

## Volunteers from the Audience: Audience Interests and the First Amendment

Note: This is an early version of a paper to be presented as part of a symposium on Jerome Barron's *Access to the Press*.

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At least since Alexander Meiklejohn wrote that “[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said,”<sup>1</sup> First Amendment theorists have debated the implications of speaker-focused versus audience-focused theories of free speech.<sup>2</sup> Jerome Barron's classic article<sup>3</sup> is, in this vein, deeply concerned with providing citizens greater access to conflicting viewpoints and non-mainstream subject matter, not because speakers with disruptive ideas have a right to be heard but because we as a society have an interest in hearing them. Because his arguments are audience-centered, in evaluating them it is helpful to ask more about who is in the audience and what speech they want, need, and deserve.

I want to make three points about audiences: First, audiences are interactive, talking to each other and responding to shared experiences. They are also generating new messages of their own, and this aspect of their behavior is highly salient at the moment, under the name of “user-generated content.” But at the same time, audiences remain generally dependent on larger institutions for access to the means of communication, with important implications for free speech theory. Law and technology help constitute the audience, shaping what it is an audience *for* and what it can do in response.<sup>4</sup> An audience-centered theory of free speech simply cannot accept that the First Amendment is satisfied by government nonintervention into the market; indeed, the concept of nonintervention is incoherent from an audience-oriented perspective, because the nature of the audience will change depending on the private property arrangements that law enables.

Second, in part because of the diversity and constant interactions of audiences, they are difficult to attract and unpredictable in their preferences. An audience-centered free speech theory needs to discuss ways in which speakers get audiences' attention. Barron identifies dynamics that encourage speech to become ever more intrusive, as a method of catching audiences' attention. But just because speech can attract attention – and even provide new and useful information – does not mean that it merits First Amendment

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<sup>1</sup> ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 26 (2d ed. 1960)

<sup>2</sup> Numerous First Amendment theorists have analyzed audience rights, interests, and understanding of speakers' messages. For examples of recent scholarship concerned with identifying the interests of speakers versus those of audiences, see Tom Bennigson, *Nike Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?*, 39 *CONN. L. REV.* 379 (2006), and Randall P. Bezanson, *Speaking Through Others' Voices: Authorship, Originality, and Free Speech*, 38 *WAKE FOREST L. REV.* 983 (2003).

<sup>3</sup> Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 *HARV. L. REV.* 1641, 1641 (1967).

<sup>4</sup> *Cf.* Lawrence Lessig, *Code* (elaborating ways in which law and technology determine what people can do with speech).

protection, in his view. In fact, Barron would not grant any constitutional protection to commercial speech, contrary to First Amendment law in recent decades, which protects truthful commercial speech against many restraints. Both Barron and modern commercial speech doctrine justify their conclusions with claims about audience needs and rights. Their divergent paths illustrate the difficulty of defining audience interests for free speech purposes.

Third, and relatedly, sometimes audiences are more likely to pay attention to what seems familiar, whether it is well-known content or an accepted medium. This habit supports arguments for improved access to existing channels of communication. At times, second-comers have claims to use others' property – copyrighted works or cable channels, for example – because the social costs of defining the relevant property rights more broadly are too high. Copyright's fair use doctrine and access rights both raise questions of merit and power: Does every perspective deserve the same amount of attention? Who should decide? These are not new debates, but I hope at least to draw some useful contrasts as part of the overall discussion of the role of the audience in First Amendment theory.

#### I. Talking Together in Rented Rooms; or, User-Generated Discontent

Barron was concerned with those whose ideas were unacceptable to the mainstream media, and who therefore found it impossible to be heard in a public discourse dominated by a few large channels of communication.<sup>5</sup> If Barron's analysis was right, then the internet could solve many, but not all, of the problems he identified. Aside from his condemnation of the concentration of sources, Barron's critique of modern media, drawing on the work of Marshall McLuhan, had two related but analytically distinct components: First, visual media like television encourage style over substance, making them less valuable than media like newspapers for hashing out the issues of the day.<sup>6</sup> Second, modern media are so expensive to produce that they can only survive by appealing to the lowest common denominator.<sup>7</sup> As David Foster Wallace wrote, "television is [not] vulgar and dumb because the people who compose the audience are vulgar and dumb. Television is the way it is simply because people tend to be extremely similar in their vulgar and prurient and dumb interests and wildly different in their refined and aesthetic and noble interests."<sup>8</sup>

The internet and the "long tail" of media<sup>9</sup> promise to alleviate the problem of the lowest common denominator, enabling smaller producers to survive by targeting niche markets even in television and film. Because of decreased costs of production and distribution in the digital age, it is easier for people to get access to a variety of content. Amazon.com offers more books, by several orders of magnitude, than even enormous physical bookstores. Because listing a book costs Amazon very little compared to the costs to a

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<sup>5</sup> See Barron, *supra* note 1, at 1641.

<sup>6</sup> See Barron, *supra* note 1, at 1645 (modern media encourage "a high degree of nonintellectual and emotional participation and involvement").

<sup>7</sup> See Barron, *supra* note 1, at 1645-46.

<sup>8</sup> DAVID FOSTER WALLACE, *E Unibus Pluram: Television and US Fiction*, in *A SUPPOSEDLY FUN THING I'LL NEVER DO AGAIN* 21, 37 (1997).

<sup>9</sup> See CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* (2006).

physical bookstore of stocking a book that sells only one copy a year, and because Amazon sells nationwide, it can profit from books that ordinary bookstores can't afford to carry. Those books naturally cover more topics, from more viewpoints, than the relatively few blockbusters available in conventional bookstores. Netflix and iTunes offer other examples of increased diversity through new business models.

Yet Barron identified another feature of modern media as also producing systematic distortions in discourse: the dominance of audiovisual media over text. If, as McLuhan famously said, the medium is the message, and if the message of film and television (not to mention video games and internet video) is inherently antipolitical, then the availability of political documentaries on Netflix that could never survive at the multiplex will not be sufficient to restore a healthy democratic public sphere. Perhaps Barron's fears are better addressed by the explosion of blogging and other more text-based methods of communication used by millions of citizens on the internet. Henry Jenkins, a media scholar at MIT, has written extensively about the ways in which people – young people in particular -- are using new media, and the connections they make through the internet, to learn how to think and to write, as well as how to communicate in other ways.<sup>10</sup> Text is part of that process, but it need not have pride of place. Jenkins, and scholars like him, argue that new media regularly support significant political discourse even in the narrowest sense of “politics.” At least after a new generation learns to use a medium's particular features, it can provide complex and serious content as well as distracting entertainment.<sup>11</sup>

A related question is whether Barron is actually urging us to reclaim a culture that existed when information was transmitted through print (and photographs), or imagining a

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<sup>10</sup> See HENRY JENKINS, *CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE* 169-239 (2006) (discussing the literary accomplishments of young Harry Potter fans who write their own stories and other content related to Harry Potter, and political activism by people of all ages in virtual worlds); Henry Jenkins, *Introduction to Jon Katz book based on his “Voices From the Hellmouth” columns*, <http://web.mit.edu/cms/People/henry3/Intro-Katz.html> (visited Aug. 28, 2007) (“[S]tudents [who wrote to Slashdot about what was happening in their high schools] saw themselves as empowered by the web to share what was happening to them to a larger public, ... they understood their personal experience as part of a much larger political debate, and ... they felt the importance of forming an alliance, even if only temporarily, both with other students and with adults .... For every student who wrote, there were many many more who read these accounts with recognition.... Today, these students understand the computer as a powerful resource for social change, for speaking to each other across great distances through channels not controlled by their teachers and their parents.... [T]hey are really ‘Generation.org,’ able to understand perhaps more fully than anyone else how networked communication offers an infrastructure for political resistance.”).

<sup>11</sup> Jenkins links criticism of new media with fear of adolescents, who are the most eager adopters. Teen culture seems meaningless and dangerous without an appreciation of its context. As he points out in recounting his experience with congressional hearings on the relationship of media violence to school shootings, “Senators were discussing with shock and outrage films they hadn't seen, television shows they'd never watched, games they'd never played, and music they'd never listened to.” Jenkins, *supra* note []. Jenkins outlined the challenges for students – and others – in developing media literacy as audiences and creators in a white paper for the Macarthur Foundation. See HENRY JENKINS, *CONFRONTING THE CHALLENGES OF PARTICIPATORY CULTURE: MEDIA EDUCATION FOR THE 21ST CENTURY* (Oct. 19, 2006), [http://digitallearning.macfound.org/atf/cf/%7B7E45C7E0-A3E0-4B89-AC9C-E807E1B0AE4E%7D/JENKINS\\_WHITE\\_PAPER.PDF](http://digitallearning.macfound.org/atf/cf/%7B7E45C7E0-A3E0-4B89-AC9C-E807E1B0AE4E%7D/JENKINS_WHITE_PAPER.PDF).

utopia. Illiteracy, poverty, and – crucially – the denial of the franchise were significant historical limits on the ability of people to participate in the republic of letters. Print, and the cultural apparatus that surrounded it, didn't work well for many Americans. Nor was print journalism immune from appeals to prejudice, short-circuiting rationality; “yellow journalism” got its name from newspaper circulation battles that slaveringly promoted war. Because other media are capable of communicating valuable information – images from New Orleans after Hurricane Katrina, or the beating of Rodney King – the beneficiaries and losers from new modes of communication cannot simply be sorted into the categories of the thoughtless and the thoughtful, respectively.

Even if Barron's deliberative ideal is ahistorical and discounts the value of images, however, it has many attractive features. We might well want to design our institutions to encourage easy access to diverse viewpoints on important political and social issues. This leads back to Barron's more extended criticism of mass media: its concentration and focus on profits, resulting in lack of interest in controversial topics other than celebrity gossip.

Diversity of content might at first seem to solve this problem, but concentration comes in many forms. The long tail only works efficiently if there are major content aggregators. iTunes, Amazon, Netflix and others profit because they offer hits to attract numerous customers. Their customers' second, third, and subsequent choices then increasingly diverge, creating the long tail.<sup>12</sup> There are still blockbusters, who in Barron's terms still have substantial control over the topics of public discourse. Bill O'Reilly's books sell many more copies than an unknown's political rantings; *The Daily Show* gets many more viewers than most original political satires on YouTube. At the same time, those dominant channels can be evaded on occasion, and may occasionally be prodded to address issues carried up through the capillaries of the internet;<sup>13</sup> I do not mean to suggest that nothing has changed, only that there remain substantial concentrations of power over public discourse.<sup>14</sup>

It's not just that big hits remain profitable, or that they support the businesses that bring us the rest of the long tail. Concentration is more pervasive. The spaces in which people communicate – blogs, MySpace pages, message forums, and so on – are largely spaces they do not themselves own, but are provided by ISPs whose policies may prioritize many things over users' ability to speak.<sup>15</sup> And in many categories, there are dominant

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<sup>12</sup> See ANDERSON, *supra* note [], at []; see also Clay Shirky, *Power Laws, Weblogs, and Inequality*, [http://www.shirky.com/writings/powerlaw\\_weblog.html](http://www.shirky.com/writings/powerlaw_weblog.html) (updated Feb. 10, 2003; visited July 13, 2007) (making the same point about the varying popularity of weblogs; “[d]iversity plus freedom of choice creates inequality, and the greater the diversity, the more extreme the inequality.”).

<sup>13</sup> See YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 219-33, 253-55 (2006) (describing ways in which the internet enables information to filter up from individual sources to widespread public attention in both traditional and nontraditional media).

<sup>14</sup> For example, Oren Bracha and Frank Pasquale have addressed the ways in which search engines' market power means that they will not necessarily solve the market-concentration problems Barron identified, at least in the absence of government regulation. See Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness and Accountability in the Law of Search* (available on SSRN).

<sup>15</sup> Even a blog hosted on a person's own website and read by fifteen people depends on the existence of intermediaries – domain name registrars, internet service providers of the writer and the readers, etc. See

providers with substantial market control. YouTube is a vehicle for new content to receive widespread attention, but other competing video sites lag far behind, and that means that YouTube's choices about what video to host – screening out pornography and limiting the length of videos – determine what most people will see.<sup>16</sup> Aesthetic complaints about YouTube are familiar from decades-old criticism of other popular media: by structuring itself around short and popular clips, the site creates stylistic expectations that make it harder for truly innovative works to thrive.<sup>17</sup>

This market concentration also has implications for the legal regime governing internet intermediaries. The standard example is the Digital Millennium Copyright Act (DMCA). Under the DMCA, internet service providers can avoid monetary liability for copyright infringement by disabling access or removing links to material when they receive a properly formulated notice that it is infringing a copyright owner's rights.<sup>18</sup> Though there are mechanisms for users to protest such actions, in general they do not, even when they might have valid defenses. The DMCA has, as intended, mobilized the power of intermediaries to control individual infringers – as well as a certain percentage of noninfringing uses. Because DMCA notice requirements are minimal and internet service providers have no incentive to investigate, they can be used to suppress critical speech as well as copyright infringement.<sup>19</sup> For a number of reasons, including the fact that most users aren't thinking about copyright or free speech when they choose providers, internet service providers do not generally compete to protect user rights. As a result, service providers serve as a chokepoint for content – in this case, a generally desirable one, but with costs worth noting.

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Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 16-17 (2006) (identifying several levels of intermediaries who control access to most people's internet speech); *id.* at 29-30 (exploring the dynamics that make intermediaries more vulnerable to the chilling effects speech regulations than speakers themselves).

<sup>16</sup> See, e.g., Nick Douglas, *YouTube's Dark Side: How the Video-Sharing Site Stifles Creativity*, SLATE, July 18, 2007, <http://www.slate.com/id/2170651/nav/navoa/> (“The Internet was supposed to make the video world egalitarian. No longer would an oligarchy of content providers—a few TV networks, a couple of major movie studios—control what we watch. The Web gives creative people a potential audience of millions, as well as countless venues to display their creations. But that's not how things turned out. Web video isn't an oligarchy, it's a dictatorship. You're either on YouTube or nobody's watching. This dominance has a downside: The popular misapprehension that YouTube and Web video are synonymous has limited our sense of what online video can be.”).

<sup>17</sup> See *id.* (“The most popular videos in YouTube's history are music videos, TV clips, and lowbrow home-video footage; the same is true for this month's top clips, which include commercials, a TV interview, and a Timbaland video. .... It's no accident ... that the most prominent number on each YouTube page is the number of 'Views.' The site puts on a good front about the primacy of user-generated content, but YouTube's real message is that in the world of online video, quality is less important than mass appeal.”).

<sup>18</sup> 17 U.S.C. §512 (2000).

<sup>19</sup> For discussion of the use of DMCA notices to achieve non-copyright or speech-suppressing objectives, see Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621 (2006). As Kreimer noted, corporations are aware that DMCA notices can be used for non-copyright purposes, and *Forbes* even advised businesses to abuse the DMCA process to shut down critics, hoping that ISPs would acquiesce to avoid trouble. See Kreimer, *supra* note [], at 32-33.

The DMCA is the most prominent legislative definition of aggregators' responsibilities for individual content providers' behavior, but there are other regimes, both possible and actual. The government can target intermediaries in order to control speech, using that intermediary power to its own advantage.<sup>20</sup> It has been relatively easy to ignore the government's pervasive power to control discourse by controlling intermediaries because Section 230 of the Communications Decency Act reflects a policy of deliberately releasing ISPs from chokepoint/publisher status for private torts such as defamation. Yet that rule is not inevitable and, most significantly, not currently understood as a First Amendment requirement but a matter of legislative grace. Mark Lemley, for example, has recently explored various possible safe harbors for internet service providers who provide access to substantial amounts of content, some of which is predictably going to violate some law.<sup>21</sup> He argues that all such situations should be treated the same, and endorses an intermediate standard that would limit the DMCA's incentives to overblock while being less freewheeling than the CDA.

A recent series of events related to the popular web journaling site Livejournal illustrates the complex interplay between law, visibility, and intermediary control of speech. Known as "Strikethrough" to many journal writers, the controversy began when Livejournal suspended and deleted, without warning, a number of user accounts for noncompliance with its content policies.<sup>22</sup> Livejournal's concern was with sexual content in particular; MySpace had been much in the news for the presence on its site of pedophiles trolling for targets. While Livejournal is a very different type of website, it still falls within the "social software" category, and its differences would not be significant to the reporters and regulators focused on pedophilia. Allegedly, an outside group (or perhaps a person posing as a group) threatened to contact advertisers about Livejournal's supposed support for pedophilia.

Initially, however, Livejournal did not suspend users it had determined to be pedophiles; it neither examined users' writings nor cross-referenced identifying information with sex offender registries. Rather, the targeted users had "interests" – phrases on their profile pages, designed to allow people to find like-minded journalers – dealing with illegal sexual conduct, such as rape and incest. Livejournal had initially conceived of "interests" as reflecting users' favorite things, but users had for a long time used the interests area of their profiles to identify topics of interest to them. So, for example, some abuse survivors listed incest as interests, as did a community dedicated to reading Nabokov's *Lolita* in an

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<sup>20</sup> See Kreimer, *supra* note [], at 22-24 (discussing, among other things, government mandates for library filtering, attempts to make ISPs block access to child pornography and material harmful to minors, and the DMCA).

<sup>21</sup> See Mark Lemley, *Rationalizing Internet Safe Harbors*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=979836](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=979836).

<sup>22</sup> For a timeline, see *LiveJournal Conflicts Time Line*, [http://community.livejournal.com/ljconflict\\_archive/711.html](http://community.livejournal.com/ljconflict_archive/711.html), Aug. 14, 2007. Strikethrough followed the dynamic Kreimer identified, where public relations concerns dominated Livejournal's behavior towards its users: "[W]here an intermediary is partially dependent on other revenue streams, whether from advertisers or other corporate affiliates, it may be vulnerable to pressures to which the primary speaker is immune. Putting the censorship decision in the hands of the intermediary allows commercially powerful blocs of customers a potential veto on the speech of others." Kreimer, *supra* note [], at 29-30 (footnote omitted).

online book club; they were caught up in Livejournal's purge. More controversially, a Harry Potter fan community that included fan stories with adult content – including depictions of rape and incest – was also purged.

Fan communities make up a significant part of Livejournal's user base; the resulting outcry was intensive and sustained, and even attracted notice from outside.<sup>23</sup> Eventually, Livejournal relented and reinstated many of the suspended users whose "interests" were as survivors or limited to fiction. A few months later, however, Livejournal again permanently banned certain users, this time for posting sexually explicit drawings featuring characters determined by Livejournal's staff to be below 18.<sup>24</sup>

This series of events, which is far from over, demonstrates some basic points about internet intermediaries. First, Livejournal's initial miscalculation, driven by a moral panic that turned into a business imperative, was based on the erroneous assumption that users deployed the category of "interests" in the way that Livejournal initially intended, when in fact they had adapted it to better fit their goals of self-expression and connection to others. One reason that intermediaries shouldn't be liable for everything their users do is that users do unexpected things.

Second, users are highly vulnerable to intermediaries. Because the suspensions affected a user's entire account, not just objectionable entries, the suspended users lost, in some cases, years of writing and art. There are journal backup services available, but not everyone uses them – very few people expected to be suddenly banned. Moreover, because intermediaries bring people together, there are often significant switching costs. Even if a more user-friendly environment is available, if moving there means losing connections to many friends, the gains may not be worth the costs. Or, from an external perspective:

The salience of Internet communication is famously sensitive to marginal changes in availability.... To assure the presence of countervailing sources of cultural power, major actors are crucial because they stand astride the attention of the central mass of the population.... Even if [excluded viewpoints] are available to the segments willing to expend the time, effort, and expertise to search for them, the balance of popular perception may be skewed away from a proper evaluation of the matters before the public for decision.<sup>25</sup>

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<sup>23</sup> See Declan McCullagh, *Mass Deletion Sparks LiveJournal Revolt*, Cnet News.com, May 30, 2007, [http://news.com.com/Mass+deletion+sparks+LiveJournal+revolt/2100-1025\\_3-6187619.html?tag=nefd.lede](http://news.com.com/Mass+deletion+sparks+LiveJournal+revolt/2100-1025_3-6187619.html?tag=nefd.lede); Michael Calore, *LiveJournal Hits "Undo" on Sex-Themed Site Suspensions*, WIRED BLOG NETWORK, May 31, 2007, [http://blog.wired.com/monkeybites/2007/05/livejournal\\_hit.html](http://blog.wired.com/monkeybites/2007/05/livejournal_hit.html)

<sup>24</sup> See *LiveJournal Conflicts Timeline*, *supra* note []. Because the works at issue are drawn, rather than representing actual bodies, the difference between a 16-year-old and an 18-year-old – which is often hard enough to discern in photographs – is very much in the eye of the beholder. Artists thus argue they deserve leeway, while Livejournal contends that an abundance of caution requires it to suppress material that appears to its staff to represent under-18 characters engaged in sexual activity.

<sup>25</sup> Kreimer, *supra* note [], at 40-41 (footnotes omitted).

Third, users generally recognized that Livejournal had every right to create and enforce its own policies, even if they went beyond what the law requires. The questions were, rather, ones of fairness and governance – exactly the issues Barron addressed in his analysis of private ownership of the means of communication. A pseudonymous blogger, writing in response to the Livejournal hue-and-cry mentioned above, argued:

Current controversies ... have one stark issue in common: the conflict between corporate desire to profit from users and the content they generate, and the users' own sense of ownership not only in their content and creativity, but in the hosted services they use to publish that content and to connect with others online.

.... [T]here's no such thing as "free speech" on Livejournal, because only a government with a constitutional mandate is required to provide its users with free speech. However, as civil liberties advocates have reminded us for years, the right to speech is only as good as the right to access to venues in which speech can be heard. And in an environment where public spaces are relatively rare, including the internet, there are strong arguments for corporate responsibility in voluntarily refraining from restrictions on user speech.<sup>26</sup>

As a result, the writer proposes measures to ensure user representation in corporate governance.<sup>27</sup> This kind of structural solution is similar to Barron's proposals, which focus on institutional design.<sup>28</sup>

The idea of access protection in the modern equivalents of newspapers and TV stations gains support from the default absence of editorial control on sites like Livejournal and YouTube, a default supported by significant legal protections. When an institution presents itself as an access provider, like MySpace or YouTube, a neutrality requirement is less offensive than when the institution presents itself as an editorial selector.<sup>29</sup> Current law, however, allows internet intermediaries to have it both ways. Section 230 of the Communications Decency Act (CDA) allows internet service providers to set their own content standards and still avoid being treated like publishers.<sup>30</sup>

The basic protection against strict liability, and even against any requirement to mediate disputes about appropriate content, is an important protection against unanticipated and

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<sup>26</sup> Elements, "User Generated Content" & Ownership: *The User as Citizen*, <http://elements.livejournal.com/11242.html> (posted June 2, 2007; last visited June 14, 2007).

<sup>27</sup> *Id.* ("I'd like to propose that any business entity that is primarily driven by and dependent on an active and content-generating user base be obligated to assign some share of real and actualized decision-making power to democratically chosen representatives of that user base.").

<sup>28</sup> Balkin in NYU.

<sup>29</sup> Barron's advocacy for mandatory nondiscriminatory access is tied to his acceptance of the lesser protection due commercial speech. After all, even classically "editorial" publications like the New York Times demand less control over the speech of their advertisers than over the speech of their staff writers. Even if we disagree with Barron that the newspaper's profit motive justifies control over how it can select content, we might agree that the telephone company should not be denying service based on a prospective customer's views.

<sup>30</sup> 47 U.S.C. § 230 (2000).

practically uncontrollable liability for torts committed by individual users.<sup>31</sup> But the CDA's protection against third-party suits need not depend on an ISP's unfettered ability to do anything it wants to its users. We could, for example, make certain ISPs into common carriers, or something near, requiring them to provide service to those who can pay and also ensuring that they wouldn't be liable for what users did with that service. Such a rule might help fulfill Barron's ideal of access for even controversial and unpopular speech.

It is unlikely that anything of this sort will happen, because the political momentum is all in the opposite direction. Consider, for example, the moves to make MySpace disclose the identities, and even the private messages of, sex offenders who use its site.<sup>32</sup> We don't ban sex offenders from using the telephone,<sup>33</sup> but we are apparently eager to ban them from communicating over the internet.<sup>34</sup> Some things are not even "worth saying" – though it is notable that proposals to enforce this judgement target speakers, not specific speech from them.

The proposed access bans – already being implemented by sites like MySpace and Livejournal, in part to ward off further regulation – take for granted that users need intermediaries for their speech to reach other people. Thus, given the ways in which large corporations act as chokepoints for expression, "[a]s a constitutional theory for the communication of ideas, laissez faire is manifestly irrelevant."<sup>35</sup> No practical concept of free expression can afford to ignore non-governmental sources of control over enormous

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<sup>31</sup> Numerous cases find that Section 230 requires them to hold that ISPs are not liable for user-created content. *See, e.g.*, *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003); *Green v. Am. Online, Inc.*, 318 F.3d 465, 471 (3d Cir. 2003); *Ben Ezra, Weinstein & Co. v. Am. Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 327 (4th Cir. 1997). *But see* [Roommate.com case] (9<sup>th</sup> Cir. 2007) (holding that Section 230 did not apply to discrimination claim against site that []).

<sup>32</sup> *See* Frederick Lane, *MySpace Struggles To Balance Privacy and Safety*, June 5, 2007, [http://www.newsfactor.com/news/MySpace-Works-To-Identify-Offenders/story.xhtml?story\\_id=0110010E62UC](http://www.newsfactor.com/news/MySpace-Works-To-Identify-Offenders/story.xhtml?story_id=0110010E62UC) (discussing states' requests for stored information from accounts of MySpace users identified as sex offenders); Caroline McCarthy, *MySpace to Provide Sex Offender Data to State AGs*, May 21, 2007, [http://news.com.com/MySpace+to+provide+sex+offender+data+to+state+AGs/2100-1030\\_3-6185333.html](http://news.com.com/MySpace+to+provide+sex+offender+data+to+state+AGs/2100-1030_3-6185333.html) (discussing MySpace's cooperation with state officials).

<sup>33</sup> Parole conditions on sex offenders may well include restrictions on calling particular people or contacting minors by any means, and consent to monitoring phone numbers for incoming and outgoing calls, but internet bans tend to sweep more broadly. *See, e.g.*, Minn. Stat. Ann. § 243.055 (West 2003) (allowing telephone-related parole conditions and more extensive conditions on internet use, including a flat ban). Because MySpace is a virtual "place" rather than an instrumentality of communication, excluding sex offenders from using it prohibits them from communicating with adults as well, like a ban on telephone use.

<sup>34</sup> *See* McCarthy, *supra* note [] (noting proposed laws that would require sex offenders to register email addresses so that they could be barred from using sites like MySpace).

<sup>35</sup> *See* Barron, *supra* note 1, at 1656. For powerful rebuttals to the argument that, if speakers truly desire free speech, the market will provide ISPs who more aggressively assert their customers' speech interests, see Kreimer, *supra* note [], at 34-41.

amounts of individual speech.<sup>36</sup> Regardless of what we choose to do about it, we cannot pretend that our brave new online world has rewritten the rules of access.

## II. Economies of Attention: Extreme Speech, Advertising Creep, and the First Amendment Rights of Commercial Speakers

Even speakers who have access to media that can reach the world must somehow attract some fraction of the world's attention. Given the proliferation of audience options – from hundreds of cable channels to billions of webpages – that can be a daunting task.<sup>37</sup> The internet has accelerated the problem, since many people are satisfied with the first search result they find, leading to a winner-take-all effect.<sup>38</sup>

This Part, and the next, explores the difficulties of attracting and satisfying an audience. The flip side of providing more speakers with more access to the means of speech production is that they must then find listeners, or they are only talking to themselves. Audience-wrangling is hard because audiences are so hard to predict. We like novelty and we like familiarity; we want the same thing, only different. Marjorie Garber writes, “[t]here is a paradox implicit in the very concept of the sequel. In experiential terms, a sequel is a highly conservative genre that supplies the comfort of familiarity together with the small frisson of difference.”<sup>39</sup> This part, and the one that follows, locates the paradox not in the sequel itself but in its audience, which is full of people who want just the right balance of new and old. These desires do not so much as conflict as reinforce one another, and this paradox is part of what makes audiences so unpredictable. The balance between boredom and comfort means that content regulation, like content itself, will always be chasing the next big thing.

One way to get attention is to turn up the volume, either literally or metaphorically, with shock and surprise. Barron addressed this tactic as used by radical protestors to break down the smug safety of everyday life. He wrote:

By the bizarre and unsettling nature of his technique the demonstrator hopes to arrest and divert attention long enough to compel the public to ponder his message. But attention-getting devices so abound in the modern world that new ones soon become tiresome. The dissenter must look for ever more unsettling assaults on the mass mind if he is to have continuing impact. Thus, as critics of protest are eager and in a sense correct to say, the prayer-singing student

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<sup>36</sup> A similar point can be made about the effect on democracy of control of employees' speech by private employers. See, e.g., Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101 (1995).

<sup>37</sup> See Kreimer, *supra* note [], at 17 & n.13.

<sup>38</sup> See *id.* at 40 & n.84.

<sup>39</sup> Marjorie Garber, *I'll Be Back*, LONDON REV. BOOKS, Aug. 19, 1999, <http://www.lrb.co.uk/v21/n16/garb01.html> (reviewing PART TWO: REFLECTIONS ON THE SEQUEL (Paul Budra & Betty Schellenberg eds., 1998)). As Garber notes, literary theorizing about sequels has been profoundly influenced by Terry Castle's claim that “sequels are always disappointing,” because audiences simultaneously hope that the sequel will be different, and that it will be exactly the same; those hopes cannot both be realized. TERRY CASTLE, MASQUERADE AND CIVILISATION [] (1986).

demonstration is the prelude to Watts. But the difficulty with this criticism is that it wishes to throttle protest rather than to recognize that protest has taken these forms because it has had nowhere else to go.<sup>40</sup>

Similar observations have been made of both advertising and pornography. As we are exposed to more and more, it becomes harder to get our attention, so promoters are forced to further extremes. Advertising clutter drives marketers to put messages on eggs, in urinals, on the bellies of pregnant women, and anywhere else that might surprise us out of our willful blindness.<sup>41</sup> But the very barrage of sales pitches prompts us to raise our threshold for attention, until each ad is almost meaningless.<sup>42</sup> Likewise, theorists of many stripes agree that, as society tolerates more sexual activity and display, pornography has to become more extreme to excite its consumers.<sup>43</sup> If oral sex is no longer taboo, pornography will show more anal sex. Pornography thrives on flouting boundaries, so it will follow to the edge of those boundaries no matter how widely they are drawn.<sup>44</sup>

Barron suggests that greater access to mainstream channels of communication would help solve the problem of the rioting dissenter, but that doesn't seem likely. As his own reference to the plethora of modern "attention-getting devices" indicates, there are many more speakers who want our attention than we have attention, not to mention desire to listen. The scarcity is not in our stars – or star reporters -- but in ourselves.<sup>45</sup> Barron's escalation argument, taken seriously, is deeply unsettling. There doesn't seem to be a way backwards, other than to abandon modern society and technology. Perhaps we will all develop near-impenetrable filters, armor-plating our attention.<sup>46</sup> But those filters are likely to screen out plenty of useful information as well, avoiding the tragedy of the mental commons only by preventing many productive encounters. Because people react unpredictably and often creatively to their cultural environments, assembling bits and

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<sup>40</sup> Barron, *supra* note 1, at 1647.

<sup>41</sup> See, e.g., Laura Petrecca, *Product Placement: You Can't Escape It*, USA TODAY, Oct. 11, 2006, at 1B.

<sup>42</sup> See, e.g., KEN SACHARIN, ATTENTION! HOW TO INTERRUPT, YELL, WHISPER, AND TOUCH CONSUMERS 3 (2001) ("[T]he power of marketing is eroding ... from lack of attention."); Gerald Zaltman & Robin Higie Coulter, *Seeing the Voice of the Consumer: Metaphor-Based Advertising Research*, 35 J. ADVERTISING RES. 35, 36 (1995) (explaining that "time famine" makes it "increasingly difficult for advertisers to capture consumers' attention and information-processing time").

<sup>43</sup> See, e.g., CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 200 (1989) (Greater efforts of brutality have become necessary to eroticize the taboo-- each taboo being a hierarchy in disguise--since the frontier of the taboo keeps vanishing as one crosses it. Put another way, more and more violence has become necessary to keep the progressively desensitized consumer aroused to the illusion that sex (and he) is daring and dangerous."); RICHARD A. POSNER, SEX AND REASON 364 (1992) (the more pornography circulates, "the more the demand for pornography will shift (not entirely, of course) toward aspects of sexual depiction that remain tabooed.").

<sup>44</sup> Cf. Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209 (2001) (arguing that people regularly desire to transgress sexual boundaries and experience sexuality as forbidden).

<sup>45</sup> See Balkin, *supra* note [] [NYU].

<sup>46</sup> Cf. Eric Goldman, *A Coasean Analysis of Marketing*, 2006 WISC. L. REV. 1151 (discussing the possibility of personalized technology that allows through only ads of interest to the recipient). Goldman's proposal is intriguing, but it has problems (as most accounts of choices to seek out or receive information do) with preference formation, as discussed *infra*.

pieces of information from various sources,<sup>47</sup> it is hard to predict what a world of successful attention self-defense would look like, or even how to value it.

Nonetheless, to give the dissenters an outlet that does not require shock tactics, Barron argues for a general right of reply and even, when issues are not being talked about in public at all, a right to have one's editorial advertisement published.<sup>48</sup> This would at least give dissenters some chance to catch the audience's attention, compared to no chance at all in the absence of access. Dissenters would still be disadvantaged in various ways, but they would have a formally equal opportunity to speak; if they failed to convince, it would be a failure of their substantive messages.

Barron's proposal itself requires a type of screening: the omission of advertising from constitutionally relevant speech. Coke would have no right to reply to a Pepsi ad specifically targeting it, nor to an editorial condemning soda's role in promoting obesity. This result follows naturally from the fact that Barron does not consider commercial speech worthy of constitutional protection. Indeed, writing as he was before the Supreme Court granted more than minimal protection to commercial speech, he argues in the opposite direction from most modern arguments about commercial speech: Because the mass media is profit-oriented and largely content-indifferent, even its editorial aspects should be treated as commercial speech and subjected to extensive government regulation, at least about topic choice.<sup>49</sup>

Barron's treatment of commercial speech is of particular interest because his theory is based on listeners' interests in hearing all that is worthy of being said, and that is also the core justification for modern commercial speech doctrine.<sup>50</sup> In *Virginia Pharmacy*, the Supreme Court appealed to consumer-citizens' interests in receiving relevant information to justify striking down a state rule that barred price advertising for prescription drugs.<sup>51</sup>

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<sup>47</sup> See Julie Cohen [cultural landscapes].

<sup>48</sup> See Barron, *supra* note 1, at 1660.

<sup>49</sup> See Barron, *supra* note 1, at 1660-63; see also *id.* at 1668 ("Indeed, it has long been held that commercial advertising is not the type of speech protected by the first amendment, and hence even an abandonment of the romantic view of the first amendment and adoption of a purposive approach would not entitle an individual to require publication of commercial material.") (footnote omitted).

<sup>50</sup> See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) ("[T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides."); see also Bennigson, *supra* note [] (arguing in favor of the original audience-based rationale for commercial speech doctrine); Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOKLYN L. REV. 5 (1989) (promoting a "hearer-centered" concept of the First Amendment); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 14-15 (2000); David Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991) (arguing that the concept of listener autonomy explains much First Amendment law); cf. Robert Post, *Compelled Commercial Speech and Coerced Commercial Association: United Foods, Zauderer, and Abood*, 40 VALPARAISO U. L. REV. 1 (2006) (discussing the Supreme Court's recent shift towards more speaker-focused justifications for protecting commercial speech, and the doctrinal problems created thereby).

<sup>51</sup> *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 763-64 (1976); see also, e.g., 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 496 (1996) (plurality opinion); *Cent. Hudson Gas & Elec. Corp. v. Pub. Servs. Comm'n*, 447 U.S. 557, 563 (1980) (commercial speech receives constitutional protection because of its informational function).

Even if the pharmacies had no right to speak, consumers had the right to hear what they had to say. In this view, commercial and corporate speakers may provide information and perspectives that the audience would not otherwise receive.<sup>52</sup> At the same time, because the right to speak is dependent on the audience's interest in receiving useful information, this theory does not protect commercial speech as strongly as political speech. "A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the 'free flow of commercial information.'"<sup>53</sup> For example, like media forced to offer time for competing perspectives, commercial speakers can be forced to disclose relevant information to avoid consumer deception.<sup>54</sup>

Despite having the same audience-interest rationale, however, Barron's theory is deeply incompatible with robust First Amendment protection for commercial speech, something he recognizes. And there's the rub of audience-focused theories: The audience's interests can be defined in multiple ways. The audience doesn't necessarily know what it wants; worse, it will want different things depending on what it hears. The same might theoretically be true of speakers, but in practice First Amendment theorists have generally been satisfied with defining speakers' interests as interests in communicating their selected messages. Sometimes this goes as far as specifying an interest in *being heard*, as Barron suggests, but in general it has seemed obvious that speakers want to speak.

By contrast, the question of what audiences want, or deserve, to see and hear offers much more room for debate. Audiences' attempts to evade or ignore advertising, for example, suggest that even if audiences have rights to receive *desired* information, such rights can't support an advertiser's interest in providing its own ads in which consumers have expressed no interest.<sup>55</sup> In another context, Cass Sunstein has drawn on the audience-interest tradition to argue that audiences should be exposed to multiple competing viewpoints, so that they do not get lost in an echo chamber that only reinforces their preexisting prejudices.<sup>56</sup> Others criticize Sunstein's argument on various grounds and

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<sup>52</sup> See, e.g., Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1411 (1986).

<sup>53</sup> *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978) (quoting *Va. State Bd. of Pharmacy v. Va. Consumer Council, Inc.*, 425 U.S. 748, 764 (1976)).

<sup>54</sup> See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) ("[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides," an advertiser's "constitutionally protected interest in not providing any particular factual information in his advertising is minimal"). As product placement and other forms of stealth advertising become more common, the line between commercial speech and mass media productions in general becomes more blurred, in ways that support Barron's contention that mass media are essentially profit-seeking and indifferent to content and therefore can be regulated in the service of democratic self-government. See Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83 (2006) (arguing for mandatory disclosure of commercial sponsorship in nontraditional promotional contexts such as product placement, news story placement, and "astroturf" grass-roots word-of-mouth marketing campaigns). Evoking the same audience-focused justifications as Barron did, Goodman writes that "[m]andated source disclosure is the kind of government intervention in speech markets that the public rights theory of the First Amendment supports." *Id.* at 131.

<sup>55</sup> See Bennigson, *supra* note [], at 422-23.

<sup>56</sup> [Republic.com]

point out that audience members may seek out different perspectives on their own initiative.<sup>57</sup> Whatever the case, in any modern information environment, people need filters – they can't possibly consume all the available information, or even a tiny subset of it. Access alone will never be enough; speakers will always have incentives to seek more attention than audiences want to give them.

Rights of reply would provide a different type of information environment than we have at present: some audience members would likely pay attention to the reply, even if they didn't agree. But what would it mean that a right of reply led them to think something different? Even if we assume away concerns about the amount and type of speech produced under a right-to-reply regime, it is hard to say that the world would be better -- or worse. The audience-centered view of free speech leads to troubling conclusions because it puts speech regulation into the largely intractable category of preference-formation problems. First Amendment law, in that case, should focus on defining areas of greater or lesser legislative and regulatory competence, rather than on finding a natural or neutral free market in expression. Some people will conclude that direct regulation of speech, or even of modes of speech production, is always a cure worse than the disease; but that is where the debate should focus.

### III. If You Liked X, You'll Love Y: Attention and Copying

This Part considers speech that is deliberately not new and different, that seeks attention because of its resemblance to the already-known. Though it seems different from the extreme speech discussed in the previous Part, it actually poses similar issues for audience-centered theories of free speech. Extreme speech has been addressed through laws governing privacy, obscenity, and the like, responding to concerns over various kinds of boundary-crossing. By contrast, copying speech is subject to copyright law, which generally intervenes between a willing speaker and a willing listener to protect a copyright owner's economic interests.

Copyright confers various exclusive rights on a copyright owner, including the right to authorize the production of derivative works, which are works that recast, adapt, or otherwise alter the original; classic examples are sequels and movie versions of novels. Copyright, like the other property regimes discussed in Part I, has architectural effects on speech. Disseminating speech subject to copyright usually requires the copyright owner's permission. This affects the size and composition of the audience for that speech, even though the value of the speech to the audience is unlikely to depend on whether or not the dissemination is authorized.<sup>58</sup> One reason copyright does not allow copyright owners total control over their works, indeed, is to allow audiences access works when the benefits of access outweigh those of control.

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<sup>57</sup> [Benkler]

<sup>58</sup> Cf. Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, [ ]-[ ] (2004) (discussing the free speech value of dissemination even in the absence of authorization).

Fair use is one type of restraint on copyright owners' exclusive rights. When a copier borrows from an original work and also adds substantial new content, for example, the result may be an infringing derivative work, but it may also be a fair use. Fair use doctrine favors transformative uses, which courts have defined as uses that comment on, criticize, or add new meaning to the original, as well as uses that recontextualize the original and thereby create a social benefit.

But why can't the fair user just make up her own expression? What gives her the right to borrow someone else's work as a starting point for a new message? The literature on fair use offers some answers,<sup>59</sup> which turn out to be structurally similar to Barron's argument for a right of access to culturally dominant means of communication. Barron argued that the ability to respond in kind – using the same medium as an initial message – was vital to an adequate and effective right of reply:

If a group seeking to present a particular side of a public issue is unable to get space in the only newspaper in town, is this inability compensated by the availability of the public park or the sound truck? Competitive media only constitute alternative means of access in a crude manner. If ideas are criticized in one forum the most adequate response is in the same forum since it is most likely to reach the same audience. Further, the various media serve different functions and create different reactions and expectations -- criticism of an individual or a governmental policy over television may reach more people but criticism in print is more durable.

The test of a community's opportunities for free expression rests not so much in an abundance of alternative media but rather in an abundance of opportunities to secure expression in media with the largest impact.<sup>60</sup>

Barron's argument fits very well with the standard justification for allowing parodies of copyrighted works. Criticism and literary analysis can work as a rebuttal to a popular text, but there are times when a response is best put in the form of a novel or video clip. Sometimes it takes a story to beat a story, as with Alice Randall's novel reworking the racial and sexual politics of Margaret Mitchell's *Gone With the Wind*.<sup>61</sup>

More broadly, Barron's argument can even be read to justify a claim for fair use for satires and other nonparodic works. If access to an audience is an important value, and riffing on a popular text helps gain attention, then the copier's ability to catch the public's eye is itself something that promotes First Amendment values.<sup>62</sup> Lionel Richie's ballad

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<sup>59</sup> See, e.g., Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of 'Mary Sue' Fan Fiction as Fair Use*, 95 CAL. L. REV. 597, 617-21 (2007) (answering these questions with reference to the social meaning of borrowing existing culturally significant icons).

<sup>60</sup> See Barron, *supra* note 1, at 1653.

<sup>61</sup> [Suntrust]

<sup>62</sup> [Check Jed Rubenfeld's piece on this.] Randall P. Bezanson, *Speaking Through Others' Voices: Authorship, Originality, and Free Speech*, 38 WAKE FOREST L. REV. 983, 1056-75 (2003) (articulating a theory of when copying should be deemed transformative, and thus protected against government regulation, for First Amendment purposes).

*Endless Love* becomes a political argument about the close relationship between President Bush and then-Prime Minister Tony Blair.<sup>63</sup> Viewed this way, free speech interests weigh in on the side of fair use any time a second-comer alters a copyrighted text to make some sort of point, whether or not it reflects on the original text. This view goes beyond current law,<sup>64</sup> but it has some appeal, especially for those who worry about the difficulty of determining when an unauthorized alteration is a parody commenting on the original and when it is a mere satire.<sup>65</sup> Likewise, Jack Balkin's concept of "glomming on," a process in which individuals participate in political and social discourse by copying stories from mainstream media and adding short comments, involves substantial copying that might or might not survive a traditional fair use analysis.<sup>66</sup> Copying, as paradoxical as it may seem, gives these small speakers a voice, and a reason to use it.

But because audience interests are complex and diverse, Barron's point about using the extreme to get our attention also provides a counterargument to the claim of a right to use popular materials. Their very popularity, some copyright theorists have argued, risks overuse, so that what was once engaging becomes boring. The unfettered ability to use a work to make a new point could accelerate this process. A copyright owner's exclusive right to control reuses could lead to wiser stewardship, avoiding the tragedy of the mental commons with respect to any given cultural artifact (as compared to the tragedy of the mental commons described above, which dealt with individual attention).<sup>67</sup>

The rebuttals to this argument are persuasive<sup>68</sup> – for one thing, one doesn't have to believe in Santa Claus or the Easter Bunny to believe that their public domain status has not diminished their cultural power. Copyright's concept of transformative use offers a more nuanced way to understand Barron's point about the escalation of dissent. Humans seek novelty, which can manifest in more extreme versions of the same message, or simply in different versions. Every generation of legal scholars rewrites free speech theory (among other things), renaming or reframing concepts to make them more useful. In that we are like everyone else who creates. We don't destroy or diminish the value of

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<sup>63</sup> [cite Lessig]

<sup>64</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994) ("If ... the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish) ...").

<sup>65</sup> See, e.g., Bruce P. Keller & Rebecca Tushnet, *Even More Parodic Than the Real Thing: Parody Lawsuits Revisited*, 94 TRADEMARK REPORTER 979, 984-99 (2004) (criticizing the parody/satire distinction in fair use cases on practical and theoretical grounds). [Related problem of what the audience understands – a work might be intended as parody but perceived as homage. Cf. Bezanson, *supra* note [], at 1030 (using the variation in audience understandings to argue that concepts like equal access and fairness become incoherent as foundations for communications policies).]

<sup>66</sup> See Balkin, *supra* note [], at []; cf. Rebecca Tushnet, *Copy This Essay* (discussing ways in which copying can further free speech interests in informing audiences, as well as in self-expression and persuasion).

<sup>67</sup> See, e.g., William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 484-88 (2003).

<sup>68</sup> See Dennis S. Karjala, *Congestion Externalities and Extended Copyright Protection*, 94 GEO. L.J. 1065 (2006); Mark A. Lemley, *Ex Ante versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 130 (2004).

the original sources by rewriting them. At least for those who are interested in a topic, the narcissism of small differences makes it unlikely that we will run out of variations on our themes.

Escalation is one way to grab the attention of the otherwise indifferent. This explains why advertisers, radicals, and crackpots -- groups that most people would prefer to ignore -- are tempted to escalate. But in the ordinary case, when the relevant audience knows it might be interested in a particular message, escalation is unnecessary and variation will do. New wine in old bottles, or old wine in new bottles, satisfies our thirsts. Even advertisers don't need to escalate when they are confident they've targeted the right people: consider the relative unobtrusiveness of Google's text-only targeted ads, or ads in specialized publications.

Audience patterns of attention thus explain some of the attractions of copying, and point to appropriate limits on copyright. But copyright law is more than just a useful example of how free speech interests should shape law; it is intimately bound up with debates over access rights. When people get access to speech platforms, they tend to copy. And in the digital age, that means Napster and blogging and YouTube -- lots of pure copying, which is probably infringing; lots of transformative use, which is probably not; and lots of things somewhere in between, whose copyright status is unclear at best. Promoting access, in Barron's sense, means promoting copying, even if we add in measures to limit the subset of copying that is copyright infringement. No analysis of access can afford to ignore this, if only because copyright owners will be paying close attention to every legislative or regulatory initiative dealing with digital content.

#### IV. Conclusion

[Tie in intermediaries: the proliferation of content from new sources challenges the mass media, but remains dependent on larger organizations. These new voices contribute to the incessant hammering at our attention, making even more salient the need for ways of sorting out information. And our need for filters doesn't necessarily correspond to existing intermediaries. Intellectual property is another key regime shaping the content and availability of speech, especially once we recognize that variation within constraints is the basis for much if not all successful communication. Thinking about access rights for marginal speakers requires us to consider all these things. Speakers are audiences; audiences are speakers; and the places where they/we meet up are almost always controlled by third parties. Because of these complexities, speech regulations are as difficult as they are inevitable.]