

THE CONSTITUTION CALLS INTO QUESTION U.S. GOVERNMENT AUTHORITY TO BIND ITSELF BY TREATY TO CONFER UPON BROADCASTERS AND WEBCASTERS THE POWER TO SUPPRESS THE CONSTITUTIONALLY PROTECTED SPEECH OF OTHERS

SUMMARY

Any international agreement to protect against broadcast signal theft or the unfair and deceptive practice of presenting someone else's webcast as one's own may be laudable, but the draft Treaty on the Protection of Broadcasting Organizations (hereafter "Broadcaster Treaty") and the related United States' proposal go much further. Rather than protecting the broadcast or webcast, as such, or preventing unfair and deceptive trade practices, they would indiscriminately empower persons who broadcast or webcast speech in which they have no copyright to suppress the reproduction or distribution of that speech by others – including the rightful authors and copyright owners. Such power would directly abridge freedom of speech protected by the First Amendment, and make such speech less accessible to others. Also, it would weaken copyright law by giving non-authors power to impair the rights of copyright owners and to profit by artificially diminishing the advancement of science and the dissemination of art.

The Copyright Clause is, by its very nature, antithetical to the First Amendment. The Courts have recognized that the Copyright Clause would be an empty power if the First Amendment did not accommodate it, but by the same token, First Amendment freedoms would be severely diminished if the Copyright Act were not forced to leave ample breathing room for the First Amendment. Accordingly, Congress has followed judicial accommodation crafted by the courts by establishing limitations upon copyrights, such as through the idea/expression dichotomy, the fair use doctrine, the first sale doctrine, and the lack of any copyright restraint whatsoever on the right of the people to perceive a public performance or to privately perform a work.

But the subject matter of this proposed treaty lies outside the Copyright Clause, and must rest on Commerce Clause authority. Unlike the Copyright Clause, Congress has nearly infinite means of regulating commerce without impairing the First Amendment in the least, and the courts have placed formidable barriers against the use of general Commerce Clause powers to suppress speech. (Where impairment of First Amendment freedoms is merely incidental to a general rule of commerce, neither based on the content of speech, the nature of the speaker, the medium of expression or the fact that it is speech, such impairment is not unconstitutional.)

A right vested upon someone who is not the author of a copyrighted work to prohibit the distribution, fixation, or reproduction of the work cannot possibly pass muster under the First Amendment.

There is no more of a basis for empowering broadcasters or webcasters to suppress speech than in a proposal granting retailers of books, magazines, newspapers, CDs, videos or video games the power to prohibit their customers from reproducing or redistributing to others the copies obtained from the retailer, regardless of the copyright owner's own wishes or whether the work was in the public domain.

INTRODUCTION

The United States government may not negotiate a treaty that grants legislative power to Congress beyond the power in Article I, nor that obligates Congress to suppress freedom of speech in violation of the First Amendment.

The contemplated Broadcaster Treaty unquestionably abridges freedom of speech – including the speech of consumers who receive the broadcasts or webcasts, copyright owners whose works were broadcast and who wish to enable others to market fixations reproduced for distribution, and merchants who may want to market them to other consumers. Speech received by means of a broadcast or a webcast could not be repeated either by reproduction, distribution or retransmission. The question, then, becomes whether there is any power granted to Congress that would justify such an incursion upon the Bill of Rights.

Ordinarily, the copyright clause of the Constitution empowers Congress to enact laws which suppress speech only in furtherance of the power to advance science and the useful arts by granting authors certain exclusive rights in their works of authorship. To the extent that a broadcast contained copyrighted material, it would permit granting copyright protection in them to the authors (in which case it would merely duplicate existing copyrights). But the draft treaty would have us confer the rights upon persons who are not the authors. Moreover, it would allow broadcasters and webcasters to impair the value of the copyrights by empowering the broadcaster or webcaster to interfere with the copyright owner's own licensing of its rights.

Ordinarily, the Commerce Clause provides ample authority to govern in areas in or affecting interstate or international commerce, including regulation of broadcast spectrum. But the draft treaty would impact areas beyond interstate or international commerce. More importantly, the Commerce Clause has never been strong enough to nullify First Amendment rights. Although the courts have permitted incursion, via the commerce clause, into regulation of commercial speech (such as truth in advertising and labeling disclosures) and speech (like child pornography) that is not protected by the First Amendment, the general rule is that the Commerce Clause does not permit regulation of speech in the manner contemplated by the draft treaty.

The draft treaty would suppress speech that is fully protected by the First Amendment, would suppress speech that is unprotected by copyright or, if protected, does not infringe the rights of the copyright owner, and would suppress speech in a manner that is not rationally related to any legitimate state interest, much less the least restrictive means to further a compelling state interest.

I do not contend that a broadcasting or webcasting treaty could not protect against broadcast signal theft or the unfair and deceptive practice of presenting someone else's webcast as one's own. These may be laudable objectives, and fit well within areas already accepted as being in conformity with the First Amendment. What is objectionable is a treaty that would confer upon some speakers the power to prevent others from repeating or copying speech they have not authored, but have merely performed. Such power would directly abridge freedom of speech, make speech less accessible to others, allow broadcasters and webcasters to constrain speech that is not their creation, impair the copyrights of authors, and to profit by impoverishing the public's access to the discourse of others.

DISCUSSION OF LEGAL PRINCIPLES

The U.S. delegation to WIPO may not lawfully negotiate a treaty obligating the United States Congress to enact laws that Congress is either not empowered to enact or, if within Congress' power, would violate a restriction upon that power.

Thus, for a treaty to have any hope of compelling Congress to enact new laws that would survive a challenge to their constitutionality, the treaty must, in the first instance, require the enactment of laws within the scope of legislative authority and not barred by the First Amendment. But first, I will address a procedural matter.

I. Legislative Action and/or a Formal Notice and Opportunity to Comment is Essential

The proposed treaty is does not govern commerce between nations. Rather, it obligates signatory nations to alter their own domestic laws. Were these requirements in the best interests of the United States, it stands to reason that Congress would have already taken up the domestic obligations in one form or another, such that the treaty would only seek uniformity and mutual cooperation with the stated public policy of this nation. But that is not the case here. The proposed treaty would obligate Congress to make fundamental and radical changes to United States domestic law. Yet, neither members of Congress nor their constituents have been given any meaningful opportunity to participate in the formulation of the very U.S. policy that would have to be altered if the draft treaty were adopted.

The absence of the Broadcaster Treaty in no way prevents Congress from enacting the very legislation that would be called for, including the provisions in the U.S. delegation's proposal. The fact that Congress has been unwilling and/or unable to enact such legislation should, therefore, be taken as a sign that Congress might not welcome international obligations compelling it to act. Moreover, given the ample time Congress has had to consider granting broadcasters the right to suppress the freedom of speech of others, it warrants examining the areas where Congress has given that right in a limited way, and the areas in which our own Constitution would prohibit Congress from granting such a right.

II. Reasonable and Constitutional Protections Have Already Been Granted

To the degree that broadcasters or webcasters need protection, Congress has already enacted myriad legal provisions to ensure that their legitimate business interests are protected. The Federal Communications Commission is given broad authority to regulate the airwaves to avoid signal interference, to protect and encourage diversity in broadcasting, and to generally oversee the public policy intended to ensure a robust, competitive and diverse broadcasting industry. 47 U.S.C. The theft of electronic transmissions has been criminalized. 18 U.S.C. § 2511. The Lanham Act, 15 U.S.C., prohibits interlopers from passing on a trademarked broadcaster's or webcaster's transmission as their own. The FTC Act, 15 U.S.C. §§ 41-51, gives the Federal Trade Commission ample leeway to investigate and punish unfair and deceptive trade practices. And finally, the Copyright Act itself assures that copyright owners' rights are protected from infringing broadcasts and webcasts (public performances) of their works.

It may well be that some of these existing domestic law provisions would be more effective if all countries were in agreement to establish them, make them uniform, and enforce them. Congress would likely find no objection in, for example, an international treaty prohibiting

the re-transmission of a broadcast signal without the broadcaster's permission. But the fixation of the broadcast and/or reproduction of the broadcast, such as was done by people using the Sony Betamax recorder, is an entirely different matter involving the content of the signal and not the signal itself. That content included material in the public domain as well as copyrighted. Where the reproduction of the broadcast results in copies of audiovisual or other works in which there is no copyright, the reproduction is not infringing of the copyright, or there is consent of the copyright owner to make the reproduction, an act of Congress authorizing anyone to suppress it would frustrate the lawful, non-infringing, constitutionally protected reproduction and distribution that can be enjoyed today, whether by average citizens, by enterprising merchants, or by the copyright owners themselves.

III. Congress Does Not Have Power to Enact the Required Legislation

It is hard to imagine that the United States delegation to WIPO would be supporting the adoption of a treaty obligating the United States Congress to enact laws that Congress has absolutely no authority to enact – and which, if enacted, would abridge fundamental rights guaranteed by the First Amendment to the Constitution. Yet, that appears to be precisely the case. No one has yet articulated any source of legislative authority that the United States Congress could rely on to enact the required domestic laws without unconstitutionally abridging the freedom of speech, and the opportunity publicly to advance such argument has not been made available.

There are two possible sources of legislative authority: The Copyright Clause and the Commerce Clause. The First Amendment limits each of these, albeit in different degrees.

As demonstrated below, the legislation required by the proposed Broadcaster Treaty could not pass muster under the Copyright Clause. Arguably, there might be authority under the Commerce Clause (but only arguably, as substantial weight of authority would limit Congress's ability to enact legislation under the Commerce Clause which seeks to skirt the limitations in the Copyright Clause, particularly when such legislation runs counter to the declared purpose of the Copyright Clause). Assuming, for the sake of argument, that the legislation might survive a Commerce Clause challenge, it would certainly fail a First Amendment challenge.

A. The Required Legislation is Not Permitted by the Copyright Clause

The national legislation required under the proposed Broadcaster Treaty cannot pass muster under the Copyright Clause. Concededly, no attempt is being made at this time to justify the treaty based on the Copyright Clause, but as *Trade-Mark Cases*, 100 U.S. 82 (1897), indicates, courts may look for any potential source of authority when an act of Congress is challenged on the basis lack of Section I authority.

The proposed Broadcaster Treaty echoes many copyright provisions, including the granting of exclusive rights for only limited times, but it fails to meet other essential elements of copyrights as laid out by the Supreme Court in interpreting Copyright Clause authority. More importantly, despite recitations that nothing in the treaty is to impair copyright treaties, enactment of the required legislation would directly impair the exclusive rights of copyright owners whose works are broadcast, and would impoverish the public's access to those works without regard to the authors' wishes. That is, it would run contrary to the stated purpose of the Copyright Clause.

The Copyright Clause empowers Congress to secure to authors, for limited times, the exclusive rights to their writings, while concurrently limiting Congress' power in important ways. Congress' power under the Copyright Clause requires that the exclusive rights be granted for limited times, only to authors, only for original writings, only for expressions (and not the ideas expressed), and only for the advancement of science and the useful arts. The Broadcaster Treaty requirements for legislation fail those standards.

The proposed right to suppress speech would be granted to persons other than the authors. While broadcasters may author their own broadcasts, the proposed treaty would apply regardless of that fact. Moreover, such right of suppression is wholly unnecessary when they are the authors, because they would already enjoy existing copyright protection.

The proposed right to suppress speech would be granted for works that are not copyrightable. Copyright protection can only be conferred upon original works, *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991). One who merely transmits the work, whether copyrighted or not, has created no original work.

The proposed right to suppress speech would be granted over the objection of the authors. When, pursuant to the Copyright Clause, copyright owners are granted certain exclusive rights, any act of Congress purporting to invoke the Copyright Clause to grant additional rights over those same works to persons who are not the authors or the copyright owners, and which rights directly burden the rights of the authors, cannot stand. Under the legislation required by the proposed treaty, a broadcaster who broadcasts the winning performance of Ms. Jones' third grade class could prohibit Ms. Jones, the performers, or the performers' parents from recording, reproducing or distributing copies of that wonderful event. To make matters worse, if Ms. Jones' class performed an original work of authorship, and had the exclusive right to authorize the public performance by the broadcaster and any fixation, reproduction and distribution of the broadcast, the exclusive right would, in effect, be shared with the broadcaster – the authors would not have plenary power to exercise their rights under copyright law because the broadcaster (who is a copyright licensee), has the power to “just say no” to any of the copyright owners' licensees for the reproduction and distribution.

On the Internet, it is becoming quite common for average citizens to create audiovisual works which are then uploaded to a website where, with permission of the author, they are performed publicly by a webcaster. For many, this is the most effective way of disseminating their works, given that they are not webcasters, and do not have the resources to become webcasters. One site is devoted to webcasting short films created on cell phones, exclusively. But if an entrepreneur were, with the permission of the authors, to reproduce the best of these in a collection on a single DVD for sale or rental in video stores, permission of the webcaster would be required. In effect, the webcaster would have veto power over the author's freedom to authorize the reproduction and distribution of his or her own work from the most readily-available source – the licensed performance – and force the author to supply the entrepreneur with a separate source for reproduction, assuming one exists and it has not already been erased from the cell phone's memory.

The sand of these new rights could also clog the gears of commerce in the multi-billion-dollar home video industry. Currently, the copyright owners in made-for-TV movies and in television shows are exploiting the lucrative home video market as never before. The work

that is televised, under license from the copyright owner, as the first channel of dissemination before going to home video might now need to cross a new hurdle – getting permission from the broadcaster to reproduce it onto DVDs for distribution to the home video market. The more powerful copyright owners may bargain to receive those rights in exchange for the license to broadcast the show in the first instance, but the very fact that they must do so means that the copyright is now being licensed not just for cash, but for cash plus a license from the broadcaster to exploit fixations, reproductions and distributions of copies of the broadcast. It is the equivalent of getting permission from the author of a book to copy a chapter for reproduction and distribution in a separate work, only to be sued by the bookseller because you copied it from a book you bought from the bookseller, who had been given the right to suppress reproduction and distribution of copies of speech sold at its store.

Thus, the legislation required by the proposed treaty would work against the very rights of copyright owners or, at a minimum, create a parallel regime of rights for persons who are not the authors of original works. Neither of these results can be justified under the Copyright Clause. As we shall see below, the Commerce Clause also fails to provide sufficient authority, and the First Amendment would dash any arguable authority outside of copyright.

B. The Required Legislation is Not Permitted by the Commerce Clause

Although it is said that the Foreign Commerce Clause is plenary, and not limited by the rights of states that serve to temper Congress' power over interstate commerce, *United States v. Clark*, No. 04-30249 (9th Cir., Jan. 25, 2006), the Broadcaster Treaty would not fundamentally govern international trade, but domestic trade. That is, the treaty requires signatories to change their domestic laws governing purely domestic activity. For this reason, this paper will examine the proposed treaty in light of the Domestic Commerce Clause. But there is another reason for ignoring the Foreign Commerce Clause, and that is that the government cannot, by merely passing a treaty, nullify constitutional guarantees in the Bill of Rights, or circumvent the limits placed upon Congressional power in the Constitution.

It is plain that the rights proposed to be conferred upon broadcasters are very similar to the rights already enjoyed by copyright owners, the primary difference being that copyright owners enjoy these rights by virtue of having authored an original work, whereas broadcasters enjoy these rights by virtue of having performed a work publicly by means of a broadcast or webcast, no matter who authored it.

There is substantial disagreement whether such “copyright-like” provisions, once enacted by Congress, can escape being declared unconstitutional because of the express limitations in the Copyright Clause by merely claiming authority under the Commerce Clause instead. *See, e.g., United States v. Moghadam*, 175 F. 3d 1269 (11th Cir. 1999), *cert. denied*, 529 U.S. 1036 (2000) (noting that there are times when “the Commerce Clause cannot be used by Congress to eradicate a limitation placed upon Congress in another grant of power,” *id.* at 1280, but nevertheless finding an “extension” of law beyond the fixation requirement acceptable); *Kiss Catalog Ltd. V. Passport Int'l*, No. CV 03-8514 DSF (CWx), 2005 U.S. Dist. LEXIS 37671 (C.D. Cal. December 21, 2005); *United States v. Martignon*, 346 F. Supp. 2d 413 (S.D.N.Y. 2004). The weight of authority may be tilted against such evasion, *see, e.g.,* Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial review in the Creation and Definition of Private Rights in Information*, 15 Berk. Tech.

L.J. 535 (2000); William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*, 67 Geo. Wash. L. Rev. 359 (1999), but there is disagreement, and the Supreme Court has yet to address the issue head-on.

In *Kiss Catalog*, the court considered the constitutionality of a “copyright-like” federal anti-bootleg statute, determining that “once the Court concludes that the Statute does not fall within the purview of the Copyright Clause, it need no longer consider whether it complies with the limitations of the Copyright Clause.” 2005 U.S. Dist. LEXIS 37671 *18. But the task was much easier than that presented by the Broadcaster Treaty because the anti-bootlegging provision was viewed as complimentary to the copyright. It was the author of the performance, who would have enjoyed copyright protection but for the fact that the performance was not yet fixed, who benefited from a separate provision giving a right to prohibit the fixation by someone not the author. Under the legislation required by the Broadcast Treaty, in contrast, the broadcaster’s right to suppress speech includes the right to suppress the speech of the author. That is, rather than being a complement to the copyright, it derogates from it.

It stands to reason, therefore, that even if the courts might recognize Commerce Clause authority to enact legislation that enhances copyright protection without meeting all of the requirements of the Copyright Clause, they would likely frown on reliance upon the Commerce Clause to enact “copyright-like” legislation that is not permitted by the Copyright Clause, impairs the copyrights granted pursuant to the Copyright Clause, and works against the very purposes of the Copyright Clause by limiting access to science and art.

There is no need to resolve this debate, however. As explained next, regardless whether the Commerce Clause can be interpreted as permitting this grant of power to broadcasters without running afoul of the limitations in the Copyright Clause, the First Amendment stands as an insurmountable obstacle to the enactment of most of the draft treaty’s requirements.

C. The First Amendment Prohibits Suppression of Speech Through the Commerce Clause

When Congress acts pursuant to its Copyright Clause authority, particularly as refined by the courts in requiring limitations on copyrights (such as the originality of expression, accommodation of fair use, and exhaustion of the distribution right once the authorized copy belongs to another), it will rarely clash with the First Amendment’s prohibition of the suppression of speech. That is largely because, “[i]n addition to spurring the creation and publication of new expression, copyright law contains built-in First Amendment accommodations.” *Eldred v. Ashcroft*, 537 U.S. 186, 219 (U.S. 2003). Indeed, the Copyright Clause and the First Amendment are complimentary.

The Copyright Clause and the First Amendment seek related objectives -- the creation and dissemination of information. When working in tandem, these provisions mutually reinforce each other, the first serving as an "engine of free expression," the second assuring that government throws up no obstacle to its dissemination. At the same time, a particular statute that exceeds proper Copyright Clause bounds may set Clause and Amendment at cross-purposes, thereby depriving the public of the speech-related benefits that the Founders, through both, have promised.

Id. at 244, Breyer, J., dissenting (citation omitted).

Here, in contrast, the proposed broadcaster and webcaster rights seek objectives antagonistic both to copyrights and First Amendment rights. Where the Copyright Clause and the First Amendment work in tandem to advance the progress of science and art, the broadcaster rights based purely on the Commerce Clause would work at cross-purposes, taxing both copyrights and First Amendment liberties – charging a toll to the enjoyment of the rights of authors and their public.

Accordingly, even assuming, *arguendo*, that the Commerce Clause grants *prima facie* authority to Congress to confer upon broadcasters and webcasters a right to suppress the fixation, repetition or distribution of fixations of any constitutionally protected speech of others that they happen to broadcast or webcast, there can be no doubt that such authority is limited by the First Amendment.

The First Amendment limitations applicable to the Commerce Clause are virtually insurmountable. Consider, for example, direct government suppression. If the government enacted a law requiring anyone who wished to fix, reproduce or distribute copies of speech that had been broadcast or webcast to first apply for and obtain the government's permission, we would not hesitate to recognize that such a law would be unconstitutional on its face. The mere fact that, in this case, the government would require people to apply for and obtain permission from the broadcaster or webcaster rather than from the government does nothing to improve it. It remains unconstitutional, and though subject to heightened scrutiny, would no doubt fail the most basic test. The granting of rights to broadcasters based upon broad “commerce” power, where those rights serve only to frustrate the rights granted under the very specific provisions of the Copyright Clause and, both in purpose and effect, directly suppress speech guaranteed as a fundamental right under the First Amendment, it can hardly be argued that such a right could be considered rationally related to any legitimate state interest.

IV. Conclusion

For the foregoing reasons, it would be prudent for the United States delegation abandon any efforts to promote the proposed Broadcaster Treaty (and the similar webcaster right to suppress speech), including the United States proposal to WIPO. Instead, the delegation should seek guidance from Congress, and from the public through a formal Notice of Inquiry. Such guidance should then be evaluated against the powers and restrictions on power imposed by the Constitution, and a new proposal drawn up limited to furthering international uniformity consistent with existing U.S. laws – laws that have demonstrated Congress’ will and that have already withstood constitutional challenge.

Respectfully submitted,

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