Copyright, First Amendment, and the Ontology of Speech

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The protections of the First Amendment have traditionally been thought to attach to a category of "things" designated as "speech." Thus, much emphasis has been placed on determining whether code is speech, whether data is speech, or whether copyrighted works are speech. But the First Amendment is not about protecting things. Rather, it is the activity of communication, or expression, that we mean to protect. The difficulty is that the activity is inextricably tangled with the vehicle for the activity, and we cannot regulate one without at least somewhat regulating the other. Still, conceptually separating the communicative activity from the underlying vehicle helps to shed light on some difficult questions. In the context of copyrighted works in particular, rather than worrying about whether such works "are speech," we should instead focus on the expressive interests at stake in particular uses of those works. The result may be, for example, that we ought to be much more skeptical about the derivative works right than the public distribution right. Or that we ought to have strong intermediary immunity with respect to mash-ups, samples, satires, and similar creative uses, but not with respect to mass distribution of works substantially identical to the original. Or that the public domain, while playing a key role in copyright policy generally, has no special status with respect to the First Amendment. By being more careful about identifying expressive interests, we can more easily see where there are fundamental conflicts with other interests, and where there are not.