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Publication Date

2008-07-28

Peer reviewed

New Media in Old Bottles? Barron's Contextual First Amendment and Copyright in the Digital Age

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In his seminal 1967 article, *Access to the Press—A New First Amendment Right*, Jerome Barron argued that First Amendment doctrine is predicated on the unrealistic, romantic notion that speakers share a rough equality of opportunity to compete in the marketplace of ideas.¹ That view, he underscored, ignores the mass media's overwhelming dominance of public discourse.² In the face of mass media dominance, to protect speakers' right to preach atop a soapbox or leaflet on street corners does virtually nothing to serve the First Amendment's interest in full and free discussion of the widest variety of competing ideas.³ We must, rather, direct First Amendment doctrine to how public discourse actually operates in practice, to be fully cognizant of the different functions the various media serve and how speakers can effectively air their views. In that light, to focus solely on restraining government from suppressing speech is to overlook the propensity of private power to deny speakers effective access to potential audiences. As Barron insisted, only the mass media "can lay sentiments before the public, and it is they rather than government who can most effectively abridge expression by nullifying the opportunity for an idea to win acceptance."⁴

Barron's argument for a First Amendment right of access presupposes that only the highly concentrated mass media can accord speakers a meaningful platform to impact debate on important issues of the day. As Barron elucidated, "unorthodox points of view which have no claim on broadcast time and newspaper space as a matter of right are in poor position to compete with those aired as a matter of grace."⁵ Yet forty years later, in our Internet age, it is by no means clear that mass media will long continue to exert such a hold on public discourse. The Internet features a

* Professor, UCLA School of Law. My thanks to the organizers and participants of *The George Washington Law Review* Symposium on Access to the Media. My thanks also to David Nimmer and Dawn Nunziato for their helpful comments on an earlier draft and to Wyatt Sloan-Tribe for his excellent research assistance. Portions of this Article draw upon, and on occasion are taken from, my recently published book, NEIL WEINSTOCK NETANEL, *COPYRIGHT'S PARADOX* (Oxford Univ. Press 2008).

¹ Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641 (1967) [hereinafter Barron, *Access to the Press*].

² *Id.* at 1641–42.

³ *See id.* at 1643.

⁴ *Id.* at 1656.

⁵ *Id.* at 1641.

bountiful, vibrant stew of individual expression, peer discussion, social networks, political organization, cultural commentary, and user-generated art. In particular, amateur online journalists, from bloggers to posters of videos on YouTube, regularly compete with established media for audience attention and sometimes break stories that are later picked up by the press. Traditional mass media also face growing competition from a variety of new media enterprises. Some new media provide individuals with online platforms for speech, conversation, and virtual community. Others, like Google News, aggregate digital expression from all over the Internet on a single site and give users tools easily to find just what news stories, blogs, video clips, or Web sites they want to see.

Given this emergence of Internet speech, Barron's call for a robust, egalitarian First Amendment may well be best met today not by a right of access to the mass media, but by meaningful opportunities to bypass the mass media. Our interest in rigorous debate among diverse and antagonistic voices might be best served not by requiring media giants to act as quasi-common carriers, but by insuring that peer communication, user-generated content, and new media will continue to level the playing field. The free speech concern is not so much that commercial mass media fail to air unorthodox views—the Internet after all is chockfull of dissident voices—but rather that media and telecommunication conglomerates might successfully bring the Internet to heel, drive out new media, and subject digital communication to their proprietary control. Hence, to a large extent, the fulcrum of ensuring real opportunities for expressive diversity has moved from calls for speakers' right of access to broadcast and print media to issues involving network neutrality and copyright. The bulk of scholarly and activist attention (among those who sympathize with Barron's proactively egalitarian vision of the First Amendment) has moved from how to regulate mass media to promote expressive diversity to how to ensure that individual speakers and new media have access to the conduits of digital communication and are able to build upon and disseminate the salient images, sounds, and texts that make effective communication and self-expression possible.

This Article focuses on one part of that equation: copyright and its role in shaping public discourse in the digital arena.⁶ In Part I, I return to

⁶ In focusing on copyright, I do not mean to suggest that the issue of open versus proprietary communication networks (what is frequently referred to as the issue of network neutrality) is less significant for First Amendment policies. On network neutrality, see Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23 (2001); Susan P. Crawford, *Network Rules*, 70 LAW & CONTEMP. PROBS. 51 (2007); Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925 (2001); Tim Wu & Christopher S. Yoo, *Keeping the Internet Neutral?: Tim Wu and Christopher Yoo Debate*,

Barron's still cogent call for a "contextual approach" to the First Amendment. Barron's proposal for a speakers' right of access to the media has sparked decades of debate, the details of which are beyond this Article's scope.⁷ Rather, I take up Barron's general vision of a proactively egalitarian First Amendment and assess how it might apply in the digital arena, touching upon speakers' right of access in passing. I ask, in particular, whether we should aspire to mass media bypass rather than access, and whether the multiplicity of new media and Internet sites for user-generated expression actually can and should supplant traditional mass media. I conclude that peer speech over the Internet can serve as an effective means for speakers to convey their messages, even if online peer speech is "effective speech" in a different, more complex manner than speaker access to the mass media. Yet I also conclude that traditional mass media play a vital, ongoing First Amendment role and, accordingly, that we should aim to preserve the place and vitality of the mass media even as we insist on giving considerable free play to peer expression.

I then turn to copyright's part in furthering First Amendment goals. Copyright law is part and parcel of what Thomas Emerson has termed our "system of freedom of expression," the elaborate matrix of speech-related entitlements, institutions, and regulatory regimes that both inform and supplement the First Amendment.⁸ As the Supreme Court has iterated, copyright serves as an "engine of free expression."⁹ It provides an incentive for the creation and dissemination of a broad range of original expression, subsidizes a robust sector of authors and media enterprises

59 FED. COMM. L.J. 575 (2007).

⁷ Frederick Schauer has argued, for example, that (1) a government-enforced right of access would abridge the free speech rights of press owners, (2) unorthodox viewpoints can find expression in niche newspapers like the *Daily Worker*, and (3) putting aside the limited availability of broadcast licenses, media concentration stems from the social fact that most audiences prefer to read mainstream newspapers rather than unorthodox, niche ones. See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 126–28 (Cambridge Univ. Press 1982). I think that Schauer's argument gives too little weight to how the law shapes media markets and to the importance for democratic governance of government facilitation of robust debate among a wide variety of antagonistic sources. Indeed, the Supreme Court has rightly identified expressive diversity as a "basic tenet of national communications policy" because "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663–64 (1994) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (plurality opinion)). My aim in this Article, however, is not to defend Barron's call for a First Amendment right of access per se, but to assess how his general vision of an egalitarian First Amendment might apply in the digital arena.

⁸ See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 3–5 (Random House 1970).

⁹ See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

independent from government subsidy, and highlights the value of individuals' creative expression in our public discourse. But in so doing, copyright law inevitably favors some media and potential speakers, and some types of expression, over others. Copyright both underwrites original expression and impedes uses of existing expression. It supports independent authors and publishers, but has also come to entrench copyright industry incumbents and burden new media.

Part II addresses copyright's potential for burdening speech. It focuses in particular on incumbent mass media's untoward use of copyright as a vertical restraint to stifle the new media that provides platforms for peer speech. Part III then examines the other side of the coin: copyright's continuing part in underwriting traditional media, a salutary function that stands in some tension with the media's use of copyright to suppress new media competition. Finally, Part IV considers copyright's potential for enabling powerful new media to threaten expressive diversity in the digital age in much the same way that incumbent media has overwhelmingly dominated public discourse in the print and broadcast era.

I. The Contextual Approach and the Digital Context

Barron cogently argued that the First Amendment requires real, effective, and widespread opportunities for dissident speakers to communicate their message to an audience, not merely a right to be free from government censorship. For that reason, Barron insisted, the First Amendment has meaning only within actual context, taking into account the social, political, technological, and market realities of our day.¹⁰ When mainstream mass media dominate public discourse, and unorthodox voices can reach a large audience only through broadcast television and large circulation newspapers, the autonomy of the press must give way to the broader free speech interest in robust debate. First Amendment rights are not absolute trumps against government regulation. Rather, given that the opportunity for effective discussion exists only in the mass media, "the interests of those who control the means of communication must be accommodated with the interests of those who seek a forum in which to express their point of view."¹¹

Barron's contextual approach invites us to assess his argument for a First Amendment right of access to the press in our current context. The emergence of the Internet, with its countless opportunities for individual speakers to reach a global audience, might radically undermine the factual

¹⁰ See Barron, *Access to the Press*, *supra* note 1, at 1653.

¹¹ *Id.* at 1656.

premise of Barron's argument.¹² In 1967, only those who owned a press, or who owned a broadcast station and held an FCC broadcast license, could reach a mass audience. Today, anyone with access to a computer or smart phone can disseminate text, images, sounds, and video the world over. In our era of ubiquitous "cheap speech," some commentators insist, we have no need for speaker rights of access to the print and broadcast media (even if we did before the digital era); indeed, we have little justification for imposing any regulation on the mass media to further expressive diversity and informed public discussion of important issues.¹³

Yet, as other commentators have rightly responded, with all its promise to empower individual speakers, the digital arena actually presents a far more complex picture.¹⁴ At the very least, the Internet's free speech promise is vulnerable to media and telecommunications conglomerates' reassertion of dominance through copyright and propertizing broadband distribution networks. Many (though far from all) Internet speakers convey their messages or artistic visions through creatively appropriating and remixing salient images, music, texts, and videos from popular culture. Others quote liberally from mainstream news reports or from corporate, government, or church documents to expose their failings. And while new media, including news aggregation, user-generated video, and social network sites, present vibrant platforms for online speech and community, they also facilitate considerable unlicensed copying of mass media content.

¹² For an illuminating, skeptical account of whether the Internet offers individual speakers more opportunities, with explicit reference to Barron's article, see Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. (forthcoming Sept. 2008) (manuscript at 3–6, on file with the *Cornell Law Review*).

¹³ See Yochai Benkler & Lawrence Lessig, *Net Gains: Will Technology Make CBS Unconstitutional?*, NEW REPUBLIC, Dec. 14, 1998, at 12, 14 (suggesting that an abundance of open networks and untrammelled peer communication will render broadcast licensing and other media regulation an unconstitutional abridgement of freedom of speech); Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083, 1129–31 (1999) (arguing that the affordability and democracy of the Internet as an information-gathering and -disseminating tool removes any need for a right of expressive access by private individuals and entities to privately owned information); Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CAL. L. REV. 371, 382–83 (2006) (describing views of proponents of media deregulation, in contrast to opponents); Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1846–47 (1995) (predicting that the Internet will usher in an era of "cheap speech").

¹⁴ See, e.g., CASS R. SUNSTEIN, REPUBLIC.COM 16, 56–62 (Princeton Univ. Press 2001) [hereinafter SUNSTEIN, REPUBLIC.COM]; Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389, 1391–94 (2004).

As a result, many Internet speakers and new media have incurred the wrath—and copyright infringement lawsuits—of studios, record labels, and publishers.¹⁵ Such new media and the speakers who use them also rely upon ready access to well-functioning, universally available, high-speed digital communications networks, like the Internet. Yet traditional media and telecommunications firms seem poised to convert open broadband communications networks to dedicated channels for distribution of proprietary content. Traditional media's successful assertion of proprietary control over content and digital communications networks would remake the Internet into something more like cable TV and other traditional media markets. The result would be a significant contraction of the free-flowing expressive diversity and bottom-up speech that the Internet makes possible.¹⁶

Moreover, even absent that radical return to predigital market structure, the overwhelming abundance of Internet speech might ironically work to make the spectrum of expression that actually reaches an appreciable audience narrower than Internet enthusiasts sometimes assume. Much depends upon which mechanisms people use to guide them in determining what speech to see and hear. Traditional media firms still enjoy a significant advantage in capturing audience attention through brand recognition, marketing, and investing in high-production-value, star-studded content. As such, media firms might be able to assert dominance over the digital arena simply by standing out from the din of far more cheap speech than individuals can process. Alternatively, as I discuss in Part IV, new media-filtering mechanisms, including search engines, content aggregation sites, and fora for user-generated content, might pose their own issues of bias and deny an effective voice to certain speakers.

I have thus far focused on the threat that mass media might drown out iconoclast Internet speech. Yet the digital arena presents a complex picture from the converse perspective as well. To the extent the Internet's promise is of a universe free of mass media and populated entirely by yeomen

¹⁵ See *infra* notes 74–79.

¹⁶ See Susan P. Crawford, *The Internet and the Project of Communications Law*, 55 *UCLA L. REV.* 359, 372–74 (2007) [hereinafter Crawford, *The Internet*] (describing telephone and cable companies' efforts to "monetize" their Internet access networks by removing nondiscrimination rules and providing favored transport to the applications and content they provide); Andrew Currah, *Hollywood, the Internet and the World: A Geography of Disruptive Innovation*, 14 *INDUSTRY & INNOVATION* 359, 360 (2007) (arguing that the major picture studios aim to use digital rights management ("DRM") backed proprietary control over content "to transform the networked environment into a secure, predictable and 'well mannered' marketplace," one that conforms with the studios' traditional business model).

speakers, that promise might actually run counter to First Amendment goals. As I will shortly discuss, mass media and other concentrations of expressive power actually serve important First Amendment functions. Somewhat counterintuitively perhaps, we should thus aspire to preserve a degree of nonegalitarian expressive power, so long as plentiful opportunities for unorthodox expression are available as well.

A. Benkler and Baker: Torchbearers for Barron's Project in the Internet Era

Given the Internet's uncertain promise for free speech, how might we apply Barron's clarion call for a contextual First Amendment to the context of the digital arena? To navigate these shoals, I draw upon two particularly thoughtful contemporary torchbearers for Barron's overall project, Yoichi Benkler and Ed Baker. Only Baker echoes Barron's proposal for a First Amendment right of access *per se*. But both Benkler and Baker take up the cudgel for contextual First Amendment law and policy, one that would afford meaningful opportunities for individual expression and robust debate among diverse and antagonistic sources.

In his book *Wealth of Networks*, Benkler both celebrates the free speech potential of online peer communication and warns against reassertion of control by media and telecommunications conglomerates.¹⁷ Benkler presents a fundamental opposition between mass media and peer speech. Critics have long lambasted the commercial news and entertainment media for sacrificing quality to serve the bottom line. The media, they charge, routinely produces bland, uncontroversial expression designed to put audiences in a buying mood and to attract a broad cross section of viewers, readers, and listeners without unduly offending any of them.¹⁸ Yet as Benkler details, the mass media's free speech limitations are actually far more profound than what media critics characterize as profit-driven distortions.¹⁹ The mass media, whether it be the advertiser-supported ABC or the government-funded BBC, has traditionally operated on an industrial, "one-way hub-and-spoke" model in which speech is produced and packaged at the center by a small set of hierarchical

¹⁷ YOICHI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 2* (Yale Univ. Press 2006).

¹⁸ See, e.g., Barron, *Access to the Press*, *supra* note 1, at 1645–47; see also BENKLER, *supra* note 17, at 196–211 (reviewing three basic critiques of the media); W. RUSSELL NEUMAN, *THE FUTURE OF THE MASS AUDIENCE* 28–30 (Cambridge Univ. Press 1991) (summarizing the viewpoint of critical media theorists and other critics that commercial media trivializes political life).

¹⁹ See BENKLER, *supra* note 17, at 179–85, 212–33.

organizations and then distributed to audiences at the edge.²⁰ Individuals in this model are passive recipients of finished media goods, not active participants in ongoing conversation expressing creativity, informing public opinion, and shaping culture.²¹

Benkler emphasizes that, in contrast, digital network communication provides countless outlets for speakers of all shapes and stripes to express their views. And no less important than this sheer multiplicity and diversity of speech, digital networks offer a radically different process and character of discourse.²² Blogs, collaborative creations like Wikipedia, online spaces like YouTube for individuals to post and to critique one another's creative works, and numerous other fora are sites for ongoing conversation, debate, creative expression, and information sharing. The content is ever growing and changing as participants add new entries and observations, correct misinformation, and subject previous entries to often searing criticism.²³ This discourse is far more transparent, and its production more embedded in mutual social relations, than the mass media model. Moreover, for many such sites, discussants focus on what interests them without regard to building audience share or, indeed, whether the texts, graphics, video, or music they create and exchange are marketable. As Benkler eloquently summarizes:

What emerges in the networked information environment . . . will not be a system for low-quality amateur mimicry of existing commercial products. What will emerge is space for much more expression, from diverse sources and of diverse qualities. Freedom—the freedom to speak, but also to be free from manipulation and to be cognizant of many and diverse options—inheres in this radically greater diversity of information, knowledge, and culture through which to understand the world and imagine how one could be.²⁴

For Benkler, then, our primary concern should not be to ensure speaker access to the mass media or even to impose structural regulation on the media to promote competition and diverse ownership. Rather, First Amendment goals are best served by allowing peer communication to flourish and preventing the mass media from reasserting the one-way hub-and-spoke model in the digital network arena. Radically distributed clusters of inquiry, debate, and collective action make up the backbone of

²⁰ *Id.* at 179.

²¹ *See id.* at 179–80.

²² *See id.* at 212–13.

²³ *See id.* at 216–17.

²⁴ *Id.* at 168–69.

our system of free expression in the digital age. Mass media are dinosaurs, doomed to serve as just one more niche in the welter of online conversation and cultural production.²⁵ In turn, speakers' rights of access to the media are mere artifacts of outdated, social democratic administrative regulation of the twentieth century.²⁶

Benkler's vision of open networks and untrammelled peer communication presents a very different understanding of effective speech than Barron's. Barron placed prime importance on robust public debate of the pressing issues facing our nation, not each individual speaker's active participation in the discussion.²⁷ In Barron's understanding, effective speech means that views one shares are disseminated to a mass audience through the media, not necessarily that one has the opportunity actually to present those views. As he explained, the "contextual approach highlights the importance of the degree to which an idea is suppressed in determining whether the right to access should be enforced in a particular case."²⁸ Not all speakers need to have an opportunity to present their views in a newspaper's or broadcaster's programming. A speaker's right of access depends on whether the speaker's view is indeed suppressed and underrepresented in the relevant media and community. The existence of competition among similar media and provision of access to others who have already expressed the view that a given speaker seeks to convey would weaken that speaker's access claim.²⁹

From Benkler's perspective, on the other hand, effective speech lies in actively engaging in network conversation. Online fora enable few nonmedia speakers to reach a mass audience directly. But in the digital age, reaching a mass audience is no longer the be all and end all of effective speech. Effective speech lies no less in online platforms for communicating and coalescing with others from distant places.³⁰ Effective speech means finding meaning and exchanging views in any of a multitude of online agoras of one's choosing. It entails personal engagement in new forms of social networks, communities, and communicating groups, organized around a seemingly infinite array of topics, themes, messages, and practices. To be certain, peer speakers can sometimes act as media watchdogs and sources of mass media news stories and opinion. Yet for

²⁵ *See id.* at 55–56.

²⁶ *See id.* at 159–60.

²⁷ *See supra* notes 10–11 and accompanying text.

²⁸ Barron, *Access to the Press*, *supra* note 1, at 1677–78.

²⁹ *Id.* at 1678.

³⁰ *See* BENKLER, *supra* note 17, at 9.

Benkler, equally important is the opportunity to affect public opinion through links among multiple, dispersed sites for unfiltered online conversation that join together around common concerns.³¹

Hence, for Benkler and others who champion online peer communication,³² the representative speech that Barron proffered falls far short of egalitarian First Amendment values. In their view, it is not enough in the digital age to enable self-chosen proxies to present unorthodox points of view in the mass media on behalf of like-minded others. Effective speech, rather, lies in each individual's ability to express herself through online conversation and debate with others who share her interests, even if they reside across the globe.³³ Concomitantly, the ability to form dynamic social and political relationships centered on such online conversation is no less central to meaningful free speech than is addressing a mass audience on issues of broad concern to a territorial polity.³⁴

In his book *Media Concentration and Democracy*, Ed Baker adheres to an understanding of effective speech and of a system of free expression more in line with Barron's.³⁵ Like Benkler, Baker both lauds peer communication and highlights the discourse-skewing propensity of our increasingly concentrated mass media. Baker also shares Benkler's understanding of individual free speech as fundamentally a right of personal autonomy (albeit with important implications for collective self-governance).³⁶ Yet in addressing the role of the mass media in our system of free expression, Baker would advance First Amendment goals not by bypassing the mass media, but through media regulation designed to promote diverse ownership of press outlets and greater editorial independence of professional journalists.³⁷ Much in line with Barron, he would also require that large media entities "provide fair access for

³¹ *See id.* at 256.

³² *See, e.g.,* Crawford, *The Internet*, *supra* note 16, at 388–89 (discussing the creative potential of online networked communication).

³³ *See* BENKLER, *supra* note 17, at 272.

³⁴ *Cf.* PIERRE LÉVY, *COLLECTIVE INTELLIGENCE: MANKIND'S EMERGING WORLD IN CYBERSPACE* 61–82 (Robert Bononno trans., Plenum Publ'g 1997) (touting the Internet's potential to engender new forms of community and democratic politics).

³⁵ C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* (Cambridge Univ. Press 2007) [hereinafter BAKER, *MEDIA CONCENTRATION*].

³⁶ *See* BENKLER, *supra* note 17, at 8–9, 161–69. *See generally* C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (Oxford Univ. Press 1989) (defending an individual "liberty" theory for freedom of speech, as opposed to a "marketplace of ideas" theory).

³⁷ *See* BAKER, *MEDIA CONCENTRATION*, *supra* note 35, at 164.

alternative views and voices.”³⁸

Baker’s differences from Benkler follow both a descriptive and normative dimension. Baker recognizes that the Internet adds to effective diversity of expression “by dramatically reducing the time, cost, and consequent geographic limits of *distribution*.”³⁹ But he emphasizes that reduced distribution cost can also magnify economies of scale and thus lead to greater market concentration in the production of certain commercial content.⁴⁰ Hence, while the Internet leads to greater expressive diversity overall, it might actually reduce diversity of the expression that market actors produce.⁴¹

And for Baker, commercial media expression still matters—perhaps even matters most—given the media’s continuing dominance of public discourse and power to shape public opinion. Echoing Barron, Baker emphasizes that the formal or technical capability of individual speakers to reach an audience does little to yield a more democratic distribution of communicative power.⁴² With regard to the Internet, the familiar problem is the overabundance of cheap speech.⁴³ Even if Benkler accurately portrays digital networks as bounteous founts of peer speech, what really matters is how many people are listening to this speech, not that individuals can regularly vent their views in some discrete corner of cyberspace. Merely posting a blog or YouTube video does not guarantee that anyone will see it; indeed, the more speech digital networks make possible, the more audience attention becomes an exceedingly scarce commodity. And, Baker details, established media are generally much more adept at capturing individuals’ attention than are bloggers and YouTube creators.⁴⁴ As a result, “Internet audience attention tends to be incredibly concentrated and largely colonized by major corporate interests.”⁴⁵

Mind you, Baker does not entirely lament that result. Unlike Benkler, he underscores the importance of the mass media’s continuing fourth estate role in our system of free expression. The institutional press has the financial resources, which volunteer peer-to-peer speakers and online

³⁸ *Id.* at 186.

³⁹ *Id.* at 101.

⁴⁰ *See id.* at 101–02.

⁴¹ *See id.*

⁴² *See id.* at 121–22.

⁴³ *See supra* note 13 and accompanying text.

⁴⁴ *See* BAKER, MEDIA CONCENTRATION, *supra* note 35, at 107–08.

⁴⁵ *Id.* at 197; *see also* Timothy Wu, *Application-Centered Internet Analysis*, 85 VA. L. REV. 1163, 1180 (1999) (concluding aptly that given the increasing cost of attracting users to one’s website, “describing today’s World Wide Web as a free and open forum of *equal* speech is a bit delusional”).

bloggers lack, to engage in investigation, writing, and editing.⁴⁶ The press also has a unique professional and institutional commitment (albeit a commitment that requires regulatory buttressing) to conduct serious, independent journalism. As a result, Baker contends, we are far from the day in which Benkler's peer discussants can assume the watchdog and other fourth estate roles of the institutional press.⁴⁷

B. Mass Media and Peer Speech in the Digital Arena

While I join in celebrating peer expression, I share Baker's skepticism about digital networks' capacity radically to upend the balance of effective communicative power. I also agree with Baker in insisting that the institutional press plays a vital role in our system of free expression, a role we would not want to jettison in favor of yeomen speakers even if the Internet were to offer that possibility. As I have detailed elsewhere, despite the mass media's painfully evident flaws, its fourth estate function remains indispensable even in the age of networked peer communication.⁴⁸

Liberal democracies require both a rough consensus regarding the most important public issues to be addressed and a truly *public* discourse in which opposing perspectives on those issues are confronted.⁴⁹ With its expressive power and venerable institutional role, the mass media is uniquely situated to define the public agenda by focusing on a discrete set of salient issues,⁵⁰ to act as a watchdog against government and nongovernmental centers of power, and to catalyze and represent public opinion before government, political party, and corporate officials.⁵¹ The

⁴⁶ See BAKER, MEDIA CONCENTRATION, *supra* note 35, at 197.

⁴⁷ See *id.*

⁴⁸ NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 95–99 (Oxford Univ. Press 2008).

⁴⁹ See STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 179–82 (Univ. of Chi. Press 1995) (discussing John Stuart Mills's thesis that a liberal state requires a robust exchange of view); CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 186–87 (Oxford Univ. Press 1997) (contending that liberal democracy requires a realm of discursive exchange in which citizens can test their preferences and produce better collective decisions).

⁵⁰ See Maxwell McCombs et al., *Issues in the News and the Public Agenda: The Agenda-Setting Tradition*, in PUBLIC OPINION AND THE COMMUNICATION OF CONSENT 281, 292 (Theodore L. Glasser & Charles T. Salmon eds., Guilford Press 1995) (noting that given competition among issues for saliency among the public, "the public agenda typically consists of no more than five to seven issues").

⁵¹ See DAVID L. PROTSS ET AL., THE JOURNALISM OF OUTRAGE: INVESTIGATIVE REPORTING AND AGENDA BUILDING IN AMERICA 244–49 (Guilford Press 1991) (noting, on the basis of detailed case studies of investigative reporting, that government officials tend to respond to investigative reporters and media exposés before interest groups or the public at large take up the issues, thus treating the press as if it were the public).

mass media also provide a framework for robust debate, albeit within a mainstream consensus, including through investigative journalism, pundit debates, op-ed pages, book reviews, and letters to the editor, in which readers, viewers, and listeners consistently come across opposing views.⁵² Finally, traditional news mass media, and especially their elite representatives like *The New York Times* and *The Washington Post*, serve as reasonably reliable sources—in line with their institutional commitment to professional, industry-wide standards of candor, quality, and accuracy in reporting—for the information upon which individual elucidation and public discourse depend.⁵³

Bloggers, amateur journalists, and peer discussants can certainly serve as valuable adjuncts to the press and indeed as media gadflies and sources of media coverage. But, as studies show, the blogosphere is largely parasitic on media coverage, with little original reporting.⁵⁴ Digital network discussion also appears to be highly fractured and balkanized. Conservative and liberal bloggers, for example, rarely link to blogs across the political divide—and even when they do, views from opposing camps can generally be found only by following a link; unlike op-ed pages and letters to the editor, they are not interspersed side-by-side.⁵⁵ Bloggers also

⁵² In particular, op-ed pages presenting a wide spectrum of opinions penned by regular columnists became an established feature of most newspapers in the years following Barron's call for a right of access to the press. *The New York Times* seems to have initiated the practice in 1970. ERIC ALTERMAN, *SOUND AND FURY: THE MAKING OF THE PUNDITOCRACY* 131 (Cornell Univ. Press 1999). The use of op-ed columns might have been further spurred in response to litigation, culminating in the Supreme Court's ruling in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 242–43, 258 (1974). In that widely discussed case, Jerome Barron unsuccessfully defended a political candidate's right to reply to newspaper criticism under state law in the face of the newspaper's argument that the requirement that it publish the reply abridged its freedom of speech. See Jerome A. Barron, *Access to the Media—A Contemporary Appraisal*, 35 HOFSTRA L. REV. 937, 942 (2007) (noting “soul-searching and self-examination” among the press, leading to newspapers' appointments of ombudsmen and “the emergence of op-ed pages in many of the country's leading dailies,” following the Supreme Court's decision in *Tornillo*).

⁵³ See NETANEL, *supra* note 48, at 98.

⁵⁴ See Lada Adamic & Natalie Glance, *The Political Blogosphere and the 2004 U.S. Election: Divided They Blog* 10–11 (2005), available at <http://www.blogpulse.com/papers/2005/AdamicGlanceBlogWWW.pdf> (studying blog linking patterns during the 2004 election campaign); PROJECT FOR EXCELLENCE IN JOURNALISM, *THE STATE OF THE NEWS MEDIA 2006: AN ANNUAL REPORT ON AMERICAN JOURNALISM, A DAY IN THE LIFE OF THE MEDIA: BLOGS* (2006), http://www.stateofthenewsmedia.com/2006/printable_daymedia_blogs.asp (studying blog content generally).

⁵⁵ Adamic & Glance, *supra* note 54, at 8 (finding that only fifteen percent of conservative and liberal bloggers' links are to blogs across the political spectrum). For a discussion of the problem of excessive insularity in the context of the Internet, see ANDREW

lack the financial resources for investigative reporting and fact checking that mass media enjoy.⁵⁶ Nor do they have the institutional commitment to accuracy. Indeed, stories have already surfaced of political and corporate operatives putting bloggers on their payroll or even masquerading as nonpartisan, objective bloggers themselves.⁵⁷ And tellingly for peer speech's relative ability to fulfill a fourth estate role, a recent study finds that the public *views* the traditional news media as far more trustworthy than bloggers and other Internet sources.⁵⁸

In sum, yeomen speakers cannot and should not be seen as replacements for the institutional press. Even in the digital arena, large, financially robust, nongovernmental organizations devoted to reporting the news of the day play an indispensable First Amendment role. In particular, commercial media still supply an invaluable and unequalled layer of accreditation, fact checking, agenda setting, and wide-ranging and systematic investigative reporting, while reaching a mass audience and representing public opinion before powerful decisionmakers.

Yet, while casting doubt on peer speakers' capacity to supplant or assume the media's fourth estate role, I do not mean to understate their contribution to public discourse. The Internet certainly provides a means for many individuals to engage in effective speech. Online fora present new platforms for individual, community, and political expression and conversation. Much of this speech is of a different sort than Barron contemplates in arguing for a First Amendment right of access to the media: it involves direct participation in niche online conversation and community rather than having one's viewpoint heard by a mass audience.

L. SHAPIRO, *THE CONTROL REVOLUTION, HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW* 105–11 (PublicAffairs 1999), and SUNSTEIN, *REPUBLIC.COM*, *supra* note 14, at 54–73.

⁵⁶ See Daniel W. Drezner & Henry Farrell, *The Power and Politics of Blogs* 4 (2004), available at <http://www.danieldrezner.com/research/blogpaperfinal.pdf>.

⁵⁷ See Lindsey Powell, Note, *Getting Around Circumvention: A Proposal for Taking FECA Online*, 58 *STAN. L. REV.* 1499, 1525–29 (2006); Sam McManis, *These Days, You Just Can't Trust Some Blogs*, *SACRAMENTO BEE*, Dec. 21, 2006, at E1 (describing “flogs,” fake weblogs that purport to chronicle an ordinary consumer's passion for a product but that are actually sponsored by corporate public relations firms); see also PROJECT FOR EXCELLENCE IN JOURNALISM, *THE STATE OF THE NEWS MEDIA 2007: AN ANNUAL REPORT ON AMERICAN JOURNALISM, EXECUTIVE SUMMARY* 5 (2007), available at <http://stateofthemediacom.org/2007/execsummary.pdf> (“Politicians, interest groups and corporate public relations people tell PEJ they have bloggers now on secret retainer—and they are delighted with the results.”).

⁵⁸ See PRINCETON SURVEY RESEARCH ASSOCS. INT'L, *LEAP OF FAITH: USING THE INTERNET DESPITE THE DANGERS, RESULTS OF A NATIONAL SURVEY OF INTERNET USERS FOR CONSUMER REPORTS WEBWATCH* 23, 26 (2005), available at <http://www.consumerwebwatch.org/pdfs/princeton.pdf>.

But the blogosphere and other types of peer speech can also percolate to influence media coverage and the public agenda. Indeed, peer speech serves as a valuable adjunct to the institutional press and a partial corrective to commercial media's inevitable failings and distortions. As such, a robust network featuring manifold opportunities for online peer communication does, I think, provide a rough analog and adequate substitute for the First Amendment right of access to the mass media that Barron championed under very different circumstances forty years ago.

A telecommunications and media policy informed by Barron's contextual First Amendment perspective thus aims to foster both multiple sites for peer speech *and* the continued vitality of the commercial press. Following Barron's understanding, our system of free expression requires not just a diversity of content, but a plurality of types of speech and speakers. It must embrace commercial mass media, cottage industry publishers, professional authors, publicly funded artists and media, nonprofit organizations and political activists, digital new media, and a host of sundry creators and discussants who exchange their opinions, expression, and personal reworkings of bits and pieces of popular culture without any expectation of monetary remuneration.

How does copyright law fit into that matrix? I begin to answer that question by focusing on how copyright burdens peer expression and the new media that provide platforms for such expression.

II. Copyright as a Burden on Speech

Copyright law shapes public discourse in several ways. In addition to providing an economic incentive for the creation and dissemination of original expression, copyright tends to favor media that control vast inventories of existing copyrights, including publishers, motion picture and television studios, record labels, and news organizations. Concomitantly, copyright burdens the speech of those who wish to build upon existing expression in conveying their message. In an era in which mass media sounds, texts, and images are common reference points for a wide audience, that burden is borne most heavily by independent and nonmarket speakers who must risk either a copyright infringement lawsuit or procure copyright licenses they can often ill-afford. The all too frequent result is self-censorship from the get-go.⁵⁹

⁵⁹ For a more detailed account of copyright's speech burdens, see NETANEL, *supra* note 48, at 109–53.

A. Copyright Burdens in the Digital Arena

This “censorial” speech burden weighs particularly heavily in the digital arena because digital technology makes it so easy to appropriate, manipulate, edit, and rearrange existing expression. The ensuing remix culture, in which millions refashion and combine portions of mass media works to create their own expression, runs headlong into the commercial media’s assertion of copyright control. Broad, lengthy copyrights thus stand as an obstacle to the free-flowing peer communication that Benkler rightly champions as an important new component of our system of free expression.

Yet another way in which copyright law can burden speech is when the incumbent mass media use copyrights as vertical restraints to foreclose potential new media competitors. How does this occur and why does it constitute a burden on speech? New digital media cover a broad spectrum, including (1) social networking and user-generated content sites, like MySpace and YouTube, as well as more subject-matter-specific sites, like Free Republic, FanFiction.net, and Machinima.com, which provide fora for users to post their own creative expression, to post and comment on existing expression, and to engage in discussion generally; (2) search engines, like Google, and content aggregation sites, like Google News and Google Book Search, which enable users to search massive stores of expression and information online; and (3) tools for digital copying, distribution, and storage, like peer-to-peer file-trading networks and network-enhanced digital video recorders, which enable users to find, copy, store, access, and share vast quantities of existing works.

These new media counter the dominance of incumbent media conglomerates and create opportunities for individuals to reach a broad audience in numerous ways. Social networking and user-generated content sites provide online spaces where speakers can reach audiences most directly and find discussants who share common interests. Except for the rare amateur video that becomes a breakaway hit on YouTube, site participants do not reach an audience anywhere near the size and breadth of the readers and viewers of commercial mass media. Nevertheless, the sites offer audiences of considerably larger size and geographical scope than were available to the street corner pamphleteer of old. Through a combination of filtering, subject matter focus, and search engine technology, they also enable participants to find others of like interest, rather than being lost in the welter of expression that populates the Internet. And, as Yochai Benkler emphasizes, they enable interaction, sharing of information, and bottom-up organizing that offer both a more active participation in public discourse than under the hub-and-spoke model of

analog media and an opportunity for grassroots impact on political agenda-setting as well as decisionmaking.⁶⁰

Search engines and content aggregation sites are not designed to provide a forum for new expression per se. Rather, they make vast libraries of existing expression and information, ranging from the entire Internet to just news organization and blogger Web sites, readily accessible for readers, viewers, and listeners. The collection, organization, and diffusion of knowledge have long played a vital role in our system of free expression.⁶¹ Yet digital communication and storage hold the promise of taking that role to an entirely new level, making virtually the entire store of the world's recorded knowledge available online. Moreover, search engine and content aggregation sites effectively organize and make that knowledge available in ways that dramatically improve our ability to find and use the information we need.

Search engines and digital content aggregators have inherent First Amendment value simply in helping audiences find and sort through information and expression that would otherwise be beyond their reach. In doing so, moreover, these new media also help to loosen media conglomerates' hold and provide opportunities for a more diverse range of speakers to reach an audience. Media conglomerates owe their economic and expressive power as much to their control over content distribution as to their dominance in content creation.⁶² When Barron wrote his seminal article, dissenters and iconoclast speakers needed both access to mass media distribution networks and proximity to popular mass media content to reach a broad audience.⁶³ While popular commercial content still dominates the typical response to users' news search queries, search engines and digital content aggregators provide a new, highly effective distribution channel. As such, these new media afford a greatly enhanced opportunity for nonmainstream speakers to reach an audience.

Consider Google News, for example.⁶⁴ The Google News Web site

⁶⁰ See BENKLER, *supra* note 17, at 10–11, 180.

⁶¹ See Peter S. Menell, *Knowledge Accessibility and Preservation Policy for the Digital Age*, 44 HOUS. L. REV. 1013, 1019–40 (2007) (tracing efforts to preserve, catalogue, and provide access to knowledge to Ptolemaic Egypt).

⁶² See BENJAMIN M. COMPAINE & DOUGLAS GOMERY, WHO OWNS THE MEDIA?: COMPETITION AND CONCENTRATION IN THE MASS MEDIA INDUSTRY 326–27, 375–76, 378–80 (3d ed., Lawrence Erlbaum Assoc. 2000) (discussing record labels and motion picture studios); Currah, *supra* note 16, at 365 (noting that motion picture studios resist Internet distribution because it threatens their sunk cost and core competency in the distribution of physical media).

⁶³ See Barron, *Access to the Press*, *supra* note 1, at 1641–42, 1647.

⁶⁴ Google News, <http://news.google.com> (last visited Mar. 30, 2008).

uses Google's search engine algorithms to gather news stories from 4,500 English language sources and arrange them in order of importance.⁶⁵ The Google News home page displays leads and links to news stories selected by Google's algorithm. Each story features a headline and lead from one news source, followed by links to that source, six other identified news sources, and a page containing further links to all news sources reporting on the story.⁶⁶ Readers may also conduct word searches within the Google News material and may customize the Google News page to highlight stories on topics of personal interest or from certain regions of the world. As such, Google News is an invaluable tool for anyone wanting to assess and compare how a wide variety of press outlets from around the world cover a given story or to find news coverage of topics of general or personal import with a single click, without having to go to the multiple Web sites of individual newspapers.

The Google News search algorithm is a filter and thus necessarily contains its own biases.⁶⁷ But Google News regularly gives prominence to news sources, such as blogs and foreign news outlets, that are not mainstream U.S. news media. The Google News aggregation site accordingly presents an expressive universe that is considerably more diverse—in terms of both range of content and multiplicity of voice—than site visitors would otherwise encounter, certainly as compared to U.S. readers' offline reading habits, but also when measured against online audience share.⁶⁸ As indicated in Table 1, for example, the Nielsen/Netratings listing of the top twenty most visited news Web sites for January 2008 indicates that, except for Yahoo News and Google News, all of the sites are individual sites of major American newspapers and broadcasters or news aggregation sites controlled by major American media. No newspaper or broadcaster Web site likely to present a considerably different perspective on many issues than that of U.S. mainstream commercial media news are part of the top twenty.

⁶⁵ *Id.*

⁶⁶ *See id.*

⁶⁷ For further discussion on these biases, see *infra* Part IV.

⁶⁸ For example, Google News often cites to blogs and online media such as Slashdot.org, Monsters.com, Critics.com, and Huffingtonpost.com. *See* Google News, <http://news.google.com> (last visited Mar. 30, 2008).

Table 1
Nielsen/Netratings Top News Sites in the U.S. for January 2008⁶⁹

1.	Yahoo! News
2.	CNN Digital Network
3.	MSNBC Digital Network
4.	AOL News
5.	NYTimes.com
6.	Tribune Newspapers
7.	Gannett Newspapers
8.	ABCNEWS Digital Network
9.	USATODAY.com
10.	Google News
11.	Fox News Digital Network
12.	WorldNow
13.	washingtonpost.com
14.	CBS News Digital Network
15.	McClatchy Newspapers Digital
16.	Hearst Newspapers Digital
17.	Topix
18.	Advance Internet
19.	IP Websites
20.	Associated Press

Table 2 presents the top twenty news sources appearing on the Google News home page for January and February 2008, as measured by

⁶⁹ Top News Sites for January, <http://www.cyberjournalist.net/top-news-sites-for-january-4> (last visited Mar. 30, 2008) (citing Nielsen Online) (as measured by unique audience). Readers might not be familiar with some of the news sites listed. Topix is a news aggregation site backed by Gannett Co., The McClatchy Co., and Tribune Co. See About Topix, <http://www.topix.com/topix/about> (last visited Mar. 30, 2008). Advance Internet is a news aggregation site backed by Advance Publications, owner of *The New Yorker*, *Vanity Fair*, *The Plain Dealer*, and other newspapers. See MediaOwners: Advance Publications, Inc., <http://www.mediaowners.com/company/advance.html> (last visited Mar. 30, 2008). In addition, Advance Publications is the tenth largest U.S. media owner. *Id.* IB Websites are a group of network websites featuring local TV stations and leading broadcasters such as Hearst-Argyle Television, Post-Newsweek Stations, McGraw-Hill Broadcasting, NBC and Cox Television, and Meredith Broadcasting. Internet Broadcasting, Local Internet Solutions, <http://www.ibsys.com> (last visited Mar. 30, 2008). WorldNow is a provider of web services to local TV stations and newspapers. See M. Amigot, *Local TV Stations Demand More Flexible Content Managements Tools*, IBLNEWS, Feb. 3, 2008, <http://iblnews.com/story.php?id=35505>.

Newsknife in a statistical sample. Newsknife presents a ranking of news sources based upon the number of times they appear in the sample as one of the seven links to a major news story featured on the Google News home page, with more weight given to sites appearing as the first link than the second link to a story, and so on through the seventh position. As indicated in Table 2, the top twenty sources appearing in Google News are also dominated by mainstream U.S. news media. However, they also include Reuters, Al-Jazeera, BBC News, and Guardian Unlimited, all based outside the United States and all presenting perspectives that are often quite different than those of U.S. news media. Those who search for news at Google News are thus potentially exposed to a greater diversity of opinion than online readers otherwise partake.

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Table 2

Top Twenty News Sites Appearing on Google News for January and February 2008, ranked by Newsknife and noting the number of times the sites appear in each of the seven links for each story featured on the Google News Home Page⁷⁰

Rank	News Site	1 st Link	2 nd	3 rd	4 th	5 th	6 th	7 th
1	Reuters, UK	40	36	22	18	15	10	9
2	New York Times	57	24	17	13	10	8	8
3	Voice of America	24	16	21	14	8	5	4
4	Associated Press	11	17	22	18	19	16	13
5	Washington Post	26	16	10	12	8	12	5
6	Bloomberg	6	10	16	25	14	19	5
7	CNN U.S.	18	12	11	5	6	8	2
8	Al-Jazeera, Qatar	0	39	1	4	1	3	3
9	Los Angeles Times	7	13	7	8	9	4	9
10	ABC News	15	7	8	6	4	3	2
11	BBC News, UK	3	5	10	9	16	14	8
12	Fox News	13	7	10	3	2	8	2
13	Christian Sci. Monitor	11	4	8	5	6	0	2
14	CNN International	5	6	6	6	4	2	4
15	Int'l Herald Tribune	2	7	2	8	7	3	5
16	Guardian Unltd., UK	2	1	5	9	8	6	10
17	USA Today	6	2	6	3	7	4	2
18	CBS News	3	10	4	0	4	3	2
19	Wall St. Journal	3	4	4	6	4	4	1
20	TIME	4	5	6	2	2	1	1

Although known primarily for facilitating millions of unauthorized downloads of copyrighted material, peer-to-peer file-trading networks similarly perform a salutary function in lessening incumbent commercial media's hold over content distribution and thus enhancing expressive diversity. In addition to facilitating downloads, file-trading networks provide navigation tools and aggregate content. They provide a platform for searching a vast library of sound recordings and videos to find those of interest to the user.

⁷⁰ *Newsknife Ranking of "Home Page" News Sites, Year to Date*, NEWSKNIFE, Mar. 1, 2008, http://www.newsknife.com/members/front_relevant_news01.html. This table is taken from rankings that appear in the Newsknife Members' Area and is accessible only by subscription. For general information regarding Newsknife, which rates news sites based on their appearances at Google News, see Newsknife, <http://www.newsknife.com> (last visited Mar. 30, 2008).

In making it possible for users to search for and gain access to hundreds of thousands of sound recordings and videos, file-trading networks have much in common with search engine aggregators like Google News and, indeed, Google.⁷¹ As with Google News search results, file-trading network downloads are dominated by popular commercial media hits.⁷² But peer-to-peer file-trading networks also create openings for authors and artists who are not affiliated with major labels, publishers, and studios to reach a sizeable audience. They likewise afford an outlet for the creative appropriations, remixes, and mashups that, through digitally intertwining elements of disparate well-known works, have emerged as a potent art form and vehicle for social critique and political commentary. So even if those who trade digital files of mass media products are not themselves engaged in “speech” (and I have argued elsewhere that they are not),⁷³ peer-to-peer file-trading networks, like social networking, user-generated content, search engine, and content aggregation sites, may well provide a salutary structural contribution to our system of free expression by providing unprecedented opportunity for unorthodox and nonmarket speakers to reach an audience.

Yet to one degree or another, each of these new media also encourage, facilitate, or directly engage in copying and disseminating existing copyrighted expression. The incumbent media have responded with a barrage of copyright infringement lawsuits. Recent, highly publicized cases include record label and movie studio lawsuits against MySpace and YouTube;⁷⁴ publisher and authors guild lawsuits against Google Book Search;⁷⁵ news agency lawsuits against Google News;⁷⁶ newspapers’ lawsuit against Free Republic;⁷⁷ record label and movie studio lawsuits

⁷¹ See Siva Vaidhyanathan, *The Googlization of Everything and the Future of Copyright*, 40 U.C. DAVIS L. REV. 1207, 1211 (2007) (listing commonalities between the peer-to-peer interface Grokster and the Google search engine).

⁷² See, e.g., BigChampagne Online Media Measurement, Top Swaps, <http://www.bigchampagne.com> (last visited Mar. 30, 2008) (listing the week’s top ten most popular song downloads).

⁷³ NETANEL, *supra* note 48, at 44–46.

⁷⁴ See, e.g., Complaint, *Viacom Int’l Inc. v. YouTube, Inc.*, No. 07 Civ. 2103 (S.D.N.Y. Mar. 13, 2007) [hereinafter *Complain, Viacom Int’l*]; Complaint, *UMG Recordings, Inc. v. Myspace, Inc.*, No. CV06–07361 (C.D. Cal. Nov. 17, 2006).

⁷⁵ See, e.g., Complaint, *Authors Guild v. Google Inc.*, No. 05 Civ. 8136 (S.D.N.Y. Sept. 20, 2005).

⁷⁶ See, e.g., Complaint, *Agence France Presse v. Google Inc.*, No. 1:05cv00546 (D.D.C. Mar. 17, 2005).

⁷⁷ *L.A. Times v. Free Republic*, No. CV 98–7840–MMM, 1999 WL 33644483, at *1 (C.D. Cal. Nov. 8, 1999), *enforced*, 2000 WL 1863566, at *1 (C.D. Cal. Nov. 16, 2000) (entering permanent injunction).

against peer-to-peer software and service providers Napster, Grokster, Aimster, Streamcast, and others;⁷⁸ and record label and movie studio lawsuits and threatened lawsuits against providers of consumer copying equipment and services such as ReplayTV, TiVo, XM Satellite Radio, MyMP3.com, and Cablevision.⁷⁹

The copyright industry plaintiffs are clearly motivated by what is likely a justified fear of losing licensing revenue. But that is only part of their motivation. In most of these cases, indeed, the plaintiffs refused to settle the lawsuit on terms that would permit the new media defendant to continue to operate without fundamental alteration in return for paying a copyright license fee.⁸⁰ Rather, the lawsuits are also efforts to stifle new media competition. Like many mature industries, studios, record labels, and publishers are heavily invested in their existing business models, distribution networks, and infrastructure. They have every incentive to seek to sideline innovative technologies that would be disruptive to their core business.⁸¹

Indeed, as I have detailed elsewhere, incumbent commercial media have a long history—as old as copyright itself—of using “copyrights as vertical restraints to foreclose potential competitors in content distribution.”⁸² The record label, book publisher, news agency, and motion picture studio lawsuits against new media fall solidly within that mold.⁸³ The studios’ dealings with Google-owned YouTube are a case in point. As noted in the press, the studios seek not only to require YouTube to prevent users from posting unlicensed clips from studio movies and TV programs, but also “to protect their decades-old way of doing business—controlling not only their programming but the advertising revenue and distribution outlets.”⁸⁴ Viacom’s lawsuit against Google and YouTube comes in the

⁷⁸ See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

⁷⁹ See, e.g., Complaint, *MPAA v. ReplayTV*, No. 01-09801 (C.D. Cal. Nov. 14, 2001).

⁸⁰ See, e.g., *Music Firms Dismiss Napster Deal*, BBC NEWS, Feb. 21, 2001, <http://news.bbc.co.uk/1/hi/business/1182859.stm>.

⁸¹ See CLAYTON M. CHRISTENSEN, *THE INNOVATOR’S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL* xi–xiii, xvii (Harvard Bus. Sch. Press 1997); Fred von Lohmann, *Fair Use as Innovation Policy*, 23 BERKELEY TECH. L.J. (forthcoming 2008) (manuscript at 13 & n.21, on file with the Berkeley Technology Law Journal) (applying Christensen’s analysis of industry conservatism in the face of disruptive innovation to copyright industries).

⁸² NETANEL, *supra* note 48, at 148–50; see also Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 ANTITRUST BULL. 423, 423–28 (2002) (focusing on music and video digital distribution).

⁸³ See *supra* notes 74–79.

⁸⁴ Meg James & Dawn C. Chmielewski, *Media Giants to Take on YouTube*, L.A.

wake of the parties' failure to agree on terms for licensing Viacom content on YouTube, a failure that can be explained largely by Viacom's unwillingness to relinquish the premium for controlling distribution.⁸⁵ The recently announced News Corp.-NBC Universal partnership to establish an alternative to YouTube and to license their content only to Google rivals stems from a similar motive.⁸⁶ As one media analyst put it, "[t]he media companies don't want to be forced to only work with one distribution entity."⁸⁷

Media firms' desire to avoid subservience to a potential new media behemoth is understandable. But their repeated use of proprietary copyrights to drive out potential rivals to their own distribution business has rightly raised regulatory concerns. Indeed, motion picture studios, record labels, music publishers, and broadcasters have repeatedly run afoul of antitrust authorities when colluding to suppress competition.⁸⁸ Congress also stepped in on a number of occasions to prevent media firms from using their copyrights as a vertical restraint. The Copyright Act, accordingly, contains several provisions codifying compromises that allow proprietors of new content delivery platforms, including cable and satellite television operators, webcasters, and early record labels, to engage in limited distribution of copyrighted works in return for paying a statutory fee rather than having to obtain copyright holders' consent.⁸⁹ Likewise, music performance rights societies ASCAP and BMI operate subject to antitrust decrees requiring them to license all radio broadcasters on "reasonable" terms that are subject to judicial oversight.⁹⁰

TIMES, Mar. 22, 2007, at A1.

⁸⁵ *Id.*; see Complaint, *Viacom Int'l*, *supra* note 74.

⁸⁶ See James & Chmielewski, *supra* note 84.

⁸⁷ *Id.* (quoting UBS Warburg media analyst Aryeh Bourkoff).

⁸⁸ See RUSSELL SANJEK & DAVID SANJEK, *AMERICAN POPULAR MUSIC BUSINESS IN THE 20TH CENTURY* 58–60, 65, 165–66, 208–09, 227–28 (Oxford Univ. Press 1991); Barak Y. Orbach, *Antitrust and Pricing in the Motion Picture Industry*, 21 *YALE J. ON REG.* 317, 321 (2004). But short of collusion, current antitrust doctrine places few limits on incumbents' ability to use copyright as a vertical restraint. For analysis and criticism of antitrust law's current leniency toward the use of intellectual property for vertical foreclosure, see Roger G. Noll, *The Conflict over Vertical Foreclosure in Competition Policy and Intellectual Property Law*, 160 *J. INSTITUTIONAL & THEORETICAL ECON.* 79, 87–90 (2004).

⁸⁹ For a brief summary of compulsory licenses and private copying levies in the U.S. and Europe, see Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 *HARV. J.L. & TECH.* 1, 31–35 (2003).

⁹⁰ See Michael A. Einhorn, *Intellectual Property and Antitrust: Music Performing Rights in Broadcasting*, 24 *COLUM.-VLA J.L. & ARTS* 349, 356 (2001) (discussing the Rate Court provisions in ASCAP and BMI antitrust consent decrees); Timothy Wu, *Copyright's Communications Policy*, 103 *MICH. L. REV.* 278, 310–11 (2004) [hereinafter Wu,

As crafted by Congress and the courts, the compulsory licenses aim to maintain copyright law's economic incentives to create and disseminate new expression. But they deprive incumbents of the use of copyright to foreclose potential rivals directly, by refusing to license, or indirectly, by expropriating the surplus that provides an incentive for the development of new content delivery platforms. And, almost across the board—from cable television's multiple channels to webcasters' niche programming—by freeing new technological distributors from copyright incumbents' vertical restraints, the compulsory licenses have created alternative outlets for independent speakers and helped to foster expressive diversity.

Not surprisingly, however, commercial media incumbents continue to seek to enforce proprietary copyright against new technology media, and both the courts and Congress have recently tilted towards the incumbents' claim that copyrights are inviolable property. As a result, a number of new media, including MP3.com, peer-to-peer file-trading systems and user-generated video sites, have been enjoined from further infringing copyright (or facilitating others' infringement) and then driven out of business when the copyright industry plaintiffs refused to license.⁹¹ It remains to be seen how the industry lawsuits against their powerful, well-heeled rival, Google, will play out—whether courts will similarly enable the incumbents to use copyright as a veto or whether some combination of courts and Congress will spur a compromise.

In sum, copyright has emerged as a significant bottleneck to competition from new media distributors in the digital arena. Moreover, the continued use of copyright as a vertical restraint threatens to extend media incumbents' control over distribution just when the economics of digital markets undermine the traditional basis and justification for that control. In the analog, hard-copy world, copyright industry distributors rightly earn a premium because their vast networks for physical transportation, retail chain marketing, and broadcasting are critical to getting original expression to audiences. Furthermore, the substantial cost of establishing a large-scale distribution network, as much or more than

Copyright's Communications].

⁹¹ See, e.g., *In re Aimster Copyright Litig.*, 334 F.3d 643, 653 (7th Cir. 2003) (holding a supplier of a peer-to-peer file-sharing service contributorily liable for its users' infringement); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020–21 (9th Cir. 2001) (holding that individuals who distribute copyrighted music files through a peer-to-peer network infringe copyrights and that Napster was contributorily liable for its users' infringement); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 353 (S.D.N.Y. 2000) (holding MP3.com liable for enabling its subscribers to access songs on subscriber-owned compact discs via the Internet). The current "MP3.com" and "Napster" are successors in name only to the original businesses.

copyright law, often prevents the entry of serious competitors. But digital technology changes this analysis. Distribution now costs next to nothing. Any studio, label, publisher, and, most importantly, individual author can make a work available to a global audience simply by posting it on a Web site or releasing it onto a peer-to-peer network. Moreover, content aggregators can act as gateways to libraries of content far more vast than that of a single media distributor or brick-and-mortar retail chain. Digital technology thus makes possible distribution that can aggregate decentralized, widely dispersed sources on a single content aggregator site. In so doing, it can provide consumers with ready access to nearly universal, all-inclusive libraries of content through a single gateway (or competing all-inclusive gateways). If copyright law can prevent that highly efficient regime of new media distribution, it will do so at the cost of distorting the market and impeding expressive diversity.

III. Funding Traditional Media

In some tension with copyright's deleterious use to entrench large media conglomerates, copyright also plays a salutary role in underwriting robust, financially independent commercial media. As I have explained elsewhere, copyright plays an important structural role in our system of free expression by providing a mechanism for authors, publishers, and media firms to gain financial sustenance from the market rather than to rely upon government subsidies.⁹² The commercial media are able to fulfill their fourth estate function only because of their fiscal independence. Indeed, as Ed Baker points out, high-quality investigative journalism is an expensive enterprise. To engage in that activity, commercial firms must likely earn supranormal profits (and must have a continuing commitment to investing those profits in high-quality journalism).⁹³ So while we do not want to create a system of free expression so dominated by media conglomerates that other voices have no effective outlet,⁹⁴ nor do we want to diminish media firms' market sustenance to such an extent that they will be unable effectively to serve their fourth estate role.

As Baker points out, the Internet threatens to erode financial support for quality journalism in two principal respects. First, relatively expensive, high-quality journalism may lose out in economic competition to Internet

⁹² See NETANEL, *supra* note 48, at 89–93.

⁹³ See BAKER, MEDIA CONCENTRATION, *supra* note 35, at 28–37.

⁹⁴ Moreover, Baker convincingly demonstrates that conglomerates are less likely to reinvest profits in high quality journalism than are smaller journalism-dedicated enterprises. See *id.* at 35–36.

cheap speech.⁹⁵ Digital technology and the Internet drastically reduce the cost of creating and distributing many types of content, but not all content.⁹⁶ In particular, digital technology does little to reduce the investment of labor and skill required to engage in sustained investigative journalism and produce well-edited, thoroughly fact-checked product.⁹⁷ Nor does it enable the commercial press to capture a greater share of the social value of quality journalism, which, because of its vital fourth estate function, redounds to the benefit even of those who never pay to receive it.⁹⁸ To the extent cost reductions enable nonmarket speakers, such as bloggers, to make their voices heard, our First Amendment goal of expressive diversity is well served. But the cost reductions can affect competition among different types of commercial content creations as well. Those types of content that can now be produced and distributed more cheaply will gain a competitive edge over those, such as quality journalism, that enjoy relatively lower cost reduction without a commensurate ability to capture more of the social value they generate. And, as Baker aptly points out:

As the cost of creating certain content (i.e., products) goes down, the incentive to spend on competing high cost categories typically also goes down. In competition with the now more cheaply produced content, the noncheapened (or less cheapened) categories are less valuable to their creators/owners, with the result that their production will typically be reduced or abandoned.⁹⁹

If the cost of creating fluff and diverting entertainment drops appreciably more than that of producing quality journalism, a prospect that appears likely, our public discourse may be significantly impoverished.

Second, the Internet has the potential dramatically to reduce advertising revenue to traditional media.¹⁰⁰ In particular, search engines appear to be siphoning off an increasing share of the advertising pie. As Baker notes, by the middle of 2005, the combined advertising revenue of Google and Yahoo! already rivaled that of the three major prime-time TV

⁹⁵ *Id.* at 119.

⁹⁶ Goodman, *supra* note 14, at 1439–40.

⁹⁷ See BAKER, MEDIA CONCENTRATION, *supra* note 35, at 115; Goodman, *supra* note 14, at 1442.

⁹⁸ See BAKER, MEDIA CONCENTRATION, *supra* note 35, at 116; Goodman, *supra* note 14, at 1415.

⁹⁹ BAKER, MEDIA CONCENTRATION, *supra* note 35, at 119; cf. Crawford, *The Internet*, *supra* note 16, at 367–69 (discussing audience migration from television and print media to the Internet).

¹⁰⁰ See BAKER, MEDIA CONCENTRATION, *supra* note 35, at 117.

networks.¹⁰¹ This diversion of revenues is “not just a transfer from traditional media to new media but, to a significant degree, a transfer away from the support of journalists and other content creators to the support of distributors of online content.”¹⁰²

A similar scenario may unfold with online news aggregators, like Google News. As discussed above, by linking to news stories from a variety of sources in response to search inquiries, Google News provides a tremendously valuable service.¹⁰³ However, Google News could well divert advertising revenue from the very newspapers and newspaper Web sites that underlie it. That threat does not arise from Google’s copying and display of short snippets from newspaper articles per se. Few who would otherwise turn to the article itself would find the headline and first couple lines a satisfactory substitute. But those who read their news online may well go to the Google News aggregation Web site rather than the Web site of a single newspaper or news agency to find the articles of interest to them. Essentially, Google News might harm newspapers by commoditizing them and by appropriating reader loyalty from particular papers to itself. That effect might increase over time. Indeed, survey research reports that 66% of high school students in the U.S. get news from the Google and Yahoo news aggregation sites, versus only 34% from local newspaper and 21% from national newspaper sites.¹⁰⁴

Google’s automated search and display of headlines and article snippets is what enables it to provide its news aggregation service several orders of magnitude more efficiently than manual news clipping and summaries. In defense against copyright infringement claims, Google contends that headlines are not copyrightable, and that its copying and display of article leads are fair use.¹⁰⁵ Regardless of whether Google is correct, it is, again, the Google News service as a whole, not Google’s minimal copying and display of online newspaper stories, that might harm the newspapers.

How, then, should a copyright law animated by First Amendment values respond? Part of copyright’s purpose and its “engine of free

¹⁰¹ *Id.* at 118.

¹⁰² *Id.*

¹⁰³ *See supra* notes 64–118 and accompanying text.

¹⁰⁴ PROJECT FOR EXCELLENCE IN JOURNALISM, *THE STATE OF THE NEWS MEDIA 2007: AN ANNUAL REPORT ON AMERICAN JOURNALISM, ONLINE: PUBLIC ATTITUDES (2007)*, http://stateofthemediamedia.org/2007/narrative_online_publicattitudes.asp?cat=7&media=4 (reporting results of Knight Foundation survey).

¹⁰⁵ *See* Google’s Motion and Memorandum for Partial Summary Judgment Dismissing Count II for Lack of Protectable Subject Matter at 2 n.3, 8 n.11, *Agence France Presse v. Google Inc.*, No. 1:05cv00546 (D.D.C. Mar. 21, 2006).

expression” function is to encourage investment in producing expression. That purpose is ill-served by allowing a search engine aggregator to appropriate the value of newspapers’ investment in the articles they post on their Web sites. But to hold a search engine firm liable for displaying short snippets of online material could well cripple the very tool that makes the Web so valuable: the ability to quickly find information of interest and import from among the billions of pages available.

Some observers, including the Pew Research Center’s Project for Excellence in Journalism, suggest that online news aggregators should be required to pay for referencing newspaper leads and headlines.¹⁰⁶ This need not be accomplished by according newspapers a proprietary copyright in that expression; rather, the Copyright Act could be amended to accord news aggregators a statutory license, much like cable television operators enjoy a statutory license to retransmit broadcast programming in return for paying royalties set by a Copyright Office tribunal.

Such news aggregation statutory licensing proposals merit further exploration. Yet, all in all, I think First Amendment values are best furthered by holding Google News’s replication of headlines and opening sentences to be fair use. Newspapers will have to respond by attempting to strengthen customer loyalty and providing more attractive content and features on their Web sites. Newspapers might even compete with Google by providing their own niche news aggregation services, perhaps powered by their editorial judgment, as an adjunct to their own stories and columns. And rather than cannibalize its service by usurping advertising revenues from the newspaper Web sites that Google News aggregates, Google might come to partner with newspapers in advertising and producing content. Indeed, Google has agreements to sell ads in the print editions of fifty major newspapers, including *The New York Times* and *The Washington Post*, while a consortium of seven newspaper chains has entered into a partnership “to share content, advertising and technology” with Yahoo.¹⁰⁷ These scenarios certainly have their minefields as well as opportunities; but at bottom, as in other areas, copyright should serve to promote the creation and dissemination of expression, not prop up traditional business models.

IV. New Media Giants

To accord search engine and content aggregators limited privileges to

¹⁰⁶ PROJECT FOR EXCELLENCE IN JOURNALISM, *THE STATE OF THE NEWS MEDIA 2007: AN ANNUAL REPORT ON AMERICAN JOURNALISM, OVERVIEW: MAJOR TRENDS* (2007), http://stateofthemediamedia.org/2007/narrative_overview_eight.asp?cat=2&media=1.

¹⁰⁷ Miguel Helft & Steve Lohr, *176 Newspapers to Form a Partnership with Yahoo*, N.Y. TIMES, Nov. 20, 2006, at C1.

copy and display copyrighted content, whether as fair use or under a statutory license, serves a dual purpose. Most obviously, depriving copyright holders of a veto grounded in proprietary copyrights prevents them from holding up highly valuable services like Google News. But the absence of a copyright holder veto also helps to preserve competition in the market for search engines and content aggregators. Proprietary copyrights can be assigned or exclusively licensed; thus, to the extent that copyrights accord exclusive rights to aggregate and display copyrighted content (including the display of short segments of works), Google or another search engine giant might be able to procure exclusive licenses to aggregate and display seminal works. But if, in contrast, any search engine can aggregate and display content as a fair use or under a statutory license, that potential for a search engine giant to use exclusive licenses to consolidate market dominance is averted.¹⁰⁸

Depriving copyright holders of the right to exclude in order to maintain competition in ancillary markets is a time-honored practice. It extends back to the very first statutory license, the compulsory mechanical license, enacted as part of the Copyright Act of 1909.¹⁰⁹ The compulsory mechanical license gives anyone who wishes to distribute a recording of a musical composition that the composer has previously licensed for distribution the right to do so upon payment of the statutory fee to the composer (or in most cases, the music publisher who has acquired the mechanical rights). The compulsory license was enacted to break up the monopoly of the Aeolian Company, which through exclusive licenses with eighty-seven members of the Music Publishers Association, had cornered the right to cut piano rolls of the vast majority of copyrighted music of the day.¹¹⁰ The statutory two-cent royalty and compulsory license provision guaranteed that other piano roll recorders—and eventually record labels—could record songs free of exclusive licenses granted to any single company, thus guarding against future music copyright monopolies.

Guarding against market dominance by new media giants like Google by preventing them from acquiring exclusive rights to search, aggregate, and display content, has a First Amendment as well as market competition

¹⁰⁸ Cf. Menell, *supra* note 61, at 1064–67 (advocating a safe harbor from copyright infringement for creating comprehensive, searchable digital archives on the condition that the search engine/archivist provide a copy of the digital archive to the Library of Congress for public use).

¹⁰⁹ See SANJEK & SANJEK, *supra* note 88, at 12. The compulsory mechanical license was codified as Section 115 of the Copyright Act of 1976. 17 U.S.C. § 115 (2000).

¹¹⁰ See SANJEK & SANJEK, *supra* note 88, at 12; Wu, *Copyright's Communications*, *supra* note 90, at 300.

dimension. Many new media markets, including those for search engines, content aggregators, and broad-based social networking and user-generated content sites, exhibit much the same centripetal force as traditional mass media. These media markets, both new and traditional, are characterized by high fixed costs and relatively low marginal costs.¹¹¹ The result is a declining average cost per unit of production, substantial economies of scale, and high barriers to entry.¹¹² For that reason, media, information, and telecommunications markets typically have built-in tendencies towards high levels of concentration and oligopoly.¹¹³

Demand-side network effects can exacerbate these tendencies. Amateur video creators want to post their work on the site with most viewers and viewers want to view the videos that everyone else is discussing. A search engine produces more useful results the more it is used—since frequent use enables the search engine provider to refine its search algorithm in response—and the more useful the results, the more people want to use the search engine.¹¹⁴ Similarly, social networking sites and peer-to-peer file-trading systems are also generally more valuable to any given user the more other users are on the network. Such network benefits can quickly tip the scales in favor of a single new media network as users stampede to the network that gives them the ability to communicate with the greatest number of other users.¹¹⁵

We already see the impact of these centralizing forces in various new media. Google dominates the search engine market.¹¹⁶ Google's YouTube dominates the market for user-generated videos.¹¹⁷ Facebook and MySpace dominate the social network market.¹¹⁸

¹¹¹ See Eli M. Noam, *Fundamental Instability: Why Telecom Is Becoming a Cyclical and Oligopolistic Industry*, 18 INFO. ECON. & POL'Y 272, 279 (2006).

¹¹² See *id.*

¹¹³ See *id.* at 280, 282.

¹¹⁴ Bracha & Pasquale, *supra* note 12 (manuscript at 34 & n.123).

¹¹⁵ See Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSP. 93, 94, 96 (1994); Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 488–90, 551–53 (1998).

¹¹⁶ See Google 'Dominates World Search,' BBC NEWS, Oct. 11, 2007, <http://news.bbc.co.uk/1/hi/technology/7039114.stm>. As of the end of 2007, Google's share of U.S. web queries stood at 56.3 percent, while Yahoo's was 17.7 percent and Microsoft's was 13.8 percent. Bloomberg News, *Google's Share of Search Market Falls, Nielsen Says*, SILICONVALLEY.COM, Jan. 19, 2008, http://www.siliconvalley.com/latestheadlines/ci_8018514.

¹¹⁷ Reuters, *YouTube: More Visitors than Rival Sites Combined*, USA TODAY, June 28, 2007, http://www.usatoday.com/tech/news/2007-06-28-youtube-audience-surge_N.htm.

¹¹⁸ Vauhini Vara, *MySpace Has Large Circle of Friends, but Rivals' Cliques Are Growing Too*, WALL ST. J., Oct. 2, 2006,

These new media are built on a model that is very different than traditional mass media's hub and spokes. They are fundamentally platforms for user-generated speech and, in the case of search engines and content aggregators, user access to as broad a swath of expression as possible. But every filtering mechanism and usable platform comes with biases, and new media giants regularly institute constraints that narrow the range of expression. For example, YouTube limits the length of user-generated videos to ten minutes.¹¹⁹ It also prohibits sexually explicit content, graphic violence, "gross-out videos of accidents,"¹²⁰ and, until recently, "war footage if it's intended to shock or disgust."¹²¹ Following its war footage guideline, YouTube has removed dozens of videos depicting combat in Iraq, including those protesting U.S. military action.¹²² Finally, in defense against Viacom's billion dollar lawsuit claiming that YouTube facilitates massive copyright infringement, Google recently deployed digital filters that preemptively block many creative mashups, as well as users' exact copies of television show segments, from appearing on the site.¹²³

Google News also has certain biases. First, since it only aggregates "news," it must determine what constitutes a "news" site as opposed to opinion or fiction. Second, although Google News covers 4,500 news sites,¹²⁴ it does not encompass the entire universe of possible sites even in that category. In that vein, some right-wing sites have accused Google of terminating its listing of right-wing blogs and e-zines on the grounds (which the critics argue are specious) that Google received complaints of hate speech at those sites.¹²⁵ Third, an academic study, completed in 2005,

<http://online.wsj.com/article/SB115950109260277754.html>.

¹¹⁹ YouTube, [Uploading Videos to YouTube](http://www.google.com/support/youtube/bin/answer.py?answer=57924&topic=10525), <http://www.google.com/support/youtube/bin/answer.py?answer=57924&topic=10525> (last visited Mar. 30, 2008).

¹²⁰ YouTube, [YouTube Community Guidelines](http://www.youtube.com/t/community_guidelines), http://www.youtube.com/t/community_guidelines (last visited Mar. 30, 2008).

¹²¹ Steve Peoples, Elizabeth Gudrais & Scott MacKay, *Political Scene: YouTube Dumps Antiwar Videos*, PROVIDENCE J., July 2, 2007, at C1.

¹²² See *Id.*; Edward Wyatt, *Now on YouTube: Iraq Videos of U.S. Troops Under Attack*, N.Y. TIMES, Oct. 6, 2006, at A1.

¹²³ See Andy Greenberg, *YouTube's Filter Fails to Please*, FORBES.COM, Oct. 18, 2007, http://www.forbes.com/2007/10/18/google-viacom-video-tech-cx_ag_1018youtube.html.

¹²⁴ See *supra* note 65 and accompanying text.

¹²⁵ See Jim Kouri, *Internet Providers Censoring Conservative News E-mail*, NEWSWITHVIEWS.COM, Apr. 26, 2007, <http://www.newswithviews.com/NWVexclusive/exclusive114.htm> (citing Noel Sheppard, *Is Google Purging Conservative News Sites?*, NEWSBUSTERS, May 22, 2006, <http://www.newsbusters.org/node/5477>).

found that of the articles that Google News featured, 40% were from nontraditional news sources and that this led Google News to be more biased towards one extreme or another on particular issues than was Yahoo News, of which only 24% of the results came from nontraditional news sources.¹²⁶ Perhaps that study led Google to cut back somewhat on its prominent display of nonmedia blogs and e-zines, which seems since to be the case. Finally, the Google News algorithm features news stories based on (1) the story's "freshness," and (2) the "global editorial interest" based on the number of original articles reporting on the story by news organizations worldwide.¹²⁷ That raises the possibility of a bandwagon effect, whereby news media's judgment of the most worthy stories will also be the top stories on Google News.

Biases and filters are not inherently untoward; indeed, some biases and filters are unavoidable if an information platform is to be usable. But they do suggest the desirability of a competitive new media market, offering alternative sources of information (and aggregation), much like in traditional media markets. If YouTube removes antiwar videos, our First Amendment interest in robust debate and expressive diversity is best served by the availability of such videos on other readily accessible, easily locatable, and commercially viable Web sites. Hence, to the extent copyright law can be tailored to enhance competition and expressive diversity by denying new media firms the possibility of acquiring exclusive rights to display, aggregate, and distribute entire swaths of copyrighted content, it should be so tailored.¹²⁸

Conclusion

Applying Jerome Barron's contextual approach to the First Amendment in today's digital arena counsels a continuing need for government actively to promote expressive diversity and widespread

¹²⁶ Eric Ulken, *Non-Traditional Sources Cloud Google News Results*, USC ANNENBERG ONLINE JOURNALISM REV., May 19, 2005, <http://www.ojr.org/ojr/stories/050519ulken>. But see DAN GILLMOR, *WE THE MEDIA: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE* 166 (O'Reilly Media 2006) (contending that a drawback of Google News is that it refuses to acknowledge news content from grassroots journalism, like most blogs).

¹²⁷ Krishna Bharat, *Patterns on the Web*, in *STRING PROCESSING AND INFORMATION RETRIEVAL: 10TH INTERNATIONAL SYMPOSIUM* 1, 9 (Mario A. Nascimento et al. eds., Springer 2003).

¹²⁸ Fostering competition might not be the only means to further First Amendment interests. Intriguingly, Frank Pasquale has cited Google's market dominance and bias in arguing for a right of reply to search engine results. Frank Pasquale, *Asterisk Revisited: Debating a Right of Reply on Search Results*, 3 J. BUS. & TECH. L. 61, 62-63 (2008).

opportunities for effective speech. Yet under current conditions, instituting a right of access to the mass media is far from the only means to accomplish that end and might not be the best means. Among other items in the regulatory toolkit, copyright law can and should be harnessed to the task of Barron's contextual First Amendment vision. Copyright, which the Supreme Court has famously labeled "the engine of free expression,"¹²⁹ has long been understood to further First Amendment values. In the digital arena, this must entail tailoring copyright law to foster online peer communication and the new media that make such communication possible, while continuing to underwrite a vibrant, financially robust institutional press. Judicious application of the fair use doctrine and statutory licensing can also help to ensure that new media giants will not dominate public discourse like the old.

¹²⁹ Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).