COPYRIGHT’S PUBLIC FORA

Jake Linford

At least since the Eldred decision, it has been common to speak of fair use and the idea/expression divide as two traditional contours of copyright law that walk as a matched pair to shape the “public domain,” the space within which important First Amendment goals can be met beyond the reach of the owner of copyrightable expression. When the Supreme Court talks of space for speech, however, it often does so in terms of public fora. Scholars to date have misaligned public fora analysis and the copyright ecosystem currently operating in the United States. Some think the whole copyright ecosystem is a public forum, while others think introducing public forum doctrine is potentially fatal to any constitutional scrutiny of Congressional activity in the copyright realm. This article cleans up the confusion, and in doing so, makes the case for how public forum analysis, while arguably narrowed by the Supreme Court in recent years, provides an opening for courts to scrutinize Congressional activity and copyright owner claims in light of the purpose for which copyright protection was made possible: promoting the progress of science and useful arts, as defined by the Constitution’s Progress Clause.

There are several types of constitutional public domains that are better defined by comparing them to public fora. First, there are only two copyright public domains that are properly “traditional” or “irrevocable” in the way that traditional public fora are irrevocable, meaning they cannot be taken from the public: the substrate of uncopyrightable ideas that is separable from protected copyrighted expression; and the eventual point at which copyrighted works become part of the commons for all to use. Second, the promise that a copyrighted work will lose protection at any particular point in time, after which an individual can “speak within the forum of the work” as she likes is like the promise given to the speaker in the limited public forum – the state can take away the forum at any time, like Congress did when it restored copyright protection to foreign works, but so long as the state holds open the public forum, the right to speak from within it is nearly identical in strength and scope to the right to speak in a traditional public forum. Third, viewing the copyright ecosystem through the lens of public fora doctrine makes clear that fair use cannot be conceptualized like a public forum or a commons at all. While the user of ideas uses something that never belonged to the copyright owner, the fair
user is allowed to transgress active property rights held by the copyright owner. This transgression is permitted not as a matter of right but to meet both public and private necessities. It is therefore problematic to think of fair use as a “traditional” First Amendment contour in the same way that the Court has trained us to think of traditional public fora.

Getting the descriptive account right has some important normative payoffs. While the rights of the public to speak are more restricted in both limited and non-public fora, the state’s power to restrict speech even in those fora is still cabined by the purposes for which they were created. Congress is constitutionally empowered to create a copyright infrastructure and grant exclusive rights to authors to promote the progress of science and useful arts. Thus, while introducing First Amendment analysis into copyright may open the way for the rapidly narrowing public fora doctrine to narrow public domains and broaden the propertization of copyright, it also opens space for constitutional challenges grounded in the substantive limits prescribed by the Progress Clause.