglomerate owns a significant percentage of the shopping malls, when airports are privatized and owned by a bare handful of air service conglomerates, or when only a small number of companies control the vast majority of the spaces visited by the public on the Internet? What happens when one of the media multinationals starts investing in malls, or the Internet, and plays only its music, displays only its graphics, and shows only its movies? Economies of scale suggest that such concentration of ownership will result in less variety, less originality, and more conformity. The dangers of centralized government control over expressive works are just as real when we have centralized private control. This is the lesson of the stationers Company, the Star Chamber and the Statute of Anne.[10]

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[9] *See Finley* discussion, *Speech Art Law Symposium,* New Orleans (Jan. 8, 1999).

[10] *See* Hamilton, *supra* note 6, at 15-17.

If centralization of control over artistic works is the cardinal fear, and the Copyright Clause tells us it is,[11] then turning to the government to solve the problem posed by consolidated private power is backward to say the least. Why turn to one centralized power to fix another centralized power's errors? Federal or state laws that would force private arts purchasers to open their doors to particular works or types of works, or that would force diversity in their art choices are misguided. Such a solution simply compounds the problem posed by oligopolistic private owners.

The better answer, if we intend to foster the marketplace of expression, lies in the rigorous enforcement of the antitrust laws. As the current dispute between Microsoft and the Justice Department over Microsoft's web browsers implies,[12] the antitrust laws[13] can be important tools in engineering the marketplace of expression. Where were they when our media companies consolidated their world domination over the marketplace of expression?

Keeping the government from censorship and private owners from monopolistic behavior is not enough, however, to ensure healthy development of the marketplace of expression. The Copyright Clause rewards only that expression that is demonstrably original.[14] It transforms what could be a static set of expressions into an ever expanding array. Assuming the proprietors of space frequented by the public do not have monopolistic power, that ever-expanding array, or at least a significant portion, is likely to find its way to the public. Without the Copyright Clause, the market in expression would *not* be a free market and it would not be a diverse market.

In sum, the Copyright Clause establishes criteria by which we can judge how the marketplace of expression is faring. It is not enough to ask whether art is being suppressed, for the Copyright Clause empowers the federal government to permit authors to suppress those works that copy theirs. We should be asking instead whether the market is subject to decentralized control and whether it contains an ever-expanding variety of original, creative works.

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[11] *Id.*

[12] *See* Michelle M. Flores, *Gathering Clues on Microsoft*, SEATTLE TIMES, Sept. 22, 1996, at F1.

[13] 15 U.S.C. §§ 1-27 (1996).

[14] *See* U. S. CONST. art. I, § 8, cl. 8.