

(Intro music)

Kelsey Reichmann: Welcome to Sidebar, a podcast by Courthouse News Service. I'm your host, Kelsey Reichmann. In this episode, Kirk McDaniel, one of our reporters and Sidebar's producer, joins us. Hey, Kirk, how's it going?

Kirk McDaniel: Hey, Kelsey, happy to be here.

KR: So, I understand you want to talk about free speech, which is always a timely topic.

KM: That's right. If you had to guess, what would you say is the greatest regulation of our freedom of speech in America?

KR: Hmm, if cable TV is any indicator, I'm guessing policing speech on college campuses or maybe shadow banning certain politicians on social media.

KM: Would you believe me if I told you it was copyright law?

KR: That's not exactly where my mind went to. So, like protections on things people create – music, books, film, art – are regulations on speech?

KM: They absolutely are. In researching this story, I have gained a whole new way of viewing the way we exercise the right to speak freely and the speech we actively consume. And if you think copyright is just a term for media executives and lawyers, well, allow me to show you just how important it is, not only for you and me, but every person listening to this podcast. Just as the right to freedom of speech is in our collective lifeblood, so, too, is copyright.

KR: OK, I'm pulling out my pocketbook Constitution, but I seem to be stuck on the First Amendment.

KM: Move a little further down. In Article One of our Constitution, eight sections down from the establishment of our governmental body and just below the clause creating the Post Office, is where lies the text that gives Congress the preeminent power to regulate copyright. The text directs Congress to quote “promote the progress of science and useful arts by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries.”

Jennifer Jenkins: Copyright and the First Amendment work together. They're friends.

KM: That is Jennifer Jenkins, a professor of law at Duke University and the director of the university's Center for the Study of the Public Domain. Jenkins took me back over 230 years to our nation's founding to show just how integral copyright law has been in our history.

JJ: Initially in 1790, when we first had our first copyright law, it only covered books, maps and charts. Those regular people like us weren't really the subjects of copyright law as much because, you know, you might be doing something in your house, but nobody was going to notice. And now, with, you know, the benefit of this laptop that I'm looking at you on, you know, we all have a printing press, we all have a music studio, we all have a movie studio, we all have a broadcasting tower and we all have the ability to create in a way that makes us the subject of copyright law.

KM: I'm sure this is not your first brush with copyright law, whether it's a big, multimillion-dollar lawsuit you hear about on the news or just a little icon you see in a magazine, copyright is all around us, because speech is all around us. When you are exercising your First Amendment right to paint a picture or write the next great American novel, your speech belongs to you. No one can take

your speech and pass it off as their own. However, when all the power is vested solely in one person, the rights of others slowly begin to dwindle.

JJ: Copyright law often interferes with free expression when the copyright owner is claiming that someone else's protected First Amendment protected speech is illegal because it infringes the copyright owner's protection. And so, there's two safeguards that are built into copyright law that the Supreme Court has repeatedly said this is why we don't think copyright law is quote "a law abridging the freedom of speech in violation of the First Amendment." One is the fact that copyright never protects ideas and facts. And so, if I write my next book and it's great and I did a ton of research and I spent a ton of time on those, my expressions are protected by me, but all the facts that I put in there and all of my ideas go immediately into the public domain, and anyone can use them. So, that's the first one. And the second one is something that you probably thought a lot about, you know, as someone who's in journalism, reporting, and that's fair use. Fair use allows people to, for First Amendment reasons in part, to use copyrighted expression under some circumstances, when we think it's a good thing, when we think it's socially beneficial and we think it doesn't unduly interfere with the market interest of the copyright holder.

KM: Without the First Amendment, industries like media, entertainment, arts and even technology would look very different. But without copyright there would be no incentive for a writer to get that manuscript published or a musician to get their song out there for the world to hear. They get credit and legal protections and we, the public, get the right to talk about, build upon their work through fair use.

KR: Jenkins mentioned the public domain. How does that come into play with copyright law?

KM: I think this is something that a lot of people were hearing about just at the beginning of this year, when the buzz was all about how the copyright protections for the original Mickey Mouse were ending.

KR: Mickey Mouse is at last free from his shackles?

KM: More like the shackles have come off of the creatives who have anxiously been waiting to put their own twist on several classic Disney characters since 1928.

KR: So, for almost 100 years these characters were essentially locked behind glass, like Taylor Swift's six stolen albums, and now anyone can make their own Taylor's version-style Mickey Mouse rendition?

KM: In a way, yeah, but to be clear, the version of Mickey Mouse that has entered the public domain is the one whistling in the "Steamboat Willie" cartoon released in 1928.

(Clip from "Steamboat Willie")

KM: Folks have wasted no time in getting to reuse this incredibly iconic character. Several horror films and even a shooter video game are in the works based on the titular mouse. This seems to be a similar treatment Winnie the Pooh got when he gained public domain status in 2022. That character, along with his friends from the Hundred Acre Woods, are now the lead in the horror film franchise "Winnie the Pooh: Blood and Honey."

(Clip from "Winnie the Pooh: Blood and Honey")

KM: But this fun, weird, interesting system of having old works revived by new artists is entirely by design.

JJ: The Constitution says that copyrights last for limited times and that's by design, so that after a limited period of exclusivity work, copyright holders enjoy very important rights completely in favor of that, that their works enter the public domain, so that other future artists and creators can reimagine them, revisit them and, you know, build on them.

KM: Another very relevant example that Jenkins pointed out was the recent big Oscar movie "Poor Things," with actors Emma Stone, Mark Ruffalo and Willem Dafoe. Did you ever get to see the movie, Kelsey?

KR: I didn't get a chance to see that one yet.

KM: No spoilers, but it's a strange film in which Emma Stone stars as a sort of Frankenstein's monster that goes on a journey of self-discovery. The movie would have had a really rough time getting to the big screen if Mary Shelley's "Frankenstein" was not already in the public domain.

JJ: So, "Poor Things" was based on the book "Poor Things," written in the '90s, I think, and I think one of the reasons it resonated is because it has the female perspective from Emma Stone's character, right, of that monster, and that's just one of many examples of what the public domain allows. It allows you to take a work that's no longer subject to copyright and to think about it, grapple with it, get creative and reimagine it, right, and maybe reimagine it with a, you know, slightly adjacent or different or interesting or intriguing or twisted or steampunk or whatever sensibility it is. That's your thing and that's amazing.

KM: No way around it. Copyright and free speech are joined at the hip, but while they have been around for as long as we've been a nation, they haven't worked out all their troubles. In fact, with every advancement in technology, the balancing act between the rights of copyright holders and the rights of free speech, it's more difficult to maintain. Nothing more clearly shows that than the internet. I'm not breaking any new ground by saying that the internet has changed everything. The World Wide Web has impacted how we create and disseminate copyrighted material. But in the 1970s, the United States was going through a huge overhaul of the copyright system. Congress passed the Copyright Act of 1976, which made it so that instead of having to register something with the U.S. Copyright Office to own it, a person owned the created work instantly upon creating it. Now, if you know your history, around that same time, the internet was making the shift from an experimental idea to what we know it to be today. This transitional period is summed up well by Mike Masnick, writer and founder of Techdirt, an online news site covering all things tech, law, policy and civil liberties.

Mike Masnick: With the 1976 act, anything created that was new was covered by copyright automatically. There were still incentives to register it, but everything. Around that same time is when the internet really started getting going, you know, the proto-earliest internet in like the late '60s and then early '70s, and of course it really took off in the '80s and '90s. But similar time, and all the internet is, and computers and personal computers certainly, are giant copying machines. That is all that they do. Like, everything that they're doing is sending copies of data from here to there. So, we have this, really those two things happening at the exact same time, in direct conflict with each other. We created giant mass copying machines that could send copies anywhere in the world. At the same time, we made everything covered by copyright. And those two things are in inherent conflict, and nobody wants to deal with it, and we just pretend that they're not in conflict.

KM: The conflict between copyright holders and the internet didn't quite kick off in the 1970s when the law changed. In the 1990s, copyright holders began to catch on and realize how this new tool

could lead to greater risk of infringement. This was something that both Masnick and Jenkins saw as the start of our current copyright era.

JJ: When I was in law school, actually in the mid-90s, that's when the World Wide Web was relatively new, that's when this idea of digital technologies was really new, and it was a very frightening moment for copyright holders, because the rules that we had, the rules that we were accustomed to, were written against the backdrop where it was relatively hard to infringe copyright at scale.

MM: It was the first area where there was an established industry that was sort of threatened by the nature of the internet, and that industry, being the entertainment industry, you know, the tool that they had always used to sort of protect themselves was copyright. So, they immediately sort of jumped to copyright as the tool to sort of, you know, protect themselves from this new horrible technology that was going to destroy their business.

KM: Not only did copyright holders have big concerns about what the internet may do to their property, but online hosting services were worried about how they could be held liable for copyright infringement.

Corynne McSherry: So, everybody comes to Congress and they're like we all have a problem. Everybody's claiming they've got an existential crisis.

KM: That's Corynne McSherry. She works as the legal director at the Electronic Frontier Foundation, a nonprofit organization that advocates for the protection of civil liberties in the digital space. Think ACLU with more ones and zeros.

CM: The hosting services are like, look, we could be sued out of existence, and we won't be able to grow and provide new services if we're worried about copyright liability all the time. And the rights holders were like, yeah, but we are going to go out of business if no one does anything about our copyrights online.

KM: To solve this problem and bring balance to the scales, Congress got to work. The solution was the Digital Millennium Copyright Act of 1998, or DMCA. This is a massive law that touches on all sorts of aspects of the internet. But one provision, Section 512, sought to address these concerns directly.

CM: What it gave to rights holders is the ability essentially to just fill out a form or send in an email that has to meet certain criteria but basically identifies I'm a rights holder at this URL. This is where this infringing material can be found. I attest that, you know, in good faith that this is in fact infringing material, and if the service provider gets a notice that meets all the requirements, it has to expeditiously take it down.

KM: Section 512 of the DMCA is a lot like another widely debated law regulating the internet, Section 230 of the Communications Decency Act. For a refresher, Section 230 makes it so that hosting services cannot be held liable for the content users post on their sites. So, while Section 230 makes it so websites can't be sued into oblivion for having certain content on their site, Section 512 of the DMCA makes it so they can't be sued for having copyrighted material on their sites. This takedown procedure has, relatively speaking, kept rights holders happy and content creators upset for a continued 20-plus years.

KR: Why are the creators upset? It sounds like if their work gets taken down, then they were just caught using someone else's property without permission.

KM: That is definitely what things should look like in a perfect world, but our world, and especially the internet, are not perfect. The notice and takedown procedure has been criticized for being the most effective way of suppressing speech online. Creators may put something up on the web one day just to find it struck down for violating a copyright the next. And sometimes, totally legal, content gets caught in the crossfire. Here's McSherry again.

CM: If you are a rights holder and you see your material, it's been posted and you didn't authorize it and it's not otherwise a fair use, which it might be, then you can send a notice and the service provider doesn't have to take it down, but they have every incentive to take it down because they want to avoid liability and they're not going to review every takedown notice to make sure that it's, like, perfect and they're not going to investigate whether the stuff's actually lawful or not because it's too expensive. Unfortunately, it's also really easy for that system to be abused. The process gets abused regularly when, when people just don't like the use, they don't want it to be used. And so, there really isn't any other area, with the possible exception of trade secrets, but there really isn't any other area in the United States where we would allow expression, right, because it is expression, to be taken down without any, essentially, any legal process, like, for example, even defamatory speech. Even if a court finds the speech to be defamatory, it does not necessarily mean that you can get it taken down off the internet. I mean maybe, but not always, because we understand, because courts are required to balance First Amendment interests even in that instance. But when you go to copyright land, I always sort of think there's First Amendment land and there's copyright land and in copyright land you can. There we have this sort of hair trigger system where if you just claim copyright, suddenly, you know you have all this power that you didn't have before.

KM: What is truly wild is that for everyone I spoke to for this story, I heard a new way in which the DMCA's notice and takedown provisions have been abused. Here's Mike Masnick from Techdirt again.

MM: So, it could be something as simple as, yeah, this person is reviewing my movie and they used a few clips, but the real issue is that they were really negative on the movie, so I'm just going to use the few clips as an excuse to take it down. We've seen stories of, you know, people making copyright claims which are clearly just sort of a form of extortion, which is, you know, we're going to keep making copyright claims on all of your videos unless you pay us money or all sorts of things. You know, you have this tool and it all goes back to, again, copyright being sort of the one legal tool that allows for the removal of content under the First Amendment, and therefore it becomes a weapon in the hands of some people who are, you know, trying to make use of that tool, whether it's for sort of extortion, shakedown kind of situation or whatever.

KM: Professor Jenkins had an example that absolutely left me speechless.

JJ: Have you seen this, where the police would play songs. Like in one case, the cop is playing Taylor Swift.

News clip: Taylor Swift songs typically go viral, but not for this reason. An East Bay deputy may be in trouble this evening for playing one of Swift's songs on his cell phone, while an activist recorded him.

JJ: They were playing the song because they knew that Facebook, or other platforms, because there was a copyrighted song being broadcast, would actually block, actually block that from being shown, and so, right, that's using something. It's like the arrest has nothing to do with the fact that the cop's playing Taylor Swift, right, but that was the mechanism to keep that encounter and the recording of that encounter from being available on the platform for others to see. And so, you know, that's a misuse, right? That's not what Congress was trying to do when they passed the DMCA.

KR: There have been attempts to revise Section 230 in Congress and the courts. Is there a similar effort for the DMCA?

KM: Of everyone that I spoke to, no one called for the outright gutting of the DMCA. I got a sense that such a course of action could do more damage than good.

MM: It has sort of reached this weird, I wouldn't quite call it equilibrium because it's not exactly good, but it's this weird system where it's like everyone sort of understands it and nobody quite likes it, but, you know, nobody's willing to move it in any direction because it'll almost certainly be significantly worse for someone.

KM: The foremost authority on this issue, the U.S. Copyright Office, is aware of people's criticisms of the DMCA's notice and takedown provision. In 2020, the office released a yearlong study it did, hearing from members of the public and looking into how other countries quote "strike a balance." In the report, the office acknowledged that, with how much the internet has exponentially changed in recent years, it may be time to fine-tune Section 512, but recommended against Congress making wholesale changes to the system.

KR: So, there's plenty of notice and takedown system haters, but does it have any advocates?

KM: That's a good question. For that, I spoke to someone very close in the copyright community.

Keith Kupferschmid: I'm Keith Kupferschmid, the CEO of the Copyright Alliance. Our mission is to make sure people understand and appreciate the value and importance of copyright law and also the importance of protecting creators' rights.

KM: The Copyright Alliance represents its millions of individual creators and over 100,000 organizational members. In its work as a nonprofit, the group also lobbies on Capitol Hill on behalf of the copyright community. I asked Kupferschmid about what he thought about the criticisms that have been made against the overblocking of content and whether it may be time for the laws to change.

KK: Yeah, I think from our perspective, as a general matter, the laws are working pretty well. I mean, there's certain areas where I won't go into here, but it gets into a level of complexity, OK, where it probably would make some sense to, you know, maybe look into this, or fix this. And usually what happens is, over time, those areas mount up or we see a particular problem that needs to be addressed and we go, OK, let's sit down and try to figure out how to solve this problem. Sometimes the pendulum might swing a little bit more one way or a little bit the other way. Sometimes the pendulum might swing a little bit more one way or a little bit the other way, and the challenge is to make sure it's kind of down the middle and that it's right where it should be.

KM: The Copyright Alliance testified before Congress and signaled that the time may be near to update the DMCA to ensure that it is living up to what Congress intended it for. So, it seems to many that the copyright balancing act is a tad off. Just as the fear of mass copyright infringement

on the internet spurred the entertainment industry into lobbying for change, Masnick worried that those same powerful voices may win out in the debate on how to fix the DMCA.

MM: You know, the DMCA is already, like, you know, problematic in the way you're trying to move it. It's just going to lead to a lot more takedowns of content, a lot more abuse, a lot more over-removals is the term that is used, of content that shouldn't be removed. And therefore, let's not mess with this weird, uncomfortable equilibrium we have, because even if it's weird and uncomfortable, nobody's entirely happy with it. You move it in almost any direction, and someone is going to freak out. In my opinion, it's like, if it's worse for the industry, like, so what? Like I don't care that much, like, it should be worse for them. This is the nature of free speech, like, live with it, but I also recognize that they're kind of powerful and, so, I don't think it's likely to happen realistically.

KM: As of now, there is not a lot of momentum behind revisiting Section 512 of the DMCA. I think Congress may be busy with TikTok or something, but many of these very real copyright and free speech issues have existed for a long time now and will only grow in time as more of our lives and creative works live online, and on top of that, we have more technology coming along to take our copyright conversation to new, more complex heights. Artificially intelligent copyright infringers are coming for you, right after this quick break.

Nika Schoonover: This is Nika Schoonover, a reporter for Courthouse News based in Brooklyn. I cover the Eastern District of New York, which consists of both the Brooklyn and Long Island federal courthouses. That includes former Representative George Santos, accused of wire fraud, money laundering and theft of public funds, among other charges. His trial is currently set for September. Most recently, I covered the conviction of two men in the murder of former Run-DMC DJ Jam Master Jay in his Queens recording studio in 2002 after a drug deal went sour. Their sentencing has yet to be scheduled. You can find my coverage on these stories and much more at [courthousenews.com](https://www.courthousenews.com). You can also follow me on X, formerly Twitter, @NikaSchoonover. Now, back to Sidebar, a podcast from Courthouse News.

KM: Just as the invention of the internet completely reimaged what copyright law looks like, artificial intelligence poses the same revolutionary shift.

JJ: I haven't felt the ground move since the World Wide Web in the '90s. Since then, I'm feeling the ground move in a way now that I felt it moved then, and there's so many fascinating issues raised by generative AI and so many of them involve copyright.

KM: Generative artificial intelligence has been in the news a lot lately. It's either the nightmare of a T-2000 coming to usurp your flesh and blood existence or a quick way to get your term paper written. Full disclosure, this episode was produced with minimal robot usage, if that makes you feel any better. This budding technology is here to stay. A report from the S&P Global found that in 2023, private equity firms invested \$2.18 billion into the technology. But as we go barreling into our AI future, many questions remain on how copyright law needs to evolve with it.

JJ: The question of if you train your AI system on copyrighted material, just the training bit, is that copyright infringement, or is it fair use? And that really is the multimillion-dollar question.

MM: All of these generative AI tools and the large language models that they use are based on sucking up a ridiculous amount of data just by scanning the internet and using all sorts of databases of crawled content online, much of which is covered by copyright. And so, then there's

this very big question of does that infringe on copyright? And we're seeing all these lawsuits there now.

KM: Those lawsuits that Masnick mentioned are starting to pile up. In October 2023, a group of authors sued Microsoft, Meta and Bloomberg, claiming that the companies used their copyrighted works without their permission. Then, in December, The New York Times filed similar claims against ChatGPT and Microsoft, arguing that they used the Times' content to train their models, which resulted in the content being cited verbatim in outputs. One of the weirder lawsuits filed was by George Carlin's manager against a YouTuber after they created an AI stand-up special featuring the raunchy comedian 16 years after his death. Carlin's manager has claimed that the YouTuber used Carlin's albums to create the special, thus infringing them. These lawsuits, the many more that have been filed and many more yet to be filed, will have a huge role in shaping how courts fit an AI peg into a copyright-shaped hole. States are also going to have a say in this debate. In March, the state of Tennessee passed a law that would make it so that musicians cannot have their voices replicated by AI without their consent. The Ensuring Likeness, Voice and Imaging Security Act, or Elvis Act, creates a civil action where artists can hold violators accountable in court. Despite these efforts, there's no real answer yet on the question of how to balance the rights of copyright holders and the right of free speech.

MM: Not everything has to be owned, not everything has to be property, not everything has to be locked up. The world can survive with certain kinds of content being available for other people to make use of, and I think, you know, that having AI output be not covered by copyright is a perfectly fine situation. Now, there are a lot of people who are upset by that, and there are people who are creating things with AI who think that it has to be protected and has to be owned, and so there will be a push to change the laws in that direction. I'm hoping that it doesn't come to that. What I think really is going to happen is that the fact is, most AI produced work is not produced by AI alone. It is produced in combination between an individual and the AI, and therefore everyone is just kind of going to let it slide and pretend that it can be covered by copyright, because some of the work is created by a human and therefore, we're just going to protect that part of the work. I imagine there will be some crazy fun copyright lawsuit in the next five years in which a court has to try and pick apart which parts are created by a human and which parts were created by an AI. That will be fun to write about, but right now that is a big mess.

KM: On the side of the copyright community, Keith Kupferschmid is looking at how AI may, and already is, affecting copyright holders.

KK: I think, with AI taking place right now, I think there's a real, real risk to copyright owners, especially individual copyright owners. You see a lot of licensing going on between AI companies and bigger companies, whether it's, like, you know, photography agencies or newspapers or big platforms and websites. You see a lot of that licensing going on. You don't see that much licensing, for instance, going on between the AI companies and individual photographers or individual authors or musicians and things like that, and so that's something that hopefully will come with time and we'll have to see, but you know, it's things like that. Like I said, AI is a tremendous challenge, and I don't want people to think that, oh, wait a minute, we're anti, you know, we're Luddites or anti-technology, because we have a tremendous amount of members that are using different technologies, using AI and things like that. Ultimately, what we want to see, whether it's AI or any other technology, that it be three things: that it be used ethically, responsibly and respectfully.



KM: So far, we've talked at length about copyrighted material made by humans for humans, but when an intelligent machine enters the debate, we may have to consider who gets the rights to the content made by machines for humans.

JJ: A really interesting question is the law is clear in the United States, not elsewhere, that there has to be human authorship in order for there to be copyright ownership. So, if I'm sitting around putting prompts in the Dolly which I do do, it's so fun and Dolly spits something out, I would own it because the machine created it. All I did was put in, like you know, seven words or 10 words. We're still used to there being a human being on the other side of a creative work. I think, what does it even mean for culture and art and what it means to be human? And you know whether we're as exceptional as we thought we were, when a machine can create something that moves you just as much as, like you know, that human being that you were, like, attributing authorial genius to. I mean, it's like that's deeply disruptive, just as a species.

KR: Well, I wasn't planning on questioning my existence and a conversation about copyright, but here we are.

KM: Yeah, sorry for that. This stuff can get pretty deep fast.

KR: It feels like we may be standing on the precipice of some very big changes to copyright law.

KM: I think you are totally right about that, but there is still much uncertainty as to what the future will look like. But in the meantime, copyright is, and will continue to be, one of our greatest regulations of our speech. Thanks to copyright law, we are all owners of our creations. And thanks to the internet, we have more tools at our disposal to create. When the DMCA was written, no one knew that people would have whole careers making content online. YouTubers weren't a thing. Going viral was certainly not what it meant today, and people had specific places to go to engage with art, music or movies. Now it's all in our pockets. So, as we reflect on how far we've come, I think it's important that we, now more than ever, consider the impact copyright law has in our lives and the balancing act between our right to own speech and the right to speak freely without fear of a lawsuit.

JJ: It's a balancing act between like real, not illusory, enforceable rights. That's an important, really important part of the system, and also for a robust, vibrant public domain and real exceptions like fair use that prevent copyright essentially from getting in its own way. And so, it's not an either or, it's not a they're right, I'm wrong. It's not a red and blue, black and white kind of thing. It really is a balancing act.

KM: This may be a wake-up call and the best time to get educated about copyright law, both to avoid liability and know when it's okay for others to use your own work. Check out what the Electronic Frontier Foundation is doing to preserve free speech on the internet and learn more about the law over at the Copyright Alliance. If you really want to have some fun, learn about the many, many works that have entered the public domain earlier this year at Duke University's Center for the Study of the Public Domain. You never know, something there might spark that next big creation.

KR: Thank you, Kirk, for sharing the complicated love story of copyright and free speech. Who doesn't love a good romance? If this love affair didn't have enough drama for you, Hillel Aron has you covered next time on Sidebar. From Survivor to Vanderpump Rules, the world has been captivated by reality television for decades, but a recent spate of lawsuits charges makers of reality TV, including NBC, Bravo and Netflix, of creating an unsafe work environment for its hundreds of

often unpaid cast members, plying them with free booze and setting them up with unhinged, unstable characters, or at least with people who play unhinged, unstable characters on TV. Will these complaints spell the end of the reality TV industrial complex, or are they simply an extension of the shows themselves? Find out what happens when people stop being polite and start getting real, real litigious. Make sure you subscribe to Sidebar on all your favorite streaming platforms, so you don't miss out. If you liked this episode and wanted to share your thoughts, leave us a review on Apple Podcasts. For more stories like this, check out [courthousenews.com](http://courthousenews.com) or our social media pages for more. See you next time.

(Outro music)