Proposed insert to page 53

This contains some transitional material and the long version of the "economics of suppression" insert. It all would be inserted at page 53.

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Polar and Converging Models

The Treatise suggests that the two major strains in copyright are the economic or instrumental perspective, and the authors' rights perspective.[1] This dual perspective parallels the configuration in property and tort law as a whole, where quandries such as the suppression problem are sometimes analyzed in terms of whether the individual holding an entitlement is a "steward" entrusted with the resource solely for sake of the social good that is likely to result from his or her productive use of it, or a "sovereign" to be left unregulated in managing the resource.[2] Despite their potential for conflict, the sovereignty and stewardship models often generate results that converge.[3] It may be that copyright's various normative strands can be similarly reconciled in regard to particular issues. I shall suggest that in regard to at least some suppression issues -- notably, those arising in regard to authors who have already made their work part of the public debate or consciousness -- it may be possible to reach some consensus among the competing policies and principles, thus rendering it unnecessary to choose one dominant strand on which to rely. But such an analysis requires that one voyage some distance beyond the explicit words of the copyright statute.

The economics of suppression

At first glance, suggesting that authors be rendered unable to use their copyrights for suppression seems consistent with the economic or "pursuit of knowledge" instrumental approach, for

depriving authors of a suppression right seems to guarantee that knowledge otherwise unavailable will reach the public. But matters are not so simple. Before turning to the "authors' rights" approaches, it would be advisable to explore the economic arguments themselves.

Among other complications, as Professor Goldstein recognizes, authors need control over when and how their works are published. There can be practical problems in distinguishing suppression from a refusal to license motivated by a desire to maximize financial return.[4] It may be for these reasons that in patent law, it is commonly said that patentees are permitted to suppress their patents,[5] though even in patent the intellectual property owner's ability to suppress is not so complete.[6]

More important than the practical problems may be a conceptual one. If the proper way to look at these problems is economic, the principles of consumer sovereignty would seem to dictate that governmental decision-makers should not question why someone refuses to sell or license. Economics "assum[es] that man is a rational maximizer of his ends in life,"[7] and a desire to suppress would seem to be as rational an end as a desire for fame or fast cars. How then can economics and the hatred of private censorship be squared? Additionally, it has been persuasively argued that the ultimate allocation of a resource will be efficient regardless of how entitlements are initially assigned,[8] at least in the absence of factors such as transaction costs and strategic behavior,[9] and that in the absence of such factors and income effects[10] a change in intitial entitlements will not alter

what constitutes the efficient result.[11] So long as the parties can meet face to face, as copyright owner and potential parodist or critic could often do, why should there be any need for the judiciary to do anything but enforce whatever property right is before it?

The ultimate answers to whether suppression would or would not be economically desirable will depend in most cases on empirical analysis of the particular fact pattern.[12] But some general observations can indicate preliminarily why neither consumer sovereignty nor the Coase Theorem mandate that judges be indifferent when copyright owners seek to use the copyright law to enforce attempts at suppression.[13]

At least five reasons suggest that the market cannot always be relied upon to mediate attempts at suppression and that it might be economically desirable to refuse authors an entitlement to suppress.[14] The five reasons are the "suppression triangle"; the public goods dilemma; pecuniary effects; managerial discretion; and income effects. The first four reasons are interrelated, and to explicate them let me begin with the "suppression triangle".

Suppression Triangle. I use the term "suppression triangle"[15] to point to the fact that in cases involving the suppression of information or other intellectual products,[16] at least three parties are affected: (1) the person who seeks or threatens to make the information known (the potential publisher), (2) the person who wants to keep the information

secret (the potential suppressor), and (3) the person or persons who would want to know the information (the potential recipients). This is the triangle of affected interests. Yet in the suppression transaction typically only two parties are present: the potential publisher, and the person with the secret who wants to suppress it. Whether an attempt to suppress is likely to be value-maximizing will in my view depend, inter alia, on how well the interest of the omitted third party, the class of potential recipients, is represented by the two immediate participants.

In cases of blackmail, it is almost inevitable that there will be only two persons immediately involved and that they will not serve the interests of the omitted party. The potential blackmailer cannot solicit the third party's bid without defeat any possibility of sale to the person desiring secrecy.[17] One can see why contracts to suppress are not reliably value-maximizing in the blackmail context.

In the case of a copyright owner, the case against allowing the suppression is somewhat weaker because the potential publisher may be in a position to reflect the interests of the affected third parties (that is, the public). That possibility, when considered in conjunction with the many positive effects of granting copyright owners rights to exclude, may explain why the legal system exhibits uncertainty in handling the suppression question in the copyright context.

Nevertheless, the possibility of misallocation remains. Consider a hypothetical novelist or moviemaker who wants to keep the world from knowing what a hostile critic or parodist has to say about his work; the critic or parodist wants to quotes from the work or uses its imagery; that use of quotation or imagery is somehow essential to the comprehensibility of the criticism or parody.[18] Should the law require the critic or parodist to purchase licenses to quote or paraphrase, how sure could we be that the "highest-valued" use would ensue?

Assume that the critic or parodist stands to earn at most a thousand dollars profit from even the best-written product. Assume that the novelist or filmmaker would lose fifty thousand if the criticism or parody is published. Since the copyright owner would charge at least fifty thousand for a license to criticize or ridicule his work and the critic or parodist stands to gain only one thousand from publishing, it may look like the copyright owner holds the "highest valued" use when compared with the publisher. But that may be an illusion resulting from the fact that the third party in the owner/user/public triangle is not being counted as part of the deal. The publishing of the review or parody might benefit the public (who would thus be warned off from, let's say, a much-hyped romance novel that doesn't really excite anyone who reads past page five) to the tune of that same fifty thousand, or perhaps even more. On these hypothesized facts, requiring the publisher to buy a license from someone who would not sell it is a bad idea, and giving the

publisher (the critic or parodist) free use is a good idea. And both are consistent with economic measures of value.

If the critic had been able to capture the full value the review gave to the audience, then the novelist's fifty thousand minimum asking price would have been met. What prevented the critic from capturing the audience's full value?

The public goods dilemma. One of many possible factors presenting the critic from capturing that value is the public goods dilemma alluded to earlier: While for ordinary goods the price will equal marginal cost under perfect competition, for public goods[19] such as intellectual products the producer will not cover his total costs if he charges only a price equal to the marginal cost of production. This means that at least in the absence of price discrimination, the seller of an intellectual product will need to charge a price for, e.g., the newspaper, that is higher than the marginal cost of reproducing it. As a result, persons who would want the good and who would be willing to pay up to marginal cost for it will not purchase it; and total revenues will not reflect the extent to which the good could serve consumer needs.[20] Moreover, the end result of the publisher's inability to capture the full value the work holds for an audience may be that a publisher will not be able to bid enough to purchase the license. In sum, groups of consumers and producers in this area do not bargain over total value with each other in the way that the one-person farmer and rancher of the Coase theorem are able to do.

Pecuniary losses. Another complication is the fact that much of the loss that can come from a critical review will often be merely pecuniary, reflecting not a net loss to society but rather a shifting of revenues from one novelist to another and possibly better one.[21] It is as if the triangle now were a geometric figure with four points (the criticized novelist, the critic, the public, and the better novelist). If one could add to the price offerred for the "license to criticize" an amount reflecting the monies that the better novelist would reap, it might be enough to make the difference; since this cannot happen, mere pecuniary losses may take on an importance they should not have and they might prevent socially desirable licensing.

Managerial discretion. Another possible complication has to do not with the potential buyer's inability to raise the appropriate amount of capital, but with the potential licensor's potential inability to know even a good deal when it comes along. This complication I will label managerial discretion,[22] by which I mean to embrace all those things that may make managers in complex corporations sometimes arrive at decisions that are less value-maximizing than they could be. I would include here, for example, risk aversion, bureaucreatic structure, group dynamics, and laziness. Thus, the officials of the copyright owner (for example, the executives at the company publishing the novel or making the movie) may refuse to license simply because the license is in an unfamiliar field and their particular bureaucratic structure penalizes unlucky risk takers more than it rewards lucky ones. When critical, parodic, or otherwise

controversial licenses would be at issue, the human desire to "play it safe" might prevent value-maximizing transfers from occurring.[23] Managerial discretion, too, can prevent the parties from dealing with each other like the unitary participants in the classic Coasian transaction.

Income effects. All of the above are reasons why socially desirable "licenses to be critical" are not likely to be granted if left solely to the devices of copyright owners.[24] One additional factor remains to be discussed: "income" or wealth effects. The term basically refers to the fact that giving someone an entitlement makes that person richer, and this may change how the holder values both the entitlement and other resources, and this in turn may affect how entitlements are eventually allocated once bargaining between that person and other persons is completed.[25] Income effects do not retard resources from moving to their highest-valued use; nor are they often strong enough to make a difference; but, when income effects do have an impact, they have the potential of rendering the meaning of "highest-valued" use indeterminate.[26]

An "income" or "wealth" effect only rarely affects allocative decisions.[27] Income effects are most likely to have an impact when something priceless, like life, is at stake; in such contexts, whoever owns the entitlement initially will be most unlikely to sell it, so that the initial assignment of rights is likely to foreclose the question of who appears to "value" it more.[28] Even if something less extreme than life were at stake, an income effect can still come into play. This is

particularly true where what is involved is personal interests such as reputation and freedom from ridicule. In such cases, whomever is given the right in the first instance is likely to refuse to sell it; he or she will appear to value it more highly than the other party, who is placed in the position of buyer and who is thus limited in what he or she can bid by current assets plus whatever can be raised on the strength of the proposed license. An author who fears disclosure of embarrassing personal facts or criticism of her work may be unwilling to sell at any price-- but that same person may be unable to buy silence if the right were given to the publisher instead.[29]

In such cases, looking to the results of consensual transactions will not give us any information about who "should" have the right. Thus, refusing to allow a copyright owner to suppress in a case where the income effect is likely to make a determinative difference does not necessarily contravene economic principles.

Authors' Rights and Suppression

The authors' rights strain of argument has, as mentioned, two principle lines of argument, one resting on the appropriateness of rewarding valuable labor, and the other resting on the perception that authors have some kind of special psychologic and psychic connection with their works. While conceivably each strain could be employed to argue that authors should be free to suppress others' unfriendly use of their work, such an argument does not inevitably follow from their terms. To

the contrary, attention to questions of proper reward and psychological cathexis may better indicate that the power to suppress should not be given to artists.

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-- Footnotes --

1. See __ supra. The Treatise also suggests that the copyright act embraces and furthers certain First Amendment values. Vol II at 238-43.

2. In intellectual property law, the sovereignty model correlates roughly with the "authors' rights" perspective. The stewardship model corresponds most closely with the economic perspective, and it also has echoes in the notion that copyright serves First Amendment values. See Vol II at 238-43 (First Amendment).

3. It is their convergence in the usual case that permits their continued coexistence as competing perspectives. For example, one way to serve the "social good" is, arguably, to respect individual owners' investments in their property, cf., Michelman, Property, Utility & Fairness, 80 HARV.L.REV. 1165 (1971) (utility arguments support paying compensation to owners disadvantaged by government activity in a fairly wide range of instances).

Similarly, a way to serve the economic health of a society is, arguably, to honor owners' decisions as to how their property should be used. This latter argument is, at its extreme, Adam Smith's "invisible hand" notion.

4. For example, it can be difficult to distinguish suppression from an attempt to direct the work into the most valuable derivative work markets. See e.g. Vol I at 571-73 (rights over derivative works can affect the direction of investment and the type of works produced.)

Similarly, in regard to unpublished works, it can be difficult to distinguish cases of supression from cases of economically motivated refusals to license: for example, someone claiming economic motives may have no real intention of ever publishing. Conversely, an author accused of suppression may be simply trying to keep the work out of the public eye temporarily until it reaches its mature form and can be published.

Even if some practical means existed to distinguish all dissembling "supressors" from those copyright owners who are genuinely motivated by financial return, some cases will present instances of truly mixed motives. For example, the owner of copyright in an out-of-print collection of letters might sue a biographer who quotes the letters extensively both out of a dislike for the biographer's message or perceived inaccuracies, and out of a desire to preserve the reprint market for the letters. See Meeropol v. Nizer, 417 F. Supp. 1201, 1208 (2d Cir. 1976), rev'd and remanded, 520 F. 2d 1061 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978).

5. See Gordon, An Inquiry into the Merits of Copyright, 42 STAN.L.REV. 1343 at 1376 & n. 159.

6. For example, anticompetitive misuse of rights in both patent and copyright may be a ground for denying enforcement of the applicable intellectual property rights. See Vol II 177-182 & 180 nn. 13-14 (intellectual property owner's anticompetitive conduct). Also see Gordon, An Inquiry into the Merits of Copyright, 42 STAN.L.REV. 1343 at 1462 n. 525 (some other potential limitations on patentee's right to suppress).

7. R. POSNER, ECONOMIC ANALYSIS OF LAW (3rd ed.) at 3 (1986).

8. See Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1960).

9. See id. (transaction costs); also see, e.g., Regan, The Problem of Social Cost Revisited, 15 J. Law & Econ. 427 (1972) (strategic behavior).

10. Income effects are, roughly, the impact on one's preferences brought about by a change in wealth, including the change brought about by being given, or being denied, an entitlement. See, e.g., Mishan, The Postwar Literature on Externalities: An Interpretive Essay, 9 Econ. Lit. 1 (1971) (the allocative impact of income effects illustrated at 18-21, though not explicitly in the context of the Coase theorem).

11. The impact of strategic behavior and income effects is sometimes exaggerated. See Coase, Notes on the Problem of Social Cost, in R.H. COASE, THE FIRM, THE MARKET AND THE LAW 157 (Chicago 1988), particularly at 159-162 (assessing the presumed difficulties caused by the strategic behavior potentially induced

by the presence of bilateral monopoly) and 170-174 (discussing arguments re the presumed effect of changes in legal position on the distribution of wealth and on the allocation of resources).

12. Even if one interprets copyright's economic goal as being solely the use of incentives to "promote knowledge," so that satisfying the copyright owner's personal tastes would not count as an independent value, the empirical answer to suppression questions would not be easy: in a given case enforcing any particular type of suppression would both keep some knowledge secret, and yield long-term incentives that could aid knowledge in the long run (because authors who can suppress have a copyright worth more than authors who cannot). Cf., Michelman, Property, Utility & Fairness, 80 HARV.L.REV. 1165 (1971), (the effects of demoralization on productivity.) Which of the two potential effects on knowledge would be greater (the loss from enforcing suppression or the gain from long-term incentives) cannot be determined a priori.

13. For a fuller discussion of this issue, see Gordon, The Right Not to Use, manuscript on file with the University of Chicago Law Review.

14. Additional reasons might include, e.g., the potential nonmonetizability of first amendment values. See Gordon, Fair Use as Market Failure, 82 COLUM. L.REV. 1600 at 1631-32.

15. I base this theory in part on the work of James Lindgren in the blackmail area. Lindgren, Unraveling the Paradox of

Blackmail, 84 Colum. L. Rev. 670 (1984) (discussing the three-party structure involved). For an economic analysis of blackmail stressing other aspects of blackmail activity, see Coase, The 1987 McCorkle Lecture: Blackmail, 74 Va. L. Rev. 655 , 673-74 (1988).

I am indebted to Warren Schwartz for suggesting the potential relevance of the blackmail literature to this problem.

16. Information can implicate different issues from literary expression and other intellectual products; for purposes of this very general discussion, however, I shall group all together under the rubric "information."

17. Lindgren, Unraveling the Paradox of Blackmail, 84 Colum. L. Rev. 670 (1984).

In the blackmail case, the argument works like this: consider an unfaithful spouse who is approached by a blackmailer who offers to be silent about the infidelities, for a price. The unfaithful spouse may value silence more than the blackmailer values publication, but a deal between spouse and blackmailer may not be not value-maximizing because the interest of the other spouse, who presumptively would want to know the information, is not being represented. See Lindgren, supra. Lindgren also argues that some information "belongs" as a normative matter to the omitted third party. Id at, e.g., 716-717; such a normative judgment is unnecessary to the position I take in text.

18. There is another factor that may be at work here as well: the idea/expression dichotomy. Since under current law copyright owners cannot prevent others from using their ideas, it could be argued that little suppression of note could occur; it might be suggested that a critic deprived of the privilege to quote could nevertheless communicate effectively.

For simplicity's sake, therefore, assume that in the following examples whatever the defendant has taken from the first artist's work could be considered copyrightable expression and that the use of copyrighted expression is somehow essential to the effectiveness of the planned derivative work.

19. "Public goods" are goods like books, songs, and photographs: they can be enjoyed by large numbers of people simultaneously (assuming each has a copy or a copying device) without diminishing the enjoyment of others. If in addition it is difficult or impossible to exclude nonpurchasers from enjoyment, the good in question will also be termed a "collective good." Gordon, Fair Use as Market Failure, suprat note __ at 82 COLUM.L.REV. 1610-11 & nn.64-65.

20. As economist Michael L. Katz writes of the similar problem in the research and development area:

> In the absence of perfect discrimination, the firm conducting the R & D will be unable to appropriate all of the surplus generated by the licensing of its R & D, and the firm will sell its R & D results at prices that lead to inefficiently low levels of utilization by other firms.

Katz, An Analysis of Cooperative Research and Development, 4 RAND J.Econ. 527 , 527 (1986).

21. See Posner, Conventionalist Defenses of Law as an Autonomous Discipline at 17 [September 21, 1987 unpublished manuscript, on file with the University of Chicago Law Review] (using pecuniary effects to explain why landowners who create certain positive spillovers are not entitled to payment from those who benefitted.)

22. There is a fairly extensive literature on the controversial question of whether managerial discretion exists and if so what impact it has and what should be done about it; all I mean to suggest here is the simple possibility that managers in complex corporations do not always make the same decisions that an individual owner of a corporation would.

23. It might be argued that a taste for laziness or risk aversion are simply preferences that deserve the same respect under the notion of consumer sovereignty as other desires. However, we are not talking here about the risk aversion or laziness of the copyright owner, but of some person who is fortuitously placed within the licensor organization to be able to control licensing decisions. Whether gratifying such a person's taste in regard to laziness or risk serves greater economic ends (as, e.g., a form of compensation) is an even more complex question than the question of how economics should analyze an owner's taste for such things.

24. Of course, such licenses might be granted; I offer here only an abstract analysis which would need to be empirically verified.

25. For an excellent numerical example of income effects, see Mishan, The Postwar Literature on Externalities: An Interpretive Essay, 9 Econ. Lit. 1 (1971).

26. For a dramatic hypothetical example, see Yen,Restoring the Natural Law: Copyright as Labor and Possession, 51 OHIO ST.L.J. 491 at 518-519 (forthcoming) ("flip flop" of rights). **Note: Alfred Yen informed me he would be sending you a copy of the galleys to this piece; the citations are to the galleys rather than to the early draft of which I sent you a copy earlier.**

27. See Coase, Notes on the Problem of Social Cost, in R.H. COASE, THE FIRM, THE MARKET AND THE LAW 157 (Chicago 1988). Among other things, Professor Coase argues that if the legal rules are known in advance, the prices of applicable resources will likely alter in a way that minimizes income effects; in addition, contractual provision for contingencies may be available to mitigate some changes in legal rules. Id. at 170-174. Neither of these devices are likely to eliminate the income effect in the suppression context, however.

28. For an extreme example of how a wealth effect could affect allocative decisions, consider two groups of sworn enemies, say Montagues and Capulets, each of whom see their highest purpose in life as avenging the honor of their clan by slaying their

opposite numbers. Assume also that the participants in this feud want to obey the law.

If Montague A is given the entitlement to kill Capulet B, nothing B can offer A is likely to persuade A to hold off. The "highest valued use" of B's life would appear to be as a sacrifice to the satisfaction of A's honor.

Change the entitlement, however, and give B the right to be free of others' assaults, and nothing A could offer would persuade B to sell. The change in initial entitlement has altered the allocative outcome. This time B lives.

29. For example, assume A is a novelist, a copyright owner who has an entitlement not to license and who is otherwise financially comfortable; she has perhaps $4000 in the bank and a two-year old car and a prospect of steady royalties. She may be tempted by B's offer of, say, $10,000 for a license to use her work, but she can afford to say no without altering her lifestyle. If B's project is an ordinary commercial project and A will not be sacrificing more than $10,000 from foregoing alternative uses of the work, she will probably license. (It might also happen that B's project would not require an exclusive license and would not otherwise interfere with A's other licensing opportunities. If so, granting B permission to go forward would have no opportunity cost at all for A. She would be even more likely to license such a use.) However, if B's project is hostile toward A's work as a whole, A may well refuse the license, either to protect her long-term economic interest

(which may be a mere pecuniary loss, remember) or her aesthetic reputation.

If however novelist A had no entitlement to prevent B's use, then the most she could offer B to persuade B not to make the critical use planned is the amount in her bank account, plus whatever she could sell her car for, plus whatever she could borrow on the strength of her expected royalty stream. The total may well be less than $10,000. Give A the entitlement and the highest-valued use of the contested expression is in her hands; give B the entitlement and the highest-valued use is in that licensee's hands.

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Polar and Converging Models

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"The economics of suppression" (short version)

It may seem odd to see someone contend that it can be consistent with economics to second-guess an owner's decision

about whether or not to license or sell a resource. However, many well-recognized economic phenomena are likely to operate in the suppression context in ways that rob us of any assurance that the owner's decisions will in fact tend toward the "maximization of economic value" in any meaningful sense. Consider for example a historian who denies a hostile critic permission to quote fairly extensively from her book, or sets an extremely high price (say, $10,000, which the historian believes will be the amount lost in revenues if the critic's hostile review is published.) Also assume that the review would not be effective without the quotations. If the critic (who stands to make, say, $500 from the review) declines to purchase a license but publishes the quotations nevertheless, and the historian sues, the following reasons counsel the courts not to assume that because the historian's price was higher than the critic's offer that it is "value maximizing" to enforce the copyright.

First, the critic's fee is unlikely to represent all the value which publication of the review will bring to the affected audience, in part because the market for such goods rarely if ever gives their seller a price that captures the relevant surplus.[4] Thus, the buyer's likely maximum offer ($499) is likely to significantly understate the actual value of the use in her hands.

Second, the historian's likely minimum price ($10,000) is likely to significantly <u>over</u>state the social value of the quotations remaining solely in the historian's hands, since much of that amount reflects merely a pecuniary loss: that is, if the

review is published, many consumers of historical works will simply shift their purchasers to another (perhaps better) historian, and there may be no net social loss at all.[5] There may even be a social benefit if an inferior history is ignored and a better one supported by the reading public.

Third, the historian's reputation and image are involved, and when such irreplacable items are on the table the phenomenon commonly labelled the "income" or "wealth" effect becomes quite important.[6] That is, when something irreplaceable is at issue (such as life or reputation), persons are unlikely to sell what they own at any price. Yet if they have no legal entitlement to the item at issue, their ability to buy it is limited by their available resources. In cases where the effect of the initial grant of entitlements is so strong that it is likely to determine where the resource rests in the final analysis, the results of consensual bargains cannot be relied upon to yield any independent information about "value".

Of course, the above discussion is quite summary.[7] Nevertheless, it should suggest why the copyright owner's pursuit of a non-monetary interest could give an economically-oriented court reason to favor a defendant with a greater than usual degree of leniency.

Authors' Rights and Suppression

The authors' rights strain of argument has, as mentioned, two principle lines of argument, one resting on the appropriateness of rewarding valuable labor, and the other resting on the perception that authors have some kind of special

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4. See Michael L. Katz, An Analysis of Cooperative Research and Development, 4 RAND J.Econ. 527 , 527 (1986) (in the absence of price discrimination, a firma that invests in research and development "will be unable to appropriate all of the surplus generated by the licensing of its R & D").

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7. For further exploration, see Wendy Gordon, The Right Not to Use: Nonuse and Suppression in Intellectual Property (draft on file with the University of Chicago Law Review).