March 2000

The Constitutionalization of Technology Law

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Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38TW9W

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

First, I should distinguish between the two branches of this symposium, one dealing with intellectual property law and the other dealing with Internet regulation. The two bodies of law tend to have different interactions with the Constitution. Litigation about the constitutionality of Internet regulation tends to center on the First Amendment, and to involve the application of well known (if not always clear) principles of law to new factual situations. Thus, facial constitutional challenges have been mounted to the Communications Decency Act of 1996 and the Child Online Protection Act, both of which regulated indecent speech over the

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[Editor’s Note] The Editors of the Berkeley Technology Law Journal express their appreciation to Professor Lemley for acting as the Guest Editor for this Symposium.


The First Amendment has also been interposed as a defense in various criminal prosecutions that sought to punish speech-related activity on the Internet. In all these cases, the nature of the speech and the restriction of it were clear, even if the outcome was not. The papers for this symposium focus on two cases that extend First Amendment arguments to cover new territory: the regulation of computer source code itself. Those arguments are important not only for the fate of encryption regulation, but also because they will help to determine the role the First Amendment plays in regulating other rules about software, notably intellectual property rules.

Intellectual property has long coexisted uneasily with the First Amendment. Recent expansions of intellectual property law have put


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

Why now? What is new about the Internet and what has changed about intellectual property to bring these constitutional concerns to the fore? The answer in both cases is that the new constitutional claims are a reaction to new efforts by the government to intervene in the marketplace to favor a particular outcome. The background for this intervention in both Internet regulation and intellectual property is the dramatic growth in importance of the new information economy.\(^\text{15}\) With recognition has come increased

\[^{10}\text{Thus, Benkler responds to database protection and the Digital Millennium Copyright Act. See Benkler, supra note 1; Yochai Benkler, Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain, 74 N.Y.U. L. REV. 354 (1999). Lemley and Volokh respond to the growing scope of copyright protection. See Lemley & Volokh, supra note 8, at 147. The courts have also faced First Amendment claims arising from the expanded protection of the Digital Millennium Copyright Act. See Universal City Studios v. Reimerdes, 82 F. Supp. 2d 211 (S.D.N.Y. 2000).}\n
\[^{11}\text{U.S. CONST. art. I, § 8, cl. 8.}\n
\[^{12}\text{See, e.g., Feist Pubs. v. Rural Telephone Servs., 499 U.S. 340 (1991); Graham v. John Deere Co., 383 U.S. 1, 5 (1966) ("The clause is both a grant of power and a limitation.").}\n
\[^{14}\text{See Benkler, supra note 1; Hamilton, supra note 1.}\n
\[^{15}\text{See, e.g., U.S. DEP’T OF COMMERCE, SECRETARIAT OF ELEC. COMMERCE, THE EMERGING DIGITAL ECONOMY 1 (1998).}\]
attention by both Congress and powerful interest groups, and therefore some of the problems predicted by public choice theory. This is particularly true in the intellectual property setting, where the issues are both complex and hotly contested. Because these are hard issues, and because there are strong interest groups pushing particular agendas, it is far too easy for Congress to fall into a pattern of responding to private demands, rather than thinking proactively about what should be done. To a disturbing extent, Congress in recent years seems to have abdicated its role in setting intellectual property policy to the private interests who appear before it. Congressional hearings on patent reform, the Digital Millennium Copyright Act, and database protection have all exhibited some of these characteristics.

Congressional regulation of intellectual property or of the Internet is not driven solely by considerations of public choice theory. Many members of Congress have an altruistic desire simply to participate in this incredible new phenomenon. As one commentator familiar with the process put it, “everyone wants to get involved with the Internet. Unfortunately, if you’re in Congress, the only way to get involved is to pass legislation.” And so legislation is passed. By and large, this legislation is regulatory, because legislation generally is. Even those in Congress who want government to keep its hands off the Net ironically end up passing new laws


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

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


19. Legislation is far from the only regulator of the Net, of course. See generally LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999).
to accomplish that goal.\textsuperscript{20} Thus, the pressures to "do something" in these areas come from several quarters at once.

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

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

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


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