Copyright and the First Amendment: Comrades, Combatants or Uneasy Allies?

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I have begun work on an article tentatively entitled "Copyright and the First Amendment: Comrades, Combatants or Uneasy Allies?" This piece attempts to take a different perspective on an issue which has already attracted the interest of a number of other scholars.

The apparent conflict is obvious. The Copyright Clause in the Constitution provides that "The Congress shall have Power ... To promote the Progress of Science..., by securing for limited Times to Authors ... *the exclusive Right* to their respective Writings...." However, the First Amendment famously provides that "Congress shall make *no law* ... abridging the freedom of speech, or of the press." Since the copyright laws permit the copyright owner to enjoin others from speaking or writing (or copying and distributing) certain words, music, photographs, audio-visual works and so forth, and to obtain monetary relief for such unauthorized acts, hasn't the Congress done precisely what the First Amendment seems to preclude – enacted legislation which limits the speech or writing of persons other than the copyright owner?

My article, and presentation, will proceed as follows. First, I will look to the learning that can be drawn from the history of these two provisions. Next, I will look at the goals of the copyright and first amendment regimes – seeking to identify those places where they clash, and then identifying the ways that these conflicts can be minimized by harmonization of those goals. Then, I will look to the internal mechanisms in the copyright regime – principally the idea/expression distinction, the fair use doctrine and copyright's supposed limited duration – that have been offered by courts to downplay the clash. Finally, I will discuss the situations where none of these solutions works – where "the rubber meets the road." I will offer mechanisms for identifying these situations, and explain why, when in doubt, the First Amendment should prevail.