

# 1. The Constitutionalization of Technology Law

2. *By Mark A. Lemley*

Technology lawyers, and especially intellectual property lawyers, have discovered the Constitution. They are filing suits to invalidate statutes and interposing constitutional defenses to intellectual property claims at an unprecedented rate. Scholars are focusing more attention on the complex interaction between intellectual property, Internet regulation and the Constitution than ever before. The goal of this symposium is to investigate two of those constitutional claims in much greater detail. In this introduction, I will endeavor to explain why the issue arises at all.

First, I should distinguish between the two branches of this symposium, one dealing with intellectual property law<sup>1</sup> and the other dealing with Internet regulation.<sup>2</sup> The two bodies of law tend to have different interactions with the Constitution. Litigation about the constitutionality of Internet regulation tends to center on the First Amendment, and to involve the application of well known (if not always clear) principles of law to new factual situations. Thus, facial constitutional challenges have been mounted to the Communications Decency Act of 1996<sup>3</sup> and the Child Online Protection Act,<sup>4</sup> both of which regulated indecent speech over the Internet.<sup>5</sup> The First Amendment has also been interposed as a defense in various criminal prosecutions that sought to punish speech-related activity on the Internet.<sup>6</sup> In all these cases, the nature of the speech and the restriction of it were clear, even if the outcome was not. The papers for this symposium focus on two cases that extend First Amendment arguments to cover new territory: the regulation of computer source code itself.<sup>7</sup> Those arguments are important not only for the fate of encryption regulation, but also because they will help to determine the role the First Amendment plays in regulating other rules about software, notably intellectual property rules.<sup>8</sup>

Intellectual property has long coexisted uneasily with the First Amendment.<sup>9</sup> Recent expansions of intellectual property law have put more strain on the uneasy truce between the two bodies of law. Some of the cases and arguments that arise in the intellectual property context are First Amendment reactions to this expansion of intellectual property rights.<sup>10</sup> Constitutional analysis of intellectual property is complicated, however, by the fact that Article I specifically contemplates the creation of certain limited intellectual property rights.<sup>11</sup> While the Intellectual Property Clause is a grant of power, it is also a limitation.<sup>12</sup> Thus, the constitutionalization of intellectual property law has also taken the form of arguments over whether Congress has exceeded its power under the clause.<sup>13</sup> The Benkler and Hamilton articles in this symposium nicely meld these two distinct constitutional debates in the specific context of the legality of database protection.<sup>14</sup>

Why now? What is new about the Internet and what has changed about intellectual property to bring these constitutional concerns to the fore? The answer in both cases is that the new

constitutional claims are a reaction to new efforts by the government to intervene in the marketplace to favor a particular outcome. The background for this intervention in both Internet regulation and intellectual property is the dramatic growth in importance of the new information economy.<sup>15</sup> With recognition has come increased attention by both Congress and powerful interest groups, and therefore some of the problems predicted by public choice theory.<sup>16</sup> This is particularly true in the intellectual property setting, where the issues are both complex and hotly contested. Because these are hard issues, and because there are strong interest groups pushing particular agendas, it is far too easy for Congress to fall into a pattern of responding to private demands, rather than thinking proactively about what should be done.<sup>17</sup> To a disturbing extent, Congress in recent years seems to have abdicated its role in setting intellectual property policy to the private interests who appear before it. Congressional hearings on patent reform, the Digital Millennium Copyright Act, and database protection have all exhibited some of these characteristics.

Congressional regulation of intellectual property or of the Internet is not driven solely by considerations of public choice theory. Many members of Congress have an altruistic desire simply to participate in this incredible new phenomenon. As one commentator familiar with the process put it, “everyone wants to get involved with the Internet. Unfortunately, if you’re in Congress, the only way to get involved is to pass legislation.”<sup>18</sup> And so legislation is passed. By and large, this legislation is regulatory, because legislation generally is.<sup>19</sup> Even those in Congress who want government to keep its hands off the Net ironically end up passing new laws to accomplish that goal.<sup>20</sup> Thus, the pressures to “do something” in these areas come from several quarters at once.

The result is an intellectual property law that increasingly looks like what it is—the product of detailed compromises between private interest groups. Most (but not all) of these interest groups are intellectual property owners, and so most (but not all) recent changes in the law have been in the direction of greater protection for intellectual property owners.<sup>21</sup> Where a well-organized group has opposed expanded protection, the result has generally been not to defeat the bill altogether, but rather to expand protection in general while providing specific carve-outs for the group that complained.<sup>22</sup>

If you are a loser in this process because you aren’t well-organized or well-funded—say, because you are a member of the public—you will naturally look for an end-run around what Congress has done. The Constitution is the perfect avoidance mechanism, because it allows you to resort to the judgment of the courts, and courts are more resistant to the sorts of public choice concerns described above.<sup>23</sup> If you can persuade a court that what Congress has done is unconstitutional, all the campaign contributions in the world are unlikely to help your opponents.

Lest this analysis be misinterpreted, let me make one thing perfectly clear: I do not mean to

suggest that the particular constitutional arguments in question should be subject to more skepticism because they are a reaction to the rent-seeking process I have just described. There can be no question that Congress and the Clinton Administration have dramatically expanded the scope of intellectual property protection, or that they have attempted to regulate speech on the Internet that they could not regulate in other contexts. Further, one of the clear implications of public choice theory is that Congress will pay less attention than it probably should to constitutional constraints on its behavior. I believe the Constitution should be read to impose limits on the growth of regulation in both contexts, though the precise scope of those limits is not yet clear. The fact that Congress is doing more in both areas will necessarily increase the danger of conflict with the Constitution. So long as Congress expands its regulatory efforts over technology, the constitutionalization of technology law will continue.

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† Professor of Law, Boalt Hall School of Law, University of California, Berkeley; Director, Berkeley Center for Law and Technology; of counsel, Fish & Richardson P.C. Thanks to Rose Hagan for comments on an earlier draft.

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1 . See Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 Berkeley Tech. L.J. (2000); Marci A. Hamilton, *A Response to Professor Benkler*, 15 Berkeley Tech. L.J. (2000).

2 . See Lee Tien, *Publishing Software as a Speech Act*, 15 Berkeley Tech. L.J. (2000); Robert C. Post, *Encryption Source Code and the First Amendment*, 15 Berkeley Tech. L.J. (2000).

3 . Pub. L. No. 104-104, § 502, 110 Stat. 56, 133 (codified at 47 U.S.C. § 223 (1996)) (prohibiting any person from knowingly transmitting obscene or indecent messages or displaying patently offensive communication on the Internet to children under eighteen years of age).

4 . Pub. L. No. 105-277, tit. XVI, 112 Stat. 2681, 2736-41 (1998) (to be codified at 47 U.S.C. § 231) (forbidding according minors access to web sites containing indecent material).

5 . See, e.g., *Reno v. ACLU*, 521 U.S. 844 (1997) (Communications Decency Act); *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999) (Child Online Protection Act).

6 . See, e.g., *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997); Robert Kurman Kelner, *United States v. Jake Baker: Revisiting Threats and the First Amendment*, 84 Va. L. Rev. 287 (1998).

7 . See *Bernstein v. United States Dep't of Justice*, 176 F.3d 1132 (9th Cir.), *reh'g en banc granted and opinion*

*withdrawn*, 192 F.3d 1308 (9th Cir. 1999); *Junger v. Daley*, No. 98-4045, 2000 WL 343566 (6th Cir. April 4, 2000). A district court has come to the opposite conclusion. *See Karn v. Department of State*, 925 F. Supp. 1 (D.D.C. 1996), *remanded for reconsideration*, 107 F.3d 923 (D.C. Cir. 1997) (unpublished disposition).

8 . For an early effort to explore some of those implications, see Dan L. Burk, *Patenting Speech* (2000) (unpublished manuscript, on file with author). *Cf.* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 *Duke L.J.* 147, 236-37 (1998) (raising briefly the speech issues Burk discusses at length).

9 . *See Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539 (1985). Many commentators have discussed this tension, generally arguing that intellectual property law needs to take more account of the First Amendment than it historically has done. *See, e.g.*, Floyd Abrams, *First Amendment and Copyright*, 35 *J. Copr. Soc'y* 1 (1987); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 *Calif. L. Rev.* 283 (1979); Charles C. Goetsch, *Parody as Free Speech—The Replacement of the Fair Use Doctrine by First Amendment Protection*, 3 *W. New Eng. L. Rev.* 39 (1980); Paul Goldstein, *Copyright and the First Amendment*, 70 *Colum. L. Rev.* 983 (1970); Lemley & Volokh, *supra* note 8, at 147; Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 *UCLA L. Rev.* 1180 (1970); Hon. James L. Oakes, *Copyrights and Copyremedies: Unfair Use and Injunctions*, 18 *Hofstra L. Rev.* 983 (1990); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 *Vand. L. Rev.* 1 (1987); David E. Shipley, *Conflicts Between Copyright and the First Amendment After Harper & Row, Publishers v. Nation Enterprises*, 1986 *BYU L. Rev.* 983 (1986); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 *Emory L.J.* 393 (1989); Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 *Cardozo Arts & Ent. L.J.* 79 (1996); Mel Marquis, *Comment, Fair Use of the First Amendment: Parody and Its Protections*, 8 *Seton Hall Const. L.J.* 123 (1997); *cf.* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *Yale L.J.* 283, 296-97 (1996) (offering speech-related justifications for limited copyright protection); Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 *Wm. & Mary L. Rev.* 665, 666 (1992) (suggesting that, if anything, commentators understate the problems caused by the conflict between copyright law and the First Amendment).

10 . Thus, Benkler responds to database protection and the Digital Millennium Copyright Act. *See Benkler, supra* note 1; Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 *N.Y.U. L. Rev.* 354 (1999). Lemley and Volokh respond to the growing scope of copyright protection. *See Lemley & Volokh, supra* note 8, at 147. The courts have also faced First Amendment claims arising from the expanded protection of the Digital Millennium Copyright Act. *See Universal City Studios v. Reimerdes*, 82 *F. Supp.* 2d 211 (S.D.N.Y. 2000).

11 . U.S. Const. art. I, § 8, cl. 8.

12 . *See, e.g.*, *Feist Pubs. v. Rural Telephone Servs.*, 499 U.S. 340 (1991); *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966) (“The clause is both a grant of power and a limitation.”).

13 . *See, e.g.*, *Eldred v. Reno*, 74 *F. Supp.* 2d 1 (D.D.C. 1999); Paul J. Heald & Suzanna Sherry, *Implied Constitutional Limits on Congressional Power: Construing the Commerce Power in Light of the Intellectual Property Clause*, 2000 *U. Ill. L. Rev.* (forthcoming).

14 . See Benkler, *supra* note 1; Hamilton, *supra* note 1 .

15 . See, e.g., U.S. Dep't of Commerce, Secretariat of Elec. Commerce, *The Emerging Digital Economy* 1 (1998).

16 . For background on public choice theory, see, e.g., Maxwell L. Stearns, *Public Choice and Public Law: Readings and Commentary* (1997); J. Buchanan & Gordon Tullock, *The Calculus of Consent* (1962); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 *Tex. L. Rev.* 873 (1987); William N. Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 *Va. L. Rev.* 275 (1988).

17 . This is not a new problem, and it has been explored in greater detail elsewhere. See, e.g., Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 *Or. L. Rev.* 275 (1989); Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 *Cornell L. Rev.* 857 (1987). The issues (and certainly the laws) are becoming increasingly complex, however, and the interest groups have more at stake. Thus, the pressures identified in this paragraph are increasing over time.

In prior years, Rep. Robert Kastenmeier was a strong positive force in ensuring that intellectual property legislation was vetted for quality. His proposed list of criteria for considering a new intellectual property bill, see Robert W. Kastenmeier & Michael J. Remington, *The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?*, 70 *Minn. L. Rev.* 417 (1985), deserves renewed attention today.

18 . Interview with anonymous source in Washington, D.C. (March 31, 2000).

19 . Legislation is far from the only regulator of the Net, of course. See generally Lawrence Lessig, *Code and Other Laws Of Cyberspace* (1999).

20 . A prime example is the Internet Tax Freedom Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998), which imposed a moratorium on taxation of e-commerce.

21 . See, e.g., Anticybersquatting Consumer Protection Act, Pub. L. No. 106-113, 113 Stat. 1501 (1999) (codified at 15 U.S.C. § 1125(d)) (giving new trademark rights in domain names); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (new rights codified at 17 U.S.C. §§ 1201-1205) (banning circumvention of technological access control measures); Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, §102(b), 112 Stat. 2827, 2827 (1998) (codified at 17 U.S.C. § 302) (extending the duration of existing copyrights by 20 years); No Electronic Theft Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997) (new rights codified at 17 U.S.C. § 506) (expanding criminal penalties for copyright infringement); Economic Espionage Act of 1996, Pub. L. No. 104-294, 110 Stat. 3488 (codified at 18 U.S.C. §§ 1831-1839) (criminalizing trade secret misappropriation); Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (codified at 15 U.S.C. § 1125(c)) (creating a trademark cause of action which does not require consumer confusion).

22 . See, e.g., Fairness in Music Licensing Act, Pub. L. 105-298, § 202, 112 Stat. 2830-31 (1998) (codified in principal part at 17 U.S.C. § 110(5)(B) and at §§ 101, 504, 513); Digital Millennium Copyright Act, Pub. L. No. 105-304, § 202(a), 12 Stat. 2860, (codified as amended at 17 U.S.C. § 512); and 17 U.S.C. §§ 108, 110, 111, 119.

23 . See, e.g., Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103

Harv. L. Rev. 43, 78-81 (1989); Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public Law*, 54 Tulane L. Rev. 849, 874-75 (1980); Cass Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29 (1985). *But see* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 Yale L.J. 31 (1991) (criticizing this conclusion).