

*Cracks in the Edifice:
A Copyright Critique of the Institutional First Amendment*

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Twice in the last ten years, the Supreme Court has brushed off First Amendment challenges to the current copyright protection regime on the ground that the fair use and idea / expression dichotomies built into copyright law sufficiently incorporate First Amendment values. Outside of tampering with these “traditional contours,” the Court has signaled its significant deference to the judgment of Congress in how it exercises the power granted by the Intellectual Property Clause to order copyright protection.

In the First Amendment context more generally, the Court has invested considerable energy in distinguishing between protected speech and non-protected activity. Copyright’s fair use doctrine does not perfectly fit this traditional mode of analysis, but there is an undercurrent that we should be protecting potentially infringing activities that have something to say, *i.e.*, where the unauthorized use allegedly transforms or comments on the work appropriated, instead of merely circumventing or misappropriating the rents the copyright owner is otherwise allowed to extract. Historically, the Court also differentiated between core and non-core speech, although this distinction has eroded somewhat as the Court has extended more First Amendment protection to commercial speech and recently refused to apply the non-core label to non-violent video games and crush films. The idea-expression dichotomy seems somewhat consistent with this notion, leaving the use of some material unprotected, not because we value the use but because the raw material cannot be reduced to ownership. For example, the Supreme Court held, in *Baker v. Selden*, that scientific truth and similar ideas “are the common property of the whole world.”

There is a third mode of constitutional analysis. In recent years, Fred Schauer, among other distinguished scholars, championed the idea that free speech should be understood through an institutional lens, that is, with deference or scrutiny adjusted somewhat based on the nature of the institution making or hosting the speech at issue. For example, this notion of an Institutional First Amendment has recently been considered in debates over whether the Press Clause favors an institutional press, and whether it ought to do so. In a way not previously realized by either constitutional or intellectual property scholars, the federal Copyright Act already evidences this institutional perspective. The text of the statute embodies an Institutional First Amendment mindset in ways that initially appear unproblematic, but suggest upon closer examination that Congress is deeply involved in preselecting winners and losers in copyright disputes. Those choices have real effects on the speech opportunities afforded to some classes of copyright holders and presented to some classes of unauthorized users while arguably withheld from others. This analysis reveals a potential dark side to the institutional competence account that I see as underlying the

Institutional First Amendment rationale, particularly in light of the Supreme Court's decision to defer to Congress at the intersection of the First Amendment and the Intellectual Property Clause.