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**FREEDOM OF  
EXPRESSION<sup>®</sup>**

Overzealous Copyright Bozos  
and Other Enemies of Creativity

**KEMBREW McLEOD**



**DOUBLEDAY**

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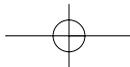
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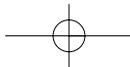
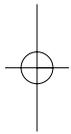
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FOR LYNNE





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## INTRODUCTION

In 2003 Fox News sued Al Franken and his publisher, Penguin, for naming his book *Lies and the Lying Liars Who Tell Them: A Fair and Balanced Look at the Right*. The veteran satirist, who had publicly quarreled with Fox News host Bill O'Reilly in the months leading up to the book's release, used the news channel's slogan "Fair and Balanced" in the title. The company claimed this use trespassed on its intellectual property. By associating Al Franken's name with Fair and Balanced®, the Fox lawyers argued, it would "blur and tarnish" the good reputation of the trademark. The suit went on to state that Franken "appears to be shrill and unstable." He was also described in the lawsuit as "increasingly unfunny," a charge Franken responded to by saying that he had trademarked "funny" and was considering a countersuit.

Later that week on his daily radio talk show, O'Reilly grew testier, lashing out at Franken and his alleged theft. Despite O'Reilly's bluster and the earnest legal arguments of Fox's lawyers—who drew laughter from the courtroom when they advocated their indefensi-

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ble position—U.S. District Judge Denny Chin dismissed the injunction against the book. “There are hard cases and there are easy cases,” Chin stated. “This is an easy case in my view and wholly without merit, both factually and legally.” The O’Reilly-Frankendustup was the prelude to an increasingly aggressive trademark rampage. That year, the news channel threatened to sue a Web-site outfit that was selling a satirical T-shirt that mimicked its logo with the words “Faux News” and tweaked its motto: “We distort, you comply.” It also targeted *The Simpsons* (which airs on its sister network) for parodying the news channel’s right-wing slant. During one episode, the cartoon imitated the Fox News ticker, running crawling headlines such as “Oil slicks found to keep seals young, supple” and “Study: 92 percent of Democrats are gay.”

Fox News eventually backed down, opting not to file a lawsuit against the show. “We called their bluff,” said Matt Groening, *The Simpsons*’ creator, “because we didn’t think Rupert Murdoch would pay for Fox to sue itself. So we got away with it.” It’s probably the first time that media consolidation has actually *enabled* freedom of expression®. Still, *The Simpsons* writers got a slap on the wrist by the parent company when it imposed a rule that the cartoon could no longer imitate news crawls. “It might confuse the viewers into thinking it’s real news,” Groening drily noted. As for the Web site that sold the “Faux News” T-shirt, Fox News dropped its threat after the American Civil Liberties Union intervened on its behalf. The ACLU sent Fox a “‘get stuffed’ letter,” as the site’s operator Richard Lockett put it.<sup>1</sup>

“Blur and tarnish,” the choice of words used by Fox’s lawyers in the Franken case, might sound absurd to the average person, but it’s the language of trademark law. Unlike copyright law, which protects creative works such as books and movies, and patent law, which covers inventions and the like, trademark law is designed to

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prevent consumer confusion and unfair competition. In other words, you can't place the Coca-Cola logo on your own newly minted soft drink or use the company's trademarked advertising slogans to trick people into buying your product. It also protects companies from having their trademarks associated with something unsavory, which is where the blurring and tarnishing comes in. The problem—at least as far as freedom of expression<sup>®</sup> is concerned—is when trademark holders go too far in trying to protect their property. The *Fox News v. Franken* case is but one of many examples of this kind of overkill.

By wielding intellectual-property laws like a weapon, overzealous owners erode our freedoms in the following ways: (1) we, or our employers, engage in self-censorship because we think we *might* get sued, even if there's no imminent threat; (2) we censor ourselves after backing down from a lawsuit that is clearly frivolous; (3) worst of all, our freedoms are curtailed because the law has expanded to privatize an ever-growing number of things—from human genes and business methods to scents and gestures. (Donald Trump not only trademarked “You're Fired,” but also his hand gesture that accompanied the phrase on *The Apprentice*.)

In the first case, the makers of the anti-Fox News T-shirts didn't back down and instead brought in the ACLU, which forced Fox News to call off its attack dogs. Victory for freedom of expression<sup>®</sup>. In the second case, Penguin Books fought Fox's lawsuit and easily won because the law allows us to parody or criticize intellectual properties. Franken's publisher didn't make him change the title or cower from what was obviously a lawsuit that was “wholly without merit.” Another victory for freedom of expression<sup>®</sup>. These two instances remind us that we can fight back and win, especially because many recent court decisions have upheld free-speech rights in the age of intellectual property. The problem is that lots of indi-

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viduals and companies either don't know this or don't want to take a risk.

The third case is far more troubling, because in some important respects the law *does* curtail our rights. The rise of the Internet has served as a wonderfully effective boogeyman used by intellectual-property owners to legitimate the same one-dimensional arguments they've been asserting for years. Those claims go something like this: *Anyone* who does *anything* to *any* of their properties is a "pirate" (such as VCR owners and music fans who made cassette-tape copies of works in the 1980s). Courts and Congress fortunately rejected this line of reasoning twenty years ago, giving consumers far more options—including the option not to be sued. However, Internet-fueled fears have changed the legal and cultural landscape in dramatic ways.

In 1998 Congress passed the Digital Millennium Copyright Act (DMCA) in response to the megabyte-sized specter that haunted American business interests. Although well-intentioned, the DMCA is a terrible law. It was written to protect digital property by making it illegal to bypass "digital locks" such as copy-protection technologies on CDs or simple passwords on software. It's a bad law because it has failed to prevent unauthorized duplication of copyrighted goods—surfing the Internet lately?—and has only succeeded in curtailing freedoms, criminalizing legitimate research, and arresting the development of worthwhile software. (Sometimes it has led to the arrest of software developers themselves.)

One of the DMCA's unintended consequences is that companies have tried to use it to squash competition on things such as garage-door openers and aftermarket ink cartridges. A few years ago, for instance, Lexmark placed in its printers an "authentication regime"—a fancy way of referring to a kind of password that lets the ink cartridge and the printer "talk." Then it invoked the DMCA

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to eliminate competition from less-expensive aftermarket ink cartridges that “hacked” the digital lock on Lexmark’s printer. It took many months and many more thousands of dollars to convince courts that these competing products weren’t illicit materials. Only in America, you might think, but draconian DMCA-like laws are spreading around the globe like digital wildfire. In 2004 thirty-three-year-old Isamu Kaneko, an assistant professor at the University of Tokyo, was arrested because he developed file-sharing software similar to the popular KaZaA application. The same year, the Italian parliament passed a law imposing jail time of up to three years for anyone caught sharing copyrighted material via the Internet.

These sanctions are another unfortunate outcome in the drive to privatize every imaginable thing in the world, including genetic material. The peculiar case of John Moore couldn’t have happened without the expansion of patent law in the past quarter century. When Moore’s spleen was removed to treat a rare form of leukemia, his University of California doctor patented a cell line taken from his organ, without Moore’s knowledge or permission. The long-term market value of the patent has been estimated at roughly \$3 billion, and Moore’s doctor received \$3 million in stocks from Genetics Institute, the firm that marketed and developed a drug based on the patent.<sup>2</sup>

When Moore found out about these shenanigans, he sued—and lost. The California Supreme Court claimed that giving Moore any rights would lead to the commodification of the human body—an argument that ruffled the feathers of Judge J. Broussard, who dissented from the *Moore v. Regents of the University of California* decision. “Far from elevating these biological materials above the marketplace,” Broussard wrote, “the majority’s holding simply bars *plaintiff*, the source of the cells, from obtaining the benefit of the

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cells' value, but permits the *defendants*, who allegedly obtained the cells from plaintiff by improper means, to retain and exploit the full economic value of their ill-gotten gains."

Patents not only allow companies to have a monopoly control over human and plant genes, but also business methods, such as Amazon's "one-click" procedure. U.S. Patent No. 5,960,411 gives Amazon the right to extract money from any business that wants to let customers purchase items on the Internet with only one click of the mouse. The online retailer exercises the monopoly right that this patent gives it, bullying small and large companies into purchasing a license for this "technology." For instance, Amazon won a court order that prevented [barnesandnoble.com](http://barnesandnoble.com) from using this feature for two holiday-shopping seasons before the two parties reached a settlement. Today, every company from Apple's iTunes to the smallest of businesses that Amazon's lawyers can shake down are compelled to license the "one-click" feature. Otherwise, they'll be sued.

Clear Channel Communications, which controls more than one hundred live venues and over thirteen hundred radio stations in the United States, bought what is considered in the music industry to be an important patent. It covers selling recordings of concerts immediately after a performance, something that has recently become popular with fans who want to take home live CDs. Other companies had been providing this service, but Clear Channel intends to enforce its patent to squeeze licensing fees from other small businesses and bands and to eliminate competition in this area of commerce. "It's one more step toward massive control and consolidation of Clear Channel's corporate agenda," says Mike Luba, the manager of the jam band String Cheese Incident, which was prevented by the corporate Goliath from using CD-burning equipment. Pixies manager Ken Gores grumbled, "I'm not fond of doing business with my arm twisted behind my back."<sup>3</sup>

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Another terrible law is the Sonny Bono Copyright Term Extension Act of 1998, which extended the length of copyright protection by twenty more years. To put this into perspective, nothing new will enter the public domain until 2019—that is, until Congress likely extends copyright protection again for its corporate campaign donors. Previously, copyright law was written in such a way that, between 1790 and 1978, the average work passed into the public domain after thirty-two years. Stanford University law professor Lawrence Lessig notes that this honored a constitutional mandate that copyright protections should last for “limited times,” something today’s Congress interprets quite liberally. U.S. copyright protection now stretches ninety-five years for corporate authors, and for individual authors it lasts their entire lifetime, plus an additional seventy years.

Copyright protectionists argue that extending a work’s copyright ensures that there will be an owner to take care of it. But the opposite is often true. “Long copyright terms actually work to *prevent* a lot of stuff from being preserved,” argues film archivist Rick Prelinger. “There’s a lot of material that’s orphaned,” he tells me. “It’s still under copyright, but the copyright holders are gone, or we don’t know who they are. The copyright could be obscure.” Many archives won’t preserve a film if they don’t know who the owner is, which means there are thousands of films, records, and other fragile works that aren’t being protected because nobody knows their status. “The interesting thing about film, what’s actually scary about film,” Prelinger tells me, “is that the term of copyright is now longer than the average lifespan of film as a medium. So you’ve got this film in a cage and you can’t get to it until the copyright expires, and the cage melts down. But in the meantime the film may disintegrate. That’s a real issue.”

John Sorensen, a high school friend and an independent documentary producer who has worked for A&E and PBS, shares

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Prelinger’s concerns. “From the perspective of a historian,” he says, “after spending a lot of time looking at film and photo collections from the early part of the century, one realizes that the things that still exist, the images that are chosen to be preserved, are those images that are perceived by corporate or government bodies to have potential value. So the visual record that is kept is totally subject to the laws of the marketplace.” Of the works produced between 1923 and 1942—which were affected by the Bono Act—only 2 percent have any commercial value. This means we are allowing much of our cultural history to be locked up and decay only to benefit the very few, which is why some have sarcastically referred to this law as the Mickey Mouse Protection Act. If not for the Bono Act, *Steamboat Willie*, the first appearance of the rodent, would be in the public domain.<sup>4</sup>

## INTELLECTUAL PROPERTY V. FREEDOM OF EXPRESSION®

When companies try to use intellectual-property laws to censor speech they don’t like, they are abusing the reason why these laws exist in the first place. Copyright was designed to, as the U.S. Constitution puts it, “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.” Copyright exists—and the U.S. Supreme Court has consistently repeated this—as a means to promote the dissemination of creative expression, not suppress it. The overzealous copyright bozos who try to use the law as a censorious weapon mock the idea of democracy, and they step on creativity. As culture increasingly becomes fenced off and privatized, it becomes all the more important for us to be able to comment on the images, ideas, and words that saturate us on a daily basis—without worrying about an expensive, though meritless,

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lawsuit. The right to express one's views is what makes these "copy fights" first and foremost a free-speech issue. Unfortunately, many intellectual-property owners and lawyers see copyright only as an economic issue.

By using intellectual-property law as a thread that ties everything together, I gather what may seem to be a wild array of subjects: hip-hop music and digital sampling; the patenting of seeds and human genes; folk and blues music; education and book publishing; the collage art of Rauschenberg and Warhol; filmmaking, electronic voting, and the Internet. However, all of these topics are connected to the larger trend of privatization—something that pits economic values against the values of free speech, creativity, and shared resources. The latter aren't airy dreams. They're the very reasons why the framers of the Constitution established copyright and patent law: so that society would benefit from a rich culture accessible to all. Thomas Jefferson and the other Founding Fathers were thoughtful, and got it right.

They articulated a theory of intellectual-property law that rewarded authors and inventors for their creativity, but they did not intend the law to be so rigid that it would give creators (and their heirs) *complete* control over their work. In the influential 1984 *Betamax* case that legalized the VCR, Supreme Court Justice John Paul Stevens reminded us of copyright's Constitutional mandate. He made clear that the monopoly power of copyright was designed *first and foremost* to benefit society by stimulating new creative works. Copyright's purpose, he argued in the majority opinion, is *not* to provide a special private benefit to an individual or corporation.

"Rather, the limited grant is a means by which an important public purpose may be achieved," wrote Stevens. "It is intended to motivate the creative activity of authors and inventors by the provi-

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