

FAREWELL MADISON AVENUE

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The myth is that the First Amendment constructs the marketplace of ideas and expression.¹ Standing behind the Supreme Court's free speech jurisprudence like the shadow behind Alfred Hitchcock (always there and always substantial),² though, are the Court's copyright decisions. They have done more to affect the marketplace than the free speech decisions,³ which, if one becomes very serious about the jurisprudence, actually chart the ways in which government is at liberty to suppress speech. The momentous copyright decision that ought to be erased is Justice Holmes' *Bleistein v. Donaldson Lithographing Co.*,⁴ a decision, I realize, few constitutional law scholars have read. They should.

In *Bleistein*, the Court addressed what might seem like a mundane question to us today: whether a circus poster is covered by the copyright statute. The Court said, "Yes," and now bears the blame for turning Madison Avenue into a superpower, for million-dollar Super Bowl commercials with frog superstars, and for the mess some refer to as the Global Information Infrastructure (or, if they are feeling really smart and want to impress someone, the "GII").⁵ Bubbling underneath the decision (in the

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1. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

2. Cf. *Stewart v. Abend*, 495 U.S. 207 (1990).

3. See Marci A. Hamilton, *Copyright and the Constitution* (unpublished manuscript on file with author); Marci A. Hamilton, *Art, Distribution and the State: Perspectives on the National Endowment of the Arts*, 17 *Cardozo Arts & Ent. L.J.* (forthcoming 1999); Marci A. Hamilton, *Art and the Marketplace of Expression*, 17 *Cardozo Arts & Ent. L.J.* 167 (1999); Marci A. Hamilton, *Appropriation Art and the Imminent Decline in Authorial Control over Copyrighted Works*, 42 *J. Copyright Soc'y* 93 (1994); Marci A. Hamilton, *Four Questions About Art*, 13 *Cardozo Arts & Ent. L.J.* 119 (1994).

4. 188 U.S. 239 (1903).

5. For a discussion of the Global Information Infrastructure, see Bruce A. Lehman, Chairman, Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* (1995); see also Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 *Vand. J. Transnat'l L.* 613, 620-23 (1996); Jane C. Ginsburg, *Global Use/Territorial Rights: Private International Law Questions of the Global*

briefs) was a debate the Court elided to our detriment. The parties debated whether the Constitution's Copyright Clause, which appears in Article I, clause 8, section 8, could cover a mere advertisement. The poster creator (predictably) argued that posters are creative *enough* to be copyrightable while the poster users (predictably) argued that the posters were merely functional, and therefore couldn't be copyrightable. Justice Holmes "dealt" with the constitutional arguments as follows:

We shall do no more than mention the suggestion that painting and engraving unless for a mechanical end are not among the useful arts, the progress of which Congress is empowered by the Constitution to promote. The Constitution does not limit the useful to that which satisfies immediate bodily needs.⁶

Nice try, but the "useful arts" term mentioned in the Copyright Clause is referring to inventions, not writings, and nobody has ever argued that "bodily needs" have anything whatsoever to do with copyrightability. The dissent was much more on target when it said that the poster had "no other use than that of a mere advertisement, and no value aside from this function, [and therefore] it would not be promotive of the useful arts, within the meaning of the constitutional provision."⁷

The real question in the case was whether writings that are more functional than not can be protected under the Constitution and therefore those who own them can sue others who copy them. By winging the question, the Court opened the door to copyright protection for a mind-numbing list of what we now call "cultural" products and accordingly hang or display in our living rooms, for example, posters of Valvoline, Vaseline, and airplanes, not to mention B movies. It set the stage for the Court's meandering commercial speech doctrine, with its assumption that advertising speech is *valuable* speech. It also ensured that Madison Avenue would become a magnet for wealth, capable of charging a company that actually contributes products to the economy millions of dollars for taking pictures of those products. So, let's erase it (or at least flip it so the *Bleistein* dissent becomes the majority).

Information Infrastructure, 42 J. Copyright Soc'y 318 (1995).

6. *Bleistein*, 188 U.S. at 249.

7. *Id.* at 252 (Harlan, J., dissenting) (quoting *Courier Lithographing Co. v. Donaldson Lithographing Co.*, 104 F. 993, 996 (1900)).

It is 1903, and there is no copyright protection in advertisements because they are functional, not art. First, Madison Avenue remains the name of a thoroughfare in New York, never becoming an insiders' nickname for the advertising industry and its "admen." Without the river of money being poured into Madison Avenue, imagemakers do not become kingmakers. Political campaigns are not taken over by advertising but rather remain mildly boring but informative. People like Abraham Lincoln, unphotogenic and humble with nary a clue about managing their "image," continue to have a chance at being President. When your child says, "I want to be President someday," you can beam instead of making an immediate appointment with your family psychiatrist.

Without *Bleistein*, our art museums are much purer as well. Much of modern art can be blamed on *Bleistein*. Who thought of saying that the functional could be artistic first? Holmes or Duchamp? The idea for turning a urinal into art is right there between the lines of *Bleistein*. The same can be said about car bumpers, baby bottles, and Campbell's Soup can labels.

Best of all, we would not have been cursed with living in a time called "The Information Era." There would have been no doubt when computer software appeared from the primordial Industrial Age glop that it was *functional*, not a "literary work." There would be no cases referring to the "look and feel" of computer software (a scary concept all on its own)⁸ or its dissection, dessication, and rationation (or whatever the *Altai* court proposed in place of "look and feel").⁹ I would not have had to write a copyright article that included a section explaining what a "data structure" is.¹⁰

If Bill Gates or any other computer pioneer wanted to make billions of dollars on computer software, he would have had to make the case for its propertization from the ground up, instead of being able to piggyback onto the preexisting copyright system. *Before* these companies were worth billions of dollars and capable of taking over 52% of intelligent life on this earth, they would have had to chase down our nation's lawmakers, persuade them to write laws that would yield them billions (without hav-

8. See *Whelan Assocs. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1231 (3rd Cir. 1986).

9. See *Computer Assocs. Int'l v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992).

10. See Marci A. Hamilton and Ted Sabet, *Computer Science Concepts in Copyright Cases: The Path to a Coherent Law*, 10 Harv. J.L. & Tech. 239, 252 (1997).

ing billions for lobbying to get the billions, a barrier to entry if there ever was one), and write testimony that would explain why a guy with a torn t-shirt who has not showered in a week and who eats stale Ritz crackers three meals a day, but who just wrote a computer program, needs at least a million dollars to be prodded to write another one.

Only because of *Bleistein* does Wall Street see the following equation: the Internet = \$\$\$\$\$. If programs were not copyrightable, the "suits" never would have become interested in the hackers' activity or the Internet in the first place, and it would still be a free-for-all run by hackers who don't care about money because no one has explained to them yet how money works and why it is desirable. But for Justice Holmes' decision in *Bleistein*, Vice President Al Gore could not be claiming today to be the father of the Internet, because it wouldn't exist. (Or if he did, we would have real cause to wonder what was wrong with him.) Cyberspace would be groovy, not blue chip, and certainly not a tool for selling Beanie Babies. The top law schools would continue to treat copyright as a form of entertainment ambulance-chasing, and *U.S. News and World Report* would never think of ranking "intellectual property" programs. In fact, if this were not the "information era," *U.S. News* might not bother ranking graduate schools and their programs at all.

Copyright law could have continued to grapple with its own problems, without having to take on the computer confusion. Computer law would have been forced to evolve as an independent, sui generis legal system. This alone would be worth the erasure.

I have not yet arrived at the most impressive gain from erasing *Bleistein* from the books: The Disney Imperial Dynasty would be washed from history and replaced with an interesting historical figure, Walt Disney, who had a flair for drawing mice with clothes on. As soon as the Disney company transformed its creative holdings (two mice, a duck, and two rather drunken-looking dogs) into cash-seeking missiles, they would have lost the quality that made them copyrightable in the first place and become solely functional. Once they became functional, anyone could use them, and Disney would not hold a monopoly in those images. Without its monopoly, there would be no Euro-Disney, no Walt Disney World, no China Disney. Nor would I have had to take out a home equity loan to take my children on a one-week vacation to the Imperial Kingdom. If *Bleistein* were erased from the books, I would not have had to witness on C-SPAN

during a channel-surfing mishap the House suspend the rules and enact by unanimous consent (all two present saying "aye"), the Sonny Bono Copyright Term Extension Act,¹¹ which added twenty extra years of protection for all copyrightable works, mainly because Disney lobbied like crazy to keep their images from falling into the public domain.

No Madison Avenue, no Super Bowl commercial competition, no urinals in the art museums (outside of the men's rooms), no Global Information Infrastructure, no speculation regarding how much of the world Bill Gates can now take over, no Disney World. Don't wake me up just yet.

11. See 17 U.S.C. § 302 (1998).