Regulatory Capitalism, Decentred Enforcement and Its Legal Consequences for Digital Expression: - The Use of Copyright Law to Restrict Freedom of Speech Online

Benjamin Farrand, PhD in Law
Lecturer in Intellectual Property Law, School of Law, University of Strathclyde, Graham Hills Building, 50 George Street, Glasgow, United Kingdom G1 1QE
Benjamin.farrand@strath.ac.uk

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Abstract

Copyright as currently understood is justified by the belief that the protection it grants to creators incentivises the continued creation of works deemed culturally beneficial to society. However, its use can be less altruistic, as a means of suppressing embarrassing or controversial information. The ability to disseminate sensitive material quickly through the Internet concerns both State and non-State actors, and there are indications that through the use of private intermediaries, copyright can be used to suppress speech. This article shall seek to explain how the current neoliberal system of governance blurs the line between public and private actors, creating a diffused and decentralised system of copyright enforcement that allows for the suppression of speech in a way that avoids discussion of censorship.

Keywords: - copyright, neoliberalism, freedom of expression, regulatory capitalism, censorship, fair use, intermediaries

Introduction

The regulation of the content of published and disseminated material is a constant source of debate and controversy throughout the world, irrespective of cultural or linguistic difference, governmental structure or legal system. Questions regarding free speech and censorship on the Internet are not new, but constitute new facets of an on-going debate on the limits of expression. Although not widely-known as a regulatory mechanism overseeing the boundaries of permitted and prohibited speech, one of the first tools of legal censorship over broadly disseminated written works was the system of copyright. Originating in renaissance Europe with the invention of the printing press, the use of copyright as a means of supressing unfavourable speech was an explicit means of State and/or religious censorship. However, copyright today is purported to exist for the protection of creative artists and the incentivisation of creation for the benefit of society. Indeed, copyright is predominantly associated with economic issues, such as questions over the economic harm caused by Internet-based piracy of cultural works. However, there is evidence to suggest that copyright law can be used, particularly on the Internet, to control or suppress speech by a range of State and non-State actors. With the ability to disseminate material quickly over the Internet, potentially being able to reach a greater number of people than ever before possible and with fewer barriers to reproduction or dissemination, actors have been forced to respond with various regulatory techniques in order to suppress content deemed unfavourable. Whereas this is achieved through explicit means acknowledged as forms of censorship in certain autocratic regimes such as Saudi Arabia, Iran and China (Mueller 2010:10, Deibert, Palfrey, Rohozinski & Zittrain 2011), such active means may not fit effectively within discourses of Western liberal democracy; take, for example, US Secretary of State Hillary Clinton's address to the Newseum in New York in 2010, where she stated that the US Government took the view that it is critical that Internet users are assured certain basic freedoms. In her

speech, Clinton stated that blogs, emails, social networks, and text messages have opened up new forums for exchanging ideas, and created new targets for censorship. Nevertheless, the US and others have been involved in the suppression of embarrassing and critical information, such as in the case of the release of diplomatic cables by WikiLeaks (an issue that shall be considered in greater detail at a later point in this article). This suppression of information is achieved by indirect rather than direct means, in part perhaps to avoid allegations of censorship. One means of achieving this indirect suppression is through the use of copyright law.

The purpose of this article is to explore further the use of copyright law as a means of supressing speech on the Internet through the application of a theory of regulation that can aid in explaining how such use is possible. In particular, this article seeks to demonstrate how neoliberalism and the associated regime of self-regulation has impacted the regulation of speech online in a way that requires that the traditional perception of the State as the entity with the power to censor be re-examined. This article will argue that neoliberal theories have allowed for the suppression of speech through the twin effects of the proliferation of self- and intermediary-based regulation, described by some authors as 'regulatory capitalism', and the primacy of property protection as a regulatory goal (in general and within copyright law), which allows for the control of information through its treatment as a form of property. Through a process of 'intermediarisation' and the decentralisation of regulation, in which responsibility for assessing breaches of copyright and the removal of infringing content is held by different Internet intermediaries, State and non-State actors such as transnational corporations are able to suppress speech that they find embarrassing, critical or otherwise unfavourable, while being able to both avoid allegations of censorship and limit accountability. This article shall argue that the perception of copyright as bestowing a strong

property right in the neoliberal tradition over created works makes enforcing copyright through 'intermediarisation' a particularly effective tool in suppressing speech. This shall be done through briefly tracing the evolution of copyright law as a means of controlling expression, by analysing the interaction between copyright law and censorship, and by applying of the theory of intermediarisation to a number of case studies that demonstrate the usage of copyright as a means of suppressing information. The difference between this approach and more traditional approaches to Internet regulation, and indeed, the original contribution this paper aims to make, is that while traditional analysis focuses on how infrastructure determines how access is permitted or restricted, either through code (Lessig 2006) or through the creation of closed systems that offer stability in exchange for flexibility (Zittrain 2008), this article approaches the issue differently, assessing how a general regulatory theory that explains contemporary regulatory environments and relationships between actors can determine both infrastructure and response to regulatory challenges on the Internet. Whereas the theories of Lessig and Zittrain are technology specific, the theory of regulatory capitalism applied is an overarching theory that can nevertheless provide insight into Internet-based regulation. The originality of this article is in its assessment and application of this theoretical framework to the use of copyright law enforcement mechanisms as a way of suppressing embarrassing content.

The structure of this article therefore is as follows. The main body of the article is comprised of three sections. In the first section, the theoretical underpinnings of this research are expanded upon, providing the frame of reference for the rest of the article. This section shall both define and assess, with reference to relevant literature, the concepts of neoliberalism and regulatory-capitalism, and their applicability to the issue of free speech online. The second section will consider the interaction between copyright and the First Amendment, detailing

the view of the US courts that there is little (if any) incompatibility between the two legal principles. In particular, the view that the First Amendment is predominantly concerned with state censorship, rather than private censorship, shall be addressed. The third section begins by discussing how the modern copyright system brings this perception into question, as copyright enforcement on the Internet has developed in such a way that it may be used for that purpose of private censorship through the assignment of enforcement powers to intermediary non-State organisations. It shall argue that the influence of neoliberal conceptions of property have had a demonstrable impact on the development of copyright law, and how the conception of copyrighted works as a form of absolute property has resulted in far-reaching legislation that can impact freedom of expression. The third section of the article will also consider the role of copyright as a tool of decentred censorship in more detail, expanding upon the findings of the second section. This section shall exemplify this censorship ability through three case studies demonstrating the use of copyright to censor material, by a State/public actor, a transnational corporation, and by individuals, all through the use of a private regulatory mechanism. This final section shall demonstrate the importance of intermediaries in achieving this censorship, due to both the takedown of material under the authorisation of private actors rather than judicial authorities, and the difficulties in having removed content reinstated. The article will conclude by arguing that the combination of regulatory capitalist systems of governance combined with a neoliberal conceptualisation of copyright have allowed for the use of copyright law as a decentralised means of suppressing unfavourable speech. This paper shall focus in particular on the effect of notice and takedown requests as a means of removing content alleged to infringe copyright.

Neoliberalism and regulatory capitalism: - the creation of a 'decentralised' regulation system

In this section, I shall demonstrate how neoliberalism and regulatory capitalism provide a useful framework for assessing the way in which copyright law can be used as a means of suppressing speech on the Internet. There are three main ways in which regulatory capitalism can contribute to the study of this issue; firstly, regulatory capitalism in its encapsulation of decentralised, non-hierarchical and self-governing regulatory systems accurately reflects the decentralised nature of Internet-based regulation, and can bring new insight into existing theories of internet governance. Secondly, the approach to regulation in regulatory capitalism as constituting relationships between informational nodes mirrors the nodal structure of the Internet, which ultimately constitutes a network of networks. Finally, taking the view that regulatory capitalism does not stand opposed to neoliberalism as an explanation for the development of private and self-regulatory systems, then the regulatory capitalism theory may help to explain how precisely copyright as conceived as a property right can allow for censorship by state and non-state actors online through diffused self-regulatory enforcement. In order to demonstrate how this is the case, it is necessary to expand upon the theory of neoliberalism, and its relation to regulatory capitalism.

Neoliberalism, according to Harvey, is a theory of political economic practices that propose "that human well-being can best be advanced by the maximisation of entrepreneurial freedoms within an institutional framework characterised by private property rights…the role of the State is to create and preserve an institutional framework appropriate to such practices" (Harvey 2007:22). As a result of the promotion of this ideology, Harvey argues, a property discourse has become hegemonic. This has largely been achieved through the dispersal of neoliberal thinkers throughout educational, financial, state and international institutions (such as the International Monetary Fund and World Trade Organisation), sweeping "across the

world like a vast tidal wave of institutional reform" (Harvey 2007a:23). In turn, this has had significant impact on political and economic thought, to the extent that neoliberalism "has become incorporated into the common-sense way we interpret, live in, and understand the world" (Harvey 2007a:23). In terms of practical effect, neoliberalism is both a return to, and an expansion of, "classical liberalism, entailing limited government, unregulated free markets and the sanctity of private property" (Robertson 2008:27) based heavily upon the work of Friedrich von Hayek, author of "The Road to Serfdom" and Milton Friedman, author of "Capitalism and Freedom".

Whereas Hayek was much more influential in European politics, Friedman was highly influential in the United States, where his work in economics, particularly "Capitalism and Freedom", resulted in the University of Chicago and 'Chicago School Economics' dominating US political-economic thought from the late 1970s onwards (Birch & Tickell in Birch and Mykhnenko 2010:50). Through the combination of the election of the Thatcher and Reagan governments in the UK and US respectively, and the support of these governments for the policies of Hayek and Friedman, policies of "privatisation, marketization and deregulation have opened up the State to profit-making activities […] and lifted restrictions on businesses operating within and across national borders" (Cahill 2010:298). This process is often conceptualised through the word 'neoliberalism'. It is worth noting that privatisation refers both to the act of the state placing once-public property into the hands of private actors, and to the act of outsourcing traditionally public regulatory functions to private entitites.

However, the adoption of neoliberal policies does not appear to result in a significant reduction in the number of regulatory institutions; instead, regulatory bodies appear to have

proliferated. For this reason, Levi-Faur & Jordana (2005) and Braithwaite (2008) see regulatory capitalism as a critique of neoliberalism, providing explanation for the increased number of regulatory structures. According to Levi-Faur & Jordana, while "conventional wisdom holds that we live in a neoliberal era and under neoliberal hegemony, the reality is significantly different and much more complex" (2005:6). After all, it is reasoned, the prime motivations of neoliberalism as envisioned by thinkers such as Friedman were the shrinking of the state, deregulation, and the free market forming the basis of societal and economic relations. Given the substantial increase in regulations and regulatory bodies since the 1980s, neoliberalism would appear to have failed as a doctrine. "If we were to judge neoliberalism by the degree of "deregulation" it attained, it would be a failure. If we were to judge it by the degree of "regulation" it promoted, it would be, on its own terms, a fiasco" (Levi-Faur & Jordana 2005:7). Braithwaite goes further; privatisation in the UK was combined with the creation of numerous regulatory bodies. Seeing this link between proliferation of regulators both governmental and non-governmental in the wake of privatisations, Braithwaite states that neoliberalism is something of a misnomer in explaining these developments; "markets themselves are regulatory mechanisms, as opposed to the neoliberal schema of markets as the antithesis of regulation" (2008:8). For this reason, academics such as Levi-Faur (2005) and Braithwaite (2008) have argued that "regulatory capitalism" is a more adequate explanation for contemporary regulatory structures, with Levi-Faur (2005:15) defining it as: -

> A distinctive order that critically differs from laissez-faire capitalism. In regulatory capitalism, the state retains responsibility for steering, while business increasingly takes over the functions of service provision and technological innovation…(it entails) a restructuring of the state (through delegation and the creation of regulatory

> agencies) and the restructuring of business…through the creation of internal controls and mechanisms of self-regulation.

Braithwaite has theorised that since the 1980s, states have become rather more preoccupied with the regulation of governance structures, and less with taking a direct hand in the provision of that governance. The number of non-state regulatory bodies has grown at an impressive rate, Braithwaite has argued, "so it is best not to conceive of the era in which we live as one of the regulatory state but of regulatory capitalism" (Braithwaite 2008:1).

Under this theory, "markets and rule-making displace public ownership and centralised administration through privatisation and the growth of autonomous regulatory agencies" (Wright 2011:31). Through the development of these autonomous agencies, Bevir & Rhodes consider that government has shifted from government of a unitary state to governance in and by networks (2003:1). Lazer expands upon this conceptualisation, stating that it is no surprise, and indeed, not coincidental that the regulatory age overlaps with the information age (2005:54). To regulate requires access to sizeable amounts of information and the ability to process that information. The development and accessibility of information processing technologies facilitates access and utility of regulatory information. For this reason, Lazer states, the role of regulators has shifted from one of "primarily being somewhat isolated decision makers to rich informational nodes in an international network" (2005:54). In other words, regulation, and indeed regulatory capitalism, function through networks, in which regulation is decentralised, or in Lazer's words, "diffused" (2005:55). For the purposes of this work, the conceptualisation of regulatory capitalism as a system functioning through networks is a useful one. According to Mueller, the Internet "triggers an explosion of new kinds of network organisation […] and […] enables a vast expansion of transnational issue

networks or policy networks" (2010:45). In this way, the Internet is something of a "network of networks", a network by way of its infrastructure, and by way of its regulation. Understood in this way, regulatory capitalism can be seen as a networked system of regulation, taking place within the Internet, itself a network. In this way, it complements well Castells theory of the network society (2000), in which:

> Communication technologies, a virtually indispensible medium in our informational age, (are placed) at the centre of human action, which is to rely on processes enacted by organisational forms that are built upon networks, particularly upon information networks (Miard in Costigan & Perry 2012:129).

The Internet is a decentralised and diffuse system that is regulated in different ways by different actors. As Mueller states, "most of the real world governance of the Internet is decentralised and emergent: it comes from the interactions of tens of thousands of network operators and service providers" (2010:9). In this way, regulation becomes diffused – not performed by one over-arching institution, but by and through networks of intermediaries. Wu considers the issue with Internet regulation to be one of increased centralisation and the problems associated with monopoly, with "the flow and nature of content[…]strictly controlled for reasons of commerce" (2010:6), and control placed in "a few hands" (2010:110). When assessed through the regulatory capitalism model however, a monopoly is not essential to restricting or suppressing content, as that control can be affected through the network relationships. Or, to put it another way, the diffusion of regulatory control could potentially achieve the same result as monopoly regulatory control.

Regulatory capitalism is a useful theory that helps to explain the proliferation of decentralised, privately enacted regulatory structures over the past few decades, while not being incompatible with the general critique of neoliberalism. Cahill is supportive of such a view, stating "clearly there are differences between neoliberal theory and neoliberalism in practice" (2010:305). Whereas neoliberal theory considers that markets are autonomous and any state regulation is considered as interference or intervention, history has demonstrated that states have often regulated in order to ensure certain free-market ideals. Polanyi uses the example of *laissez faire* capitalism in 19th Century England, which was presumed to be a time of minimal regulation or state interference, when in fact the state was involved in continuous, centrally organised and controlled interventionism (Polanyi, as cited in Cahill 2010:306). In contrast to regulatory capitalism thinkers, Cahill suggests that we consider neoliberalism in terms of "actually existing neoliberalism", which corresponds closely with neoliberal theory while recognising that the neoliberal ideal of the small state has not been eventuated (Cahill 2010:306-307). Harvey maintains that this is to be expected; the neoliberal project relies upon state action to ensure neoliberal goals are met, creating "the paradox of intense state interventions and government by elites and 'experts' in a world where the state is supposed not to be interventionist" (2007b:69). Businesses and corporations often work closely with governments, setting the terms and conditions of regulatory and self-regulatory systems, with legislators producing legislation and regulatory frameworks favourable to particular businesses or industries (2007b:76-77). In this way, the interests of state and corporation are aligned – in actually existing neoliberalism, state and market are mutually reinforcing, rather than opposed. As shall be demonstrated, the state and market may not be opposed, but align, when considering the suppression of speech through copyright law. Wu and Goldsmith, for example, have considered predominantly the role of the state in Internet regulation, and the impact of territoriality in regulating the Internet along national jurisdictions (2006), referring

to how "governments control behaviour not individually, but collectively, through intermediaries" (2006:68). However, it is not only governments that are able to exercise this ability to control power through intermediaries; other non-state actors within the network are also able to exert this influence. Furthermore, whereas Goldsmith and Wu posit that the Internet is a sphere in which government and market are in conflict (see, for example 2006:29-30), with one seeking to regulate and the other seeking to *avoid* regulation, the regulatory capitalism approach would suggest that both "market" and "state" can be aligned in seeking regulatory approaches.

Cahill posits two main ways in which regulatory capitalism is used to ensure neoliberal ends; the first is that there has been a significant process of marketization and privatisation, particularly of social services. Although they are subject to some form of regulation, the provision of the service is performed by the private entity rather than the state. Cahill reasons that "neoliberal theory has provided a convenient rationale and justification for such policies" based on the idea that the state is an inefficient provider of certain services, which the market is much better able to provide (Cahill 2010:307). Secondly, Cahill states that this "actually existing neoliberalism" has facilitated a greater marketization of life, in which an increased number of services, such as childcare provision and education funding are provided by private, self-regulating entities, "in keeping with the neoliberal argument that markets are the most moral and efficient means of economic organisation and […] should be the primary mechanism through which individuals source their wants and needs" (Cahill 2010:308). Cahill goes on to state that while there may have been an increase in legislation and regulation, it "has been used to secure the formal freedoms advocated by neoliberal polemicists" (Cahill 2010:308). This would appear to be in line with Harvey's argument that

despite neoliberalism's 'small-state' theoretical basis, neoliberalism in fact relies upon state intervention in order to achieve its aims.

There is indeed evidence to suggest this is the case. Numerous writers on the topic of regulation (Shamir 2011, Ogus 1995, Scholte 1997 and Jessop 1997 to name but a few) express a certain cynicism over whether regulatory regimes control private companies, or private companies control the regulatory regime, particularly with regard to private self-regulation. Ogus for example argues that from the early 1980s onwards, the UK was (and is) seen as a "bastion" of self-regulation (1995:97), and that fitting with the neoliberal dynamic, the perception is that self-regulation is cheaper and more effective than public regulation, and addresses a "market failure" of information asymmetry, in which private enterprises better understand their business than public regulators (1995:97-98). However, as Ogus goes on to note, "private interests that are threatened by regulation may gain considerable benefits if they are allowed themselves to formulate and enforce the relevant controls" (1994:98). Culpepper (2010) in particular has researched this issue extensively, determining that where private actors work in areas of low political saliency (i.e. issues that are not particularly mediatised and unlikely to be 'vote winners' in elections, such as corporate directorship), often those private interests are able to direct legislation and/or regulation in a way that suits their business interests in a way that Culpepper refers to as 'Quiet Politics' (see Culpepper 2010:5-23 for more information). As will be demonstrated in later sections, this perception appears relevant and applicable to the case of Internet intermediaries that take on regulatory functions – to give but one example at this stage, MacKinnon argues that "the geopolitical power of corporations has been growing for decades…the conventional power politics of nation-states is disrupted by the emerging power of the private sector […] Internet-related companies are even more powerful because not only do they create and sell products, but

they also provide and shape the digital spaces upon which citizens increasingly depend" (2012:10-11). For this reason, I feel that regulatory capitalism theory is not entirely inconsistent with analysis of neoliberalism, and is a useful way of considering the way in which copyright law is used as a means of censorship. Nevertheless, before applying these theories to the issue of online censorship through copyright law, however, it is useful to consider beforehand the traditional perception of the role of copyright in censorship, the interaction between the First Amendment and copyright, and the inbuilt protections afforded to users of copyrighted work found in the doctrine of fair use.

Copyright as the engine of expression, or copyright as the suppressor of expression?

The focus of this analysis of "censorship", or rather, suppression, is limited to cases in which the documents under discussion contain information that one party wishes to remain confidential, but nevertheless may be subject to a public interest defence under fair use. In this respect, and as shall be demonstrated, both the ability and desire to "censor" in this manner may be on the part of a state or non-state actor, who works through an intermediary in order to suppress that speech. The First Amendment states that: -

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

In this respect, the First Amendment is considered as applying to the US government, and not private actors. The judiciary of the United States does not appear favourably predisposed to

the argument that copyright can be used as a means of suppressing speech. Birnhack has gone as far as to state that the US courts' systematic rejections of a conflict between copyright law and freedom of expression constitute a "denial of the conflict" (2002-2003:1282), and Pollack refers to concerns being "brushed away" (2004:32). In the important (and indeed, controversial) decision *Eldred v Ashcroft* (2003), the US Supreme Court ruled that a challenge made by a private actor to a change in copyright law by Congress could not be made on the basis of the First Amendment. The challenge was brought by Eldred (and other petitioners), who runs Eldritch Press. Eldritch Press is a non-commercial enterprise offering public domain works in digital formats on the Internet. The petition argued that the recently adopted Copyright Term Extension Act (CTEA) was unconstitutional, as the Act extended the term of copyright protection for twenty years (the life of the author plus 70 years, increased from life plus 50), for both existing and new works (Birnhack 2002-2003:1275). In addition arguing on the basis of the 'limited time' provision of the 'Copyright Clause' of the US Constitution (Article 1, S.8), Eldred raised a second argument on the basis that the CTEA as a content neutral form of regulation of speech failed to comply with the protection of speech provided for by the First Amendment (Eldred v Ashcroft 2003:2). Content-neutral regulation is regulation that does not discriminate on the basis of the content of the speech; examples provided by Netanel include, for example, decibel limits on rock concerts or permitting broadcasting only within certain frequencies set forth in a Federal Communications Commission license (2008:118). Eisgruber argues that as copyright protection does not appear to discriminate based on viewpoint or content, even if changes to copyright laws are unwise, they should not necessarily be subject to First Amendment scrutiny (2003:21). The Supreme Court reached a similar conclusion. In the majority opinion given by Justice Ginsburg, it was stated that the Court rejected First Amendment scrutiny of "a copyright scheme that incorporates its own speech-protective purposes and

safeguards" (Eldred v Ashcroft 2003:28), reiterating an earlier statement from *Harper & Row* (1985) that copyright is the engine of free-expression (Eldred v Ashcroft 2003:28-29). Eisgruber agrees, stating that "copyright is not censorious […it] does not pick and choose among ideas and subject-matters" (2003:18). This was a view reiterated by the Supreme Court in the case of *Golan v Holder* (2012), where it ruled, "by establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas" (2012:23-24). However, this may be brought into question where the use of copyright is to *prevent* rather than *promote* dissemination, as shall be expanded upon in the next section of this article.

Birnhack reasons that this view held by the Supreme Court can be seen in its reference to "the common history of copyright and the First Amendment…(and) to their common goal" (2002-2003:1280). In Eldred v Ashcroft, the Court declared that "the Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles" (Eldred v Ashcroft 2003:28). This is indicative of a view that copyright and the First Amendment are not only compatible, but work harmoniously, with the First Amendment "removing obstacles to the free flow of ideas, [and] copyright adding positives incentives to encourage the flow" (Birnhack 2002-2003:1286). Nimmer argues that the conventional view is that supporting copyright and opposing censorship appear to go hand in hand, and are mutually supportive rather than contradictory (1969-1970:1180-1181). Preceding analysis by the Courts, Nimmer appears to predict somewhat the reasoning of the Courts when arguing that in general, copyright's incentivisation of the dissemination of knowledge "comports" with freedom of speech (1969-1970:1191). Even if copyright has some ability to restrict free speech through preventing others from copying one's expression of an idea wholesale, it is "far out-balanced

by the public benefit that accrues through copyright encouragement of creativity" (Nimmer 1969-1970:1192). Pollack expands upon this, arguing that the fact that the Copyright Clause was intended only to promote progress (argued by Pollack as being the dissemination of knowledge) and was not aligned with censorship, explaining why the Drafters' did not acknowledge any incompatibility between it and the First Amendment (2004:29). Indeed, whereas the First Amendment guaranteed the freedom of speech, copyright would ensure the dissemination of that speech (2004:30). In this way, copyright as established in the US Constitution differed significantly from 'pre-modern' copyright, insofar as 'pre-modern' copyright was explicitly a tool of censorship (Cotter 2003:324-325, Wittecombe 2004:59, Green & Karolides 2011:111). Cotter writes that, "in England, the interests of church and state in censoring dangerous ideas, and of the printers and publishers of suppressing competition, coalesced in the development of a quasi-copyright regime that persisted until the 18th Century" (2003:326). By focusing on those with the power to disseminate information, rather than those who were able to produce that information, the State was much more able to effectively censor messages. This close relationship between publishers and the State was mutually beneficial; according to Patterson, "by promoting censorship and press control the stationers were utilising the best means available to protect their "property". The government was not really interested in copyright as property, only as an instrument of censorship" (Patterson & Lindberg 1991:26).

In comparison, in the 18th Century, it was the work of Adam Smith and John Locke on the importance of personal property, liberty and the pursuit of learning that became influential (Deazley 2004:1-13), with these works influencing the development of a copyright based on the dissemination of knowledge (Spitzlinger 2011:273), and therefore a copyright which the Drafters considered compatible with free speech. Copyright was no longer an explicit means

of state censorship but a tool for economic development and the exchange of ideas (Cotter 2003:328). For this reason, the First Amendment and copyright could be seen to be compatible, so long as the government did not explicitly interfere. Indeed, government appears to be the particular focus of the First Amendment, as is evidenced in the literature. Netanel describes freedom of expression as secured "most basically by constitutional constraints on the state's censorial power" (2008:35), and Eisgruber states that "most of free speech law rests on a concern about censorship…on a judgement that government ought not to prohibit the dissemination of ideas because it deems them wrong or harmful" (2003:18). With this in mind, the Supreme Court in Eldred v Ashcroft stated that copyright has 'built-in' First Amendment protection, particularly through the doctrine of fair use (Eldred v Ashcroft 2003:29, reiterating earlier statements in the case of *Harper & Row v Nation Enterprises* from 1985, and reiterated in *Golan v Holder* (2012) at p.24). With regard to the possibility of private actors having the potential to censor, Birnhack argues that the view of the courts is that the doctrine of fair use can perform a First Amendment function (2002-2003:1290). The fair use doctrine is laid out in 17 USC §107, in which it is stated that the fair use of a copyrighted work, including such use by reproduction in copies for purposes such as criticism is not an infringement of copyright. This is subject to four factors being considered, namely the purpose of the use of the work, the nature of the work copied, the amount of the work used and the effect on the potential market for the work. For example, in the case of *Rosemont Enterprises v Random House Inc* (1966), the notorious tycoon Howard Hughes sought to block the publication of a biography by John Keats, on the basis that its reliance on portions of a series of articles known as 'The Howard Hughes Story', was an infringement of copyright (1966:paragraph 1). Evidence suggests that Hughes' use of copyright as a means of blocking publication was intended specifically as a means of preventing information from becoming public, including the allegation that Hughes specifically purchased the copyright

over the series of articles solely for the purpose of bringing the lawsuit (1966:paragraphs 5-8, 49). The Court of Appeal stated that fair use was a "privilege in others than the owner of a copyright to use copyrighted material in a reasonable manner without his consent" (1966:paragraph 14), and that in this case, the public interest served by the biography outweighed Hughes' desire for privacy (it is worth noting that this common law approach to fair use predates the current approach, laid down in the 1976 Copyright Act mentioned earlier). For this reason, Keats could rely on fair use of the copyrighted material in order to publish the biography. In the case of *Harper & Row v Nation Enterprises* (1985) however, it was held that the publication of sections of Gerald Ford's unpublished manuscript by The Nation magazine in such a way as to 'scoop' an article appearing in The Times did not constitute fair use. The fact that the use of the work was for commercial purposes and intended to pre-empt publication by another magazine (1985:paragraphs 32-33), that the manuscript was currently unpublished but subject to contract for publication (1985:paragraphs 34-36), that the article took only 13% of the manuscript but was almost entirely based around that 13% that the courts considered some of the most important work in the manuscript (1985:paragraphs 37-39) and that the publication significantly impacted upon the marketability of the manuscript subject to a contract with another publisher (1985:paragraphs 40-42) meant that a claim of fair use was negated. With regard to the relationship between fair use and the First Amendment, the Court stated that First Amendment protections were "already embodied in the Copyright Act's…latitude for scholarship and comment traditionally afforded by fair use" (1985:paragraph 28). Eisgruber comments on this fact that yet another reason why copyright should not be subject to First Amendment scrutiny is that fair use affords "speakers protections comparable to those recommended by the First Amendment itself" (2003:24). In this respect then, the legal position appears to be that the First Amendment protects from governmental censorship (the

government being the body most able to censor or suppress speech), whereas fair use performs the same function *within* copyright with respect to private actors.

Regulatory capitalism and the private enforcement of copyright: - sidestepping the First Amendment, silencing fair use?

It is submitted that it is here that the theory of regulatory capitalism becomes useful in demonstrating how copyright can be used as a means of suppressing speech. The traditional analysis of the ability to use copyright as a means of censoring content has primarily been undertaken (particularly by the courts) using a state-centred approach, in which the perception is that it is the State that has the power to censor, or perhaps more aptly, the power to regulate (as evidenced by the analysis in the previous section). However, in discussions of the regulation of copyright on the Internet, this state-centred approach is not particularly useful, or enlightening, and reflective of a traditional view of the state as regulator, rather than the model of regulatory capitalism, in which regulation is diffused and regulators are decentralised networks of actors. This traditional approach can be seen in the case of *CBS v Democratic National Committee* (1973), in which it was stated that "Congress appears to have concluded**[...]**that of these two choices-private or official censorship-Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided" (1973:105). This would suggest that there is a difference in the ability of private and "official" actors to censor, and that both state and private sector are distinct in this respect. Instead, what we have seen since the late 1990s is the de-centring of regulation and regulatory institutions, and the delegation of these powers to private institutions. As goes the theory of regulatory capitalism, governments devolve the power to regulate to private bodies in a form of 'self-regulation', predominantly on the

neoliberal principle that the private entities are more effectively able to regulate than the government itself. With regard to copyright enforcement on the Internet, these powers have been devolved to Internet intermediaries such as Internet Service Providers and content-hosting platforms such as YouTube, who effectively self-regulate by removing infringing content. In this way, the regulation of copyright in the online environment has moved from state-centred public enforcement, to decentred private enforcement through networks of actors. This would appear to fit within the framework of regulatory capitalism as described in the first section of this article.

With regard to copyright enforcement, this is made possible through legislation such as the Digital Millennium Copyright Act (DMCA) in the US, and the E-Commerce Directive (Directive 2000/31/EC) in the EU. A framework has been created in which the removal of content from the Internet is not subject to judicial oversight, but only requires requests from right holders. This is through the creation of a 'notice and takedown' system for regulating copyright infringement online. This legislation in effect outsources the enforcement of copyright online from state actors to private enterprises – in this instance, Internet intermediaries. In the US, this power is to be found in s.512 DMCA, relating to the liability of service providers online. Section 512 states that a service provider shall not be deemed liable for copyright infringement for material transferred through the Internet connection or stored on a computer system, so long as they remove or restrict access to the infringing content on a request from the copyright holder. In the E-commerce Directive, for the purposes of looking at the role of intermediaries, Article 14 is most relevant, as it details the rights and liabilities of content hosting providers. Article 14 states that an information society service that consists of the storage on information provided by a recipient of that service will not be liable for infringement for information held on that service so long as the

provider had no actual knowledge of the infringement, and upon being made aware of the infringement, "acts expeditiously to remove or disable access to the information". This means that these service providers are immunised from lawsuits so long as they respond to notices of claimed takedown requests, "and so providers take-down to avoid the risks of suit, even if they would have faced no liability" (Seltzer 2011:3). Thus forms one type of Internet-based regulatory mechanism that can be explained through regulatory capitalism: - legislation is passed which imposes a regulatory role upon the providers of information hosting services, in exchange for immunity from suit so long as that regulation is performed. The regulators are private, non-governmental enterprises functioning autonomously within networks, with little if any governmental oversight. This regulation, referring back to the analysis in the first section of this article, works through a decentralised network of nodes – intermediary content hosts constitute one node within this network, and the node that ultimately makes the decision to remove content, whereas other nodes include the uploader of such content, and the entity that makes a copyright infringement claim constituting another inter-relational node. As Mueller states, "the Internet disperses to millions of private actors the capability to manage and control their own devices and conditions under which they access other networks. It not only makes everyone a potential publisher, it also makes every person a potential censor" (2010:187). Through this decentralised means of regulating copyright enforcement, it becomes possible for private censorship to be fostered, as shall be demonstrated by the following case studies. In such a system the judicial conception of the state being the entity most able to censor, as indicated in the *CBS* case, does not appear to reflect well the contemporary decentralised regulatory system for notice-and-takedown. The relationship is not between public censor and private entity censored, but a multilateral relationship, in which either the state or a private entity can have content removed from the Internet via an intermediary actor. With the final decision being made by that intermediary actor, on the

basis of a request by a state or non-state actor, private acts of suppression appear as effective as state-based acts. The following examples seek to show how the regulatory capitalism approach to nodal regulation allows for suppression through copyright infringement accusations, and how this is action that can be taken by both state and non-state actors.

In 2010, it was alleged that Bradley Manning, a Private in the US Military, leaked sensitive information to WikiLeaks, an organisation self-described as a publisher of classified information believed to be in the public interest. The information allegedly passed to WikiLeaks by Manning included over 251,827 diplomatic cables and 8000 State Department 'directives' detailing the opinions of US diplomats regarding certain nations, world leaders and other government officials (Welch 2010), revealing potentially embarrassing comments made by official representatives of the US in foreign nations. These cables were released in 2010, along with other sensitive military files such as a video clip showing a US military helicopter firing upon civilians in Iraq with the crew "falsely claiming to have encountered a firefight […] and then laughing at the dead after launching the airstrike" (McGreal 2010). These leaks proved highly frustrating to the US military and government, who considered them to be a threat to national security (McGreal 2010). The sensitive files were allegedly passed to WikiLeaks, an online host of classified information nevertheless believed to be in the public interest, by US Private Bradley Manning. WikiLeaks then worked with several newspapers, including The New York Times and The Guardian to search through the cables for information that may be considered to be essential for the public to know. The US Government was horrified by the release of this information, and began to apply political pressure to organisations associated with WikiLeaks in order to isolate them politically, financially and technologically. For example, VISA and Mastercard suspended all payments to the WikiLeaks website owners (McCullagh 2010) and PayPal announced that it was

suspending the account used for redirecting funds to WikiLeaks. However most interestingly, and indeed most worryingly, when WikiLeaks attempted to host its data on Amazon's servers after repeated distributed denial of service (DDOS) attacks rendered its own server unusable, after an aide to Senator Joe Lieberman started making enquiries into Amazon's support for WikiLeaks (Vance 2010), Amazon removed the WikiLeaks data from its servers. Denying that this was a result of political pressure, Amazon claimed the content was removed for a breach of Amazon's terms of service, publicly stating "there have been reports that a government inquiry prompted us not to serve WikiLeaks any longer. That is inaccurate […] it's clear that WikiLeaks doesn't own or otherwise control all the rights to this classified content" (Beschizza 2010). In other words, Amazon justified the removal of the cables from its servers on the grounds that they constituted an infringement of copyright, as WikiLeaks did not hold the 'rights' to the content – something that is highly questionable, as according to 17 USC §105, copyright protection is not available for works created by the United States Government. Yet Amazon specifically stated that hundreds of people store all sorts of content on their servers, and that "some of this data is controversial, and that's perfectly fine. But, when companies or people go about securing and storing large quantities of data that isn't rightfully theirs[…]it's a violation of our terms of service, and folks need to go operate elsewhere." (Amazon:Message 65348). This appears to indicate that the justification for removing the content was as much about copyright as it was about the sensitivity of the data. Amazon performed an act of self-regulation in response to a political situation, perhaps to avoid being regulated by a state actor – while the controversy relating to the cables had to do with the distribution of confidential (and embarrassing) material, it was 'ownership' or 'rights' over information that was contested. Through this nodal relationship of power, embarrassing content was removed, in a manner compatible with a regulatory capitalism approach. If we return to Eisgruber's earlier statement, that government ought not to suppress speech because

it criticises government or politicians, or is subversive, then if the government had explicitly suppressed the Wikileaks cables, then arguably a First Amendment challenge could have been made. However, in this instance, content was removed from Amazon servers on the basis of copyright infringement. While copyright in itself may not discriminate on the basis of viewpoint or content, in this instance, it is likely that the sensitivity of the documents involved was at the heart of the content removal, rather than a desire to protect copyrights. In other words, it is arguable that it is the content of the cables that was the focus of removal, rather than a content-neutral removal of infringing material. Through the decentralisation of copyright regulation, and the enforcement capabilities placed in the hands of an intermediary (in this case Amazon by virtue of its position as content host), the suppression of information deemed damaging to a government can be suppressed through the subversive use of copyright, rather than the overt use of governmental demand for removal; in this way "the mechanics of copyright today are the same as when copyright was used as a device of public censorship" (Patterson 2000-2001:239).

Other examples of such potential acts of censorship exist, in which the State has no direct or indirect involvement. In 2005, analysts from Citigroup wrote a report called 'Plutonomy: - Buying Luxury, Explaining Global Imbalances'. In 2006, a second report, 'Plutonomy: - The Rich Getting Richer' was written. These two reports detailed the income inequalities rising in the world, expressing views that cast Citigroup in a bad light, presenting a company unconcerned with, and even appearing to revel in inequality, in addition to demonstrating a certain amount of hubris. For example, one of the memos stated "we think the rich are likely to get even wealthier in the coming years. Implication 2: - we like companies that sell to or service the rich – luxury goods, private banks etc" (Kapur 2006), and in discussion of workers (dubbed 'the masses' in the memo), that "Capitalists (the rich) get an even bigger

share of GDP as a result, principally, of globalization…good for the wealth of capitalists, relatively bad for developed market unskilled/outsource-able labor. We expect our Plutonomy basket of stocks […] to continue performing well in future" (Kapur 2006). Citigroup was one investment firm that required a bailout from the US Government, to the tune of $25 billion in October 2008, followed by an additional $20 billion in the following month (McDermind 2008). Understandably, when the memos were leaked onto the Internet in 2009, they caused a considerable amount of outrage amongst 'netizens' who shared the memos; the general public had now in effect bailed out a company that had appeared to demonstrate such contempt for that same public. Citigroup, rather than denying the authenticity of the memos, instead attempted to remove them from the Internet. One blog, Political Gates, which documents political scandals, has a page dedicated to attempts by Citigroup to suppress the memos (Patrick 2011). In particular, it notes that Scribd, a website used to host documents has been subject to repeated takedown notices by lawyers representing Citigroup. For example, if an Internet user attempts to access one Scribd page on which one of the memos was uploaded (http://www.scribd.com/word/removal/6674234), the user is met with a message stating "This content was removed at the request of Kilpatrick Townsend & Stockton LLP". In fact, the number of takedown notices was so substantial that documents that appear to be one of the Citigroup memos are now automatically removed by Scribd's automated copyright protection system. Files uploaded that appear to be the same as the CitiGroup memos are rejected, with Scribd generating an upload error on the basis that they "appear very similar to an unauthorized copyrighted document that was previously removed from Scribd" (see www.scribd.com/word/removal/23321255). The error message does however state that if the automated takedown was made in error, the uploader can contact Scribd to report the error (although no guarantee is made that the content will be reuploaded).

This example provides some interesting points for discussion, and once again demonstrate how through decentralised regulation, promoted through a regulatory capitalism framework, help to allow for private censorship in a way that perhaps was not foreseen by Courts stating the compatibility of the First Amendment and copyright. Furthermore, it also brings into question the effectiveness of the 'built-in' First Amendment protection to be found in fair use. The Citigroup example once again demonstrates suppression on the grounds of copyright infringement, in which enforcement (by means of takedown) is performed by a private entity. In some ways, this case would appear to share similarities with the previously discussed *Random House* case. As was stated earlier, Hughes intention in bringing an action for copyright infringement was intended to suppress information that Hughes did not want made public. In the judgement, Chief Judge Lumbard made the observation that Hughes's demand for an injunction could not be granted, as he did not come to the Court with clean hands. Lumbard stated that "has never been the purpose of the copyright laws to restrict the dissemination of information about persons in the public eye even though those concerned may not welcome the resulting publicity" (Rosemont Enterprises v Random House Inc 1966:paragraph 36). Lumbard went on to state that "the spirit of the First Amendment" applies to copyright insofar as courts should not allow for interference with the general public's right to be informed of matters of general interest "when anyone seeks to use the copyright statute which was designed to protect interests of quite a different nature" (1966:paragraph 37). Arguably, the motivation of Citigroup is similar – copyright is not being protected so as to ensure that Citigroup is able to benefit through the dissemination of their work, but instead used as a means of suppressing the release of embarrassing information. Arguably, this case could be distinguished from that of *Harper & Row;* in that case, the Court determined that the actions by The Nation did not constitute fair use.

However, in this case, an argument of fair use could potentially be raised. To begin with, the release of the memos was not for commercial purposes, but to instead raise awareness of the actions of Citigroup. The market value of the memos for Citigroup itself is debatable, as given the interest in their suppression it could be argued that they were more valuable to Citigroup unpublished. While the work had not been previously released, it is arguable that the release of the memo, and the criticisms raised regarding Citigroup's conduct could have been found to be in the public interest in a manner similar to *Random House*. Furthermore, 17 USC §107 states that the fact that a work is not published will not in itself prejudice a finding of fair use, particularly in light of the other criteria. While it was stated in *Eldred v Ashcroft* that the First Amendment and fair use protection are not as strong when making "other people's speeches" (2003:31), namely by reproducing the work of another author, the uploading of the entirety of the memos for the purposes of criticism and review should at least be analysed (or capable of analysis) within the context of fair use by the Courts. As Gordon states, when it comes to the "hostile use" of another's work (in this case, the memos), in order to subject them to criticism or negative review, the user is "unlikely to obtain permission from the prior author" (1990:1033). Indeed, as Gordon goes on to state, "a speaker sometimes needs to use the expressions […] that represent what he is attempting to rebut […] or criticise in order to make his point clearly" (1990:1034). This is particularly the case with the memos – if only extracts were provided, the uploader could be accused of presenting quotes out of context. In order for the full import of the memos to be understood, the entirety would need to be presented. For these reasons, fair use analysis would be essential. However, with decentred enforcement of copyright, this analysis does not appear possible. This is because fair use is only a defence to infringement, meaning that an action for infringement must be brought against a defendant before fair use analysis can proceed (Lessig 2004:97-99). However, the way in which notice and takedown works under the

DMCA and E-Commerce Directive means that no judicial intervention is necessary – the intermediary is informed by the right-holder that a particular file infringes on copyright, and the file is then removed by that content host. Through the privatisation of copyright enforcement, the ability for the courts to intervene and perform a fair use analysis appears to be significantly curtailed. If a fair use defence cannot be raised, and the Supreme Court has determined that copyright cannot be challenged under the First Amendment, then this gives significant room for private actors to suppress information contrary to their interests. In particular, the use of automated takedowns results in a scenario in which "code is law" (Lessig 2006). Lessig theorises that the role that code plays in Internet regulation will result in a shift in the way that copyright is protected. "Code can, and increasingly will, displace law as the primary defence of intellectual property in cyberspace. Private fences, not public law" (2006:175). This appears to be in line with the Citigroup example – an automated takedown/removal process is used to protect the memos, resulting in there being no need for legal action on Citigroup's part in order for the memos to be removed from the server. As there is no need for legal action, fair use cannot be raised as a defence. Because no defence can be raised, and because code is used to automatically remove information deemed as infringing on copyright, the ability of private citizens to censor through the use of intermediaries is significantly increased. As Patterson warned, "recall that copyright is a monopoly and that one of the factors of a monopoly is the right of the monopolist to control access" (Patterson 2000-2001:237).

That both examples deal with confidential information not intended for public release does not impact upon the potential public interest in those documents being released for the purposes of critique, and at least eligible for consideration under fair use. In the case of *Open Policy Group v Diebold* (2004), confidential and private emails between employees of

Diebold concerning irregularities with the machines used for voting in elections were leaked by an unknown source. These leaked emails were then uploaded to a number of websites, including that of the Open Policy Group. In order to suppress this information, Diebold sent notice-and-takedown requests to the intermediaries hosting or linking to these emails (Netanel 2008:115) – all complied, with the exception of Open Policy Group's. Judge Fogel, presiding, was very critical of Diebold's actions, stating that "the email archive was posted[…]for the purpose of informing the public about the problems associated with Diebold's electronic voting machines. It is hard to imagine a subject the discussion of which could be more in the public interest" (*OPG v Diebold* 2004:10). Similarities can be seen between this case and the Wikileaks and Citigroup cases – in one, the purpose of the disclosure was to expose the perceived misdoings of the US government, and in the second, the inner workings of a company that received a substantial amount of public funds in order to keep the company afloat. Furthermore, Judge Fogel made additional points that have been argued earlier in this work – that the purpose of Diebold's actions was to use copyright "as a sword to suppress the publication of embarrassing content" (2004:13), rather than protect a commercial interest in copyright, as Diebold had no intention of publishing this information itself. Instead, copyright was being used to prevent publication. Judge Fogel argued that this information was without doubt in the public interest, and copyright could not be used to prevent the publication of this information for the purposes of critique. Arguably, similar findings could be made in the Wikileaks and Citigroup cases, should they have been in a position to argue a fair-use defence.

A final example pertains to the 2008 US Presidential Elections. In February 2008, YouTube removed a campaign video by John McCain ostensibly following a request by Warner Bros, on the basis that it used the song 'Can't Take My Eyes Off You' (Modine 2008). According

to technology website The Register, by October 2008, McCain had experienced several YouTube campaign videos being removed on copyright grounds. The McCain campaign team became so frustrated that they sent a letter to YouTube, stating that the site is too quick to remove videos on copyright grounds, "based on overreaching copyright claims" (Modine 2008). According to the same source, the Obama campaign also suffered from repeated YouTube takedown requests based on allegations of copyright infringement. In 'Access Controlled' (Deibert, Palfrey, Rohozinski & Zittrain 2010), it is theorised that "given the rapid-fire nature of political campaigns, the 14 business days it can take to restore a video to YouTube may effectively constitute censorship" (2010:79-80). While it may be the case that some of the claims may have been in some way legitimate (although questionable under fair use), it is altogether too likely that at least some of the takedown requests may have been made by members of the opposite campaign group, or individual supporters of either candidate, in order to harm the chances of their political opposition. Access Controlled concurs with this view, stating, "it seems likely that we will see political rivals attempt to disable each other's online speech using spurious copyright claims" (2010:80). In this final example, the primacy granted to 'property' over 'political expression' is indicative of another way in which the decentred enforcement of copyright built upon the regulatory capitalism framework can potentially lead to private acts of censorship. In discussions regarding the decision of the Court of Appeal in *Eldred v Reno* (which lead to *Eldred v Ashcroft* at the Supreme Court), Patterson stated somewhat critically that the courts had not only accepted, but reaffirmed, publishers' arguments that copyright is a form of "garden-variety property […] moreover, copyright is treated as being as the top of the hierarchy of private property" (Patterson 2000-2001:227). Birnhack similarly believes that this conceptualisation of copyright as property is intimated in the *Eldred v Ashcroft* decision (2002-2003:1327). This view of copyright as property, it is submitted, is based in neoliberal economic theory, and

reflective of the importance placed on property rights more generally. As previously stated, a significant component of neoliberal theory is the increased marketization of life, with the prime role of the state being the protection of property rights. Increased protection of creative works, it is reasoned, would provide wealth not only for the creators of works, but also for society in a form of 'trickle down' effect – "neoliberalism valorised property which was used in the production of goods and services for sale in the market" (Robertson 2008:218), and through this commodification of creativity, greater general prosperity could be assured, given the neoliberal theory that the best way of distributing that product to the populace would be for intellectual property to be valorised as private property, thereby becoming more marketable. In support of this view is Tyfield, who argues that with the crisis in industrial profitability of the 1970s, capital started finding new areas in which to invest, in particular finance, services and "cultural industries" (Tyfield in Birch & Mykhnenko 2010:61).

Yet what does the adoption of a neoliberal conception of copyright mean for the suppression of speech online? According to some authors (Zimmerman 1986, Buskirk 1992, Samuelson 2002-2003) although there may not be an intent upon the part of nations and governments to create a copyright regime that may allow for censorship, increasingly they privilege these property rights to a degree that could foster censorship. For if the copyright holders "are allowed absolute control over the context in which (works) are reproduced, they will also be allowed a form of veto power over criticism by being able to withhold the object of interpretation" (Buskirk 1992:93). In this respect, the treatment of copyright as giving a strong property right allows right-holders (and potentially, non right-holders) the ability to control use of a copyrighted work as if it were the personal property of the complainant. With regard to the previously mentioned Citigroup memos, it meant that the memos could be

treated as personal property, and removed from the Scribd server, and in this instance, political ads removed from YouTube because of the use of music within those ads. Or, as Patterson put it, "to view copyright as protecting property is to subject its regulatory aspects to proprietary concepts and thus to minimise, if not defeat, the goal of public access" (1987:9). As cases such as *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston Inc* (1995) show, the right to speak also includes the right to decide "what not to say" (1995:573). In this instance, this meant that the organisers of a St Patrick's Day Parade could prevent the attendance of a gay rights group, on the grounds that they did not want the public to believe that the group's message may have originated with the event organisers. This is the principle, as Netanel states, that "the government may not compel speech that suggests affirmance of a belief with which the speaker disagrees" (2008:51). However, Netanel argues that this should not extend to the ability of musicians (and others) to be able to prevent the use of their work in events with which the musician disagrees (2008:51). Netanel makes the example of Nazi band White Pride playing a cover of "Won't Get Fooled Again", suggesting that the playing of this cover by White Pride would not lead the public to conclude that Pete Townshend is a Nazi sympathiser (2008:52). Nevertheless, these are ultimately issues of endorsement, or false endorsement, rather than of copyright and copyright infringement. If a legal action were to be brought by the artist or publisher, it would likely be brought on the grounds of false endorsement, or freedom of association, rather than on copyright infringement grounds. However, through the use of decentred self-regulatory regimes such as that of notice and takedown, the removal of such content can be more easily achieved by making a request to a content hosting service, rather than having to bring an action to the courts and seek injunction. If the content is removed to avoid appearing to endorse a political campaign through the use of a notice and takedown request, then copyright law, intended for the encouragement of the dissemination of information, is

being used to suppress information. By treating copyright as property, and allowing for the right-holder to control it as if it were property, then this allows for the suppression of speech, both by musicians interested in avoiding association with certain politicians, but also potentially by others intent on derailing an opponent's political campaign. As Patterson states, in the US fair use operates as a "free-floating doctrine of equitable reason" (1987:40). However, if a decentred enforcement system outwith state control ultimately precludes analysis of fair use, then the potential for inequitable results, and indeed censorship through copyright, is substantially increased.

Conclusions

What conclusions can be drawn from this analysis? While neoliberal theory would dictate that the number of regulatory institutions and the volume of regulation would decrease through the application of neoliberal policies, the reality has been that regulatory mechanisms have increased in number. However, in line with neoliberal theory, these regulatory institutions are self-regulatory private corporations, largely able to dictate the terms of their own regulation. Furthermore, the adoption of neoliberal conceptions of property in the field of copyright allows for the treatment of information as an absolute form of property. As the self-regulatory institutions with the ability to remove content from the Internet are under the obligation to remove material that infringes copyright, parties wishing to suppress information are able to do so through the targeting of the Internet intermediaries. As Seltzer argues, service providers act as effective chokepoints because laws such as the DMCA and E-commerce Directive shift incentives towards takedown (Seltzer 2011:4). In the environment fostered by regulatory capitalism, in which the ability to regulate is delegated and decentralised, copyright enforcement becomes diffused, operating through networks of actors. Because it takes the form of self-regulation, an approach encouraged within neoliberal theory,

ultimately the decision to remove embarrassing content perceived to infringe copyright is taken by a private entity. As has been demonstrated, this means that the ability to censor is not one held solely by the state; we have seen that the state can exert indirect influence through a network upon a content host, resulting in removal on the basis of copyright infringement rather than direct state censorship. We have seen private actors use takedown requests to remove embarrassing content hosted by a private content host in a way that limits the ability to raise a public interest fair use defence. Finally, we have seen numerous private actors use takedown requests based in discourse of property protection that can have the potential effect of suppressing campaigns of those running for public office. This demonstrates that this form of regulation is not vertical, but multilateral, and both state and non-state actors can exert this influence through a nodal relationship – however, in all cases, the decision is made through a self-regulatory mechanism, and one that fits effectively into the general theory of regulatory capitalism. It has been argued that it is wrong to think of neoliberalism as pitting state against market, and that in effect their goals may be aligned – the same may well be said for internet regulation generally, and copyright enforcement specifically.

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