Op-Ed Contributor
Copyright and Politics Don’t Mix
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Published: October 20, 2008

THROUGHOUT this election season, Americans have used the extraordinary capacity of digital technologies to capture and respond to arguments with which they disagree. YouTube has become the channel of choice for following who is saying what, from the presidential campaign to races for city council.

But this explosion in citizen-generated political speech has been met with a troubling response: the increasing use of copyright laws as tools for censorship.

A recent dispute in a race for New York State Assembly is a perfect example. A Democrat, Mark Blanchfield, is challenging the Republican incumbent, George Amedore, in the Assembly district that includes the upstate New York city of Schenectady. Last month, Mr. Blanchfield released television and radio advertisements that included a clip from a video interview with The Albany Business Review in which Assemblyman Amedore said, “I don’t look at the Assembly position as a job.”

Mr. Amedore complained that the ads took his remark out of context, and the newspaper’s lawyers sent Mr. Blanchfield letters calling the ads “an infringement of our client’s exclusive copyright rights” (redundancy in the original), and threatening Mr. Blanchfield if he didn’t cease using the material. Never mind that Mr. Blanchfield’s use couldn’t possibly have harmed the financial interest of The Albany Business Review. Whatever the newspaper’s motive, the result is the censorship of Mr. Blanchfield’s campaign.

This problem isn’t limited to New York Assembly races. It has directly affected the presidential campaigns. Last year, Fox News ordered John McCain to stop using a clip of himself at a Fox News-moderated debate. Last month, Warner Music Group demanded YouTube remove an amateur video attacking Barack Obama that included its music, while NBC asked the Obama campaign to pull an ad that included some NBC News video with Tom Brokaw and Keith Olbermann. No doubt, these corporations are simply trying to avoid controversy or embarrassment, but by claiming infringement, they are effectively censoring political speech.

Senator McCain has taken a lead in responding to this copyright extremism. In a letter addressed to YouTube last week, the McCain campaign rightly criticized the Web site's
decision to remove work that is “clearly privileged under the fair use doctrine” of copyright law and called upon YouTube to be more protective of political speech by conducting a more extensive review of material before it gets taken down.

Copyright law has become a political weapon because of a statute passed a decade ago: the Digital Millennium Copyright Act. That law tells carriers like YouTube that unless they quickly remove material posted by users that is alleged to infringe copyright, they themselves could be liable for the infringement. Understandably, YouTube and others have become quite vigilant in removing allegedly infringing content. Indeed, the Web site has gone beyond the requirements of the law and has begun to shut down the accounts of people alleged to have violated copyright just three times.

The digital copyright act gives the alleged infringer an opportunity to demand that the content be restored. But in the height of a political campaign, even a few hours of downtime can be the difference between effective and ineffective. The law thus creates a perfect mechanism to censor political speech during the only time it could matter. Recognizing this, campaigns and their allies are beginning to exploit this weapon.

The answer to this problem is not to abolish or ignore copyright. Instead, the law should be revised, bringing focus to the contexts in which its important economic incentives are needed, and removing it from contexts where it isn’t.

After all, a 95-year copyright on “Wall-E” may encourage Pixar to make innovative movies, but we can be confident our presidential candidates don’t require any first-to-the-market advantages before they agree to debate, nor is there a need to protect their answers as though they were record albums or new technologies. This is why both Senators McCain and Obama joined in a campaign to persuade the networks to make the raw feed from their debates available free of any copyright restrictions.

What content owners need to recognize is that in the long run, it’s unwise to ask for a definition of “fair use” in the middle of a presidential campaign. Judges are very unlikely to find copyright infringement in a political ad, and a law of “fair use” expanded to allow such uses could well weaken the legitimate claims of musicians and Hollywood studios.

It would be far better if copyright law were narrowed to those contexts in which it serves its essential creative function — encouraging innovation and ensuring that artists get paid for their work — and left alone the battles of what criticisms candidates for office, and their supporters, are allowed to make.

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