Domain and Forum: Public Space, Public Freedom

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INTRODUCTION: ANALOGIZING COPYRIGHT'S PUBLIC DOMAIN TO A PUBLIC FORUM

Many copyright doctrines, whether or not they are good ideas, do not fit well into conventional First Amendment jurisprudence.[1] Fair use, for example, overlaps with some First Amendment considerations but not others, and copying (infringing or not) can serve many important free speech interests.[2] Examples of copying that fit well within traditional conceptions of First Amendment-protected speech are not hard to find. The *New York Times* recently reported on Chinese fans of American TV shows who download them using Bittorrent and similar programs, quickly create Chinese subtitles, and make them available to Chinese audiences who otherwise would not get to see them at all or would only see heavily censored versions.[3] Their actions underscore the politically disruptive potential of art, as well as of copying, by bringing new ideas to people against the will of their governments. Copying also serves as a means of self-expression, as people identify with particular songs, stories or TV shows that they use to define themselves and to

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1. *See* Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1 (2001).

2. *See* Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004).

3. *See* Howard W. French, *Chinese Tech Buffs Slake Thirst for U.S. TV Shows*, N.Y. TIMES, Aug. 9, 2006, at A6. American fans of Japanese anime and manga have for many years undertaken similar translation projects for works unavailable in English. *See* Jordan Hatcher, *Of Otakus and Fansubs: A Critical Look at Anime Online in Light of Current Issues in Copyright Law*, 2 SCRIPT-ED 514 (2005); Sean Kirkpatrick, *Like Holding a Bird: What the Prevalence of Fansubbing Can Teach Us About the Use of Strategic Selective Copyright Enforcement*, 21 TEMPLE ENVTL. L. & TECH. J. 131 (2003); Sean Leonard, *Celebrating Two Decades of Unlawful Progress: Fan Distribution, Proselytization Commons, and the Explosive Growth of Japanese Animation*, 12 UCLA ENT. L. REV. 189 (2005). Although the directly political nature of these projects is less obvious, the ways in which this copying enables Japanese culture to affect English-speaking culture—especially the ways in which cultural interactions are driven by English speakers' demand rather than pushed by corporate decisions—would also be relevant to most theories of free speech. *Cf.* Karla S. Lambert, Note, *Unflagging Television Piracy: How Piracy of Japanese Television Programming in East Asia Portends Failure for A U.S. Broadcast Flag*, 84 TEX. L. REV. 1317 (2006) (discussing the powerful cultural effects of unauthorized copies of Japanese content in other East Asian countries).

explain themselves to others.[4] And copying can serve as a means of directly persuasive argument: By selecting particularly well-argued or convincing works—whether newspaper editorials, horrifying images or devastating comedy routines with a political slant—copiers can promote their own views far better than they could with more pallid, noncopied imitations.[5]

If it is the case that, at least sometimes, copying can be part of the freedom of speech with which the First Amendment is concerned, how should we think about the relationship between copyright and the First Amendment? Many answers have been proposed to that question, and I will not here attempt a comprehensive assessment of the debate. Rather, my discussion will examine the similarities and divergences between copyright and First Amendment principles using two points of comparison: the public forum and the public domain. A "public forum" in First Amendment law is a place held in trust by the government for use by the people, whether generally (a traditional public forum) or for specific topics (a limited public forum). By "public domain," I refer to various concepts of freedom to use expression, information and other intangible intellectual goods, rather than to real property. The public forum and the public domain are places that belong to everyone, because they belong to no one, from which people cannot be excluded on the grounds that a property owner wishes to exclude them.[6]

In this discussion, it may be helpful to distinguish between constitutional mandates and constitutional values. Or, another way to put it (with somewhat different implications), there are constitutional standards enforceable by courts and constitutional decisions committed to legislatures, and legislatures have a duty to consider constitutional principles when making law, even when no court will

4. *See* Tushnet, *supra* note 2, at 568-74; Howard Parnell, *Downloading Empathy to Your iPod: Online Playlist Creators Search for Catharsis, Discover a Marketplace*, WASH. POST, Mar. 1, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/03/01/AR2006030100635.html (discussing people who create iTunes playlists of songs to express their grief over losing a loved one, which both helps them and creates links with other people who listen to the playlists); John Wenzel, *That Special Ring*, DENVER POST, July 10, 2006, at F-01(discussing cellphone ringtones as self-expression).

5. *See* Tushnet, *supra* note 2, at 574-78; Linda R. Hirshman, *Unleashing the Wrath of Stay-at-Home Moms*, WASH. POST, June 18, 2006, at B01 (arguing that many women had privately copied and emailed her article in *The American Prospect* to each other to articulate and defend their own beliefs). A slightly different example comes from Mark Tushnet's selection of Justice Douglas's concurrence in *Roe v. Wade* as his contribution to the book *What Roe v. Wade Should Have Said*, an edited volume designed to give prominent constitutional scholars a chance to write their own, improved opinions in the case. By selecting Douglas's words and arguments, Tushnet makes the claim that the Justices then did the best they could have done, being who they were and living when they were. In a sense, he argues against the book's project from within. David J. Garrow's review of the book treats Tushnet's contribution as a valuable part of the collection; it makes an argument that no other, noncopied piece could make as plainly. *See* David J. Garrow, *Roe v. Wade Revisited: Balkin's* What Roe v. Wade Should Have Said, THE GREEN BAG, Aug. 2005.

6. The extent to which the "public domain" is a place at all is contestable. Place is a metaphor, and maybe a misleading one. Julie Cohen has urged copyright scholars to think of people moving through "cultural landscapes," in which private and partially private content mingles with public domain material in unpredictable, creative, and productive ways. *See* Julie E. Cohen, *Copyright, Commodification and Culture: Locating the Public Domain*, *in* THE FUTURE OF THE PUBLIC DOMAIN 121-66 (L. Guibault & P.B. Hugenholtz eds., 2006).

intervene if they fail. First Amendment public forum doctrine is a useful place to look for insights, because, like copyright's speech-promotion function, its practical utility to speakers is largely committed to legislative discretion. The Constitution does not require creation of public forums any more than it requires the enactment of a copyright law or a fifty-six year copyright term.[7] But public forums nonetheless have been a vital part of the structure of free speech.

When the legislature does decide to create a public forum, First Amendment doctrine makes clear that the power to create is not equivalent to the power to structure in any possible way. If a public park exists, the government cannot let a commissioner decide who can speak or preach there. If there is a fund for student publications at a public university, the university cannot refuse to fund controversial student publications. Notably, in the student-fund case, the Supreme Court recognized a "metaphysical" or intangible public forum,[8] making an even closer connection to the metaphorical space of the public domain of facts, ideas and other intangibles not protected by copyright.

The particular problems of content and viewpoint discrimination rarely surface in copyright, though some people have argued that fair use implicates them. Nonetheless, one important lesson for copyright from public forum doctrine is that First Amendment law can take some—though not many—speech-related options off the table. In this brief comment, I argue that analogies between copyright law and public forum doctrine highlight important shared commitments to free and robust public discourse, but also substantial practical barriers to judicial enforcement of those commitments.

I. PUBLIC FORUMS AND THE PUBLIC DOMAIN: PARALLEL LIMITS

Problems theorizing and defining public domains are similar to problems theorizing and defining public forums. These similarities show up in various features of doctrine and conceptions of the public domain. The parallels also

7. *But cf.* Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 TUL. L. REV. 163, 197-98 & nn.184-86 (2002) (arguing that governments are obligated to create public forums on public property and citing other sources making similar claims). The idea that government must preserve some of its property for use as a public forum, and even that it must position its public forums to maximize the effectiveness of citizen speech, is analytically distinct from the more aggressive claim that government must regulate private property to provide citizens effective access to each other. In theory—and as public forum doctrine has developed—the government's obligations with respect to its own property can require attention to the practical consequences for speech, even while no such analysis is required when the government allows private property owners full exclusion rights. In other words, public forum doctrine may require that, for any given set of government properties, the use of those properties must maximize opportunities for citizens to speak, but it has nothing to say about how much property government must regulate. If people refuse to come to the government's well-maintained public spaces because they are too happy at home or at the mall, there is no further obligation. *See infra* notes 19, 25 and accompanying text.

8. Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 830 (1995) (finding that a public university's student activities fund was a "forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable").

suggest that a robust theory of the public domain, which many low-protectionists have called for as part of the affirmative case for limiting copyright expansionism, may be difficult to develop, especially in the courts.

A persistent tension in First Amendment public forum doctrine is that the doctrine regulates government behavior with respect to areas the government is not constitutionally required to maintain. That government chooses to preserve and create public forums, both traditional and limited, indicates the existence of free speech values that go beyond First Amendment rules protecting *against* government suppression. It is to these free speech values, more than to First Amendment rights against the government as such, that public domain advocates in copyright also appeal. Thus, the constitutional public domain—that which the government may not seal off using copyright or copyright-like laws—is only one component of the full complement of public domains. Indeed, the constitutional public domain is only one of thirteen overlapping types of public domains identified by Pamela Samuelson in her discussion of the varieties of the public domain in intellectual property literature.[9]

Once it exists, the public domain is a space, like a public forum, where anyone can speak without paying for placement. That lack of control is what makes public forums legally different from privately owned television stations, and Shakespeare legally different from Stoppard. The public forum doctrine's aspiration is to place a limit on the claim that freedom of the press is limited to those who own one. Public forums allow speech supporting the "poorly financed causes of little people"[10] to be disseminated where it is likely to be heard, in public spaces where the public often goes. Justice Fortas's statement in *Tinker v. Des Moines Independent Community School District* is a classic formulation of this position:

> Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots.[11]

Despite Justice Fortas's broad claims, public forum doctrine has been held hostage to history. Only traditional public forums, like parks and streets, get the full protection of the First Amendment. Newer sites of communication, from shopping malls to the internet, are free from the constraints imposed on the traditional public forum. Moreover, as long as the government does not

9. Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L.J. 783, 792-94 (2006). As Samuelson points out, conceptions of the public domain cluster around three core concepts: "(1) the legal status of information resources; (2) freedoms to use information resources, even if protected by intellectual property (IP) rights; and (3) accessibility of information resources." *Id.* at 785. Freedom of use and accessibility are values that both traditional and designated public forums further, even when their provision is conditional on policy judgments that such freedom and openness is in the public interest. Recognizing multiple concepts of the public domain can, as Samuelson says, illuminate "a range of important social values served by these domains and a plethora of strategies for preserving them and the values they serve." *Id.* at 786.

10. Martin v. City of Struthers, 319 U.S. 141, 146 (1943).

11. 393 U.S. 503, 513 (1969).

discriminate on the basis of viewpoint, most forums maintained by the government can be limited and manipulated to exclude undesired content.[12]

Relatedly, any particular public forum can be closed for non-speech-related reasons. If the government decides that the public interest will be better served by selling a park to a logging company, or by turning a park into a sports stadium, the First Amendment offers no grounds for objection. Similar dynamics are also at work in copyright. Material in the public domain can be turned into private property by non-copyright means such as contracts, digital rights management technologies, and even trespass claims.[13] Fair use is no defense. This may well be a mistake, but it is a mistake that First Amendment doctrine has allowed legislatures to make with physical property as well as with intellectual property.

If Justice Fortas was correct that free speech must exist in fact as well as in principle, the implications are profound. The public forum and the public domain are not just matters of government choice, but of social structure. If we live in gated communities, using Zune players that apply digital rights management (DRM) controls to every piece of music, the theoretical availability of the public forum and the public domain will not affect a speaker's actual ability to reach audiences.

The issue that then arises is whether the public forum doctrine exists to implement an underlying principle about the ability of poorly financed speakers to reach willing listeners, or whether it is merely an artifact of government property ownership. If it is the latter, the fact that public forums disappear is of no concern to freedom of speech. In other words, why would we care about a speaker's inability to reach listeners on public property? If the speaker has sufficient resources, she can buy airtime on private television channels, or mail out flyers, or set up a website. As long as the government does not bar her from doing any of those things, it has not prevented her from disseminating her message.[14] She might want to use a public park to speak, but she might also want to use a private doctor's office, and in the latter case the property owner could throw her out regardless of the value of her speech to democracy.

If we truly believe that every speaker ought to have a chance to reach other people, even without the ability to finance dissemination of that speech, there would be a constitutional problem if the government shut down all public parks. Further, if audiences are no longer readily available at public parks, the same interest in reaching audiences could justify overriding even private property rights. The Supreme Court has never been willing to take the argument that far. Federal courts have to date refused to recognize speech interests in speaking on truly

12. *See, e.g.*, Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921 (1993).

13. *See, e.g.*, Christine D. Galbraith, *Remembering the Public Domain*, 84 DENV. U. L. REV. 135 (2006) (discussing these transitions into private control).

14. If the government discriminates on its property based on the viewpoint of the speaker, that creates special problems. But I am here assuming a flat ban on speeches, which would not have obvious viewpoint-based motives or effects. Public forum doctrine invalidates the flat ban in a traditional public forum as well as viewpoint discrimination.

private property, on the theory that the property owner can decide on what terms access will be granted.[15]

Nor is it likely that courts will decide that the First Amendment requires limits on copyright on the grounds that freedom of speech in practice requires some freedom of copying. Instead, they are likely to leave such judgments to the legislature, confident that non-copying means of expression remain theoretically available.[16] Larry Lessig sounds the alarm about copyright's public domain. His concerns correspond to structurally identical worries about the declining role of physical public places in American life and the resulting effects on our democracy:

> There is a public domain, but it is small, relative to its history, and it is shrinking. Digital technology will only speed its decline. And because most are oblivious to the particular threat that digital technology poses for the public domain, the prospects for reversing this trend are not promising.[17]

Using similar language, First Amendment theorists criticize public forum doctrine because it is defining itself into irrelevance: "[E]xisting public forum doctrine is inadequate . . . because it limits the key reference point of the traditional public forum to antiquated public spaces that have a decreasing impact on the everyday communicative lives of modern citizens."[18]

Both public forum doctrine and copyright have allowed the slow squeezing out of a speaker's practical freedom even as the law insists her rights are unchanged. For example, there has historically been a difference between ownership of a copy and ownership of the copyright in the work embodied in a copy. When property rights are divided in such a way, copy owners have freedom to transfer, and substantial freedom to modify,[19] their copies. The concentration of property rights in a single private owner, as in a licensing model, removes those abilities. When people no longer congregate in public spaces but are more readily available in malls, property owners can more readily control what speech large groups of people see and hear. When copies are licensed and combined with DRM, the same phenomenon occurs. A copyright owner's former inability to control certain uses of its works seems merely an artifact of social arrangements and technological

15. *See* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). State constitutions, however, can grant such free speech rights without violating federal constitutional protection for property rights. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

16. *Cf.* Eldred v. Ashcroft, 537 U.S. 186, 221 (2003) (holding that the First Amendment "bears less heavily when speakers assert the right to make other people's speeches," assuming that substitutes are readily available).

17. Lawrence Lessig, *Re-Crafting a Public Domain*, 18 YALE J.L. & HUMAN. 56, 56 (2006).

18. Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1634 (1998); *see also, e.g.*, CASS SUNSTEIN, REPUBLIC.COM 5-15 (2001) (arguing that new communications technologies make it even easier for people to isolate themselves from the public forum and engage only with self-selected points of view, to the detriment of democracy and First Amendment values); *id.* at 53-54 (positing that the decline of physical public forums, which force people to confront unanticipated situations and viewpoints, will increase polarization and decrease tolerance for diversity).

19. Taking notes in books or highlighting passages in casebooks, for example, are activities that alter a specific copy, but probably don't infringe the derivative works right even in theory; in practice, these actions are not within copyright owners' control.

development. Although digital copies could open up new possibilities for cheap, easy excerpting, such as for educational uses, prevailing doctrine treats digital media, even when it's digitized analog content, as nontraditional. Thus, the allocation of control between copyright owners and audiences can be entirely different from that for analog media, without implicating constitutional considerations that would apply were copyright owners given similar control over analog versions.[20]

Nonetheless, it remains optional for the government to adopt, as good free speech policy, generous exceptions to copyright, just as states may treat private property, like shopping malls, as places where free speech must be allowed.[21] The major success of copyright restrictionists along this line has been "transformative" fair use, which courts have accepted as necessary for practical freedom of speech when a copyrighted work is an important piece of common culture. Like a shopping mall, *Gone with the Wind* is part of our collective experience, even though it is also a private possession used to generate revenue.[22] Allowing unauthorized speech "on" the copyright owner's private property is a way of recognizing that practical significance, as the New Jersey Supreme Court ruled in a shopping mall case:

> If free speech is to mean anything in the future, it must be exercised at these centers. Our constitutional right encompasses more than leafleting and associated speech on sidewalks located in empty downtown business districts. It means communicating with the people in the new commercial and social centers; if the people have left for the shopping centers, our constitutional right includes the right to go there too, to follow them, and to talk to them. We do not believe that those who adopted a constitutional provision granting a right of free speech wanted it to diminish in importance as society changed, to be dependent on the unrelated accidents of economic transformation, or to be silenced because of a new way of doing business.[23]

In the public forum context, however, this interpretation of the affirmative right to free speech remains an option for state constitutional law, rather than a federal requirement. Indeed, most states have elected to follow the federal rule that free

20. *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001). *Cf.* Berkman Center for Internet & Society White Paper, Digital Learning Case Study: Film Studies and the Law of the DVD, http://cyber.law.harvard.edu/home/dl_filmstudies (Aug. 2006) (discussing film professors' use of circumvention tools to create teaching resources incorporating clips from DVDs and the special legal problems of using DVDs, as opposed to videotapes).

21. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

22. State courts following this line of reasoning have noted that the private property owner generally seeks public entrance and participation, which decreases any asserted interest in maintaining total control. *See, e.g.*, Alderwood Assocs. v. Wash. Envtl. Council, 96 Wash. 2d 230, 244 (Wash. 1981) ("When property is open to the public, the owner has a reduced expectation of privacy and, as a corollary, any speech activity is less threatening to the property's value."). Federal courts finding fair use have drawn parallel conclusions about the scope of fair use for published works, with which the public has been encouraged to become familiar. *See, e.g.*, Arica Inst. v. Palmer, 970 F.2d 1067, 1078 (2d Cir. 1992) (explaining that the plaintiff's work was "published work available to the general public," which favored the fair use defense).

23. New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 779 (N.J. 1994).

speech rights do not extend to private property, no matter how public a function that private property serves.[24]

Proponents of a robust public domain are thus returning to arguments about the practicalities of promoting speech that have rarely had much traction in the courts. For example, Julie Cohen's theory of cultural landscapes argues for freedom for people to play with the cultural materials they encounter, whether those materials are copyrighted or not. If the public domain is, as Cohen says, "everywhere the public is," then chat rooms are public space no less than public parks, and private parties' contractual and property rights to control those chat rooms may be limited.[25]

Likewise, Michael Birnhack's concept of the public domain as enabler of deliberative democracy bears strong resemblances to descriptions of the public forum in First Amendment law. Both the First Amendment and the public domain, he argues, "construct, or aim at constructing, a communicative sphere, where people can interact with each other in various circles, whether it is an interpersonal circle, a communitarian one or a wider political circle. In this sense, both the public domain and the idea of freedom of speech stem from the same source."[26] Birnhack is writing about public forum values, not general First Amendment values. The difficulty with his aspirational account is that public forum doctrine leaves much property that can be privatized and set off limits from deliberative democratic interaction.

Calls for expansion of the public domain and public forums, in both cases, often include proposals to require nondiscriminatory access to the private resources—whether communications channels, physical spaces or intellectual property—that have taken the place of public resources.[27] Lessig, for example, argues that the principles of free access he defends can be promoted by content- and viewpoint-neutral rules, even if some payment is required, as long as no potentially censorious

24. *See* Sarah G. Vincent, *The Cultural Context of the Shopping Mall: Tension Between Patron's Right of Access and Owner's Right to Exclude*, 37 UWLA L. REV. 221, 248-53 (2004) (surveying state case law).

25. *See* Cohen, *supra* note 6, at 157; *see also* Julie Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. (forthcoming 2007) (manuscript at 21, *available at* SSRN: http://ssrn.com/abstract=929527).

26. Michael Birnhack, *More or Better? Shaping the Public Domain*, *in* THE PUBLIC DOMAIN OF INFORMATION, (forthcoming _____) (manuscript at 5, *available at* SSRN: http://ssrn.com/abstract=677301). Birnhack writes:

> [B]oth copyright law and free speech jurisprudence aim at a rich and diverse public domain, in which deliberation can take place without any impediments, in which all who wish can participate, regardless of their market power. It is a public domain which is interested in the exchange between the multiple voices and their expressions, which realizes that new ideas form when old ideas interact. In other words, this is a public domain that rejects cultural control which is executed through the use of property rights . . . .

Id. (manuscript at 34). Birnhack is trying to push First Amendment theory in the direction of recognizing more affirmative rights for speakers as well as articulating a defense of the public domain against copyright ownership. Right now, most of the ways in which one can disseminate speech do require money and "market power" to succeed.

27. *See*, *e.g.*, SUNSTEIN, *supra* note 18, at 154-57.

human will is imposed between a speaker and her audience.[28] Likewise, First Amendment reformers argue that some property owners, such as shopping mall owners, should be required to allow other speakers physical access to their property, because nondiscriminatory access serves the same function in a heavily propertized society as access to a public forum.[29]

Fundamentally, the existence of a public forum implements a constitutional norm of speakers' access to audiences even if no court can require a legislature to establish such a public space. Given this norm, it should be at least within the legislature's discretion to decide that private property has to give way to free speech in malls, if that is an effective way for speakers to connect to audiences. Likewise, the claim that copyrights are private property cannot be dispositive in determining whether there is a free speech right to copy in certain circumstances, when it serves the goal of informing the public or creating common ground. The next section addresses the idea of "property" as trump more specifically, and then discusses several ways in which public forum doctrine has set baselines defining when certain types of property can be used to control speech.

II. SOME SPECULATIONS ABOUT FORUMS AND DOMAINS

A. THE ROLE OF "PROPERTY" IN RESOLVING FIRST AMENDMENT PROBLEMS

In the first half of the twentieth century, when the Supreme Court initially addressed suppression of speech in the public sphere, the Court treated public property as, in essence, the private property of the government, meaning that there was no problem if the government suppressed speech based on its viewpoint. "The complex and difficult problem of the public forum had been 'solved' by resort to common law concepts of private property."[30] The Supreme Court later began to recognize that government discrimination against particular types of speech in public forums was a pernicious method of silencing unpopular and oppositional speakers, and developed tests that made it much more difficult for governments to do so.[31]

In the case of copyright, appeals to the idea that copyrights are private property just like printing presses, have also come under increasing pressure—where public forum doctrine ultimately recognized that *government* property is different, many copyright scholars have maintained that *intangible* property is different.[32] The

28. *See*, *e.g.*, Lessig, *supra* note 17, at 57-58.

29. *See*, *e.g.*, SUNSTEIN, *supra* note 18, at 26-28. (arguing that the First Amendment should be understood to create an affirmative right to access to people and places, justifying government regulation of access to otherwise private property).

30. Geoffrey Stone, *Fora Americana*, 1974 SUP. CT. REV. 233, 237 (1974).

31. *See, e.g.*, Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1724-39 (1987).

32. *See, e.g.*, Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173, 207-08 (2003); Laura R. Bradford, *Parody And Perception: Using Cognitive Research To Expand Fair Use in Copyright*, 46 B.C.

absence of a scarcity rationale for protecting the words that come off the printing press is of course relevant; perhaps more persuasive in a First Amendment analysis, however, is the proposition that the government cannot place expression off limits simply by declaring it to interfere with another person's intangible property interest.[33] If the property label were enough to avoid constitutional infirmity, defamation (which can be conceived of as protecting a property interest in reputation), intentional infliction of emotional distress (which can be conceived of as protecting a property interest in peace of mind) and anti-flag-burning laws (which can be conceived of as protecting the government's property in the intangible qualities of the American flag[34]), among others, could all be excised from the scope of the First Amendment.[35]

Public forum doctrine, to the extent that it rests on principles other than the simple tradition of allowing free speech in public places, depends on baseline rules defining property rights. Thus, the existence of a public forum can be described as a free speech "easement" for the public on government property.[36] *PruneYard* allowed a state to design private property rules to create a free speech easement over certain private property as well. Rights to use copyrighted works can likewise be seen as easements—not unwarranted interferences, but areas of public freedom that interpenetrate private property.

B. TRADITIONAL FORUMS, TRADITIONAL CONTOURS

Because baselines are vital to determining whether property rights can trump speech, courts have been drawn to apparently objective standards, such as historical practice. To fit within public forum doctrine, a place must be either a "traditional" or a "designated" public forum.[37] To be a traditional public forum, a place must have been "immemorially . . . held in trust for the use of the public and, time out of mind, . . . used for purposes of assembly, communicating thoughts between

L. REV. 705, 719-20 (2005); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 39 (2001).

33. I mean "simply" seriously—it is of course possible, even likely, that the reasons justifying the use of the label "property" are sufficient to sustain prohibitions on certain kinds of copying, false and damaging statements, etc. But that is an analysis from within First Amendment law, asking whether the interests protected by the law are important enough and whether the law is well-tailored enough to justify suppressing speech. The copyright-as-printing-press argument, by contrast, purports to take copyright completely outside the scope of First Amendment coverage. *See generally* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004).

34. *See*, *e.g.*, Eugene Volokh & Mark Lemley, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 182-83 (1998) (noting that a bill introduced in Congress would have declared the United States flag to be copyrighted and defined flag-burning and desecration as infringement).

35. *See* Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2445–46 (1998).

36. *See* Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 13 (1965).

37. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985).

citizens, and discussing public questions."[38] The class of traditional public forums is fixed and never expands. Internet access, even in a public library, is a new means of communication and therefore not part of a public forum.[39]

The role of tradition in defining the public domain got a boost from *Eldred v. Ashcroft*, which said that there was no First Amendment problem when Congress did not disrupt the "traditional contours" of copyright in expanding its protection.[40] Anti-expansionists quickly seized on the negative implication: as government cannot close a park to communicative activity, it may be unable to expand copyright to eliminate fair use or protect ideas or facts.[41] And this is true even though the works subject to fair use or the facts contained in copyrighted works may not have existed traditionally; it is the *class* of material, like the class of public parks, that must remain open for free use. If the analogy holds true, perhaps the Second Circuit was wrong to declare that there was no cognizable First Amendment interest in making fair use of a DVD as opposed to a videotape.[42] The DVD may be a new "place," but the creative work it contains is the type of work to which fair use applies, just as a new public park is still a place to which the ancient right of free speech applies.

History is never an answer in itself. It always requires interpretation and application to present cases. "Fighting words," for example, are words that are likely to cause immediate violence and have never been protected by the First Amendment.[43] But yesterday's fighting words, such as "damned Fascist,"[44] are extremely unlikely to start a brawl today, and therefore they are no longer beyond the scope of constitutional protection. Using a similar approach in which categories persist even as facts change, one way to give effect to *Eldred*'s "traditional contours" could be to use old principles to require new freedoms. If social changes make new, nontraditional uses fair according to the traditional factors—for example time-shifting of home video recordings or search engine aggregation of content—then these new uses may be constitutionally protected, even though they were nonexistent at the Founding and in 1790 when the first Copyright Act was passed.

The ideas of traditional forums and traditional contours offer courts some opportunities to define judicially enforceable boundaries of property rights. Most of the time, however, courts will likely remain reluctant to interfere with legislative

38. Int'l Soc. for Krishna Consciousness v. Lee, 505 U.S. 672, 679 (1992) (internal quotation marks omitted).

39. United States v. Am. Library Ass'n, 539 U.S. 194, 205-06 (2003).

40. 537 U.S. 186 (2003).

41. Whether things like new rights such as public performance or the elimination of formalities disrupt the traditional contours of copyright is debatable, as others have noted. The public forum analogy may be unhelpful in determining this, because razing the park to create a prison serves government objectives unrelated to encouraging or discouraging expression, whereas copyright amendments expand some parties' rights to control and profit from expression while diminishing others'.

42. *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 459 (2d Cir. 2001).

43. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

44. *See id. at* 574.

allocations of rights.

C. CAPTIVE AUDIENCES

A final point of comparison between the public domain and the public forum is what speakers and audiences necessarily risk by participating in public life. What sort of negative experiences should we be expected to tolerate? Freedom of speech, in a public forum and elsewhere, can be limited out of a concern for "captive audiences," people who do not want to hear the speech at issue, but cannot easily escape it.[45] In many situations, however, unwilling listeners are required to turn away and ignore the speech, because other willing listeners may be present.[46]

Essentially, First Amendment doctrine requires a certain level of toughness from citizens when it comes to unwanted messages in public places, just as it does with respect to negative but non-defamatory speech and even non-negligent defamatory speech. This offers a potential lesson for the role of copyright in protecting authors' moral interests and sensibilities. If there is a justification for a use of a work—whether in a scathing book review or a biting parody—the undeniable harm to the original author may be, like the pain of the unwilling audience watching an offensive public parade, something that society expects its citizens to tolerate.

It is probably no easier for authors to avoid reading reviews than for people in a public park to close their ears to an offensive speaker, but even if authors are captive in practice, their captivity is part of the social compact. We all encounter speech we do not like, speech that is deeply offensive to our sense of self and all that is right and just. Authors may be entitled to special rights in many circumstances, but the First Amendment's treatment of unwilling listeners suggests that authors' interests may not trump those of other, willing listeners. Of course this ties back into the property discussion above—an unwilling listener need not let a proselytizer into his house. But when the property is intangible, an author's prohibition of its critical use as part of a new work prevents the new work from reaching its willing audience. This is why the fair use is more like communication in the streets than like a forced entry into a house.

One possible extrapolation from this principle of required toughness involves the importance of an individual's affirmative choice to avoid participating in dialogue. The First Amendment solicitation cases, in which proselytizers, advertisers, and the like sought to approach private property from the public street or through the public mails, resulted in the principle that unwilling recipients must affirmatively opt out by posting signs banning solicitation or informing the mailer that they do not wish to receive further communications. The existence of a potential opt-out as a default rule means that more speech-restrictive alternatives, such as total bans on solicitation or opt-in regimes, are unconstitutionally restrictive

45. *See* Stone, *supra* note 30, at 262-66.

46. *See e.g.*, Cohen v. California, 403 U.S. 15 (1971) (holding that the First Amendment barred the prosecution of a man for wearing an anti-war jacket stating "Fuck the Draft" in a courthouse).

of speech.[47] Potential audiences who are indifferent to receiving speech, or have not yet thought about it, have First Amendment interests in being exposed to that speech, and potential speakers have First Amendment interests in reaching these audiences.

The analogy here is to massive aggregation projects like Google's web index and Google's library digitization project: especially if one believes that most authors who do not opt out are happy, or at least indifferent, to having their works indexed, Google's indexing may promote free speech values simply by fixing a default.[48] As Wendy Gordon noted, "Shareable goods are a traditional source of binding groups together: not only standard 'public goods' such as highways and defense, but also folk tales, art, songs, and symphonies."[49] In the absence of explicit individual signals that a property owner wishes to leave the public give-and-take, perhaps we should keep her in by default. This is not to say that all opt-outs must be honored—classic criticism and quotation would remain legitimate in copyright even without copyright owners' consent, just as negative opinions and damaging truthful statements about public figures remain legitimate in free speech law—but that default rules have an important role to play in structuring the communicative environment, because they have such profound effects on the overall amount of free speech.

III. CONCLUSION

From the perspective of copyright minimalism, the history of the public forum's place in First Amendment jurisprudence is a depressing one. Public forum doctrine has provided only the most minimal guarantee of payment-free speech. No constitutional rule requires that public forums be created, or that they be configured so they allow speakers to reach audiences, even though the cases speak in glowing terms about the democracy-sustaining functions of the public forum. Unless the defenders of the public domain can do a better job connecting theory and practice, the public domain may end up serving similar purposes: allowing private property owners to pay lip service to values of openness and equality, while justifying control and enforcing inequality every place it matters. Proponents of a robust public domain must remind legislators that they too affect the amount and distribution of free speech; courts cannot be left alone to defend the First Amendment.

47. *See* Stone, *supra* note 30, at 265.

48. *See* Oren Bracha, Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces of Property (September 1, 2006), U of Texas Law, Law and Econ Research Paper No. 92, *available at* SSRN: http://ssrn.com/abstract=931426. *See also* the opt-out for certain nonprofit musical performances in the Copyright Act, 17 U.S.C. § 110(4) (2000).

49. Wendy J. Gordon, *Intellectual Property*, *in* OXFORD HANDBOOK OF LEGAL STUDIES 617, 644 (Peter Cane & Mark Tushnet eds., 2003).