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Free Speech and Copyright Law

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OVERVIEW

Free Speech implies the freedom to speak freely without any restriction or censorship. Article 19 of the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights (ICCPR) recognizes the right to freedom of speech as a human right. The ICCPR recognizes the right to freedom of speech as "the right to hold opinions without interference. Everyone shall have the right to freedom of expression". This right can be found in early human rights documents such as the British Magna Carta (1215) and The Declaration of the Rights of Man (1789), a key document of the French Revolution. According to John Stuart Mill's view the freedom of speech should be understood as a multi-faceted right that not only includes the right to express, or disseminate information and ideas, but also the right to seek information and ideas, and the right to impart information and ideas. Every right has got limitations so is the free speech which need to be fair, just and reasonable.

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Copyright is an exclusive right granted to original work for a certain time period for publication, distribution and adaptation of the work. After the specific period, the work enters in to public domain. There is no copyright to idea and applies only to expression of a particular idea. The main purpose behind granting the copyright is to protect the rights of the authors so that they can get economic benefits over their works. The protection granted to copyright will serve two purposes. One way the authors get benefited, in other way the creative knowledge will assist the welfare of the society. Copyrights were recognized long back under the Roman civilization, where a creator of a manuscript was considered to have rights over his creation. However, the rights only existed as long as the owner was in possession as the rights were similar to rights over tangible property. The basic principle of copyright is based on the “eighth commandment”–“Thou shall not steal.” With the invention of the printing press, the copyright assumed significance. The first Copyright Act was enacted in 1710 in England known as Statute of Anne. Thereafter, other countries around the world introduced similar statutes to protect the copyrights.

There is an inherent tension between copyright laws and free speech as copyrights restrict the ability of people when material is protected and there are legal limits on who can circulate or sell it. But the free speech advocates that there should be no restriction or censorship to freedom of speech. Other side of the argument is that copyright itself promotes free speech as there is no copyright to an idea. Any one can use the idea of a copyrighted material with different expression since there is no restriction to using the idea. As such it appears that there is no dichotomy in free speech and copyright.

The copyright and freedom of speech protected by the first amendment ran into unresolved state of conflict in USA. Article I, Section 8 of the US. Constitution gives congress the power, “to promote the Progress of Science

and useful Arts, by securing for limited times to authors.... the exclusive Right to their...Writings...” The Copyright Act year of the Act grants the copyright owner the exclusive right to reproduce, distribute, publicly perform and display certain works, and the exclusive right to create new works based upon the existing work for the life of the author plus 70 years. Infringers are liable for both civil and criminal penalties including imprisonment. The First Amendment guarantees to the citizens 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.” *Turner Broadcasting System, Inc., v. FCC, the Supreme Court of USA* by emphasizing the importance of First Amendment held that the heart of First Amendment is “the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.” This is exactly what copyright does. But in *Harper & Row, Publishers v. Nation Enterprises*, Justice O’ Connor’s emphasized that, “In our haste to disseminate the news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression.” Hence there was no conflict or tension between them. Further in *Eldred v. Ashcroft the US. Supreme Court* held that the Copyright Act does not violate the First Amendment, and should not be evaluated under the First Amendment framework. The Court’s position is based on the view that the Copyright Clause and First Amendment were adopted close in time. It would follow that the Framers must necessarily have considered copyright and free expression compatible. Copyright and freedom of expression are consistent because they both promote speech. Perhaps the most convincing of these arguments is that copyright, as codified, already reflects a balance between free speech and property rights. In other words, the conflict between copyright and freedom

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of expression has been ‘internalized’, and presumably solved, within the framework of the copyright laws.

The freedom of expression and information protected under Article 10 ECHR includes the right to foster opinions, as well as to impart, distribute and receive information without state interference. The provisions of the ECHR may be invoked directly before the courts of the states that are party to it, subject to review by the European Court. In Germany the free speech limitations over the copyright have been recognized long back with court decisions. In 1962, the Berlin District Court in *Maifeiern*, *Landgericht Berlin*, [1962] GRUR 1962 permitted an unauthorized re-broadcasting by West-Berlin television of parts of a news item produced in the German Democratic Republic, on the grounds that the freedom of expression guaranteed by Article 5 of the Federal Constitution provided an extra-statutory justification.

In India the freedom of speech is protected under Article 19 1(a) of Indian Constitution. There are some restrictions to the freedom of speech given in Article 19 (1) (2) which reads as follows: “ Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.” The copyright is protected under Copyright Act, 1957.

This book is a compilation of different scholarly articles dealing with free speech and copyright and this work attempts to bring out a better understanding of relation between copyright and free speech.

Prof. Steven J. Horowitz in “**A Free Speech Theory of Copyright**” describes how scholars and courts tried to resolve the tension between

exclusive rights in expression and free speech by adopting two approaches. But neither of these two approaches properly appreciate the constitutional balance struck at the framing between the Copyright Clause and the First Amendment. This Article develops a free speech theory of copyright inspired by this balance. The author advocates thinking of Copyright Clause's limits as free speech limits, giving them the force of an individual right.

“Media Policy and Free Speech: The First Amendment at War with Itself” by *Ellen P. Goodman* explains the contradictory approaches of communications policy pluralists and copyright pluralists. Communications Policy pluralists have sought government interventions in the marketplace in order to increase access to mass communications whereas the copyright pluralists by contrast have fought against regulatory interventions. The article forecasts the growing conceptual and strategic difficulties and the risk of collision between communications and copyright pluralists grows with changes in their regulatory agendas. The article shows how reconciling communications and copyright pluralists' First Amendment positions, and developing a new First Amendment jurisprudence, becomes more important as the pluralist agenda matures to include positions on net neutrality, unlicensed spectrum, and compulsory copyright licenses.

In this report **“Intellectual Property and Free Speech in the Online World”** by *Laura Quilter and Marjorie Heins* presents the details of the results of a survey of how 25 institutions, including universities, nonprofit service providers, and commercial service providers, are coping with a flood of cease and desist letters and takedown notices from copyright holders. It further explains the adverse effects of mass-produced takedown notices and documents. The paper also analyses how sections of the Copyright Act that protect service providers from liability in some circumstances have led to unjustified takedowns of online material and counterproductive penalties

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against students, and suggests a number of “best practices” that can help online providers to address the concerns of both their subscribers’ and copyright holders’ rights.

In the article **“The Moral Right of Integrity: A Freedom of Expression”** *Prof. Leslie Kim Treiger-Bar-Am* explains the integrity right directly within the doctrine of freedom of expression, and its principle of protection of speakers against distortion of their expression. The moral right of integrity allows authors to prevent certain modifications to their artworks. The right is maintained by the author even where the ownership of the copyright in her work has passed out of her hands.

Edward Lee in **“Freedom of the Press 2.0”** explains the historical development of the “freedom of the press” that led to the framers’ inclusion of the concept in the First Amendment. With the advent of the Internet copyright holders have increasingly invoked copyright law to regulate directly – indeed, even to prohibit- the manufacture and sale of technology that facilitates the mass dissemination of expression works. The core thesis of this article is twofold: (i) the framers understood the freedom of the press as the freedom of the printing press – a speech technology – to be free of intrusive governmental regulation, including restrictions on technology imposed under copyright law; and (ii) today, the Sony safe harbor operates as a “First Amendment safeguard” within copyright law that is designed to protect the freedom of the press and the development of speech technologies.

Prof. Neil Weinstock Netanel in **“New Media in Old Bottles? Barron’s Contextual First Amendment and Copyright in the Digital Age”** focuses mainly on copyright and its role in shaping public discourse in the digital arena. The article addresses copyright’s potential for burdening speech by focusing on incumbent mass media’s untoward use of copyright as a vertical restraint to stifle the new media that provides platforms for peer speech.

Prof. Ryan T. Holte in **“Restricting Fair Use to Save the News: A Proposed Change in Copyright Law to Bring More Profit to News Reporting”** examines the present condition of the media and the economic and public policies behind protecting news. He further discusses current means of protecting information through copyright and misappropriation law, before proposing a change in the Copyright Act to better allow the news industry to reap profits from top-caliber news reporting.

“Defending the Public Domain – The First Amendment, the Copyright Power, and the Potential of *Golan v. Gonzales*” by *J. Blake Pinard* presents the factual and procedural history of *Golan*, including its position in the context of the broader challenges being made to the current United States copyright scheme and argues that decision in *Golan v. Gonzales* is the Eldred potential realized – that *Golan* is the second step to Eldred’s first on the path to judicial enforcement of First Amendment protections abridged by the ever broadening grasp of copyright. The author suggests that the language of Eldred, the purposes behind copyright and the First Amendment, and the inconsistency of the alternative approach all support the conclusion that the Tenth Circuit in *Golan* properly interpreted the Supreme Court’s guidance in Eldred

Prof. Michael D. Birnhack in **“Global Copyright, Local Speech”** examines the intersection of copyright law and free speech on the global level. A normative evaluation of G© law shows that: it is detached from its previously underlying philosophies and is now void of a coherent theory, other than that of a trade ideology. The framework of G© is then applied to examine the conflict between copyright law and freedom of speech: while copyright has become global, free speech jurisprudence remained local. The result is that the answers given to the alleged copyright/speech conflict in some developed countries that copyright is the engine of free speech; do not necessarily fit other places.

I

A Free Speech Theory of Copyright

Steven J. Horowitz*

Copyright is a system of federal regulation that empowers private actors to silence others, yet no one seriously doubts that copyright is consistent in principle with the First Amendment freedom of speech. Scholars and courts have tried to resolve the tension between exclusive rights in expression and free speech in one of two ways: some appeal to copyright's built-in accommodations to suppress any independent First Amendment analysis, while others apply standard First Amendment tests to evaluate whether and where copyright becomes an unconstitutional burden on speech. Neither of these approaches properly appreciates the constitutional balance struck at the Framing between the Copyright Clause and the First Amendment. This Article develops a free speech theory of copyright informed by this balance. I advocate thinking of Copyright Clause's limits as free speech limits, giving them the force of an individual right.

Introduction

If the general case for copyright is an uneasy one,¹ the case for copyright in light of the First Amendment is harder still. How can a body of law that functions to

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empower private actors to restrict expression be accommodated within a constitutional order so committed to the liberty of the mind?² To date, the answers to this question have been unsatisfactory, primarily because they fail to properly appreciate the constitutional balance struck between the Copyright Clause and the First Amendment – or so I will argue.

My negative claim is that most attempts to square copyright with free speech suffer from one of two shortcomings. Some rely on the definitional coherence between free speech and copyright³ to conclude that copyright laws as they exist are presumptively constitutional and that the First Amendment is only implicated when Congress "alter[s] the traditional contours" of copyright law.⁴ But this approach confounds consistency in principle and consistency in practice, and it cannot provide sufficiently meaningful free speech limits on copyright. Others doubt copyright's "built-in First Amendment accommodations"⁵ and instead attempt to build free speech limits from the ground up. But doing so ignores the constitutional balance struck at the Framing, treating copyright like any other restriction on expression.

The Copyright Clause itself, I will argue, is an expression of First Amendment values, and it ought to be enforceable as such. In other words, the clause's internal limits – including, for example, originality⁶ – are not merely the formal boundaries of congressional power under the Copyright Clause but are instead free speech principles that warrant careful application. In some ways, this free speech theory of copyright is unremarkable, since it is consistent with the Court's view that "the Framers intended copyright itself to be the engine of free expression."⁷ At the same time, the free speech theory of copyright helps answer a number of complicated questions, from whether Congress can appeal to commerce or treaty powers to avoid Copyright Clause limits⁸ (it can't) to whether the Court's "traditional contours" approach in *Eldred v. Ashcroft* is consistent with its suggestion that copyright embodies free speech values (it isn't).

Part I explains why attempts to describe the First Amendment limits on copyright have thus far fallen short. I begin with a taxonomy of these attempts. Arguments ultimately fail in one of two ways, which I label, for simplicity, "accommodationism" and "unexceptionalism".⁹ The accommodationists overemphasize the Framers' vision of consistency between copyright and free speech, whereas the unexceptionalists

seem to ignore the constitutional balance altogether. Missing in these dueling accounts is an approach to Copyright Clause limits that embraces copyright as the engine of free expression, resisting the unexceptionalist impulse to treat copyright like any other kind of law, while recognizing the fact that Copyright Clause limits exist to protect free expression.

Part II outlines a free speech theory of copyright, which is an attempt to fill in this gap. I argue that the Copyright Clause imposes limits on congressional power that embody free speech principles, and these limits are a necessary condition – both historically, as a description of the motivations of the Framers, and analytically – for the coherence of copyright law and the First Amendment. The clause's limits are thus in a real sense free speech protections, and they should be enforced as such. Having established the importance of Copyright Clause limits, I describe how each of them ought to be applied in practice.

Part III considers the implications of the free speech theory of copyright for a central issue of constitutional copyright law: whether and how the Copyright Clause's limits apply externally to other enumerated powers. This issue is made especially salient by recent challenges to copyright-like laws concededly inconsistent with the Copyright Clause that have been passed pursuant to either the Commerce Clause or the Treaty Clause.¹⁰

I. Unexceptionalism and Accommodationism

Copyright law is a regulatory system that creates private monopolies in expression. A copyright holder can prohibit or permit the use of her copyrighted expression, or demand payment in exchange for a license.¹¹ Willful infringers may even be subject to criminal penalties,¹² including up to five years in prison for a first offense.¹³ In short, the copyright system enables pervasive restrictions on speech. At the same time, the First Amendment guarantees that Congress will "make no law . . . abridging the freedom of speech."¹⁴ The copyright system is thus in tension with free speech.

Indeed, the tension is even worse than this initial description suggests. In the abstract, copyright-infringing expression might be dismissed as "low-value" speech,¹⁵ deserving less protection than political or artistic expression, particularly if we imagine the kind of infringement that results in the sale of

pirated recordings of commercial works. But copyright law can block even core political speech, including the early release of excerpts of a former President's personal insights into a historic, political event.¹⁶ And while prior restraints are anathema to the First Amendment,¹⁷ injunctions are readily available in copyright.¹⁸ For example, a district court in 2001 issued a preliminary injunction barring the distribution of a critical retelling of *Gone with the Wind* from a slave's perspective.¹⁹ Copyright thus restricts political and artistic expression, and does so through civil damages, criminal penalties, and prior restraints.

This tension first caught the attention of copyright scholars in the early 1970s,²⁰ and it has resurfaced as an important issue over the past ten years as Congress and the Supreme Court continue to broaden the scope and term of the copyright monopoly.²¹ The ideas developed in this body of scholarship have been innovative and important. At the same time, however, all of the established approaches are either accommodationist, and thus insufficiently critical of copyright, or unexceptionalist, and thus insensitive to how the Copyright Clause makes the copyright system different from other restrictions of expression.

In this Part, I lay out the positions within the current debate, explaining why they ultimately share a common flaw. I begin with a discussion of categorical dominance, which characterizes the view that the best way to resolve the tension between copyright and free speech is to destroy it, making one system control in all cases. This view is in some ways a default position assumed before anyone thought to question the relationship between the two systems, to which the accommodationist and unexceptionalist positions might be thought to respond.

A. Categorical Dominance

The easiest way to resolve the tension between copyright and free speech is to say that one system controls in all cases. So, for example, perhaps the First Amendment trumps, and the whole Copyright Act is unconstitutional.²² There is a certain logic to this argument: yes, the Constitution's Copyright Clause suggests that, in 1789, a copyright system was constitutional, but the First Amendment amended the Constitution in 1791, and insofar as the Copyright Clause was inconsistent with the First Amendment, it was no longer law. Alternatively, perhaps the copyright system trumps, and thus the First Amendment is simply not

a concern. Or, more plausibly, copyright might be thought of as a form of *property* and thus altogether unrelated to free speech: a copier, on this account, 'looks more like a thief than a speaker.'²³

Neither of these simple solutions is satisfactory, however. Copyright cannot be inherently unconstitutional under the First Amendment: the Framers would not so indirectly repeal the Copyright Clause, especially given the strong presumption against implied repeal of constitutional provisions.²⁴ More to the point, the first Copyright Act and the Bill of Rights were both passed by the First Congress,²⁵ and the Supreme Court has said that "[t]his proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles."²⁶

The argument that copyright is not subject to First Amendment review has a bit more currency. Property rights restrict all kinds of speech, consistent with the First Amendment. The private owner of an amphitheater can select only those performers whose views she shares, and even a public school mail system may exclude a rival teachers' union.²⁷ Perhaps copyright is like an amphitheater. Just as excluding you from my amphitheater allows you to speak elsewhere, so too does excluding you from my expression allow you to express the same ideas in another way. This kind of argument – available alternate expressions of the same idea – led the D.C. Circuit to conclude that "copyrights are categorically immune from challenges under the First Amendment."²⁸

But this argument is flawed for two reasons. First, insofar as the argument relies on the claims that copyright is a form of property that does not restrict speech, it assumes its own conclusion.²⁹ While copyright law allows for property-like exclusion,³⁰ the contours of this entitlement are by no means intrinsic to the idea of copyright. In other words, that *our* copyright resembles property does not imply that any system of exclusive rights in expression is necessarily a system of property rights. For that matter, it is controversial to call copyrights "property" even within the current system.³¹ Even if it were not, that they are property does not imply that they do not restrict speech.

They are if anything a special set of property rights *about* restricting speech.³² Second, to the extent that the argument relies on the idea/expression dichotomy, it is an argument not for *immunity* but instead for *accommodation*. That is, copyright doctrine accommodates free speech through the idea/expression

dichotomy; presumably, were the dichotomy not part of copyright, we would worry about the freedom of speech. Thus, the D.C. Circuit's position might be recast: copyright doctrine incorporates free speech concerns, and thus, where there is no major doctrinal shift, there is no room for a First Amendment challenge.³³

Though categorical dominance – for either free speech or copyright – is a simple, logically available position, it has little support at this point. "Everybody knows" that the First Amendment and copyright are at least compatible in principle.³⁴ Everybody also knows, after *Eldred*, that copyright enjoys no categorical immunity from First Amendment scrutiny. But the core of the D.C. Circuit's version of immunity is still very much alive. Many, including the Supreme Court, believe that copyright doctrine incorporates free speech values and is therefore only subject to scrutiny where Congress "has altered the traditional contours of copyright protection."³⁵

B. Unexceptionalism

If copyright enjoys no special exemption from First Amendment scrutiny, then it is perfectly natural to want to treat copyright like any other restriction on expression – that is, to determine an appropriate level of scrutiny and to ask whether the government interest in restricting expression is sufficiently strong and the restriction is sufficiently tailored to its purpose. This unexceptionalist impulse has been the primary innovation in the literature on copyright and free speech over the past ten years.³⁶ Despite the scholarly coalescence around unexceptionalism, there is little agreement at this point as to how precisely to apply standard free speech doctrine to copyright's restrictions on expression. Though many approaches have been proposed, none seems to offer a coherent picture of the free speech limits of copyright.

An unexceptionalist might begin an inquiry into copyright and free speech with the question of whether copyright is a content-based or content-neutral restriction on expression. Standard First Amendment doctrine suggests starting here, since a regulation's purpose determines the appropriate level of scrutiny and, often, the outcome in a given case.³⁷ The question of content-neutrality has proven troublesome, however.³⁸ On the one hand, copyright liability attaches to expression by virtue of its content: you are liable when you burn and sell copies

of *Rubber Soul* but not when you burn and sell copies of your own recorded music. Thus, it seems natural to conclude that copyright is content-based. On the other hand, as much as liability depends on content, the copyright system is about economic incentives, not content.³⁹ The government expresses no preference for any given content through the copyright system;⁴⁰ it merely expresses an interest in preserving economic incentives for the production of expression.⁴¹

Professor McGowan has convincingly argued that there are no First Amendment standards or principles that judges "could actually use."⁴² Copyright, he says, cannot sustain the heightened scrutiny of a content-based restriction in part because there are free speech interests on both sides of a dispute.⁴³ The First Amendment is concerned with chilling speech, so "everyone is an upstream author."⁴⁴ A content-neutral approach is similarly riddled with difficulty. First, scrutiny of content-neutral laws is so deferential as to be almost nonexistent,⁴⁵ which has led Professor Netanel, for example, to suggest intermediate scrutiny under *Turner Broadcasting Sys., Inc., v. FCC*.⁴⁶ But *Turner* was about whether forcing cable to carry local broadcasts – a form of compelled speech – was constitutional,⁴⁷ and the *Eldred* Court rejected its application to copyright.⁴⁸

Even if *Turner* could be applied to any content-neutral restriction, many copyright suits cannot fit into the content-neutral mold. Famous examples include the Church of Scientology trying to suppress criticisms by claiming copyright infringement,⁴⁹ or Hilter's publisher blocking a 1930s English translation of *Mein Kampf* intended to correct the misleading official edition.⁵⁰ The examples need not be high-profile. The point is that at least sometimes copyrights are invoked selectively in order to silence viewpoints with which a copyright holder does not agree. When this happens, copyright seems not only content-based but also viewpoint-based.⁵¹ True, fair use will often preclude viewpoint discrimination by privileging criticism.⁵² But where a use of copyrighted material cannot fit under the fair use umbrella, and where a suit is brought in order to silence the views of the speaker, copyright looks a lot like viewpoint discrimination.

These arguments are all a bit confused, however, and with good reason. Copyright laws provide statutory rights of action, created by the government, but civil copyright suits occur between private parties.⁵³ At the state action level, copyright has little to do with *particular* content, but everything to do with content

in genera⁵⁴ – in some ways, statutes seem content-neutral and in others content-based. At the private party enforcement level, sometimes plaintiffs care about the viewpoints of putative infringers, and sometimes they care only about getting paid – depending on the particular suit, content-neutral, content-based, and viewpoint-based all seem available.⁵⁵ But while First Amendment doctrine regularly considers government motives,⁵⁶ questioning plaintiffs' motives is less familiar in the free speech domain, so it is unclear how and whether judges should toggle their free speech scrutiny. There are policy arguments for any of a number of unexceptionalist approaches to copyright and free speech,⁵⁷ but the interplay between the bodies of doctrine creates a morass out of which no clear principle emerges as the legally correct one.

C. Accommodationism

At this point, the Supreme Court seems to have rejected both categorical dominance and unexceptionalism in favor of accommodationism. Accommodationism describes the position that copyright doctrine incorporates free speech values such that First Amendment scrutiny is rarely necessary. So in *Harper & Row, Publishers, Inc., v. Nation Enterprises*,⁵⁸ for example, the Court explained that the idea/expression dichotomy, the right of first publication, and fair use all "embodied" First Amendment protections.⁵⁹

Accommodationism sits between categorical dominance and unexceptionalism on the spectrum of free speech limits on copyright. Like categorical dominance, and in particular like the categorical immunity of copyright from First Amendment scrutiny, accommodationism makes free speech challenges to copyright difficult, but like unexceptionalism, such challenges are not impossible. From its roots in a famous Article by Professor Nimmer⁶⁰ to its recent endorsement by the *Eldred* Court,⁶¹ the accommodationist position has recognized the important "definitional balance" between copyright and the First Amendment, afforded by copyright's built-in free speech accommodations.⁶² At the same time, Nimmer suggests that perpetual copyright⁶³ or restrictions on the reproduction of media capturing extremely important, newsworthy events⁶⁴ ought to be subject to First Amendment scrutiny. Similarly, the Court has suggested that scrutiny is warranted where Congress has "altered the traditional contours of copyright protection."⁶⁵

Comparing Nimmer's accommodationism to the Court's helps to reveal the problems with both. Nimmer, unlike the Court, would apply First Amendment scrutiny in special cases involving socially important expression even if the copyrights asserted were consistent with one hundred years of established copyright law. The outcome seems reasonable – there is something odd about a private party controlling and potentially blocking access to the only decent video of the Kennedy assassination – but the principle is confused. On what basis can Nimmer's account decide when we especially "need" access to an author's expression? Nimmer might suggest that we apply scrutiny where expression importantly contributes to the "democratic dialogue" in the "marketplace of ideas,"⁶⁶ but this approach is compelled neither by copyright nor the First Amendment. It is the dictum of a *particular* theory of the free speech, one that bears no special relation to copyright. Furthermore, even if we were to settle on a marketplace of ideas theory of the First Amendment, Nimmer's accommodationist approach may have somewhat unpredictable unexceptionalism at the edges. The Nimmer approach may just be a deferential standard of First Amendment review that loosens copyright protection when democratic dialogue so requires,⁶⁷ but determining when "democratic dialogue so requires" is a tricky inquiry to say the least.

On the other hand, the Court, unlike Nimmer, conditions constitutional review on a particular kind of congressional action, namely action that "alter[s] the traditional contours of copyright protection."⁶⁸ There are several problems to so limiting review. First, it implicitly relies on the argument that the constitutionality of legislation varies with age. A recent law and an identical decades-old law are importantly different – the latter is almost certainly consistent with the traditional contours of copyright, whereas the former may not be. Tradition is not a First Amendment value, and the constitutionality of legislation should not depend on a threshold tradition inquiry.⁶⁹

Second, the traditional contours approach provides Congress with an odd set of incentives. Congress can enact suspect legislation and avoid First Amendment review by legislating incrementally. Copyright term provides a helpful example. If Congress should want to increase the copyright term for existing and future works to life plus one hundred forty years, the best way to do so might be to introduce ten-year increases every year for seven years. Perhaps a longer time

horizon would be required, but as long as the time between new legislation is less than the length of each individual extension, the effect is the same as a single seventy-year increase: no new works would enter the public domain for seventy years.⁷⁰ This possibility shields suspect legislation from review while increasing the costs of legislation. The incentives under the traditional contours are problematic even if we assume that Congress has the best of intentions. Suppose that Congress wanted to improve the copyright system and was considering two options: one departs substantially from the current system but by every indication would be a significant improvement, another is a small change to the system but would be only a minor improvement. Because of the risk of unpredictable scrutiny of the more significant improvement, Congress might rationally choose either the less significant improvement or a slow, incremental move toward the more significant one. Either choice would likely be less socially desirable than directly legislating the more significant improvement.

Finally, the Court's focus on congressional action is hard to square with any kind of as-applied constitutional challenges to copyright, even some particularly troubling ones. If copyright is immune from First Amendment challenge so long as the "traditional contours" of copyright remain unaltered, then selective enforcement of long-established copyright law is constitutionally permissible. The viewpoint-discriminatory examples of *Mein Kampf* or the Church of Scientology above⁷¹ suggest that as-applied immunity might not be ideal, but an even stronger case occurs at the intersection of prosecutorial discretion and criminal copyright sanctions. Criminal sanctions are probably part of what the Court would consider the traditional contours of copyright, originally passed over twenty-five years ago and amended several times since.⁷² Whether to seek criminal sanctions for willful copyright infringement is up to the prosecutor, who has largely unchecked discretion.⁷³ Suppose a zealous prosecutor wanted to curry favor with an administration by seeking extensive criminal sanctions for the unauthorized copying and distribution of an embarrassing collection of letters the President wrote when he was young, while at the same time failing to prosecute a wide range of similar infractions with no political import. Insofar as the traditional contours of copyright remain unaltered in this example, *Eldred* suggests that scrutiny is unlikely. But at the same time, this smacks of the worst kind of First Amendment violation: the coercive use of the state's force to silence speech critical of the government. Faced with such a situation, the Court would

likely change its test rather than rigidly adhere to *Eldred* at the cost of liberty. At the same time, however, that *Eldred* cannot account for important as-applied constitutional challenges suggests that the Court's accommodationism might not be the best way to navigate copyright and the freedom of expression.

D. A Common Flaw

At this point, accommodationism and unexceptionalism are the two standard accounts of the free speech limits of copyright law, as categorical dominance cannot claim the support of the courts or a plurality of scholars. I have outlined these positions and some of their shortcomings above, but in addition to their particularized problems, they share a common flaw: neither accommodationism nor unexceptionalism properly appreciates the constitutional balance struck at the framing between free speech and Congress's Copyright Clause power. Accommodationism conflates constitutional accommodations with doctrinal ones, while unexceptionalism ignores that the constitutional balance means that copyright ought to be treated differently from other speech restrictions.

Copyright law includes a number of free speech accommodations. Some of copyright's free speech accommodations come from the Copyright Clause, including, for example, the requirement of originality.⁷⁴ But that the Copyright Clause embodies free speech principles says very little about the Copyright Act, or about a particular piece of copyright legislation, much less a particular application of copyright law. The *Eldred* traditional contours test conflates Copyright Clause accommodation with doctrinal accommodation by focusing on the shape of copyright law over time. It is entirely possible that the constitutional balance was properly struck but that, in practice, copyright legislation exceeded its constitutional bounds. If the built-in constitutional safeguards are the basis for forgoing First Amendment scrutiny, then the question should not be whether the challenged law is consistent with previous unchallenged laws but instead whether the challenged law is consistent with the Copyright Clause.

The traditional contours test relies on the following chain of reasoning: (1) the Copyright Clause includes built-in First Amendment accommodations;⁷⁵ (2) "traditional" copyright law is consistent with the Copyright Clause's built-in accommodations; (3) new copyright law that is consistent with traditional

copyright law is consistent with the Copyright Clause's built-in accommodations; and thus (4) new law that is consistent with traditional copyright law is consistent with the First Amendment. This reasoning is jarring for several reasons. Premise (2) is never stated but must be assumed for the argument to work – if traditional copyright law is inconsistent with the Copyright Clause, then any nexus between new and traditional law implies nothing about the First Amendment. As necessary as (2) is, it far from manifest. Constitutional challenges to copyright are a recent phenomenon,⁷⁶ so the fact that early copyright laws were not struck down is not persuasive evidence of their constitutionality.

Also, the terms of this syllogism are connected by *consistency* or *likeness*, not *identity*: traditional laws are consistent with the Copyright Clause, and this new law is like traditional laws, so this new law is consistent with the Copyright Clause – or so the argument goes. But consistency or likeness simply cannot make the syllogism work. Consider a similar but obviously flawed argument. A statutory copyright term of forty years is consistent with a constitutional provision restricting copyright terms to no more than forty years, and forty years and one day is like forty years, so forty years and one day is consistent with a constitutional provision restricting terms to no more than forty years. This example highlights an important principle: where traditional copyright law is just within Copyright Clause limits, a small incremental change may be unconstitutional.

Both of these problems with the implicit reasoning of *Eldred* are instances of a more general concern that traditional copyright law is entirely beside the point. Consistency with traditional law is a proxy for consistency with the Copyright Clause – a bad one – and traditional copyright law is at least two steps removed from the First Amendment. The built-in accommodations that make copyright cohere with free speech are in the Copyright Clause, not in copyright legislation. Thus, accommodationism, at least as expressed by the *Eldred* Court, fails to appreciate the constitutional balance between copyright and free speech.

Unexceptionalism similarly fails to appreciate the constitutional balance, but in a different, more straightforward way. The basic motivating premise of the unexceptionalist position is that copyright law is just like other laws that restrict expression. What "other laws" copyright is like has implications for the First Amendment standard an unexceptionalist might endorse, but the standard will

always come from the body of accepted First Amendment doctrine applied in other contexts. But copyright is simply *not like* other speech restrictions. The difference is that the Constitution expressly empowers Congress to regulate expression through a copyright system, whereas the Constitution is largely silent as to any other kind of regulation of expression.⁷⁷

The unexceptionalists rely on the constitutional balance even as they fail to incorporate it into their analyses. The First Amendment tolerates neither silencing speakers for the sake of encouraging more speech⁷⁸ nor favoring some speech or speakers over others, as copyright does, at least through the doctrine of fair use.⁷⁹ Any account of the free speech limits of copyright ought to explain how we can have a copyright system at all when its purpose is to restrict some expression in order to promote other expression. At least part of the answer is that copyright is supported by the Constitution and is thus different from other kinds of speech restriction. But if it is indeed different, the free speech analysis ought to account for what this difference is.

Of course, to say that copyright is different is not to say that a given unexceptionalist position is untenable. Unexceptionalists might argue that their position incorporates copyright's unique constitutional basis into the justification for a particular standard of review. But the priority of First Amendment values over copyright would suggest that, where compromises are to be made, free speech controls. In other words, it makes perfect sense for the First Amendment to dictate how copyright should work, but it makes less sense for copyright to dictate how the First Amendment should work.

To the extent that it recognizes the constitutional balance between the Copyright Clause and the First Amendment, unexceptionalism incorporates this balance into its application of First Amendment doctrine. Similarly, accommodationism uses the constitutional balance to interpret copyright doctrine. But the Framers' balance occurred at a constitutional level, so it reveals much less about copyright or First Amendment doctrine than it does about how to interpret the Copyright Clause. In what follows, I outline a free speech theory of copyright, which explains how the constitutional balance ought to control the application of the Copyright Clause and its limits.

II. A Free Speech Theory of Copyright

In this Part, I present a free speech theory of copyright. I argue that the Copyright Clause is itself an expression of First Amendment values, and that the clause's limits on congressional power ought to be carefully enforced as free speech protections. My theory is largely consistent with the Supreme Court's accommodationism, incorporating the Court's vision of copyright as the "engine of free expression"⁸⁰ with its "built-in First Amendment accommodations,"⁸¹ but it avoids the pitfalls of the "traditional contours" test of *Eldred*. To the extent that the limits of the Copyright Clause represent First Amendment principles, however, I argue that these limits have been significantly underenforced. This Part outlines how the constitutional balance ought to inform the application of Copyright Clause limits, including a novel approach to "promoting progress."

First, a note on methodology: This Part is not intended to be primarily originalist or textualist, though it does present evidence from the founding era and rely on the Constitution's text. Any originalist account is likely to be very thin – if we know one thing about the Framers' thoughts on the Copyright Clause, it is that they didn't think about it very much.⁸² Instead, the method is at once structural and analytic. It is structural in that it focuses on the interplay between constitutional clauses: the First Amendment and the Copyright Clause are in tension, and how we resolve this tension ought to inform copyright theory. It is analytic in that its starting point is a kind of conceptual analysis of consistency: what does it mean to say, as most scholars do,⁸³ that the Copyright Clause is consistent with the First Amendment? I argue that this consistency, combined with the priority of First Amendment values, suggests that the Copyright Clause ought to be interpreted to incorporate First Amendment values. I further argue that any approach that limits the independent application of First Amendment doctrine in the copyright domain must compensate with exacting enforcement of copyright's built-in free speech accommodations.

A. Reasoning from Consistency

To understand the constitutional balance between copyright and free speech, I begin with the idea of consistency. To the extent that commentators and courts have given up on categorical dominance, they implicitly or explicitly endorse the view that copyright and the First Amendment are consistent with one another.

Ultimately, therefore, the constitutional balance has to account for some kind of consistency, but precisely what kind and what this consistency means for copyright's constitutional limits are not easy questions. Some general forms of constitutional consistency are clearly ruled out. For example, we might say that the Bankruptcy Clause and the Second Amendment are consistent in that they are unlikely to provide conflicting commands in most circumstances.⁸⁴ But this kind of relationship – which is roughly no relationship at all – does not describe the one between the Copyright Clause and the First Amendment, since there is clearly some tension between these two clauses. Congress's power to regulate commerce, on the other hand, is consistent with its power to establish post offices and post roads in a different way: the powers are complementary and overlapping. Post offices and post roads help support commerce, and the commerce power alone might enable Congress to create post offices and post roads. While there is a sense in which the First Amendment and the Copyright Clause are complementary and overlapping, they do not seem to be consistent in the same way that powers over commerce and post roads are.

The consistency between the First Amendment and the Copyright Clause is not surprising given that they are both concerned with expression. The Copyright Clause provides for exclusive rights in writings in order to promote the arts and sciences,⁸⁵ and the First Amendment protects speech and the press.⁸⁶ The fixation requirement embodied in the Copyright Clause through the word "Writings"⁸⁷ means that the domains of expression captured by these two constitutional provisions are not coterminous, especially given the capacious meaning courts have given to First Amendment "speech" over the years.⁸⁸ But though the domains differ, both provisions are primarily about expression.

The consistency also comes with a priority of values. Wherever the domains of these two constitutional provisions intersect, First Amendment concerns ought to control because the First Amendment protection of free speech is a well-established individual right⁸⁹ whereas copyright is a congressional power, and a congressional power typically does not trump an individual right.⁹⁰ The intersection of these constitutional domains will not be the marginal case. Because the Copyright Clause and the First Amendment are both about expression, congressional action pursuant to the Copyright Clause will regularly

occur within the First Amendment domain. Therefore, Copyright Clause values are free speech values, because the priority of free speech subordinates copyright values that are inconsistent with the First Amendment.

The conclusion that Copyright Clause values are free speech values is consistent with the Supreme Court's view of the Copyright Clause. The Court has explained that "copyright's purpose is to *promote* the creation and publication of free expression,"⁹¹ and that "the Framers intended copyright itself to be the engine of free expression."⁹² Rewarding the author with an exclusive right is "a secondary consideration";⁹³ authors have no claim to exclusive rights in expression except where Congress deems such rights appropriate for promoting speech.⁹⁴ The Court's jurisprudence in this area is hardly surprising in light of the Copyright Clause's text, which empowers Congress "[t]o 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."⁹⁵

The theory that the Copyright Clause expresses First Amendment values finds some support in historical sources, at least insofar as the Framers saw copyright monopolies as incentives for expression rather than as a protection of some inherent property interest. Thomas Jefferson, for example, famously doubted natural rights in information: "If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea"⁹⁶ Madison saw exclusive rights as "encouragements to literary works," and thus "too valuable to be wholly renounced."⁹⁷ Indeed, in *Federalist* No. 43, he said that "the utility of this [Copyright Clause] power will scarcely be questioned,"⁹⁸ again focusing on the instrumental rather than intrinsic value of copyright. On the other hand, the Framers' endorsement of an instrumental account of copyright does not imply that they had free speech in mind. Protecting free speech, after all, is not the same as encouraging more speech, or even better speech. Still, these founding era sources are instructive. First, an instrumental view of copyright is at least *consistent* with a free speech theory of copyright, whereas an inherent property – based account might not be. Second, at least when Madison was writing, the Bill of Rights had not yet been presented to Congress, much less ratified, so one would not expect Madison to harp on free speech. He probably had in mind a much more robust general concept of liberty – of which freedom of expression was no doubt a part.

The claim that the Copyright Clause embodies First Amendment values is foundationally important, but in itself not novel. What makes the claim here distinct is its application: a free speech theory of copyright gives interpretive effect to the First Amendment values embodied by the Copyright Clause. Traditional approaches, like the Court's in *Eldred*, recognize the First Amendment principles latent in, say, the idea/expression dichotomy, but use that recognition primarily to suppress a separate free speech analysis.⁹⁹ I argue that the fact that the Copyright Clause embodies First Amendment values should not only suppress a separate free speech analysis but also enhance the Copyright Clause analysis, as the limits that clause imposes on congressional power are protective of free speech.

The approach I propose here – reasoning from consistency – has some support from the Court. Dissenting in *Eldred*, Justice Breyer explained that he "would take into account the fact that the Constitution is a single document, that it contains both a Copyright Clause and a First Amendment, and that the two are related."¹⁰⁰ Justice Breyer is of course not alone in advocating a structural approach, since the majority's traditional contours threshold depends on copyright's free speech accommodations. But Justice Breyer's approach, like the one proposed here, pays particular attention to the fact that "[t]he Copyright Clause and the First Amendment seek related objectives – the creation and dissemination of information. When working in tandem, these provisions mutually reinforce each other, the first serving as an 'engine of free expression,' the second assuring that government throws up no obstacle to its dissemination."¹⁰¹ This approach, which includes more careful review than the *Eldred* majority applied,¹⁰² is consistent with a free speech theory of copyright.

To summarize, the Copyright Clause is consistent with the First Amendment. Although the two clauses are about the same thing – expression – and might therefore in principle express conflicting values, the priority of First Amendment values suggests that the Copyright Clause must embody values consistent with free speech.¹⁰³ The view that the Copyright Clause embodies free speech values aligns with both Supreme Court precedent and the views of the Framers, and it is the foundation for a free speech theory of copyright. A free speech theory of copyright reads the humble Copyright Clause limits in light of their First Amendment heritage. Doing so, I argue, changes their constitutional valence.

B. On Built-in Accommodation

The Court has recognized that copyright contains "built-in First Amendment accommodations,"¹⁰⁴ a view consistent with the claim that the Copyright Clause ought to be interpreted to express First Amendment values. Because the clause accommodates free speech concerns, courts generally avoid a separate First Amendment analysis in copyright cases. As a result, the Copyright Clause itself primarily does the work of the First Amendment in the copyright domain. But the clause's limits, despite doing this important work, are not given the attention they deserve in light of their function as the primary protectors of free speech. In this section, I explain why Copyright Clause limits are free speech limits and ought to be enforced as such.

The Copyright Clause's built-in accommodations have affected First Amendment analysis in the copyright domain. The most striking example of this phenomenon is the view affirmed by the D.C. Circuit in *Eldred* that copyright is categorically immune from First Amendment challenge.¹⁰⁵ Although in *Eldred* the Supreme Court rejected this categorical approach in favor of an accommodationist one, the Court nonetheless suppressed any significantly distinct free speech analysis by invoking the traditional contours test.¹⁰⁶ This suppression is probably reasonable. An independent analysis in free speech terms is likely to be intractable, as I explained when considering the unexceptionalist position above.¹⁰⁷ And there might be situations where a law is consistent with the appropriate First Amendment test – if a proper test can be found – and nonetheless violates a Copyright Clause limit intended to protect free speech, or vice versa. What the outcome should be in such a case is hardly clear. Because the jurisprudence could easily be muddled by always conducting separate free speech and Copyright Clause analyses, the Court's approach seems reasonable in the abstract.

The problem with the Court's approach is that it is *doubly* deferential to copyright at the expense of free speech. It shrewdly avoids simultaneous Copyright Clause and free speech analysis, deferring to the constitutional balance struck at the Framing. But the Court also treats the Copyright Clause power like any other of Congress's powers, with a deferential standard of review. A good example here is the Court's deference to Congress in *Eldred* on the

question of whether a twenty year copyright term extension on preexisting works is consistent with the purpose of "promot[ing] . . . Progress."¹⁰⁸ The *Eldred* Court deferred to Congress and rejected the Copyright Clause challenge,¹⁰⁹ despite clear evidence that such an extension provided infinitesimal incentive gains while incurring large losses in public domain access to works.¹¹⁰

This doubly deferential approach ignores free speech altogether. If the Copyright Clause embodies First Amendment values in its limits such that an independent free speech analysis is typically unnecessary, then the clause's limits ought to be interpreted as implicating a fundamental right recognized by the Constitution. In other words, if the Copyright Clause's limits are in fact free speech limits – and the suppression of a distinct free speech analysis in this area suggests that they are – then they ought to have the force of the First Amendment. If the standard of review for Copyright Clause challenges is too deferential, then freedom of speech is left largely unprotected.

This doubly deferential approach may in part explain the unexceptionalist turn in the scholarship that began in the late Nineties.¹¹¹ During that period, it became obvious that copyright was becoming a "one-way ratchet,"¹¹² and Congress was fortifying copyright and "paracopyright"¹¹³ protections with increasing speed. Nimmer's classic accommodationism and the Court's apparent endorsement thereof may have been too conservative to provide a strong foundation upon which to attack a string of legislation that seemed, at least to the scholars attacking it, clearly problematic from a policy perspective.¹¹⁴ This unexceptionalist move was an important one, if only insofar as it helped to highlight the problem of the Court's double deference and the need for real free speech limits to copyright.

An approach that tightens those Copyright Clause limits consistent with free speech values accords with the principles that might have motivated the turn to unexceptionalism while avoiding its difficulties. Unlike unexceptionalism, such a free speech theory of copyright completely avoids the difficult and controversial question of whether copyright laws are content-based or content-neutral restrictions on expression. Also, reading free speech values into the Copyright Clause in order to tighten the clause's limits is largely consistent with the Court's accommodationism, whereas the dominant argument for *Turner* scrutiny (1) has

been squarely rejected by the Court¹¹⁵ and (2) relies on a case about compelled speech,¹¹⁶ the relevance of which in the copyright domain is questionable. A free speech theory of copyright also avoids the difficult problem Professor McGowan identified, that the First Amendment does not distinguish between adversaries in a copyright action because there are free speech claims on both sides.¹¹⁷ Read broadly through the lens of a free speech theory, the Copyright Clause limits tend not to give rise to competing free speech claims, though these limits do face some difficulties of their own – including the problem of giving effect to "promoting progress" – which I address in later sections.

Most importantly, a free speech theory of copyright gives voice to important First Amendment values by respecting the constitutional balance between the Copyright Clause and free speech struck at the Framing. Free speech is an important individual right, giving rise to specific prohibitions on Congress. In the copyright domain, reading the Copyright Clause's limits as an expression of this individual right protects free speech in a way that, unlike the unexceptionalist approach, can be consistent with the constitutional balance and can be put into practice without departing drastically from the Court's precedent.

Strengthening the Copyright Clause's limits as free speech principles is also consistent with an important aspect of First Amendment jurisprudence: the preference for overprotection. As Professor Strauss has pointed out, "the most significant aspects of first amendment law can be seen as judge-made prophylactic rules that exceed the requirements of the 'real' first amendment."¹¹⁸ In other words, the courts have restricted state power beyond what the First Amendment strictly requires. One example of a free speech prophylaxis is the Court's holding in *Love v. City of Griffin*,¹¹⁹ where an ordinance requiring city approval for distributing literature was struck down. *Lovell* turned on the absence of standards: the city manager might deny approval for benign or invidious reasons, but the Court refused to inquire into the city manager's reasons at all.¹²⁰ Thus, even though the First Amendment would permit some restrictions on expression that the city might impose – if, for example, the City Manager imposed a time, place, or manner restriction on all literature distribution¹²¹ – the Court declared the system facially invalid because it gave officials too much discretion. This principle of overprotection suggests that, given a choice between

an underinclusive narrow construction of Copyright Clause limits and an overinclusive broader construction, we should prefer the latter if only because of the importance of prophylactic rules for free speech.

Thus far, I have argued that the Copyright Clause's limits ought to be enforced more strictly, and that this is consistent with what I call a free speech theory of copyright. Indeed, not only is it consistent with a free speech theory, it is consistent with the very idea of built-in free speech accommodations: Courts should not be doubly deferential by suppressing independent First Amendment review of copyright law while deferring substantially to Congress on whether legislation is consistent with the Copyright Clause's free speech limits. But this general principle, while useful, does not yet give much practical guidance as to how a less deferential standard of review should operate in practice. I address this question in the two sections that follow, first with a consideration of how to interpret the specific prohibitions of the Copyright Clause, followed by an account of how to deal with the clause's preambular "promote progress" language.

C. Copyright Clause Limits in a Free Speech Theory of Copyright

The Supreme Court has long recognized that the Copyright Clause "is both a grant of power and a limitation."¹²² Under a free speech theory of copyright, the clause's limits must be interpreted in a manner consistent with the idea that Copyright Clause limits are in effect First Amendment limits, protecting a core, fundamental right of the Constitution. In practice, this means that courts should not substantially defer to Congress when legislation may conflict with the clause's limits. But because the Copyright Clause's various plausible limits are not equally determinate, the level of appropriate deference may vary.

I should note that, while the approach I outline in what follows is consistent with a free speech theory of copyright in that it takes seriously the idea that Copyright Clause limits are free speech limits, I do not believe mine is the only such approach available. Indeed, others may find it fruitful to consider whether a free speech theory of copyright could lead to a different, more (socially, politically, or legally) desirable set of constitutional standards. But because the previous scholarship on copyright and free speech has predominantly been accommodationist or unexceptionalist,¹²³ the standards below are at least the

first attempt to consider how a free speech theory of copyright might work in practice.

An analysis of Copyright Clause limits begins with the clause itself, which empowers Congress,

[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors ... the exclusive Right to their respective Writings . . . ,¹²⁴

The text of this clause plausibly supports at least five limits on congressional power, either through plain meaning or through law clearly established by Supreme Court. These five limits are:

1. *Promoting progress*: Congress can only create exclusive rights in expression where doing so would "promote the Progress of Science and useful Arts."¹²⁵
2. *Limited duration*: Exclusive rights in expression are only valid where they exist for "limited Times."¹²⁶
3. *Originality*: Because exclusive rights can only be secured to "Authors" of "Writings," some originality – which is at the heart of these terms – is required.¹²⁷
4. *Ideal "Expression Dichotomy"*: Consistent with the originality presupposed by the terms "Authors" and "Writings," Congress may not grant exclusive rights in facts or ideas, which "do not owe their origin to an act of authorship."¹²⁸
5. *Fixation*: Exclusive rights may only attach to "Writings," which even broadly construed requires fixation in a tangible form.¹²⁹

These limits are not all of the same kind. Limited duration and fixation are relatively clear rules with straightforward application,¹³⁰ and originality and idea/expression dichotomy – while complicated as to compilations of facts¹³¹ – typically require inquiry only into factual questions. Promoting progress, on the other hand, is a kind of unbounded norm that has to be informed by policy concerns, either by an unchecked legislature, a judge, or a factfinder.¹³² Because

(1) is thus very different from (2), (3), (4), and (5), I treat it separately. I first address the latter set, which I call the "specific prohibitions," and then turn to the former, on promoting progress.

1. Specific Prohibitions

A free speech theory of copyright reads Copyright Clause limits as First Amendment limits, jealously guarding the individual right to free speech. Four of the Copyright Clause's limits are specific prohibitions in that they state a prohibition as a rule rather than a standard. I use "rule" in a conventional sense, where the content of the law's command is clear *ex ante*, such that legal judgments are determinately constrained in cases to which the rule applies.¹³³ The Copyright Clause prohibits perpetual exclusive rights (limited duration), rights in non-original expression (originality), rights in ideas or facts (idea/expression dichotomy), and rights in expression not fixed in a tangible medium (fixation). A free speech theory of copyright suggests, as a threshold matter, that these four prohibitions ought to be enforced and that at the margins courts should err on the side of overenforcement.

Before elaborating how a free speech theory guides the application of the specific prohibitions, I should note an important objection: to the extent that I merely suggest that specific constitutional prohibitions ought to be enforced, a free speech theory of copyright contributes nothing new to the constitutional conversation. After all, it has been clear since at least 1938 that courts give less deference to legislatures "when legislation appears on its face to be within a specific prohibition of the Constitution."¹³⁴ And in the 1879 *Trade-Mark Cases*,¹³⁵ the Court held that the Copyright Clause could not sustain trademark legislation because trademarks cannot meet the originality requirement.¹³⁶ So even as to the Copyright Clause's application, the instant theory's contribution is limited.

There are three reasons, however, that a free speech theory of copyright is not an empty contribution to a discussion of specific prohibitions. First, the Court has not held that all of the Copyright Clause's specific prohibitions are constitutionally required – it has not yet squarely addressed the fixation requirement, for example.¹³⁷ Though the famous footnote four of *Carolene Products* might suggest that the prohibitions should all be strictly enforced, one could plausibly read that standard's application as limited to individual rights – "such as those of

the first ten Amendments"¹³⁸ – rather as having force in the interpretation of Congress's enumerated powers. Second, even if the threshold recommendation that Copyright Clause limits be enforced is insufficiently novel, a free speech theory of copyright provides the additional insight that courts should err on the side of overenforcement, an important contribution to constitutional copyright law. Third, the fact that my account treats the Copyright Clause's specific prohibitions as free speech limits on my account suggests that they may have some external application to congressional action outside the Copyright Clause – a possibility I explore in detail in Part III.A.

I now turn to the question of how a free speech theory of copyright guides the application of the Copyright Clause's specific prohibitions. First, as I have mentioned, a free speech theory of copyright suggests that all of the clause's specific prohibitions ought to be enforced. This recommendation is consistent with Supreme Court precedent, as the Court has either said or held that limited duration,¹³⁹ originality,¹⁴⁰ and the idea/expression dichotomy¹⁴¹ are constitutionally required. That the Court's approach is thus consistent with recommendations of a free speech theory of copyright is one of the theory's virtues, since any theory of a body of law ought to fit much or most of that law.¹⁴² Whether fixation is constitutionally required is less clear in the Court's jurisprudence, though helpful dicta suggest that it is.¹⁴³

One can imagine various situations that test the application *vel non* of the Copyright Clause's specific prohibitions. For example, the fixation requirement could be tested by an extension of copyright to unauthorized recordings of live performances.¹⁴⁴ The law could gesture at fixation by limiting its application to those performances that are simultaneously recorded by the performer, operating in much the same way that copyrights in live broadcasts of sports events do.¹⁴⁵ The law would make one who produces an unauthorized recording of a live performance liable to the performer where the performer simultaneously produces a recording of the performance. Such a law would violate the fixation requirement in that the thing protected is not the performer's own recording – which under current law would be protected¹⁴⁶ – but the performance, which is not fixed. A free speech theory of copyright, which strictly enforces the specific prohibitions of the Copyright Clause, suggests that such a law is not within Congress's Copyright Clause power.

A free speech theory suggests not only that specific prohibitions ought to be enforced but also that they should be overenforced at the margins; when Congress tiptoes on the boundaries of its constitutional power, courts should err on the side of caution. This recommendation is consistent with the view that First Amendment doctrine contains prophylactic rules that overprotect free speech.¹⁴⁷ It is also consistent with the Framers' general aversion to monopolies,¹⁴⁸ as it gives the fullest possible force to the limits the Framers placed on Congress's Copyright Clause power.

Had the Court adopted a free speech theory of copyright, with its attendant prophylactic application of specific prohibitions, it might have decided *Eldred* differently. In *Eldred*, the petitioners challenged the Copyright Term Extension Act's extension of *existing* copyrights as inconsistent with the limited duration requirement.¹⁴⁹ The Court, in a perfectly reasonable textual analysis, held that the extension was "limited," that is "confined within certain bounds," "restrained," or "circumscribed."¹⁵⁰ But if Congress were to extend existing copyrights by twenty years every twenty years, then copyrights would *not* be of limited duration. The Court implicitly assumed that Congress had no intent to extend existing copyrights perpetually in twenty-year increments. Had the legislative history included clear statements to the contrary – say, incredibly, if every member of Congress stated his or her intent to dodge the limited duration rule by incrementally increasing the term – the outcome might have been different.¹⁵¹

The Court's assumption that Congress does not have unconstitutional motives would seem out of place in the First Amendment context. In *Love*, the city manager who had unbridled discretion to approve or deny the distribution of literature could have denied the petitioner for constitutional reasons – for example, by imposing a reasonable time, place, or manner restriction.¹⁵² But the Court is wary of discretion, which can be used to silence unpopular views, and thus a system like the one in *Love* cannot be sustained. Similarly, Congress could extend existing copyrights without any intent to provide perpetual protection, but it could also hide its motives behind incremental legislation just as the city manager of *Lovell* could hide viewpoint discrimination behind discretion. Because a free speech theory of copyright recommends prophylactic overenforcement, it suggests that the *Eldred* Court's textualist approach may have been insufficiently protective of the free speech interests expressed by the limited duration requirement.

The Copyright Clause's requirements of originality and the idea/expression dichotomy are clearer candidates for prophylactic protection than is limited duration. While originality and idea/expression are specific prohibitions, they are certainly closer to the "standards" side of the rules-standards spectrum than limited duration is,¹⁵³ which means that Congress may have more wiggle room. Additionally, a doctrine that hangs on the existence of "facts" or "ideas" apart from their expression or creative interpretation is tenuous in an age that recognizes the role of ideolog¹⁵⁴ and cognitive bias.¹⁵⁵ If one combines the kind of deconstructive insight that sees expressive originality in compilations of facts with the idea that "deconstruction must start everywhere at once,"¹⁵⁶ one could reasonably conclude that there is originality in any expression. Were Congress to so conclude and legislate accordingly, broadening copyright laws to cover what was once considered non-original or factual, a court employing a free speech theory of copyright would strike down the legislation.

One might argue that importing First Amendment prophylactics into the Copyright Clause domain is inappropriate because it is not clear that overenforcement of the clause's limits is consistent with free speech. The Copyright Clause exists to promote speech, and it does so through a delicate balance of entitlements and limits. Overenforcement of the clause's limits favors some speakers – those who would use otherwise copyrighted expression – over others. But given that anyone is potentially both a user and a speaker, it is "very hard to argue coherently that copyright is too generous to upstream authors and too mean to downstream authors."¹⁵⁷ Barring original intent to the contrary, we ought neither to overenforce nor to underenforce constitutional limits. The Framers protected free speech with limits on Congress's Copyright Clause powers, and free speech is best protected by a straightforward reading of those limits – or so the argument goes.

But this argument assumes that congressional "generosity" and "miserliness" are to be treated equally for the purposes of the First Amendment.¹⁵⁸ This is not the case: the Court patrols government restrictions on speech much more carefully than government subsidies of speech. This is the message of cases like *National Endowment for the Arts v. Finley*¹⁵⁹ or *Rust v. Sullivan*,¹⁶⁰ where the Court gave Congress "wide latitude" to make content-based determinations for the allocation of federal funds, so long as the 'legislation does not infringe on

other constitutionally protected rights."¹⁶¹ Where the denial of a government benefit is interpreted to be a *penalty*, however, the Court conducts a searching First Amendment inquiry.¹⁶² If the First Amendment required "not that everyone shall speak, but that everything worth saying shall be said,"¹⁶³ then the McGowan-based critique of a free speech theory of copyright would make sense: seeking the optimal amount of *expression*, we would not know which speakers to favor. But we know from the subsidy/penalty line of cases that the First Amendment inquiry into restrictions on speech – like damages and injunctions are for users of copyrighted works – is more exacting than the inquiry into restrictions on how the government may distribute a benefit – like an exclusive right in expression is for a copyright holder.

A free speech theory of copyright acknowledges that the Copyright Clause's limits are free speech limits. Four of these limits are specific prohibitions, and because these prohibitions do some of the work of the First Amendment in the copyright domain, they ought to limit congressional power. Indeed, consistent with First Amendment doctrine, courts should err on the side of overprotection. But one of the Copyright Clause's limits – promoting progress – cannot be called a specific prohibition, since its application requires that judges engage in normative analysis.¹⁶⁴ Thus, overenforcement of this limit is likely inappropriate. The promoting progress limit requires a different kind of analysis, to which I now turn.

2. Congressional Motives and Promoting Progress

The Copyright Clause empowers Congress to grant exclusive rights in the expression: "To promote the Progress of Science and useful Arts."¹⁶⁵ The constitutional valence of this preambular language is unclear on the Court's jurisprudence – it clearly suggests the purpose of copyright that the Framers had in mind, but whether it should limit congressional powers is unclear.¹⁶⁶ Because promoting progress is itself a free speech ideal – indeed it is the reason the Framers were willing to stomach otherwise objectionable monopolies on expression¹⁶⁷ – it ought to do at least some work in a free speech theory of copyright. At the same time, applying the promoting progress limit poses difficulties that are less salient in the specific prohibitions context, including countermajoritarianism¹⁶⁸ and institutional competence.¹⁶⁹ A reasonable account

of a free speech theory of copyright might therefore substantially defer to congressional judgment as to what promotes progress – as the Court says that it should – but at least police legislation for clear mistakes, where Congress cannot reasonably assert that a given law promotes progress.

Eldred further complicated the interpretation of the promoting progress limit. In *Graham v. John Deere Co.*,¹⁷⁰ for example, the Court said, "Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim."¹⁷¹ This suggests that there are limits to the Copyright Clause power, potentially including the limit that Congress must "implement the stated purpose" of the clause. But in *Eldred*, the Court said petitioners acknowledged that promoting progress was not "an independently enforceable limit on Congress' power," but instead "the sole end to which Congress may legislate."¹⁷² What could it mean to say that promoting progress *is* not a limit but *is* the sole end? Further muddying the waters, the Court then conducted a (very deferential) review of whether the Congress enacted the CTEA to promote progress,¹⁷³ suggesting that promoting progress *is* a limit of some kind. Based on the Court's approach, it seems that (1) Congress may *only* provide exclusive rights in expression for the purpose of promoting progress, but (2) the Court will generally defer to Congress on how best to promote progress.¹⁷⁴ Proposition (1) seems straightforward and consistent with a free speech theory of copyright, since it gives substance to the Copyright Clause's preambular language, which captures the tradeoff between exclusivity and free expression. But (2) is more challenging on a free speech theory: what level of deference is appropriate when examining congressional motives behind legislation that restricts speech?

Purpose-based inquiries are standard fare in First Amendment law, despite puzzling statements from the Court, such as, "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."¹⁷⁵ Indeed, Dean Elena Kagan has argued that this body of law "has as its *primary*, though unstated, object the discovery of improper governmental motives,"¹⁷⁶ and some would argue that the same is true for all rights.¹⁷⁷ I believe that Dean Kagan's view correctly describes First Amendment law. First Amendment scrutiny divides into

tiers based on government motives: where the government limits speech in order to silence a viewpoint with which the government disagrees, the Court will almost certainly find a First Amendment violation.¹⁷⁸ Similarly, only laws narrowly tailored to compelling interests, i.e., motives, can justify content-based restrictions,¹⁷⁹ perhaps in part because we worry that the government is regulating content because it disapproves of a speaker's views.¹⁸⁰ Motives both trigger the level of scrutiny and comprise the appropriate analysis of speech-restrictive laws.

Regardless of whether the purposive account is the correct one for the First Amendment in general, it invites ready application in the Copyright Clause context. One can largely ignore the question of whether copyright legislation serves a compelling, substantial, or legitimate state interest, since the Copyright Clause both justifies congressional motives – Congress can of course provide exclusive rights in expression for the purpose of "promoting progress" – and limits them, since Congress may not provide such exclusive rights for other purposes under the Copyright Clause. The Court has deferred to Congress as to whether legislation *best* promotes progress,¹⁸¹ but that does not imply that the Court should allow Congress act on other motives. Because the promoting progress limit is a free speech limit, and because free speech rights are vitally important, Congress should not be left to police its motives alone – Courts and Congress *both* should consider whether legislation is intended to promote progress, which suggests a meaningful role for judicial review.

At the same time, it is important to acknowledge that courts are likely not best suited to evaluate whether legislation actually does promote progress. A kind of Thayerian minimalism is thus appropriate:¹⁸² at least as to whether copyright legislation promotes progress, courts should review legislation only for clear mistake.¹⁸³ Such deferential review may help to remind Congress that it is generally responsible for making sure that copyright laws are constitutional,¹⁸⁴ and it would largely quiet fears of the countermajoritarian difficulty,¹⁸⁵ since the important job of determining how best to "promote the Progress of Science and useful Arts"¹⁸⁶ would be left to the political branches in all but the most extreme cases.

But courts should not be forced to ignore evidence of ulterior motives. Where copyright legislation is motivated by something *other than* and *inconsistent with* a desire to promote progress, then the legislation should be struck down. If the Copyright Clause is to provide a limit at all, it must limit the purposes to which Congress can apply its Copyright Clause power. Where Congress has inappropriate purposes in mind – whether they be to satisfy a powerful lobby or to protect a proprietary ideal¹⁸⁷ – its legislation cannot stand on the Copyright Clause. Institutional competence is not nearly as salient a concern where the question is the *content* of Congress's purpose as where the question is Congress's *success* in achieving its purpose. Less deferential review of the content of congressional purposes therefore seems fitting. But because Congress's political accountability at least by assumption protects against illicit motives, review should not be too strict. A straightforward approach on a free speech theory of copyright might ask whether the relevant evidence could reasonably support the conclusion that copyright legislation is intended to promote progress.

This recommendation must address an important counterargument: what could it mean to say that Congress has illicit purposes "in mind"? After all, both the federal government and its constituent branches are probably best thought of not as unitary Leviathans but as a collection of political officials with competing and conflicting motivations.¹⁸⁸ An initial but unsatisfying response might be to say that the problem of attributing motives to Congress is not unique to this free speech theory of copyright analysis. If the theory is to be a good one, then it should recommend good rules, not simply rules that are equally bad as those we have in other contexts. I think a more reasonable response is that, while it may be logically incoherent to describe Congress as motivated in any particular way, it is nonetheless a useful heuristic for judicial review of legislative purpose. Judges should by and large leave it to Congress to decide what best promotes progress, but if there is substantial evidence that most legislators had nothing like progress in mind, then invalidation is less objectionable precisely because legislators who do not seek to promote progress and indeed seek to satisfy goals *inconsistent with* promoting progress are unlikely to promote progress. In other words, courts should assume that legislators basically succeed in achieving their purposes, and if their purposes are inconsistent with constitutionally required ones, then courts may conclude that legislators failed to satisfy their constitutional obligations.

The basic structure, therefore, of a free speech theory of copyright suggests the following approach to the promoting progress limit of the Copyright Clause. Promoting progress should be a real substantive limit on congressional power, and legislation should be reviewable for whether it does in fact promote progress. At the same time, however, judges should practice a kind of Thayerian minimalism when reviewing whether legislation in fact does promote progress, for reasons of institutional competence and of countermajoritarianism. But when Congress has motives inconsistent with promoting progress—which is to say that something like a majority has such motives—then judicial review should be more searching. Such an approach is consistent with First Amendment law, which focuses on impermissible government motives.

III. The External Force of Copyright Clause Limits

Having outlined the contours of a free speech theory of copyright, I now turn to a pressing issue in constitutional copyright law: the external application of Copyright Clause limits on Congress's other enumerated powers. This issue is made particularly salient by a set of cases challenging the copyright or copyright-like laws in the Uruguay Round Agreements Act (URAA).¹⁸⁹ In these cases, a central question is whether Congress can avoid Copyright Clause limits by legislating pursuant to the Commerce Clause or some other source of power. A threshold question is whether there is any situation in which the clause's limits ought to apply externally. If so, a more challenging question is when a law is sufficiently copyright-like for the limits to apply. This Part sketches answers to both of these questions.

A. The Problem: Legislating Copyright Outside of the Copyright Clause

Before addressing how the Copyright Clause might limit legislation purportedly enacted pursuant to Congress's other powers, it is important to understand the complexities of the problem. It is unlikely that the Framers had the problem of external application in mind, since they probably would not have imagined copyright laws passed pursuant to the much weaker Commerce Clause of our nation's early years.¹⁹⁰ And while the treaty power might have supported copyright legislation, information goods were not then of the kind of

international significance that they are today. But with the expansion of the Commerce Clause and the globalization of trade in information, both the commerce and treaty power seem sufficiently powerful to support copyright legislation. The question is whether Congress can avoid Copyright Clause limits – like limited duration or originality¹⁹¹ – by citing either of these alternative powers.

One simple approach to this problem is to evaluate each power separately, where the failure of one enumerated power does not preclude appeals to another. For example, the Copyright Clause does not specifically empower the Congress to coin money, but no one would argue that this precludes Congress from doing so.¹⁹² A more realistic example is *Heart of Atlanta Motel v. United States*¹⁹³ where the Supreme Court held that even though Congress could not require equal treatment in accommodations under the Fourteenth Amendment,¹⁹⁴ it could nonetheless require such treatment under the Commerce Clause.¹⁹⁵ The Copyright Clause cannot apply externally to *all* laws, for example, by imposing a "promote progress" requirement on federal criminal law.

At the same time, however, the other extreme case is equally clear. Congress cannot pass what is clearly copyright law pursuant to another power simply to avoid the limits of the Copyright Clause. An analogous case here is *Railway Labor Executives' Ass'n., v. Gibbons*.¹⁹⁶ In *Gibbons*, Congress passed a law specifically directed at a particular bankruptcy case, directing the trustee to pursue a specified course of action.¹⁹⁷ But the Bankruptcy Clause of the Constitution imposes a uniformity requirement,¹⁹⁸ so Congress could not claim to pass such a tailor-made intervention under that clause. Even though contemporary Commerce Clause jurisprudence would otherwise support the *Gibbons* law, given that the law in question was clearly a *bankruptcy* law, the Court held that Congress could not dodge the uniformity requirement.¹⁹⁹

Gibbons is an unusual case in which Congress was clearly trying to dodge a constitutional requirement, but cases that involve external application of constitutional limits will not always be so clear. What made *Gibbons* an easy case was that the law in question was concededly a bankruptcy law insofar as it specified how a bankruptcy trustee should distribute the assets of a given estate.²⁰⁰ But not all expression-promoting laws are copyright laws,²⁰¹ nor are all exclusive rights in information within the scope of the Copyright Clause.²⁰² An

important question, therefore, is when a law becomes sufficiently like copyright law to be subject to Copyright Clause limits.

As intellectual property has become an increasingly international concern,²⁰³ the question of external application of Copyright Clause limits has become even more complicated. Congress cannot cite one enumerated power simply to avoid the limits of another, but is the treaty power so constrained?²⁰⁴ In other words, if the President negotiates a treaty and the Senate ratifies it, would congressional implementing legislation be subject to Copyright Clause limits? This is a difficult question. Treaty-implementing laws that contravene specific constitutional prohibitions are invalid,²⁰⁵ but treaty-implementing laws that simply extend beyond Congress's enumerated powers are constitutional.²⁰⁶ The copyright and copyright-like laws of the URAA, which implemented the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs),²⁰⁷ thus pose an interesting problem, at least insofar as they are inconsistent with Copyright Clause limits. If the clause's limits are treated like specific constitutional prohibitions, then the parts of the URAA that exceed those limits are invalid. But if the limits are treated simply as the boundaries of Congress's Copyright Clause power, then the URAA should not be subject to Copyright Clause scrutiny at all.

This preliminary survey of the problems of external application of Copyright Clause limits has identified two kinds of difficulties. First, as to legislation passed pursuant to Congress's other enumerated powers, we must ask (1) whether Copyright Clause limits ought to apply externally at all, and (2) if so, when a law is sufficiently copyright-like to warrant Copyright Clause scrutiny. Second, as to treaty-implementing legislation, we must ask whether Copyright Clause limits are the kind of specific prohibitions that should affect the scope of the treaty power.

B. A Case Study: Anti-bootlegging LAWS

To see how these problems play out, it is helpful to consider particular examples. Here, I focus on the anti-bootlegging laws enacted under the URAA.²⁰⁸ These laws, which implement parts of TRIPs, impose both civil and criminal sanctions on those who make unauthorized recordings of live performances. These present all of the difficulties mentioned above: First, they contain provisions that certainly

violate Copyright Clause limits, if those limits apply. Second, they are like copyright laws, but not so much so that they can lightly be called copyright laws. And finally, they are part of treaty-implementing legislation. In addition to presenting all of these problems, these anti-bootlegging laws have added benefit of precedent, as federal courts in three circuits have addressed their constitutionality.²⁰⁹

The URAA's anti-bootlegging provisions clearly violate the Copyright Clause's limits, if those limits apply. The easiest case is limited duration: the anti-bootlegging laws do not specify a term for their protection,²¹⁰ so they can in principle impose sanctions perpetually on those who traffic in unauthorized recordings, even after the copyright term would have expired. Fixation is also a concern, since the anti-bootlegging laws protect performances rather than expression fixed in a tangible form.²¹¹ If Congress were to pass a law providing copyright protection for all time in unfixed expression, courts would almost certainly invalidate it as beyond Congress's Copyright Clause power. But the anti-bootlegging laws are not, or at least not explicitly, copyright laws,²¹² so whether the clause's limits ought to apply is not an easy question.

So far, the courts that have addressed the constitutionality of the anti-bootlegging laws have been largely univocal in affirming their validity under the Commerce Clause.²¹³ A prominent point in at least two cases was the observation that "the various grants of legislative authority contained in the Constitution stand alone and must be independently analyzed. In other words, each of the powers of Congress is alternative to all the other powers, and what cannot be done under one of them may very well be doable under another."²¹⁴ But this is conclusory: sometimes the powers are alternative (as in *Heart of Atlanta Motel*), and sometimes they are not (as in *Gibbons*). These cases do not develop a useful procedure for deciding when Copyright Clause limits ought to apply.²¹⁵

Elsewhere, I have argued that Copyright Clause limits ought to apply to any law that "allocates exclusive rights in expression in order to create market incentives to produce such expression."²¹⁶ This test is narrow enough to be workable and specific enough to be useful. If a law performs the *function* of copyright – allocating exclusive rights in expression – and the *purpose* of

copyright – doing so in order to stimulate the creation of such expression – then it is sufficiently copyright-like to be subject to Copyright Clause limits. But this test is strengthened by a free speech theory of copyright. In *Martignon*, the Second Circuit remanded for consideration of whether the criminal anti-bootlegging statute violated the First Amendment,²¹⁷ recognizing the importance of free speech limits on exclusive rights in expression. But in the copyright domain, where a law that allocates exclusive rights for the purpose of creating market incentives lies, the Copyright Clause's limits embody First Amendment limits and stand in for an independent free speech analysis. The First Amendment does not imply in the abstract that exclusive rights in expression require a "durational limitation," as the Second Circuit suggested it might.²¹⁸ The durational limitation comes from the Copyright Clause, and it should be applied to anti-bootlegging laws because they perform copyright's function for copyright's purpose. Since the anti-bootlegging laws provide perpetual protection, they should be struck down.

One response to this line of argument is to appeal to the treaty power.²¹⁹ There is a wide range of scholarly opinion as to how the treaty power might be limited in the copyright context,²²⁰ but there is general agreement that, at the very least, Congress cannot pass laws under the treaty power that violate the First Amendment.²²¹ But the Supreme Court has largely read independent free speech analysis out of the copyright domain, so it is hard to see how the First Amendment could provide workable limits on Congress's treaty powers. Because the Copyright Clause's limits are free speech limits, and because the freedom of speech is the kind of fundamental right that Congress cannot make an end-run around even via the treaty power, the Copyright Clause limits ought to apply to the treaty power. Perhaps the foreign policy implications of treaty implementation suggest that Congress should be given greater latitude at the borders of Copyright Clause limitations,²²² but treaty-implementing laws that clearly violate the Copyright Clause ought to be invalidated. Because the anti-bootlegging laws clearly violate the limited duration requirement, they cannot be saved by an appeal to the treaty power.

Conclusion

The inherent tension between Congress's Copyright Clause power and the First Amendment is best resolved by recognizing the ways in which the Copyright

Clause, through its built-in accommodations, embodies free speech principles. The accommodationists take this point too far, suppressing an independent free speech analysis of copyright laws and deferring to Congress on the question of whether such laws violate the Copyright Clause's limits. Largely in response, the unexceptionalists advocate applying traditional First Amendment tests and scrutiny to copyright, and in so doing, overlook the constitutional balance between free speech and copyright struck at the Framing.

I have advocated a free speech theory of copyright that corrects the shortcomings of each of these positions. It recognizes the Copyright Clause's limits as First Amendment accommodations, but it then gives them teeth in the constitutional analysis. Because the clause's limits are in fact free speech limits, courts should not defer substantially to Congress but should instead apply careful scrutiny of copyright laws. Where the specific prohibitions of the Copyright Clause are in play, courts should be especially vigilant. Where laws are challenged for failing to promote progress, however, courts should be more deferential, policing laws only for clear mistakes, where Congress could not reasonably claim to have legislated with progress in mind.

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Endnotes

- 1 See Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).
- 2 See CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 80 (2005).
- 3 I am here invoking the idea "definitional balancing" referenced in Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1184 (1970).
- 4 *Eldred v. Ashcroft*, 537 US 186, 221 (2003).
- 5 *Id* at 219.

- 6 *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co., Inc.*, 499 US 340, 346 (1991) ("Originality is a constitutional requirement"). I discuss the specific limits of the Copyright Clause in Part II.C, *infra*.
- 7 *Harper & Row, Publishers, Inc., v. Nation Enters.*, 471 US 539, 558 (1985).
- 8 Some have argued, for example, that the "Treaty Power," which "refers to the Executive's power to negotiate a treaty coupled with Congress's authority to enact legislation implementing the treat [sic] pursuant to the Necessary and Proper Clause (after the Senate ratifies it)" is "the alternate, more viable, source of authority for expansive copyright legislation." Caroline T. Nguyen, Note, *Expansive Copyright Protection for All Time?: Avoiding Article I Horizontal Limitations Through the Treaty Power*, 106 COLUM. L. REV. 1079, 1082 & n.22 (2006).
- 9 "Unexceptionalism" is also a term used in the cyberlaw literature to describe those who believe that cyberspace is "functionally identical" to real space and therefore should be regulated using "settled principles" and "traditional legal tools." See David Post, *Against "Against Cyberanarchy"*, 17 BERKELEY TECH. L.J. 1365, 1365-66 (2002) (responding to Professor Goldsmith's criticisms in Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998)). My use of the term is only meant to signal how a position views copyright as unexceptional among restrictions of expression, not to make any analogies to Internet regulation.
- 10 See, e.g., *United States v. Martignon*, 492 F.3d 140 (2d Cir. 2007) (upholding protection of live performances under anti-bootlegging statute); *United States v. Moghadam*, 175 F.3d 1269 (11th Cir. 1999) (same); *KISS Catalog, Ltd., v. Passport Infl Prods., Inc.*, 405 F. Supp. 2d 1169 (CD. Cal. 2005) (same).
- 11 The Copyright Act gives the owner of a copyright a package of exclusive rights, which owners can "authorize," or license. See 17 U.S.C. § 106 (2006). If a use of a copyrighted work is unauthorized, the owner can seek an injunction, see *id.* § 502, which is one sense in which copyright holders can "prohibit" use, though damages are also available, see *id.* § 504.
- 12 See 17 U.S.C. § 506(a)(1) (2006).
- 13 See 18 U.S.C. § 2319(b)(1) (2006).
- 14 US CONST, amend. I.
- 15 Cf *FCC v. Pacifica Found.*, 438 US 726, 744-48 (1978) (Stevens, J., plurality opinion) (providing an opinion relating to low-value speech, joined only by Chief Justice Burger and Justice Rehnquist).
- 16 *Harper & Row, Publishers, Inc., v. Nation Enters.*, 471 US 539 (1985). But see Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copyright Serves It*, 114 YALE L.J. 535 (2004) (arguing that pure copying, which

typically counts as infringement and cannot be saved under the fair use framework, serves First Amendment interests and ought to be protected in certain circumstances).

- 17 See *Nebraska Press Ass'n v. Stuart*, 427 US 539, 559 (1976) ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.").
- 18 See Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE LJ. 147 (1998) (examining preliminary injunctions in intellectual property cases and arguing that they are often unconstitutional).
- 19 *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357 (N.D. Ga. 2001). The district court's ruling was reversed on appeal. 268 F.3d 1257 (11th Cir. 2001). See generally Note, *Gone with the Wind Done Gone: "Re-Writing" and Fair Use*, 115 HARV. L. REV. 1193 (2002).
- 20 The seminal article was Nimmer, *supra* note 3, but many important contributions emerged around the same time. See Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283 (1979); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Lionel S. Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. 43 (1973).
- 21 Much of the scholarship has reacted to The Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (1998); to proposed database regulation, see, e.g., Collections of Information Antipiracy Act, H.R. 2652, 105th Cong. (1998); and to the Supreme Court's decision in *Eldred v. Ashcroft*, 537 US 186 (2003). See generally C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 1A N.Y.U. L. REV. 354 (1999); Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act is Unconstitutional*, 36 LOY. L.A. L. REV. 83 (2002); Alan E. Garfield, *The Case for First Amendment Limits on Copyright Law*, 35 HOFSTRA L. REV. 1169 (2007); Adrian Liu, *Copyright as Quasi-Public Property: 'Reinterpreting the Conflict Between Copyright and the First Amendment'*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. LJ. 383 (2008); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE LJ. 1 (2002).
- 22 This argument is carefully explored in Sobel, *supra* note 20, at 63-67, though Sobel concludes that the Copyright Act is probably constitutional, see *id.* at 67-79.
- 23 Liu, *supra* note 21, at 389 (providing an explanation for why courts have typically been unreceptive to First Amendment challenges to copyright laws).
- 24 See Sobel, *supra* note 20, at 68.

- 25 See Resolution of Sept. 23, 1789, 1 Stat. 97 (Bill of Rights); Act of May 31, 1790, ch. 15, 1 Stat. 124 (First Copyright Act).
- 26 *Eldred v. Ashcroft*, 537 US 186, 219 (2003).
- 27 *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 US 37 (1983).
- 28 *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001), *affd*, *Eldred*, 537 US at 221 (but noting, "the D.C. Circuit spoke too broadly when it declared copyrights 'categorically immune'").
- 29 A recent Article suggests that copyright is property, but as quasi-public property, it is subject to First Amendment scrutiny under something like the public forum doctrine. See Liu, *supra* note 21.
- 30 By "property-like," I mean that copyrights are enforced as property rules according to the classic framework in Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) ("An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller).
- 31 See Sara K. Stadler, *Copyright As Trade Regulation*, 155 U. PA. L. REV. 899, 909 & n.51 (describing the controversy and citing sources). I do not intend to take a position in this debate here.
- 32 FRIED, *supra* note 2, at 141 ("It is no answer to the trouble this raises to say that this regime is just a branch of property law It is a set of doctrines that is specifically about limiting speech").
- 33 This reformulated position is much more like the Supreme Court's "traditional contours" approach in *Eldred v. Ashcroft*, 537 US 186, 221 (2003).
- 34 Professor Volokh says that this is based on what he calls the "copyright exception" to the First Amendment. See Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 LIQUORMART, and BARTNICKI, 40 HOUS. L. REV. 697, 713-32 (2003).
- 35 *Eldred*, 537 US at 221.
- 36 See, e.g., Benkler, *supra* note 21; Netanel, *supra* note 21.
- 37 On the role of purposes in First Amendment analysis, see Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996).
- 38 I take the serious disagreement among distinguished scholars to be evidence of just how troublesome the question has been. Compare Baker, *supra* note 21, at 922-23 (arguing that copyright is content-based regulation), Lemley & Volokh, *supra* note 18, at 186 (same), and Julie E. Cohen, *Examined Lives: Informational Privacy and*

the Subject as Object, 52 STAN. L. REV. 1373, 1417 (2000) (same), with Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173, 178-79 (2003) (arguing that most but not all applications of copyright are content neutral), and Netanel, *supra* note 21, at 47-54 (arguing that copyright is content-neutral regulation).

39 Netanel, *supra* note 21, at 49-50.

40 The fair use factors, which privilege some uses of copyrighted works and not others, see 17 U.S.C. § 107 (2006), might be an exception. See Netanel, *supra* note 21, at 49 n. 197 (citing Jessica Litman, *Reforming Information Law in Copyright's Image*, 22 U. DAYTON L. REV. 587, 612 (1997)). The idea that fair use favors certain speech but not others is consistent with Rebecca Tushnet's interesting and provocative arguments in Tushnet, *supra* note 16.

41 This argument, which comes primarily from Netanel, *supra* note 21, has echoes of Justice Scalia's idea that neutral rules of general applicability are not subject to First Amendment scrutiny, for which he has captured a majority in the free exercise of religion context, see *Employment Div. v. Smith*, 494 US 872, 878-82 (1990), but not in the free speech context, see *Barnes v. Glen Theatre, Inc.*, 501 US 560, 572-81 (1991) (Scalia, J., concurring). See also Note, *Neutral Rules of General Applicability: Incidental Burdens on Religion, Speech, and Property*, 115 HARV. L. REV. 1713 (2002).

42 See David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281, 284 (2004).

43 See *id.* at 295-96.

44 *Id.* at 285.

45 See *id.* at 296 ("To the extent the labels 'content-neutral regulation of speech' and 'intermediate scrutiny'⁵ suggest anything, it is that when courts apply them, the government wins.").

46 512 US 622 (1994) [hereinafter *Turner I*]. See Netanel, *supra* note 21, at 59-85. The idea of applying the First Amendment to copyright by analogy to media regulation is also in Benkler, *supra* note 21, at 385 ("Denver Area for all its opacity, indicates how a constitutional constraint could implement the normative recognition of the First Amendment costs imposed by concentrated private control over information flows."), which in part derives from Paul Goldstein's important early work on market concentration of copyrights, which he called "enterprise monopoly," see Goldstein, *supra* note 20, at 1035-55.

47 See *Turner I*, 512 US 622; *Turner Broad. Sys., Inc., v. FCC*, 520 US 180, 185 (1997) (*Turner II*) ("[T]he must-carry provisions are consistent with the First Amendment").

48 See *Eldred v. Ashcroft*, 537 US 186, 220 (2003) ("[*Turner*] bears little on copyright").

- 49 See *Religious Tech. Ctr., v. Netcom On-Line Commc'n Servs., Inc.*, 923 F. Supp. 1231 (N.D. Cal. 1995).
- 50 See *Houghton Mifflin Co., v. Noram Pub. Co.*, 28 F. Supp. 676 (S.D.N.Y. 1939).
- 51 Under standard First Amendment doctrine, copyright would almost certainly be unconstitutional where this is the case. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 US 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional.").
- 52 See 17 U.S.C. § 107 (2006).
- 53 I bracket here the interesting question of criminal copyright laws, which might implicate stronger First Amendment concerns than civil copyright laws do because of the coercive force of the state's power of criminal punishment.
- 54 On the other hand, it is hard to ignore the connection some copyright legislation has to particular content. For example, as the copyright for Mickey Mouse faced impending expiration, Disney (and others) lobbied for The Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (1998), which had the effect of protecting Mickey for an additional twenty years. See JESSICA LITMAN, *DIGITAL COPYRIGHT* 23 (2001).
- 55 Note of course that, while state action is traditionally required for constitutional claims, the First Amendment has been applied in many private action contexts, beginning famously with *New York Times Co., v. Sullivan*, 376 US 254 (1964) (defamation). See also *Zacchini v. Scripps-Howard Broad. Co.*, 433 US 562 (1977) (right of publicity); *Time, Inc., v. Hill*, 385 US 374 (1967) (tortious invasion of privacy).
- 56 See generally Kagan, *supra* note 37.
- 57 In addition to the proposals already mentioned, one might envision applying First Amendment values, not doctrine, to copyright. So for example, if one adopts something like the Meiklejohnian ideal of free speech as the instrument of self-government, see generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948), or the similar account adapted by Professor Sunstein, see Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992), one might be compelled to find First Amendment violations where copyright seems inconsistent with democratic principles. For examples of this kind of an account in the copyright literature, see, for example, Jack M. Balkin, *Digital Speech and Democratic Culture*, 79 N.Y.U. L. REV. 1 (2004); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE LJ. 283 (1996). In some ways, this kind of impulse is as old

as the scholarship on copyright and the First Amendment, as Nimmer was particularly concerned with how copyright could block important contributions to political discourse, including, for example, the famous Zapruder film of the Kennedy assassination. See Nimmer, *supra* note 3, at 1200-04. While the idea that copyright should serve democratic ends is perfectly attractive in the abstract, the idea provides few determinate commands, and to the extent that the idea overlaps with key aspects of Meiklejohn, it may be susceptible to the astute criticisms in Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993).

58 471 US 539 (1985).

59 *Id.* at 556-60.

60 See Nimmer, *supra* note 3, at 1189-93 (arguing that there are several ways in which copyright's idea/expression dichotomy strikes an effective "definitional balance" between copyright and free speech).

61 *Eldred v. Ashcroft*, 537 US 186, 221 (2003) ("To the extent that such assertions [of the right to make other people's speeches] raise First Amendment concerns, copyright's built-in free speech safeguards are generally adequate to address them.").

62 See *id.* at 219.

63 See Nimmer, *supra* note 3, at 1193-96.

64 See, *Id.* at 1196-1204.

65 *Eldred*, 537 US at 221.

66 Nimmer, *supra* note 3, at 1197. The idea of a marketplace of ideas is itself contested, and some argue that it is unpersuasive. See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 3 (1989).

67 This reading of Nimmer as generally deferential with loosening at the edges is consistent with his recommendation that unlicensed uses of politically important works like the Zapruder film should be deemed infringing and subject to damages equal to a "reasonable royalty," even as the First Amendment blocks the otherwise available injunctive relief. See Nimmer, *supra* note 3, at 1200.

68 *Eldred*, 537 US at 221.

69 *Cf.* Recent Case, 121 HARV. L. REV. 1455, 1458 (2008) ("Congress's enumerated powers are not circumscribed by previous exercises thereof"). The copyright term example is intended to be demonstrative because it is concrete, but a single seventy-year copyright term extension might actually not be subject to careful review under the Court's very conservative approach in *Eldred*. The "one-way ratchet" of copyright

legislation, see Tushnet, *supra* note 16, at 543, might itself be a traditional contour of copyright law, to the dismay of most copyright scholars.

- 70 The math here is straightforward: if all preexisting copyrights are extended for seventy years, then the copyrights that were set to expire tomorrow will expire in seventy years and one day. If the extension is chunked in smaller pieces, the practical result is the same. The exception to the claim that no new works will enter the public domain is that copyright owners may dedicate their work to the public domain, typically under the doctrine of abandonment. To find abandonment, courts typically look for "some overt act indicative of an intent to surrender rights in the copyrighted work and to allow the public to copy it." *Rohauer v. Killiam Shows, Inc.*, 379 F. Supp. 723, 730 (S.D.N.Y. 1974), *rev'd on other grounds*, 551 F.2d 484 (2d Cir. 1977).
- 71 See *supra* text accompanying notes 49-50.
- 72 See Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97-180, § 3, 96 Stat. 91. The Act was first amended in 1992, see Pub. L. No. 102-561, 106 Stat. 4233 (1992), and most recently in 2005, see Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, § 102, 119 Stat. 218.
- 73 The problem of prosecutorial discretion has been the subject of much scholarly attention, including some interesting recent contributions. See, e.g., Rachel Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. (forthcoming 2008); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 (2001); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981).
- 74 See *Feist Publ'ns, Inc., v. Rural Tele. Serv. Co., Inc.*, 499 US 340, 347 (1991). Other potential free speech accommodations, such as the exemption for libraries to reproduce and distribute certain works during the last twenty years of their copyright term, see 17 U.S.C. § 108(h)(1) (2006), are statutory. There is some debate as to whether the doctrine of fair use, which owes much to Justice Story in *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C. Mass. 1841) (No. 4901) (outlining factors to consider in a fair use analysis), but is codified at 17 U.S.C. § 107, is a constitutional requirement or a creature of statute. See, e.g., Stanley F. Birch, Jr., *Copyright Fair Use: A Constitutional Imperative*, 54 J. COPYRIGHT SOC'Y USA 139 (2007); Harry N. Rosenfield, *The Constitutional Dimension of "Fair Use" in Copyright Law*, 50 NOTRE DAME LAW. 790 (1975).
- 75 *Eldred v. Ashcroft*, 537 US 186,219 (2003).
- 76 *Feist*, 499 US 340, was the first major constitutional challenge to copyright, see Recent Case, *supra* note 69, at 1455 n. 1. The only successful constitutional challenge to copyright of note is *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007).
- 77 Outside of the First Amendment and the Copyright Clause, a notable and arguable form of expression in the Constitution is voting. See, e.g., US CONST, amends. XIV, § 2,

XV, XIX But all of these clauses restrict the government's ability to limit the franchise. None of these is like the Copyright Clause in expressly empowering Congress to limit expression.

- 78 Justice Breyer might have it otherwise; he proposes balancing the "speech-restricting and speech-enhancing consequences" of a statute. *Barnicki v. Vopper*, 532 US 514, 536 (2001) (Breyer, J., concurring). But the Court did not endorse this view in *Barnicki*, as Justice Breyer's concurring opinion was joined only by Justice O'Connor.
- 79 See *supra* note 40.
- 80 *Harper & Row, Publishers, Inc., v. Nation Enters.*, 471 US 539, 558 (1985).
- 81 *Eldred v. Ashcroft*, 537 US 186,219 (2003).
- 82 See Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2375 (2003) ("The most relevant historical evidence directly bearing on the original understanding of the Copyright Clause can be summarized rapidly. There is little evidence from the Constitutional Convention").
- 83 Some actually consider the question of its constitutionality seriously. See, e.g., Sobel, *supra* note 20, at 63-67. All of the accounts cited in *supra* notes 20-21, however, assume at least implicitly that the Copyright Clause is consistent with the First Amendment.
- 84 Compare US CONST, art. I, § 8, c1. 4 (uniform bankruptcy law), with US CONST, amend. II (right to bear arms).
- 85 See US Const, art. I, § 8, c1. 8.
- 86 See US CONST, amend. I.
- 87 See US CONST, art. I., § 8, c1. 8. The fixation requirement can probably be fairly inferred from the word "Writings," though the Court has not squarely addressed the issue, perhaps in part because the fixation requirement is also statutory, see 17 U.S.C. § 102 (2006).
- 88 The Supreme Court has seen First Amendment relevant "speech" in cross-burning, see *R.A.V. v. City of St. Paul*, 505 US 377 (1992), and on clothing, see *Cohen v. California*, 403 US 15 (1971). For an interesting account of why speech is treated broadly in some areas and in others not at all, see Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004).
- 89 This line of argument is vaguely Dworkinian. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 184-205 (1977). For an interesting argument against Dworkin's account, see Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998). But see Jeremy

Waldron, *Pildes on Dworkin's Theory of Rights*, 29 J. LEGAL STUD. 301 (2000) (arguing that Pildes's reading of Dworkin is incorrect).

- 90 Of course, that the individual right enjoys priority doesn't mean that the right to free speech is absolute in the sense that speech can never be restricted. The principle of free speech itself has been interpreted to have limits, which are played out through the classic levels of scrutiny. See *Police Dep't v. Mosley*, 408 US 92 (1972).
- 91 *Eldred v. Ashcroft*, 537 US 186, 219 (2003); see also Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1135 (1990) ("[Copyright's] underlying objectives parallel those of the first amendment").
- 92 *Harper & Row, Publishers, Inc., v. Nation Enters.*, 471 US 539, 558 (1985).
- 93 *United States v. Paramount Pictures*, 334 US 131, 158 (1948).
- 94 See *Fox Film Corp., v. Doyal*, 286 US 123, 127 (1932) ("As this Court has repeatedly said, the Congress did not sanction an existing right, but created a new one").
- 95 US CONST, art I, § 8, d. 8.
- 96 Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 13 THE WRITINGS OF THOMAS JEFFERSON 326, at 333 (Andrew A. Lipscomb ed., 1904).
- 97 Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in JAMES MADISON: WRITINGS 418, at 423 (Jack N. Rakove ed., 1999).
- 98 THE FEDERALIST NO. 43, at 271 (James Madison) (Clinton Rossiter ed., 1961).
- 99 This is the functional result of *Eldred's* "traditional contours" approach, insofar as no independent First Amendment analysis of copyright is even available in the vast majority of cases.
- 100 *Eldred v. Ashcroft*, 537 US 186, 24344 (2003) (Breyer, J., dissenting).
- 101 *Id* at 244 (quoting *Harper & Row, Publishers, Inc., v. Nation Enters.*, 471 US 539, 558 (1985)) (citation omitted).
- 102 See *id*.
- 103 This is true to the extent that the clause is about expression. The Copyright Clause is not solely concerned with expression, or at least not the expression that is the object of the First Amendment's freedom of speech. See McGowan, *supra* note 42, at 292 ("Because not all copyrighted works are First Amendment 'speech,' while all works get the same nominal statutory protection, characterizing copyright as a regulation of speech makes the statute seem more targeted at 'speech' than it really is").
- 104 *Eldred*, 537 US at 219.
- 105 See *Eldred v. Reno*, 239 F.3d 372, 375 (2001) ("[C]opyrights are categorically immune from challenges under the First Amendment").

- 106 See *Eldred*, 537 US at 221. Subsequent applications of *Eldred* also suppressed free speech analysis. See, e.g., *Kahle v. Gonzales*, 474 F.3d 665 (9th Cir. 2007) (applying *Eldred* to forgo independent First Amendment review), *superseded on denial of rehearing en banc* by 487 F.3d 697 (9th Cir. 2007) (same), *certiorari denied* by *Kahle v. Mukasey*, 128 S. Ct. 958 (2008). An interesting and important exception to this general trend is the Tenth Circuit's decision in *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007), in which that court remanded for the district court to apply First Amendment scrutiny to § 514 of the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, 4976-80 (1994) (codified at 17 U.S.C. §§ 104A, 109 (2006)), which restored copyrights in foreign works previously in the public domain. See *Golan*, 501 F.3d at 1182; see also Recent Case, 121 HARV. L. REV. 1945 (description and analysis of *Golan*).
- 107 See *supra* Part I.B.
- 108 US CONST, art. I, § 8, cl. 8.
- 109 *Eldred*, 531 US at 212.
- 110 See *id.* at 254-57 (Breyer, J., dissenting) (explaining that Congress could not have "concluded rationally . . . that the extension's economic-incentive effect could justify the serious expression-related harms [it causes] [T]he statute creates no economic incentive at all.").
- 111 See Part I.B.
- 112 Tushnet, *supra* note 16, at 543.
- 113 Paracopyright, which for example includes laws that prohibit circumvention of technical content protections, allows copyright holders to impose restrictions on users outside traditional copyright law. See generally Dan L. Burk, *Anticircumvention Misuse*, 50 UCLAL. REV. 1095 (2003).
- 114 See generally Benkler, *supra* note 21; Chemennksy, *supra* note 21; Netanel, *supra* note 21; Rubinfeld, *supra* note 21.
- 115 *Eldred v. Ashcroft*, 537 US 186, 220 (2003) ('[*Turner*] bears little on copyright').
- 116 See *Eldred*, 537 US at 220 ('[The *Turner*] 'must-carry' provisions . . . implicated 'the heart of the First Amendment,' namely, 'the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.' (quoting *Turner Broad. Sys. v. FCC*, 512 US 622, 641 (1994))).
- 117 McGowan, *supra* note 42, at 301-07.
- 118 David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 198 (1988).
- 119 303 US 444 (1938); see Strauss, *supra* note 118, at 195-97.

- 120 303 US at 451.
- 121 See *Ward v. Rock Against Racism*, 491 US 781, 791 (1989) ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of information.'" (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 US 288, 293 (1984))).
- 122 *Graham v. John Deere Co.*, 383 US 1, 5 (1966).
- 123 See *supra* Part I.
- 124 US CONST, art I, § 8, c1. 8. I have omitted as irrelevant the parts of Article I, section 8, clause 8 that concern Congress's power to grant patent rights. Because the full clause concerns both patents and copyrights, it has been called the "Copyright and Patent Clause," *Eldred v. Ashcroft*, 537 US 186, 192 (2003), the "Exclusive Rights Clause," Benkler, *supra* note 38, at 175, or the "Promote Progress Clause," Lawrence Lessig, *The Architecture of Innovation*, 51 DUKE LJ. 1783, 1793 (2002).
- 125 There is some suggestion in *Eldred*, which I explore in more detail below, that this "preambular language" may not be "an independently enforceable limit on Congress' power," but instead "identifies the sole end to which Congress may legislate." 537 US at 211.
- 126 *Eldred*, 537 US at 199-204 (considering whether the CTEA met the "limited Times' prescription").
- 127 In the *Trade-Mark Cases*, 100 US 82 (1879), the Court suggested (somewhat opaquely) that the Copyright Clause's requirement of originality can be inferred at least in part from the word "Writings," *id.* at 94 ("And while the word *writings* may be liberally construed, as it has been, to include original designs for engravings, prints, &c, it is only such as are *original*, and are founded in the creative powers of the mind"). A few years later, the Court found the originality requirement primarily in the clause's restriction to "Authors." See *Burrow-Giles Lithographic Co., v. Sarony*, 111 US 53, 58 (1884) ("We entertain no doubt that the constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representative of original intellectual conceptions of the author."); see also *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co., Inc.*, 499 US 340, 346 (1991) ("[In the *Trade-Mark Cases* and *Barrow-Giles*,] this Court defined the crucial terms 'authors' and 'writings.' In so doing, the Court made it unmistakably clear that these terms presuppose a degree of originality.").
- 128 *Feist*, 499 US at 347. This is cogent as to facts, like the telephone numbers of *Feist*, see *id.* at 361-63, but less clear as to ideas, which might reasonably be thought to contain creativity. While the Copyright Clause provides a more tenuous support for an idea/expression dichotomy than for a fact/expression dichotomy, the Court's

interpretation of the clause probably prohibits exclusive rights in ideas. See *Harper & Row, Publishers, Inc., v. Nation Enters.*, 471 US 539, 558 (1985) ("[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas").

- 129 The Court has not squarely said that fixation is a constitutional requirement, perhaps in part because the copyright system has never provided protection to expression not fixed in a tangible form. See, e.g., 17 U.S.C. § 102(a) (2006) ("Copyright protection subsists ... in original works of authorship fixed in any tangible medium of expression"); see also *Feist*, 499 US at 355 ("The two fundamental criteria of copyright protection [are] originality and fixation in a tangible form." (quoting H. R. Rep. No. 94-1476, at 51 (1976)) (alteration in original)). But the Court may soon have to address the problem, as lower courts have, in the context of copyright-like protections outside the core of the copyright system. In such cases, courts have held that the Copyright Clause requires fixation. See *United States v. Moghadam*, 175 F.3d 1269, 1280 (11th Cir. 1999) (citing "the fixation requirement inherent in the term 'Writings.'"); see also Part III.B.
- 130 There is an argument, raised in *Eldred*, that makes limited duration a bit more complicated. Petitioners argued that repeated, retroactive copyright extensions made copyrights effectively perpetual, violating limited duration. The Court was not convinced by this line of argument, however. See *Eldred*, 537 US at 199-208.
- 131 See 17 U.S.C. § 103 (2006). Copyrights in compilations "extend Q only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material." *Id.* § 103(b).
- 132 Here, promoting progress is unbounded in the way that a general negligence inquiry is, where the general procedure – be reasonable for negligence, or promote progress for copyright – can be clearly stated but the content of the standard can easily vary with application. See generally Kenneth S. Abraham, *The Trouble with Negligence*, 54 VAND. L. REV. 1187 (2001) (critiquing unbounded norms in negligence).
- 133 See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE LJ. 557, 561-62 (1992) ("One can think of the choice between rules and standards as involving the extent to which a given aspect of a legal command should be resolved in advance or left to an enforcement authority to consider."); Kathleen M. Sullivan, *The Supreme Court, 1991 Term – Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) ("A legal directive is 'rule'-like when it binds a decision-maker to respond in a determinate way to the presence of delimited triggering facts.").
- 134 *United States v. Carolene Prods. Co.*, 304 US 144, 152 n.4 (1938).

- 135 100 US 82 (1879).
- 136 See *id.* at 94.
- 137 The Eleventh Circuit, on the other hand, has, holding that the fixation requirement is not central to the Copyright Clause. See *United States v. Moghadam*, 175 F.3d 1269 (11th Cir. 1999).
- 138 *Carotene Prods.*, 304 US at 152 n.4.
- 139 See *Eldred v. Ashcroft*, 537 US 186, 199-204 (2003).
- 140 See *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co., Inc.*, 499 US 340, 346 (1991).
- 141 See *id.*, 499 US at 347.
- 142 See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 105-30 (1977).
- 143 *Trade-Mark Cases*, 100 US 82, 94 (1879) ("The writings which are to be protected are the fruits of intellectual labor, embodied in the form of books, prints, engravings, and the like").
- 144 Congress has provided copyright-like protection of this kind in the form of anti-bootlegging laws, see, e.g., 17 U.S.C. § 1101 (2006), but the protection provided is not explicitly a copyright. See *id.*; see also *KISS Catalog, Ltd., v. Passport Int'l Prods., Inc.*, 405 F. Supp. 2d 1169 (CD. Cal. 2005).
- 145 See 17 U.S.C. § 101 (2006) ("A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission."). The relevant difference is that the copyright in live broadcasts of sports events are based on the originality in the expression, i.e., the particular camera angles and the like.
- 146 See *id.*
- 147 See Strauss, *supra* note 118, at 198. See *supra* text accompanying notes 96-98.
- 148 See *Eldred v. Ashcroft*, 537 US 186, 199 (2003).
- 149 537 US 186, 199 (2003).
- 150 *Id.* at 199 (citing dictionaries from the time of Framing and from the present) (alteration in original).
- 151 It also might have been the same. For Justice Scalia, who sees little to no value in legislative history, see, e.g., *Blanchard v. Bergeron*, 489 US 87, 98-99 (1989) (Scalia, J., concurring) (describing "the level of unreality that our unrestrained use of legislative history has attained"), even such incredible evidence of Congress's bad intentions might be unpersuasive. Such an approach might be reasonable because even if the legislature intends to incrementally increase term in perpetuity, future legislators might block future increases. Especially since Congress is politically

accountable, one would imagine that when every member of Congress openly flouts the Constitution, Congress's composition is likely to change.

- 152 See *Lovell v. Griffin*, 303 US 444 (1938).
- 153 I treat them as rules, but their content is less clear ex ante than limited duration might be. There is of course a continuum. See Sullivan, *supra* note 133, at 57 ("These mediating legal directives take different forms that vary in the relative discretion they afford the decision-maker. These forms can be classified as either 'rules' or 'standards' to signify where they fall on the continuum of discretion").
- 154 See, e.g., CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 193-233 (1973).
- 155 Professor Dan Kahan and his Cultural Cognition Project coauthors, see The Cultural Cognition Project, <http://research.yale.edu/culturalcognition/> (last visited Apr. 14, 2008), have written several important papers on how cognition shapes the construction of facts and norms in the legal system. See, e.g., Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. (forthcoming 2009); Dan M. Kahan & Donald Braman, *The Self-Defense Cognition of Self Defense*, 45 AM. CRIM. L. REV. 1 (2008); Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115 (2007).
- 156 Pierre Schlag, "Le Hors de Texte, C'est Moi" *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631, 1648 (1990).
- 157 McGowan, *supra* note 42, at 301.
- 158 See *id.* at 302.
- 159 524 US 569 (1998).
- 160 500 US 173 (1991).
- 161 *Finley*, 524 US at 588; see also *Rust*, 500 US at 192-200.
- 162 See, e.g., *Speiser v. Randall*, 357 US 513, 518-19 (1958) (explaining that, in that case, "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech" and that "[t]he denial is 'frankly aimed at the suppression of dangerous ideas'" (quoting *Am. Commc'ns Ass'n. v. Douds*, 339 US 382, 402 (1950))).
- 163 ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 26 (1960).
- 164 See, e.g., Sullivan, *supra* note 133, at 58 ("A legal directive is 'standard'-like when it tends to collapse decision-making back into the direct application of the background principle or policy to a fact situation.").
- 165 US CONST, art I, § 8, d. 8.

- 166 Interestingly, the Supreme Court¹ s Second Amendment case from last Term may provide some guidance, since whether the right to bear arms is an individual right depends in part on how one interprets the purposive language in that amendment. See US CONST, amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."). The Court, in holding that the Second Amendment protects an individual right to bear arms, explained that the "[prefatory clause] does not limit the [operative clause] grammatically, but rather announces a purpose." See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2789 (2008). The analogy is of course not a perfect one, since (among other reasons) the announced purpose of an individual right may have a different force than the announced purpose of a congressional power. For a brief but thoughtful discussion of *Heller*'s effect on copyright, see Guns and Copyright, The Patry Copyright Blog, <http://williampatry.blogspot.com/2008/06/guns-and-copyright.html> (June 27, 2008, 8:40 EST).
- 167 See *supra* text accompanying notes 96-98.
- 168 'See generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).
- 169 A basic assumption on many accounts of judicial review is that judges are epistemically well suited to determine whether legislation is consistent with some set of defined constitutional purposes, but whether the judiciary is epistemically advantaged is an open question. See generally ADRIAN VERMEULE, *LAW AND THE LIMITS OF REASON* (forthcoming 2008, Oxford Univ. Press).
- 170 383 US 1 (1966).
- 171 *Id.* at 6. *Graham* was a patent case, so there is some question as to whether the Court's interpretation of Congress's patent powers is relevant to a discussion of copyright. But since the Court cited this quote in *Eldred v. Ashcroft*, 537 US 186, 213 (2003), and since the Court generally found it useful to appeal to its patent jurisprudence, see *id.* at 201 ("Because the Clause empowering Congress to confer copyrights also authorizes patents, congressional practice with respect to patents informs our inquiry."), it makes some sense to cite *Graham* here. But see *id.* at 216 (noting that "patents and copyrights do not entail the same exchange").
- 172 *Eldred*, 537 US at 211.
- 173 See *id.* 212 –14.
- 174 See *id.* at 205 – 05.
- 175 *United States v. O'Brien*, 391 US 367, 383 (1968).
- 176 Kagan, *supra* note 37, at 414 (emphasis added); see also Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 775-78 (2001) (arguing that purpose is central to First Amendment analysis). On the place of purpose-based tests in constitutional adjudication, see Richard H. Fallon, Jr., *The Supreme Court, 1996 Term* –

Foreword: Implementing the Constitution, 111 HARV. L. REV. 54, 71-73, 90-102 (1997). For an important earlier account of motives in constitutional law generally, see Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 99-168 (1977).

- 177 See Pildes, *supra* note 89, at 730 (arguing that "rights are techniques by which courts police the kinds of purposes government can offer to justify its action").
- 178 See, e.g., *Kingsley Int'l Pictures Corp., v. Regents of Univ. of State of N.Y.*, 360 US 684 (1959).
- 179 See *Simon & Schuster, Inc., v. Members of the N.Y. State Crime Victims Bd.*, 502 US 105 (1991).
- 180 See Kagan, *supra* note 37, at 428-29 (sketching a definition of illicit motives that imply a First Amendment violation). Compare Dean Kagan's focus on motives rather than tiers of scrutiny per se with Justice Stevens' rejection of tiers of scrutiny in the equal protection area. See, e.g., *Craig v. Boren*, 429 US 190, 211-12 (1976) (Stevens, J., concurring).
- 181 *Eldred v. Ashcroft*, 537 US 186, 204-05 (2003); see also *Sony Corp., of Am. v. Universal City Studios, Inc.*, 464 US 417, 429 (1984).
- 182 See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). Professor Adrian Vermeule is among the most vocal of contemporary advocates of the Thayerian approach to judicial review. See generally ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006); VERMEULE, *supra* note 169.
- 183 Thayer, *supra* note 182, at 144 ("[A court] can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one, – so clear that it is not open to rational question."); see also VERMEULE, *supra* note 182, at 270-76.
- 184 See Thayer, *supra* note 182, at 155-56 (arguing that, where review is common, legislators pay less attention to legality: "if we are wrong, they say, the courts will correct it").
- 185 See generally BICKEL, *supra* note 168.
- 186 US CONST, art I, § 8, d. 8.
- 187 Professor L. Ray Patterson suggests that, over the course of the history of copyright law, Congress's motives shifted from regulation to promote progress toward protection of property-like rights. See L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 55 (1987) ("The cumulative effect of these developments was to give the entrepreneur complete control over the . . . functions of copyright and, therefore, to subordinate copyright's purpose to its function.").

- 188 See generally Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005) (arguing that empire-building is largely an empty idea in constitutional law because the government is not a Leviathan); cf. also Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2005) (making a similar argument about the judiciary).
- 189 Pub. L. No. 103-465, 108 Stat. 4809 (1994). The central cases in this area are those that involve challenges to the URAA's anti-bootlegging provisions. See *United States v. Martignon*, 492 F.3d 140 (2d Cir. 2007); *United States v. Moghadam*, 175 F.3d 1269 (11th Cir. 1999); *KISS Catalog, Ltd., v. Passport Int'l Prods., Inc.*, 405 F. Supp. 2d 1169 (CD. Cal. 2005).
- 190 Indeed, the Supreme Court did not think that the Commerce Clause could support a different set of exclusive rights in information – trademarks – even in 1879. See *Trade-Mark Cases*, 100 US 82 (1879).
- 191 See discussion of Copyright Clause limits, *supra* Part II. C.
- 192 See US CONST, art. I, § 8, c1. 5.
- 193 379 US 241 (1964).
- 194 See *Civil Rights Cases*, 109 US 3 (1883).
- 195 See *Heart of Atlanta Motel*, 379 US at 258. Similarly, in the *Trade-Mark Cases*, the Court seemed perfectly willing to consider the Commerce Clause as a source of power for federal trademark legislation, even though the Copyright Clause could not support such legislation. 100 US at 96. The Court there concluded, under the Commerce Clause jurisprudence of that period, that the commerce power was insufficient to support federal trademark laws. *Id.*
- 196 455 US 457 (1982).
- 197 The relevant law here is the Rock Island Railroad Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 399 (1980). See *Gibbons*, 455 US at 461-62.
- 198 See US CONST, art. I, § 8, c1. 4 (empowering Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States").
- 199 *Gibbons*, 455 US at 468-69.
- 200 See *id.* at 461-63.
- 201 An obvious example is a system of federal funding for the arts. See *Nati Endowment for the Arts v. Finley*, 524 US 569 (1998).
- 202 Modern trademark protection under the Lanham Act provides exclusive rights in trademarks, see Lanham Trade-Mark Act, ch. 540, 60 Stat. 427 (1946) (codified as

amended in scattered sections of 15 U.S.C.), and despite the fact that it may protect non-original expression (like common words), its constitutionality is not controversial.

203 See, e.g., Richard B. Graves III, *Globalisation, Treaty Powers, and the Limits of the Intellectual Property Clause*, 50 J. COPYRIGHT Soc'y USA 199 (2003).

204 See generally Nguyen, *supra* note 8.

205 See *Reid v. Covert*, 354 US 1, 16-17 (1957); *Missouri v. Holland*, 252 US 416, 433-34 (1920); see also David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1097 (2000).

206 See *Reid*, 354 US at 18; see also Nguyen, *supra* note 8, at 1112-13.

207 Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197.

208 There is both a criminal, see 18 U.S.C. § 2319A (2006), and a civil statute, see 17 U.S.C. § 1101 (2006).

209 See *United States v. Martignon*, 492 F.3d 140 (2d Cir. 2007); *United States v. Moghadam*, 175 F.3d 1269 (11th Cir. 1999); *KISS Catalog, Ltd., v. Passport Int'l Prods., Inc.*, 405 F. Supp. 2d 1169 (CD. Cal. 2005).

210 See 18 U.S.C. § 2319A (2006); 17 U.S.C. § 1101 (2006).

211 *Id*

212 Interestingly, though, the civil statute does incorporate the Copyright Act's remedies, see 17 U.S.C. § 1101(a) (providing protection "subject to the remedies provided in sections 502 through 505, to the same extent as an infringer of copyright"), while the criminal statute incorporates the Copyright Act's definitions by reference, see 18 U.S.C. § 2319A(e)(1) (stating that certain terms "mean those terms within the meaning of title 17").

213 See *Martignon*, 492 F.3d at 152-53; *Moghadam*, 175 F.3d at 1277; *KISS*, 405 F. Supp. 2d at 1169.

214 *Moghadam*, 175 F.3d at 1277; see also *KISS*, 405 F. Supp. 2d at 1173 (quoting *Moghadam*).

215 *Moghadam* challenged the anti-bootlegging law on fixation grounds, and the Court held that *that* limit has no external application, reserving judgment on other Copyright Clause limits. 175 F.3d at 1277. *Martignon* turned on the fact that the challenged statute was a criminal prohibition, securing no private exclusive rights. 492 F.3d at 151. *KISS* turned on the claim that the anti-bootlegging law was merely *similar* to copyright law. 405 F. Supp. 2d at 1174.

216 See, *Recent Case*, *supra* note 69, at 1455.

- 217 See *Martignon*, 492 F.3d at 153.
- 218 *Id.* (describing the argument that the anti-bootlegging statute "violates the First Amendment because it is unconstitutionally overbroad, containing no fair use exception or durational limitation.").
- 219 See generally *Graves*, *supra* note 203; Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119; Nguyen, *supra* note 8.
- 220 See Graeme B. Dinwoodie, *Copyright Lawmaking Authority: An (Internationalist Perspective on the Treaty Clause*, 30 COLUM. J.L. & ARTS 355, 364-85 (2007).
- 221 I take this general agreement from the fact that the position least amenable to external limits on the treaty power in Dinwoodie's description, see *id.*, but he nonetheless accepts this position. See *id.* at 360-61.
- 222 I raise this as a possible objection, bracketing the solution for now. I do not intend to take a position on whether such deference is required or even desirable.

2

Media Policy and Free Speech: The First Amendment at War with Itself

*Ellen P. Goodman**

Two principal pillars of media policy are communications and copyright law. In each discipline, there are pluralists who seek greater public access to the means of communications (communications policy pluralists) and communicative content (copyright pluralists). Historically, communications policy pluralists have sought government interventions in the marketplace in order to increase access to mass communications. Copyright pluralists, by contrast, have fought against regulatory interventions they argue unduly strengthen the rights of copyright holders to deny access to content. In pursuing these strategies, the pluralists have used First Amendment arguments that are in tension with each other and ultimately unavailing in the courts. These arguments, drawing on the rhetoric of free speech rights and values, shortchange the complexity of free speech interests at stake when the government reallocates speech opportunities. This article argues that only by abandoning traditional First Amendment categories of review will pluralists

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and courts arrive at an analysis that fairly takes into account speakers' interests in controlling their speech and the public's interests in loosening that control. The article shows how reconciling communications and copyright pluralists' First Amendment positions, and developing a new First Amendment jurisprudence, becomes more important as the pluralist agenda matures to include positions on net neutrality, unlicensed spectrum, and compulsory copyright licenses.

I. Introduction

A symposium on “reclaiming” the First Amendment for media policy begs the question from what and whom the First Amendment must be reclaimed. Who has it and what are they doing with it? Since we also gather to commemorate the fortieth anniversary of Jerome Barron’s watershed article, *Access to the Press*,¹ I consider these questions as they relate to his aspirations for a more pluralistic system of communication.²

Media policy, as I define it, consists of regulatory interventions specifically designed to promote communicative opportunities. Communications and copyright law are the federal government’s two principal tools in this project.³ Such an expansive definition of media policy is not uniformly accepted today and certainly would not have been in 1967 when *Access to the Press* was published. Then, media policy was virtually coextensive with broadcast regulation. The comprehensive system of subsidies at the federal level for noncommercial media had only just begun with the passage of the Public Broadcasting Act that same year.⁴ The regulation of mere communications carriers, like telephones, was thought to have little to do with speech. And the implications of copyright law for media policy were still obscure.⁵

Digital networks have strengthened and revealed the nexus between copyright and communications law, and the impact of both on speech.⁶ Information is produced with the help of these networks, distributed through them, and then reused and distributed anew. Copyright and communications law together regulate this lifecycle of information. The campaign for communicative pluralism that Jerome Barron launched necessarily engages both disciplines and

would benefit from a coherent constitutional approach to media policy that transcends the disciplinary divide. We are far from this goal. Communications and copyright pluralists have deployed First Amendment arguments in ways that are inconsistent and ultimately at cross purposes to the “reclamation” project. Within each discipline, the arguments are not succeeding, and they undermine each other across disciplines.

Communications pluralists have supported regulation that requires proprieted interests – let us call them communications proprietors – to accommodate independent voices.⁷ This regulation typically comes in two forms: access mandates and ownership limits. Access mandates, such as must-carry obligations, force network operators to transmit the content of unaffiliated providers. Ownership regulations cap the share of communicative resources a single network operator can own. Communications proprietors resist access and ownership regulation and, if unsuccessful in Congress or at the Federal Communications Commission, they often go to court asserting their First Amendment rights to be free from such government controls.

Communications pluralists play defense when it comes to First Amendment rights, arguing that the First Amendment is no bar to access and ownership regulation.⁸ When they do make an affirmative First Amendment case for regulation, it is with the rhetoric not of rights, but of “interests” or “values”.⁹ Pluralists typically emphasize the instrumental role of the First Amendment in advancing collective interests in the free exchange of ideas.¹⁰ Owen Fiss and Jerome Barron are the leading exponents of this instrumental, values-oriented conception of the First Amendment. For Fiss, the purpose of the individual right is to serve “the larger political purposes” of establishing a “rich public debate” and enhancing “the quality of public discourse”.¹¹ Barron too emphasizes listener interests in criticizing a free speech jurisprudence that unduly romanticizes press rights at the expense of other expressive values.¹² Barron has had a significant influence on “collectivist” free speech theories,¹³ including Greg Magarian’s “public rights” theory of free speech¹⁴ and Justice Stephen Breyer’s “active liberty” theory, both of which tolerate speech regulation in the interest of enhancing public discourse.¹⁵

Copyright pluralists share with communications pluralists the politics of the First Amendment. They too fear that a concentration of property rights in communicative resources will unduly constrict the production and circulation of

speech.¹⁶ They too urge rights of access to these resources and limits on ownership in furtherance of a vibrant and heterogeneous system of communications.¹⁷ The insistence on a robust fair use doctrine, for example, is a demand for access rights to copyrighted works.¹⁸ Pluralists' recent Supreme Court challenge to the extension of copyright terms in *Eldred v. Ashcroft* sought limits on the ownership rights of a single speaker.¹⁹

It is in the domain of First Amendment law, not politics, that pluralist strategies diverge. Where the communications pluralist parries First Amendment rights to defend regulation, the copyright pluralist wields First Amendment rights to attack regulation. Copyright pluralists argue that copyright is itself a regulation of speech that should be subject to skeptical judicial review.²⁰ For them, reclaiming the First Amendment means successfully asserting free speech claims, not wresting such claims from proprietors. They argue not in terms of collective interests and instrumental value, but of individual speech rights and negative liberties: the right of the downstream user of copyrighted material to speak without governmental restraint.²¹

Communications proprietors naturally mirror these divergent First Amendment approaches. They complain that communications regulation trenches on their speech rights, while endorsing strong copyright controls that they suggest constitute mere economic regulation with only incidental effects on speech.²² As Jack Balkin has observed, "at the same time that media corporations have resisted free speech objections to the expansion of intellectual property rights, they have avidly pushed for constitutional limits on telecommunications regulation on the ground that these regulations violate their own First Amendment rights".²³ This same tension exists within the community of pluralist advocates.

To strengthen and harmonize pluralist constitutional strategies, it is not necessary that one side make an about face in support of judicial deference for media regulation or that the other come to embrace judicial skepticism. Rather, what is needed is a retreat from the traditional First Amendment regulatory categories and the associated "scrutiny" analyses that have shaped the positions of pluralists in both disciplines.

Parts II and III below show how the stark and consequential distinction between highly suspect speech regulation and almost certainly permissible

economic regulation has played out in communications and copyright regulation review. A doctrine that leans so heavily on this distinction is badly suited to media policy review.²⁴ Designed to protect individuals against a censorious government, the doctrine shortchanges the full array of speech values when it polices government efforts to support speech.

Part IV forecasts the growing conceptual and strategic difficulties pluralists will face in trying to exploit binary First Amendment categories. If copyright pluralists' constitutional arguments carry the day, regulatory interventions many of them support, such as a "net neutrality" mandate that broadband access providers transmit Internet content without discrimination, might well be found to abridge providers' speech rights.²⁵ The risk of collision between communications and copyright pluralists grows with changes in their regulatory agendas. Copyright pluralists have begun to pursue legislative rights of access in the form of compulsory copyright licenses. At the same time, communications policy pluralists have turned against regulation in their pursuit of unlicensed wireless access to spectrum²⁶ and municipal Wi-Fi projects.²⁷

Part V concludes that media pluralism would benefit from a method of First Amendment review that supports a finer calibration of speech rights and interests for content-neutral efforts to reallocate speech entitlements. Justice Breyer's First Amendment jurisprudence has been moving in this direction, steadily if not without stumbles. His approach, if properly disciplined, could yield a rule of reason for media policy that would probe carefully, without undue skepticism, whether speech reallocations appropriately balance expected gains and losses.

II. Communications Policy and Free Speech

The constitutional terrain of communications policy is marked by a conflict between First Amendment rights and values.²⁸ Regulations that limit ownership of cable systems and channels,²⁹ limit ownership of broadcast stations,³⁰ mandate that satellite systems provide access for noncommercial programming,³¹ and mandate that cable systems provide access for local broadcast programming³² all reallocate speech opportunities from communications proprietors. In all cases, the government is intervening in media markets by redistributing power over the means and content of communication to further First Amendment speech values.³³ In all cases, the regulations clip the rights of proprietors to control private means of communications.

In the contest between rights and values, communications pluralists will generally draw the short stick because First Amendment doctrine favors rights over values, negative liberties over positive ones.³⁴ It accomplishes this through the use of binary distinctions. There are editors and mere conduits for speech, speech regulation and mere economic regulation. If a communications proprietor is an editor and is constrained by a speech regulation, courts will privilege her rights to be free from such constraint over the values served by the regulation by reviewing skeptically any regulation that limits her rights in more than an incidental way.³⁵ The degree of skepticism will vary depending on whether the speech regulation is content-based or content-neutral.³⁶ Content-based regulations will be subject to strict scrutiny and presumptive invalidity,³⁷ while content-neutral regulations will be subject to less exacting review under the intermediate scrutiny standard.³⁸

The true distance between intermediate and strict scrutiny varies with context. For incidental speech regulations, like noise restrictions, intermediate scrutiny is quite deferential and puts the regulator to little trouble in defending its rules against constitutional attack.³⁹ But judicial scrutiny is considerably more rigorous, and therefore more protective of speech rights, when it comes to communications regulation that specifically targets speech. Indeed, in the leading case, *Turner Broadcasting System, Inc., v. FCC*,⁴⁰ the Court deferred so little to legislative predictive judgments underlying content-neutral communications regulation that the level of scrutiny is best described as “intermediate plus” – a standard of review that decidedly privileges speech rights over values.⁴¹

The *Turner* litigation resulted in two opinions. In *Turner I*, the Court narrowly held a statutory requirement that cable operators carry local broadcast signals to be a content-neutral regulation of cable operators’ speech.⁴² It went on to graft onto the fairly deferential intermediate scrutiny test a requirement that the government show with “substantial evidence” that the requirement was narrowly tailored to advance an important governmental interest.⁴³ Accordingly, the Court remanded the case for further consideration despite the fact that Congress had already amassed an unusually large amount of evidence.⁴⁴ It had held more than a dozen hearings, accumulated a legislative record of more than 30,000 pages, and made detailed findings based on a decade’s experience with intermittent must-carry rules.⁴⁵ Three years of litigation later, in *Turner II*, the

Court again applied the intermediate-plus standard to uphold the regulations in a 5-4 vote.⁴⁶

The most significant lower court decision to apply *Turner* showed that intermediate-plus scrutiny would indeed be highly skeptical.⁴⁷ More recently, regulators have hesitated to adopt content-neutral communications regulation because of what they perceive to be a constitutional requirement that they substantiate predictive judgments about speech markets with ironclad empirical support.⁴⁸ In practice, the intermediate-plus standard erects a constitutional presumption against access and ownership rules, relegating the affirmative, values-based argument for regulation to rebuttal.

A. Communications Regulation as Editorial Control

Given the burden that intermediate-plus scrutiny imposes on the government, communications proprietors asserting First Amendment claims against regulation will fare well so long as they can qualify what they do (e.g., running a communications network) as a First Amendment activity that is burdened by a speech regulation.⁴⁹ And so they have sought recognition that programming a channel, or providing broadband connectivity, is engaging in protected speech. They have likened these activities to those of the newspaper editor whose “choice of material [to publish], and ... decisions made as to limitations on the size and content of [what is published] ... constitute the exercise of editorial control and judgment”.⁵⁰

Correspondingly, proprietors have sought to avoid being classified as common carriers. Common carrier regulation has historically granted public access rights to private networks and regulated the ownership of network operators without any First Amendment review.⁵¹ Courts simply did not treat rules limiting what telephone companies could own, or requiring them to open their networks to all comers, as speech regulations.⁵² To the extent that proprietors can win classification as the press, and not common carriers, they will have the high ground in First Amendment disputes.⁵³

Every sort of network proprietor to try this line of argument has succeeded. For broadcasters this was easy. Almost all entities that hold broadcast licenses also produce programming and usually produce core First Amendment speech relating to politics and policy. It was thus to be expected that, notwithstanding its anomalous tolerance for broadcast regulation, the Court would accord due respect for broadcasters’ “journalistic discretion”.⁵⁴ Indeed, it is only because of

broadcasters' editorial function that the Court felt it necessary to adopt a *sui generis* approach to uphold broadcast regulation. By characterizing the broadcast airwaves as a uniquely scarce resource, the Court could overcome what would ordinarily be substantial First Amendment protection.⁵⁵ The spectrum scarcity rationale worked to dilute broadcasters' editorial function by converting them into quasi public trustees.

Cable operators, in their early days, were not as clearly editors. When the Supreme Court first came to consider their constitutional status, cable operators engaged in much less program production than did broadcasters. Because they had monopolies in their communities, operators did not compete on the basis of their content choices, nor did they brand their services with a message. For the most part, they retransmitted broadcast programming.⁵⁶ As cable operators began to add national programming channels, their claims to First Amendment protections grew more substantial. In 1984 the Court found that "[c]able operators ... share with broadcasters a significant amount of editorial discretion" in the selection of programming.⁵⁷ This decision that cable operators were editors was reaffirmed in later decisions⁵⁸ and subsequently extended by lower courts to satellite,⁵⁹ and to telephone companies seeking to provide video services.⁶⁰ Because the spectrum scarcity rationale does not apply to wired services, the conclusion that cable and telephone operators engage in protected speech meant that they would enjoy undiluted First Amendment protection.

Proprietors' success in achieving editorial status is unabating. The classification of network operators as editors seems to be a one way ratchet, moving towards a more generous understanding of the editorial function and expanded First Amendment protections. If traditional common carriers were to be deemed speakers when they acted like cable operators, one might have thought that cable operators would be considered common carriers when they acted like telephone companies, merely transmitting voice and Internet communications. The Supreme Court has not yet spoken on this issue, but a lower court has held that even under these conditions, the cable broadband provider is an editor entitled to full First Amendment rights.⁶¹ If in fact this trend holds up, the "editor" classification confers on communications proprietors a constitutional bonanza which, once given, will not be taken away.

B. Communications Regulation as Economic Control

The First Amendment system of binary classifications has naturally shaped the arguments of communications pluralists in defending ownership and access regulation. To avoid intermediate-plus scrutiny of communications regulations, they have challenged both the characterization of communications proprietors as editors and content-neutral regulation as speech regulation. What proprietors call editorial discretion, pluralists call network management, and what proprietors call speech regulation, pluralists say is mere economic regulation.

Professor Barron contributed to this process of “defining out” of stringent First Amendment protection certain communications activities and regulation. He pioneered the use of a “pragmatic First Amendment instrumentalism”⁶² by downplaying the speech rights of large media enterprises.⁶³ Barron was one of the first media law scholars to ground a theory of media regulation on a sophisticated understanding of market structure, showing why mass media markets tend towards concentration and what consolidation does to the editorial vibrancy of the medium.⁶⁴ Because commercial media operate differently from the lonely pamphleteer, and to very different effect, regulation of one should not be confused with regulation of the other.⁶⁵ In identifying the economic dynamics of the institutional press, Barron recommended less sympathy for speaker rights, unduly romanticized, and more for speech-promoting regulation, unfairly demonized.

The distinctions Barron drew between the institutional media and other speakers made it possible for him and others to characterize ownership and access regulation as mere structural or economic regulation. Such an approach is clearly helpful for the pluralist seeking to defend communications regulation against constitutional attack. If access and ownership regulations are seen as trenching only on economic interests, rather than on speech, then the use of constitutional rights to defeat such regulations evokes the discredited judicial activism of the *Lochner*-era Court.

The *Lochner*⁶⁶ Court invalidated a state law limiting the number of hours bakers could work as an unconstitutional interference with freedom of contract without due process of law.⁶⁷ If communications regulation functions as economic regulation, then the use of speech rights to overturn communications regulation looks much like the use of contract freedoms to overturn labor laws. Scholars on all sides of the debate, including those who generally support ownership and access regulations⁶⁸ and those who do not⁶⁹ have observed that communications proprietors have “*Lochnerized*” the First Amendment.⁷⁰

We would not be here today to discuss “reclaiming” the First Amendment for media policy if courts by and large had agreed that access and ownership regulations constitute mere economic controls. The Supreme Court has declined to “define out” of the zone of full First Amendment protection cable access regulations such as must-carry requirements. *Turner* reaffirmed that cable operators are editors⁷¹ and found the access requirement that cable retransmit local broadcast signals to be a speech control.⁷² Although the Court narrowly upheld the requirement, scholars have criticized its review as *Lochneresque* because of the refusal to characterize access regulation as “merely economic”.⁷³ Lower courts have been similarly tough on rules that purport to do no more than order the market.⁷⁴

In broadcasting, the constitutional calculus has been different, but even here the “mere economic regulation” argument has not carried the day. *Red Lion Broadcasting v. FCC*⁷⁵ followed prior Supreme Court precedent in defining access and ownership regulation out of rigorous First Amendment review.⁷⁶ *Red Lion* concerned a content-based access regulation – it provided for a right of reply to those who had suffered a personal attack or whose issues had been editorialized against on a broadcast.⁷⁷ The Court eschewed the rigorous scrutiny that content-based regulations would ordinarily receive. It did this at least in part using Professor Barron’s tools of market analysis, finding that the access rules ameliorated the effects of a highly concentrated media market.⁷⁸ Especially where government action, in the form of licensing requirements, was responsible for limiting entry, government could legitimately act to enlarge broadcast opportunities.⁷⁹ In this context alone, the Court recognized a “collective right of the viewers and listeners” that is strong enough to depose the customary constitutional presumption against even content-neutral speech regulations.⁸⁰

Unfortunately, *Red Lion*’s analysis obscured the importance of market structure to the analysis by relying on the poorly conceived spectrum scarcity rationale. Rather than treating spectrum constraints as one of several factors that contribute to concentration, the decision fetishized limited spectrum as the distinguishing feature of broadcasting.⁸¹ *Red Lion* defined broadcasting regulation out of the most rigorous First Amendment review, but did not define it as mere economic regulation. The result has been a schism in First Amendment doctrine, with relaxed review of broadcast regulation and intermediate-plus scrutiny for the regulation of all other media.⁸² Lower court judges hold their noses when applying *Red Lion* deference to communications regulation,⁸³ and one cannot but agree with Professor Glen Robinson’s assessment that *Red Lion*

"is at best a crippled precedent".⁸⁴ It is puzzling why the schism has persisted given the near universal agreement that constitutional doctrine should not hinge on technological differences that are no longer relevant, if they ever were.⁸⁵

The failure of the "defining out" project is not fatal to the pluralist cause. As *Turner* demonstrates, pluralists can prevail without defining communications regulation out of speech regulation. Courts applying intermediate-plus scrutiny may side with First Amendment values against First Amendment rights.⁸⁶ The *Turner* Court treated cable operators as editors, but also recognized at the end of its vigorous review that editorial discretion has varying degrees of First Amendment salience. "[C]able's long history of serving as a conduit for broadcast signals" compromised operators' editorial pretensions and reduced the risk "that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator".⁸⁷ Although the Court treated must-carry regulations as speech regulations, it was sensitive to the structural considerations that motivated Congress. Without an access mandate, the Court recognized, cable operators could "exploit[] their economic power to the detriment of broadcasters", and with it, "all Americans ... [are ensured] access to free television".⁸⁸

That this deft consideration of speech markets was wrapped up in a substantial evidence review, accompanied by a presumption of invalidity, makes *Turner* something less than an enduring win for pluralists. The closeness of the Court's decision, the stringency of its review, and the solicitude it showed for cable speech rights have all fortified the hopes of communications proprietors that future decisions will go the other way.⁸⁹ What pluralists failed to do in *Turner* and in subsequent non-broadcast cases was to overcome the definitional hurdle at the boundaries of the First Amendment. Pluralists will have a difficult time defending policies deemed speech regulation under *Turner* and there is little prospect of defining such policies out. Indeed, *Red Lion*?, failed technological determinism has perhaps so damaged the "defining out" project that, as a practical matter, it cannot be revived.

C. Speech Interests on Both Sides

The problems with defining access and ownership regulations out of the ambit of First Amendment concerns are not merely practical. This defining out gives short shrift to the First Amendment values that motivate the regulations in the first

place. The purpose of access and ownership regulations is not only to structure economic markets, after all, but to rescue a robustly heterogeneous speech culture from the risks of concentrated control of communicative resources.⁹⁰ Market interventions in the name of speech values intentionally shape the communications environment, and not for a purpose unrelated to speech.⁹¹

Pluralists have avoided reckoning with the true purpose of communications regulation by using as a rhetorical touchstone Justice Black's majority opinion in *Associated Press v. United States*.⁹² In this case, the Court upheld the application of antitrust law to the press, finding that such application was both constitutionally permissible and furthered the speech values on which the First Amendment "rests" – namely that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public".⁹³ This language has served as a bridge of sorts between the "mere economic regulation" and the very different "furtherance of First Amendment values" arguments for ownership and access regulations. *Associated Press* held that press freedoms did not justify an exemption from antitrust law – an ordinary and generally applicable regulation.⁹⁴ As the Court would later hold with respect to tax law⁹⁵ and labor law,⁹⁶ First Amendment rights do not give speakers special dispensation in economic life.

Associated Press cannot carry the weight it has been given. Antitrust laws really are mere economic regulation. They are not designed to further First Amendment values, although they had this effect when applied to the *Associated Press* by prohibiting restraints of trade and encouraging entry into the media sector.⁹⁷ Pluralists capitalized on this fortuitous alignment between mere economic regulation and First Amendment values by turning Justice Black's dicta into a justification for communications regulation.⁹⁸ In the second half of the twentieth century, "the widest possible dissemination of information from diverse and antagonistic sources" became a substantive goal for regulation developed specifically to shape communications. This dicta was to morph into "a basic tenet of national communications policy".⁹⁹

The first step came in *New York Times Co., v. Sullivan*, where the Court characterized the wide dissemination of diverse speech as a principal instrumental goal, rather than merely an underlying value, of the First Amendment.¹⁰⁰ Justice Brennan then invoked the phrase in 1973, in a dissent supporting government power to enact content-based access rights to

broadcasting facilities.¹⁰¹ A year later, the Supreme Court relied on the phrase to uphold communications regulation on the grounds that the “widest possible dissemination of information from diverse and antagonistic sources” was a “First Amendment goal” which the FCC could pursue through ownership regulations.¹⁰² Later, in *Turner*, the same goal was held to justify access regulations.¹⁰³

The use of Justice Black’s language as a First Amendment justification for communications regulation obscures the basic constitutional difficulty with communications law: it is not mere economic regulation even when it is content-neutral and competition-oriented. Rather, it is designed to reallocate expressive opportunities.¹⁰⁴ With speech interests on both sides, this reallocation unavoidably pits proprietors’ speech rights against public speech values.¹⁰⁵ In the end, the question that must be resolved is whether the benefits to First Amendment interests that are expected from the redistribution justify the burdens on First Amendment rights. Courts are understandably reluctant to short-circuit this inquiry by defining access and ownership regulations out of First Amendment scrutiny. If “defined in”, the regulations will survive only if First Amendment values can overcome the constitutional trump of First Amendment rights. The binary categorical approach of current First Amendment methodology is a lose-lose for communications pluralists. They cannot define regulation out of the First Amendment arena and must do battle within asserting soft values against hard rights under the weight of intermediate-plus scrutiny.

III. Copyright Policy and Free Speech

Copyright policy, like communications policy, intervenes in speech markets to enhance communicative opportunities. Copyright regulates speech by preventing users “downstream” of the original author from using and adapting the author’s expression without consent. This regulation, the Court has held, is designed “to promote the creation and publication of free expression”.¹⁰⁶ In its dual function as a speech generator and speech suppressor, copyright works like communications regulation to reallocate speech entitlements.¹⁰⁷ A property right in expressive works reallocates entitlements from the public to the copyright owner; exceptions to copyright protection move the entitlement the other way.¹⁰⁸

In debates over the proper scope of copyright, it is the pluralist who invokes First Amendment rights to defeat regulation protective of copyright owners.¹⁰⁹ The pluralist seeks reduced copyright protection to protect the speech rights of downstream users. The proprietor, by contrast, urges courts to view copyright

protections as mere economic regulation that, far from threatening speech rights, actually furthers the First Amendment interest in speech production.¹¹⁰ Although pluralists in copyright as in communications invoke the First Amendment values of a robust and diverse speech environment,¹¹¹ the pluralist copyright arguments are actually closer to those of communications proprietors. Both seek to exploit binary First Amendment categories to “define in” access and ownership regulation to stringent First Amendment review.

In theory, copyright pluralists should have an easier time achieving their goals. The rhetoric of First Amendment rights is more muscular than the rhetoric of values, and copyright pluralists deploy them both. The failure of this double-barreled argument to persuade courts to limit copyright undoubtedly has several causes.¹¹² One is the rigidly categorical approach to First Amendment review that has hurt communications pluralism. Courts will be reluctant to define copyright as a content-neutral speech regulation, subject to intermediate-plus scrutiny, so long as that classification creates a presumption of invalidity and makes it difficult to account for the speech interests on both sides.

A. Copyright as Economic Control

When the Government Enforces Copyright Law, It Empowers copyright owners to limit the expression of those who would “speak” the words and images under copyright. As Professor Paul Goldstein observed in one of the first articles to probe the tension between copyright and the First Amendment, copyright “[dispensed by the government... constitutes the grant of a monopoly over expression”.¹¹³ Particularly because copyright owners can readily obtain injunctive relief to stop infringing uses, scholars have likened copyright to a prior restraint on speech – the speech control long considered most odious to First Amendment rights.¹¹⁴

And yet the courts have by and large not considered copyright controls to be speech regulations under the First Amendment. Jed Rubenfeld has written that “[c]opyright law is a kind of giant First Amendment duty-free zone. It flouts basic free speech obligations and routinely produces results that, outside copyright’s domain, would be viewed as gross First Amendment violations”.¹¹⁵ The Supreme Court’s most recent examination of copyright’s effect on free speech was more nuanced, with the Court conceding that certain expansions of

copyright law might trigger rigorous First Amendment review, but confirming the general copyright exception.¹¹⁶

Copyright proprietors thus have had the doctrinal wind at their backs and can litigate from a “mere economic regulation” position that communications pluralists covet. Commentators have chronicled the steady march of copyright law towards greater and greater protection over the course of the twentieth century.¹¹⁷ This pro-proprietor speech regulation is then given the benefit of mere rationality review when it comes under First Amendment attack. Courts view copyright as a specialized economic regulation consistent with the conventional view that copyright exists to provide incentives for creation.¹¹⁸ Accordingly, litigants can easily characterize highly protective copyright law as a reasonable attempt to structure the market for expressive works to ensure optimal levels of expressive contribution.

Whenever the government structures marketplaces, of course, it can misallocate resources. In the case of copyright, such a misallocation could deprive the public of access to expressive works without any associated gains in production. Striking the right balance is the holy grail of copyright, the pursuit of which courts have decided is the job of Congress, not to be questioned too vigorously by the judiciary.¹¹⁹ We see this sort of deference on display in the Supreme Court’s most recent confrontation with the tension between copyright and free speech. In *Eldred v. Ashcroft*, the Court found the retroactive extension of the copyright term to be “a rational enactment”, even though Congress’ economic rationale was quite sketchy.¹²⁰ The Court did not believe itself to be “at liberty to second-guess congressional determinations and policy judgments [on the matter], however debatable or arguably unwise they may be”.¹²¹

In the battles over copyright law, like communications law, the charges of *Lochnerism* fly. If one views copyright law as mere economic regulation, then successful First Amendment challenges to copyright statutes indeed look like *Lochnerism*.¹²² Pluralists, it might be said, are seeking to use the Constitution to remake policies well within the legislative domain. Legal realists might dispel the shadow of *Lochner* by emphasizing that while the *Lochner* Court invalidated legislation that protected the little guy,¹²³ copyright regulation protects large corporate owners of film, music, and literary libraries.¹²⁴ This point resonates with the politics of recent copyright reform, discussed more below, but fails to recognize that the little guy – the author – is also a principal beneficiary of

copyright protection¹²⁵ and that the big guy will often be a downstream user.¹²⁶ In the end, it is only by defining copyright out of economic regulation and into speech regulation that copyright pluralists can escape the cloud of *Lochnerism*.

B. Copyright as Editorial Control

It is the goal of copyright pluralists to unsettle the traditional view of copyright as mere economic regulation with little adverse impact on speech rights. They have argued that the speech rights of downstream users are impermissibly squeezed as copyright expands. Access to expressive works is denied at the same time that digital technologies afford users greater flexibility to create new speech from copyrighted expression in the form of mash-ups, remixes, and what Jack Balkin calls “cultural bricolage”.¹²⁷ In this effort, copyright pluralists, like communications proprietors, have worked at the borders of the First Amendment to “define in” to the zone of constitutional protection what might have been thought to lie without.¹²⁸ They hope that by defining copyright law into the category of suspect speech regulation, courts will subject it to a presumption of invalidity.

This approach to the copyright-free speech nexus is relatively new. The first copyright scholars to probe the potential First Amendment limits of copyright concluded that copyright and speech rights were largely consistent so long as copyright incorporated speech-sensitive limitations.¹²⁹ These limitations included the unavailability of copyright for ideas and facts,¹³⁰ and the permissibility of fair use copying of copyrighted expression.¹³¹ Where internal limits on copyright were not capacious enough to protect speech rights, these scholars concluded that there should be a First Amendment exception to copyright.¹³² As copyright protections grew stronger and longer, copyright pluralists saw copyright exacting an ever larger price on free speech.¹³³ Instead of conceptualizing First Amendment exceptions to copyright, pluralists now conceive of copyright itself as an exception to the First Amendment.¹³⁴ Accordingly, they argue, copyright regulations should be viewed skeptically either under a strict scrutiny¹³⁵ or intermediate-plus scrutiny standard.¹³⁶

The pluralists brought this argument to the Supreme Court in *Eldred*¹³⁷ with a First Amendment challenge to the Sonny Bono Copyright Term Extension Act.¹³⁸ This 1998 law extended the copyright term by twenty years and applied retroactively to copyrighted works about to fall into the public domain.¹³⁹ Petitioners urged the Court to subject the retroactive application of the law to

Turner scrutiny as a content-neutral regulation of speech.¹⁴⁰ Writing for the Court, in a 7-2 decision, Justice Ginsburg refused to treat copyright law as a speech regulation subject to serious First Amendment scrutiny.¹⁴¹ At the same time, the Court acknowledged more clearly than it ever had that copyright did in fact raise First Amendment concerns. The way the Court handled the speech interests on both sides of the copyright question casts doubt on the utility of a categorical First Amendment approach to the pluralist agenda.¹⁴²

C. Speech Interests on Both Sides

The *Eldred* petitioners acknowledged that copyright, like communications regulation, “tries to balance free speech interests ‘on both sides of the equation.’”¹⁴³ It is from this premise that they sought *Turner* review of the Copyright Term Extension Act, arguing that copyright regulation, “like all regulation that allocates the right to speak among speakers,... must be justified under intermediate review”.¹⁴⁴ Much like communications proprietors, copyright pluralists argued that when speech values conflict with speech rights, speech rights should win.¹⁴⁵ As Fred Yen has written, “the First Amendment is not neutral about the choice between encouraging a speaker and silencing a speaker”.¹⁴⁶ It favors the right to speak. Given traditional doctrine’s hostility to speech regulation, whatever its goals and effects, the critical question is whether what is being regulated is protected speech.

The *Eldred* Court, faced with the binary choice between speech and economic regulation, chose to “define out” and defer to Congress rather than “define in” and second guess. To characterize copyright as speech regulation would have called into constitutional doubt too much copyright law.¹⁴⁷ Indeed, absent any clear limiting principle, it is hard to see why such a “defining in” would not dismantle copyright law entirely. Once dealt the blow of intermediate-plus scrutiny, copyright regulation would teeter; questions of the balance between speech rights and speech values, or the speech interests on both sides, would have only the diminished force of rebuttal. Notably, even dissenting Justices Stevens and Breyer declined to apply *Turner* scrutiny, finding instead that Congress had acted irrationally.¹⁴⁸

The reality is that copyright regulation, like communications regulation, lies somewhere between a speech regulation and mere economic regulation. As a speech-motivated intervention into speech markets, copyright deserves a hard constitutional look, but not necessarily the skepticism that is appropriate for a

governmental effort to suppress speech without offsetting speech benefits. A strategy that seeks to define media policies in or out of the ambit of First Amendment concern is unsuited to the complexity of the interests at stake. *Turner* intermediate-plus scrutiny proceeds as if governmental allocation of speech entitlements was not inevitable and often desirable. *Eldred* rationality review proceeds as if speech allocations were not in fact series of reallocations. Neither approach reflects the full spectrum of First Amendment values that Jerome Barron elucidated forty years ago and that lights the pluralist agendas today.

IV. The Clash in Pluralist Arguments

We have seen above that communications and copyright pluralists have tried with limited success to exploit First Amendment categories, supporting deferential review of communications regulation and stringent review of copyright regulation. Beneath the surface of these strategies are disagreements about the relative importance of First Amendment rights versus values, and positive liberties versus negative liberties. These tensions are likely to become more apparent as the issues that concern communications and copyright pluralists converge and their strategies evolve.

On issue convergence, consider the position of net neutrality proponents who insist that regulators prohibit broadband providers from favoring some streams of Internet content over others. In other words, they seek an access requirement for the benefit of Internet content providers. Proponents include those who are longtime communications pluralists¹⁴⁹ and copyright pluralists.¹⁵⁰ Broadband providers (communications proprietors) have just begun to formulate their First Amendment arguments against this policy, and they are very familiar. In objecting to a proposal that wireless broadband providers be subject to “open access” requirements for the benefit of all content providers, Verizon Wireless relied in part on its First Amendment rights as a carrier.¹⁵¹ It characterized broadband providers as speakers and relied on *Turner* to argue that FCC-mandated open access is presumptively unconstitutional. Had *Eldred* gone the other way, the case would support the proprietors’ argument that Congress had failed to meet its high burden of proof in justifying regulation that trenches on the speech rights of some to promote the speech production of others.

More interesting are the ways in which emerging strategies within each of copyright and communications pluralist agendas challenge pluralists to harmonize their constitutional approaches.

A. New Directions in Media Policy

There is no law of nature that says communications pluralists have to pursue their objectives through regulation, asserting First Amendment values, while copyright pluralists take their cause to court, asserting First Amendment rights. Indeed, we can begin to see a shift in these strategies. Two examples will suffice: the communications pluralists' embrace of license-free (largely unregulated) spectrum¹⁵² and copyright pluralists' embrace of new copyright law in the form of compulsory licenses.¹⁵³

1. Communications Commons

One of the top goals of communications pluralists today is spectrum policy reform. Here, pluralists argue not for the regulation of existing communications networks, but for new networks that support additional communicative opportunities.¹⁵⁴ Specifically, pluralists have petitioned the government to get out of the business of licensing spectrum and, instead, to make more spectrum available on an unlicensed basis.¹⁵⁵ Such unlicensed spectrum could then be used freely as a communications commons by anyone, subject only to reasonable technical restrictions.¹⁵⁶ The "communications commons" objective is substantially deregulatory.¹⁵⁷ In a commons, government would have substantially less control over who carries speech over the air – the government intervention that is in some sense the original First Amendment sin of communications law.¹⁵⁸

Let us suppose that the FCC, instead of expanding unlicensed spectrum use, went in the other direction by issuing licenses for exclusive use of what had been unlicensed spectrum. The unlicensed user who has lost wireless access might well invoke his First Amendment right against a regulation that withdraws from him an important channel of communication. Now it is the communications proprietor and prospective licensee who must argue that the law is merely an economic regulation reallocating speech rights from one set of users to another. Now the communications pluralist stands in the shoes of the copyright pluralist, arguing for the presumptive invalidity of a law that abridges speech rights. Because spectrum usage decisions invariably prevent some from speaking, a regulation that prohibits unlicensed users from accessing spectrum can be seen as a (content-neutral) restriction of speech.¹⁵⁹

Pluralists making a *Turner/Eldred* style argument to defeat spectrum licensing might win, but it is unlikely. Any such “defining in” to speech regulation would subject the FCC’s historic spectrum management role to rigorous constitutional scrutiny. Courts would be understandably reluctant to take this step. Moreover, to the extent that solicitude for First Amendment claims in telecommunications can be explained by a *Lochner*esque respect for property rights, the creation of new property rights through licensing would not raise the same First Amendment ire. Whatever their chances, would this be a fight pluralists would want to win? Spectrum rights can be reallocated for or against commons use and pluralists would dislike being on the government’s side of a First Amendment claim that it had unlawfully reallocated spectrum from licensed to unlicensed uses. The stakes in the First Amendment classification game are just too high.

Spectrum usage decisions, like all government allocations of communicative opportunities, implicate speech interests on both sides. A decision to leave spectrum idle, while reducing opportunities for new entrants at a particular moment, may also enhance the communicative potential of existing or future spectrum users by limiting harmful interference or avoiding conflicts. A decision to provide exclusive rights to spectrum will deny access to commons users, but might encourage rights-holders to invest in communications networks to create more communicative capacity.¹⁶⁰ Any system of assigning spectrum rights privileges some spectrum users over others – namely those who are most likely to accumulate communicative resources given the allocative structure. Predictive judgments about whether this privilege is warranted by the expected effect on speech opportunities are just the sort that Congress made in enacting the cable must-carry law.¹⁶¹ Judicial review of such judgments over the past decade cautions against argues against pluralist endorsement and further development of *Turner/Eldred* categorical reasoning.

2. Compulsory Licenses

Just as communications pluralists may shift strategies to advocate for stricter review of media regulation in future cases, it is just as likely that copyright pluralists will turn the other direction. Copyright regulation need not always result in substantial increases in the copyright owner’s ability to lock up communicative resources to the detriment of downstream users. Frustrated by the failure of the

copyright pluralist agenda in the courts, several copyright pluralists have advocated regulatory approaches to enlarge downstream access to copyrighted works.

One such proposal is that Congress expand the use of compulsory licenses to afford public access to copyrighted works.¹⁶² The justification for existing compulsory copyright licenses is that downstream users face high transaction costs in clearing the rights to perform songs or to retransmit broadcast signals.¹⁶³ The licenses ease the logistical difficulties of gaining access to content that in all likelihood the copyright owners would voluntarily provide. In justifying the proposed additional compulsory copyright licenses, commentators shift focus from the costs of transactions to copyright owners' propensity to deny access altogether.¹⁶⁴ The purpose of the proposed statutory interventions, unlike the existing compulsory licenses, would be to override the copyright holder's refusals to license in the interest of promoting First Amendment values.

If copyright enjoins the downstream user from speaking, a compulsory license flips the injunction by preventing the copyright holder from controlling distribution of her work. In challenging the regulation, the aggrieved copyright holder might well bring a First Amendment claim that this is a compelled speech regulation.¹⁶⁵ Consider the downstream user's exploitation of the author's copyrighted work – in a commercial or in pornography, for example – in a way that the author would not have permitted. The author would contend that her right to license, or refuse to license, her speech is an autonomy interest that copyright protects at least for her lifetime (plus) when that autonomy interest is strongest.¹⁶⁶ The compulsory license, while it does not compel her to speak, forces an association between her and the downstream user's speech that she resists.

In concluding that copyright furthers First Amendment values, the Court provided some support for this contention, albeit in the context of an author who had not yet published his work. The First Amendment, the Court said, "shields the man who wants to speak or publish when others wish him to be quiet" while copyright protects "a concomitant freedom *not* to speak publicly, [a freedom] which serves the same ultimate end as freedom of speech in its affirmative aspect."¹⁶⁷ To be sure, the autonomy interest in not having *someone else* speak your words publicly cannot be as strong as the interest in not having your words

spoken publicly at all. But such an autonomy interest is not so weak as to resist all judicial consideration.¹⁶⁸

The copyright pluralists, faced with such a claim, would have a reasonably good argument that government permission to speak others' words does not amount to compelled speech because it does not "[m]andate speech that a speaker would not otherwise make".¹⁶⁹ Interestingly, this argument that A has no First Amendment right to be protected from B's speaking A's words is the corollary to Justice Ginsburg's conclusion in *Eldred* that B has no First Amendment entitlement to speak A's words.¹⁷⁰ To define compulsory licensing out of the compelled speech doctrine is in some measure to retreat from the *Eldred* project of defining copyright into speech regulation. One again has to wonder about the wisdom of binary First Amendment categories that, by dividing government interventions into economic and speech regulation, shortchange the complexity of speech interests on both sides of the regulation.

B. Distinguishing Copyright and Communications Regulation

Distinctions between copyright and communications regulation do not dissolve the conflict between pluralist perspectives on First Amendment review of media policy.

Political economy furnishes one way to distinguish communications and copyright regulation. Several scholars have suggested that copyright regulation should be viewed more skeptically than communications regulation because copyright law historically has been the product of one-sided legislative battles.¹⁷¹ On the side of expanding copyright protections are the Hollywood studios, the music industry, the software industry, and other powerful industrial content producers.¹⁷² Until recently, the copyright pluralists who opposed the new copyright laws were represented by poorly funded librarians and consumer rights groups.¹⁷³ The public's interest in relatively permissive downstream use of copyrighted works was simply too diffuse to bring to bear in the legislative process that produced copyright regulations.¹⁷⁴

By contrast, as the political economy story might go, those who seek to overturn communications access and ownership restrictions are the very network proprietors who fought unsuccessfully to block such restrictions in the legislature or agency.¹⁷⁵ There is no process failure here. Network proprietors are simply trying to achieve through the courts what they could not achieve in Congress or at the FCC.¹⁷⁶

The problem with this argument is that it dies with the imbalance in power. Well-organized and focused corporate entities affected by media regulations have an advantage over individuals, but not so over other comparably powerful corporate entities whose interests are aligned with the downstream copyright user or the public. Over the past several years, commercial interests have found that copyright pluralism advances their business aims and have lobbied against copyright expansion.¹⁷⁷ In particular, hardware and software manufacturers whose customers exploit copyrighted works have resisted Hollywood's attempts to gain increased control over such works in both legislative¹⁷⁸ and judicial arenas.¹⁷⁹ Technology companies like Intel and Microsoft have similarly allied themselves with unlicensed spectrum users and against entities that seek exclusive control of the spectrum.¹⁸⁰ Moreover, as Lior Strahilevitz points out, the profusion of speakers that copyright pluralists seek to protect are endowed with the means to a new politics.¹⁸¹ Just as the blogosphere is changing electoral politics,¹⁸² it is likely to change legislative politics in ways that lessen the imbalance of power between corporate haves and public have-nots.¹⁸³

In search of relevant differences between communications and copyright regulation that could reduce First Amendment tensions, we turn next to the status of the rights-holder. Communications regulation has traditionally targeted large corporate entities, whereas copyright regulation burdens all speakers who would make unauthorized uses of copyrighted works. Particularly if one believes that the purpose of the First Amendment is to further individual expressive autonomy, the speech rights of an individual like Eric Eldred seem stronger than those of a corporate entity like Time Warner.¹⁸⁴ Ed Baker is the most artful exponent of an autonomy-based theory of the First Amendment, specifically the Amendment's Speech Clause.¹⁸⁵ Baker would tolerate significant "speech" regulation (copyright and communications) of commercial enterprises, which speak to sell, but much less regulation of individuals, who speak for expressive purposes.¹⁸⁶ If the commercial enterprises are members of the media, regulation might be less tolerable not because of any speech interests the media entity has, but because the instrumental purposes of the Press Clause might demand more government restraint.¹⁸⁷

The essential insight of this theory that not all speech is of equal First Amendment concern is correct, and should powerfully inform judicial review of media regulation. As I have argued, the dichotomous choice between speech regulations subject to a presumption of unconstitutionality and economic regulation subject to the opposite presumption impedes the calibration of First

Amendment value.¹⁸⁸ The question is whether the replacement of one inflexible categorical rule – speech reallocations are presumptively unconstitutional – with another – only speech reallocations that burden individual noncommercial speech are presumptively unconstitutional – permits adequate consideration of the speech values at issue.

There is cause for skepticism. As Baker concedes, the new dichotomy does not work for the regulation of media entities. Such, because it implicates instrumental First Amendment concerns as opposed to individual liberty interests, is subject to a different analysis.¹⁸⁹ Since most communications regulation concerns the speech interests of media entities, an autonomy-based dichotomy is beside the point. More fundamentally, even where the categories apply, the approach may be chimerical. Many speech reallocations will have broad coverage. A copyright regulation like the CTEA, for example, equally burdens for-profit corporate, for-profit individual, nonprofit corporate, and non-profit individual use of copyrighted works.¹⁹⁰ Eric Eldred was an individual seeking to make noncommercial use of the protected speech, but he could as well have been a commercial filmmaker. Certainly the destiny of a copyright rule of general applicability should not turn on who brings the constitutional challenge.

Communications regulations may also burden individuals (or their non-profit collectives) alongside of corporate entities. In *Turner*, for example, cable programmers joined cable operators in challenging the must carry law.¹⁹¹ The government affairs cable network CSPAN, which is organized as a nonprofit organization, serves the expressive interest of its CEO and founder, Brian Lamb, in addition to its press function.¹⁹² CSPAN has long argued that must carry regulations reallocate speech opportunities away from it and to commercial broadcasters.¹⁹³

The autonomy-based preference for individual expression over corporate speech products demands the very kind of searching inquiry that application of binary First Amendment categories – speech or economic regulation – disfavors. One sees this in the distinction that Yochai Benkler, drawing on Baker's theory, attempts to make between copyright and communications regulation.¹⁹⁴ A copyright law "that prohibits an individual from expressing him or herself personally or politically so as to increase the speech capacity of a commercial mass media outlet", he writes, "is not equal in the eyes of the First Amendment to a [communications] law that requires a large commercial mass media company

to make available resources – like cable channel capacity – to a non-commercial political group”.¹⁹⁵ This is so because corporations do not bear “moral claims of autonomy to freedom of expression”.¹⁹⁶ Note the specialized conditions that Benkler builds into the case for the regulations he supports: (1) access to communicative resources must be claimed by an individual, (2) for noncommercial uses, as against (3) a large “commercial mass media company”.¹⁹⁷ Very few media laws will satisfy these conditions, with most reallocating speech opportunities more ambiguously between commercial and noncommercial or corporate and individual speakers.¹⁹⁸

An autonomy-based evaluation of speech interests deployed as a threshold sorting mechanism cannot resolve the doctrinal tensions in the pluralist free speech agenda. If applied rigidly, it will sort out of serious constitutional review media laws that do in fact trench on individual noncommercial speech, while sorting in (and tipping the scales heavily against) laws that reallocate individual speech rights only slightly or incidentally.

V. Another Approach to Speech Reallocations

Reclaiming the First Amendment for media policy, specifically for the pluralist agenda, will require a departure from the application of inflexible First Amendment categories. An approach that overemphasizes the distinction between economic and speech regulations undermines the sensitive balancing of interests that ought to precede and inform these distinctions where speech interests lie on both sides of government interventions in speech markets.

First Amendment review of media regulation suffers from many of the same problems that beset commercial speech jurisprudence. Here too the Court has sought the shelter of deceptively dichotomous categories (commercial and noncommercial speech; truthful and false speech) to avoid a clear reckoning with competing values.¹⁹⁹ In this context, Justice Rehnquist – no great fan of muddy standards²⁰⁰ – criticized the Court’s approach, observing that there “are undoubted difficulties with an effort to draw a bright line between [protected and unprotected speech], and the Court does better to face up to these difficulties than to attempt to hide them under labels”.²⁰¹ The problem with the lines is not that they “waver []”, he went on, but that they are “simply too Procrustean to take into account the congeries of factors which I believe could ... properly influence a legislative decision with respect to commercial advertising”.²⁰²

What media pluralists want is a jurisprudence of positive liberties that values not only the rights of speakers to speak, but also the public interest in a rich speech environment with abundant speech opportunities. As Chris Eisgruber has noted, this kind of jurisprudence must recognize the complex speech effects of laws that serve to reallocate speech opportunities.²⁰³ The constitutional approach will have to “be thoroughly pragmatic ... [in its] effort to say how much of a burden on liberty is ‘too much’ within a framework that both treats every burden as a cause for constitutional regret and simultaneously acknowledges that some burdens will inevitably exist”.²⁰⁴ Jerome Barron recognized the need for such a pragmatic approach in 1967, but the development of a suitable framework was waylaid by the technological determinism of *Red Lion*, which relieved pluralists from making their constitutional case. Intermediate level scrutiny does in theory, and has outside of media policy, structured nuanced First Amendment decision-making.²⁰⁵ As discussed above, *Turner* intermediate-plus scrutiny holds less promise for the sort of speech allocations media policy makes.

A. Justice Breyer’s Balancing

We see in some of Justice Breyer’s First Amendment opinions the beginnings of a more pragmatic and contextualized review of laws that implicate speech interests on both sides.²⁰⁶ Writing of his technique in the context of campaign finance reform, where the “basic democratic objectives” of the First Amendment “lie on both sides of the constitutional equation”,²⁰⁷ Justice Breyer argues that the Court should not apply “a strong First Amendment presumption that would almost automatically find the laws unconstitutional”.²⁰⁸

Justice Breyer’s *Turner* concurrence itself was clearly attuned to the speech interests on both sides of the case.²⁰⁹ This sensitivity emerged more clearly the same year in *Denver Area Educational Telecommunications Consortium v. FCC*, which involved statutory provisions designed to screen children from “indecent” cable programming.²¹⁰ The federal government, in earlier legislation, had mandated that cable operators grant access to independent programmers through “leased access channels”, and to local government and nonprofit community groups through “public access channels”.²¹¹ The legislation challenged in *Denver Area* allowed cable operators to ban indecent programming from these channels.²¹² These provisions presented unusually difficult First Amendment problems because, although content-based, they were

merely permissive and clearly involved the reallocation of speech opportunities that the government itself had created.²¹³

Had the First Amendment calculus implicated only the government's interest in protecting children from indecent programming and the editorial freedom of the independent programmers, municipalities and community groups, the case would have presented a conventional content-based regulation. But the regulation also directly implicated the speech interests of the cable operator. Did the permissive regulations take away editorial freedom from leased and public access channel users or did they simply return editorial freedom to cable operators – freedom the Court had accorded full First Amendment protection?²¹⁴ If viewed as a reallocation of speech rights away from access channel users, the regulations could be categorized as speech regulations and rendered presumptively unconstitutional.²¹⁵ If viewed as a restoration of previously reallocated speech rights back to cable operators, the regulations could be defined substantially out of First Amendment review.²¹⁶

The traditional categorical method of First Amendment review, Justice Breyer wrote, “lack[s] the flexibility necessary to allow government to respond to very serious practical problems without sacrificing the free exchange of ideas the First Amendment is designed to protect”.²¹⁷ Treating the regulations as presumptively constitutional ignores the possibility of private censorship when a monopoly communications provider controls access to information.²¹⁸ Treating them as presumptively unconstitutional ignores the speech interests of the cable operator.²¹⁹ Justice Breyer shredded these categorical boxes in order to account for the full array of speech interests involved.²²⁰ In the end, the plurality gave more weight to the speech interests of the public access channel users than to the leased access channel users based on differences in their speech, governance, and history.²²¹

We see a similar balancing tack in Justice Breyer's concurring opinion in *Bartnicki v. Vopper*.²²² Here, radio journalists innocently obtained a recorded mobile phone conversation of an elected official that had been illegally intercepted by a third party. The question in the case was whether enforcement of the federal wiretap law, which criminalizes broadcast of the conversation, violated the First Amendment. The majority decision took a conventional categorical approach: It defined the broadcast into the zone of protected speech, thereby making the regulation presumptively unconstitutional, and struck it down.²²³

Justice Breyer treated the privacy interest protected by the wiretap law as a “constitutional interest” related to the system of free expression, since expectations of privacy foster private speech.²²⁴ When there are competing First Amendment interests “on both sides of the equation, the key question becomes one of proper fit” between speech benefits and burdens.²²⁵ Rather than defining the regulation in or out of presumptive invalidity, Justice Breyer engaged in a fact-specific balancing of the speech interests in publication and in private conversation, concluding that the interest in publication triumphed because the speech involved was of especial public importance.²²⁶

A similar approach emerges from Justice Breyer’s First Amendment opinions in non-media contexts, most recently in a case about public employees’ free speech.²²⁷ There is a presumption that public employees enjoy constitutional protection against retaliation for statements they make as citizens on “matters of public concern”.²²⁸ At the same time, because the government has a strong interest as an employer in disciplining employees for speech-related activity that interferes with their jobs, the government may rebut this presumption if it can show that its reasons for treating the employee differently from any other member of the public outweigh the employee’s speech interests.²²⁹ In *Garcetti v. Ceballos*,²³⁰ the Court was asked to determine whether a deputy district attorney’s statement questioning the legitimacy of a search warrant was presumptively entitled to First Amendment protection.

Justice Kennedy’s majority opinion used traditional categories to define the employee’s speech out of protected speech on the grounds that the employee was speaking pursuant to his official duties, and not as a citizen.²³¹ This definitional move is similar to the majority’s in *Eldred*: define speech out of presumptive protection lest too much speech be drawn into the gravitational force of the First Amendment.

Justice Breyer’s dissent rejected this move. He acknowledged that “judges must apply different protective presumptions in different contexts, scrutinizing government’s speech-related restrictions differently depending upon the general category of activity”.²³² But this scrutiny should be conducted both *before* and *after* the activity is assigned a degree of First Amendment protection based on the facts of the case. In this case, he argued, the speech was entitled to the presumption of protection because the speaker had unusually strong interests in the particular expression and the government had unusually weak interests.²³³

What is it that Justice Breyer's approach to speech reallocations achieves that *Turner* intermediate-plus scrutiny does not?²³⁴ It is able to assess a media law's speech effects before prejudging its likely constitutionality. In other words, it declines to shift the burden of proof to the government as soon as the plaintiff has successfully identified a speech interest, no matter how slight. Any form of intermediate scrutiny treats the speaker's interest as invariant; it assesses the strength of the government's interest only after a presumption arises as to the constitutionality of the regulation.²³⁵ Breyer's approach is sensitive not only to the strength of the government's interest in reallocating speech opportunities, but also to the magnitude of the speech interests being reallocated.²³⁶ While any kind of intermediate scrutiny weighs the strength of the government's interest in enhancing speech opportunities, it typically fails to calibrate the relative magnitude of the speaker's interests in speaking.

B. Beyond Balancing

The chief criticism of Justice Breyer's approach is that it is susceptible to an unconstrained, ad hoc balancing of multiple factors.²³⁷ It is well known that balancing approaches often suffer from lack of clarity and transparency.²³⁸ One needs to be especially careful balancing interests in First Amendment cases given the importance of the individual rights at stake and the possibility of governmental ruses that dress up speech suppressive laws as speech enhancements.

At the same time, we should also recognize that the traditional scrutiny-based approach to First Amendment problems offers no sanctuary from the subjectivity of balancing. Initial determinations of what is speech regulation and what economic regulation, of what is content-based and what content-neutral, are themselves highly contestable.²³⁹ In free speech jurisprudence, as in other areas of the law, crystalline rules seduce with a clarity they cannot deliver.²⁴⁰ Steven Shiffrin reminds us that balancing is really "nothing more than a metaphor for the accommodation of values".²⁴¹

Capturing the sensitivity and flexibility of Justice Breyer's heightened scrutiny approach, while making it more transparent and disciplined, will take some work. This work should begin, in the first instance, by disqualifying cases that provide less justification to depart from the traditional levels of scrutiny. Content-based regulations, or regulations that are implemented for a purpose unrelated to speech enhancement, fall into this category.²⁴²

Justice Breyer's balancing approach was inapposite, therefore, in *United States v. American Library Ass'n*.²⁴³ In that case, public libraries challenged a statutory requirement that, as a condition of receiving certain federal funds, they filter Internet access to protect minors from obscene and like material.²⁴⁴ The majority upheld the regulations as an appropriate exercise of the government's spending power.²⁴⁵ Justice Breyer, in his concurrence, treated the law as if it, like those at issue in *Bartnicki* and *Denver Area*, implicated speech interests on both sides. He opposed the interests of patrons denied access to certain material²⁴⁶ with those of libraries in exercising selection or editorial choices.²⁴⁷ This formulation is puzzling in light of the fact that the libraries and their patrons were on the same side of the case. The libraries objected to government intrusion on their editorial choices *for the sake* of their patrons.²⁴⁸ If this was a First Amendment case at all (rather than a Spending Clause case), it was a conventional one fit for the application of traditional categories. It did not involve speech interests on both sides, nor was the government allocating speech rights among speakers in a content-neutral manner.

As to the cases of media regulation that do involve speech reallocations, where there truly are speech interests on both sides, the question is whether the government intervention is actually pro-speech or anti-speech in ways that are constitutionally meaningful. In lieu of an open-ended balancing test, it should be possible to structure the analysis by shifting the burden of proof to challenger or defender of the media regulation depending on the likely impact of the rule.

Antitrust law uses this technique to analyze whether a restraint of trade is pro-competitive or anti-competitive. The traditional dichotomy between rule of reason and per se standards in antitrust is loosely analogous to that between rational basis and higher level First Amendment review in media law. Just as intermediate-plus or strict scrutiny review treats a speech regulation as presumptively unconstitutional, the per se rule treats certain restraints of trade as anticompetitive under the Sherman Act.²⁴⁹ By contrast, like rational basis review, the rule of reason presumes other restraints to be benign unless plaintiff can show as part of its prima facie case sufficiently severe anticompetitive effects.²⁵⁰ If plaintiff can show that the challenged conduct falls into a per se category, he will win.²⁵¹ Failing this, he will bear the burden under the rule of reason of proving as part of the prima facie case that defendant has market power and the challenged conduct has anticompetitive effects.²⁵²

Courts have tired of this traditional dichotomy, finding that the *per se* rule can too quickly invalidate efficient restraints while the rule of reason may impose too heavy a burden on the plaintiff to invalidate inefficient restraints. The modern trend is to look at restraints of trade along an analytic continuum in terms of their effects on competition.²⁵³ Courts have structured this continuum by shifting the burdens of proof.²⁵⁴ In cases where a restraint is ordinarily fit for the *per se* rule, but it has significant pro-competitive effects, courts have avoided the sledgehammer effect of the *per se* rule by applying a “quick look” review.²⁵⁵ Quick look is also used in cases that would ordinarily go straight into rule of reason review, but the challenged conduct seems sufficiently anti-competitive that courts want to relieve the plaintiff of its heavy burden until the defendant proves that the conduct is actually pro-competitive. Thus, quick look imposes on the plaintiff the initial burden of showing that the challenged conduct presents a strong likelihood of anticompetitive harm.²⁵⁶ Then the burden shifts to the defendant to advance a pro-competitive justification for the conduct.²⁵⁷ The case will then go into *per se* or rule of reason review.²⁵⁸ Quick look has not only affected the allocation of burdens, but has also in some cases expanded the range of substantive considerations courts will take into account in valuing the challenged practice.²⁵⁹

Binary First Amendment doctrine, like binary antitrust doctrine, too often has an all or nothing quality that moves cases into overly stringent or unduly searching categories of review.²⁶⁰ Shifting burdens of proof could be used to navigate the continuum between speech and economic regulation in which media laws are often situated. Indeed, the very factors that commentators have used to distinguish communications from copyright regulation could structure a form of quick look in media law review. Where, for example, a regulation trenches on speech interests at the core of First Amendment concern, the government should bear a heavy burden in defending the regulation as speech enhancing. If, however, the plaintiff’s speech interests are more attenuated, the plaintiff should bear the heavier burden.

Viewed this way, the must carry regulations at issue in *Turner* were constitutional not because the government overcame a presumption of invalidity, but because there should be no presumption of invalidity. A quick look analysis would have revealed that the cable operators’ speech interests were attenuated and, therefore, that intermediate-plus scrutiny was inappropriate. The challenger of content-neutral structural regulations would then bear a heavy burden that it

could not meet. *Eldred* presents a more difficult case because the strength of the plaintiffs speech interests is less clear. Here especially, a quick look would have been useful in flushing out the Court's reasoning. It would have forced the Court to consider Eldred's speech interests before deciding how heavy a burden he should bear in challenging the CTEA. Instead, by categorizing the CTEA as an economic regulation subject to minimal scrutiny, the Court never assessed the strength of Eldred's interests (except with throwaway lines that you have no right to speak another's words). Such a quick look would not necessarily change the outcome of the case, but it would have forced the Court to confront the burden of proof issue as a function of the underlying speech values involved.

VI. Conclusion

Media pluralists and proprietors have fought each other into doctrinal corners in an effort to deploy, or defend against, First Amendment attacks on government interventions in speech markets. Where one side sees "mere economic regulation", the other sees a flagrant free speech violation. Media pluralists make both arguments, swapping sides with proprietors depending on the regulation at issue. They argue one position to uphold communications regulation and another to overturn copyright regulation. This internal conflict becomes more apparent and troubling as pluralists find new legal strategies to open access to communicative resources.

Forty years ago, Jerome Barron argued for a media law that accounted for conflicting speech values. The First Amendment rights of speakers, he suggested, should be balanced against listeners' First Amendment interests in a robust speech environment. *Red Lion* short-circuited Barron's fruitful inquiry, asserting the importance of listener interests, but only in the presence of spectrum scarcity. *Red Lion*, with its mistaken technological determinism, enabled pluralists to advance a broadcast policy agenda without testing a constitutional theory that takes seriously the speech interests implicated by media regulation.

A more flexible and context-sensitive approach to media policy review promises to be more hospitable to the full range of speech interests implicated by government interventions in media markets. Such an approach also allows pluralists to harmonize their constitutional positions with respect to First Amendment rights and values, public interests and private liberties. Justice Breyer's approach to content-neutral regulation of speech, where there are speech interests on both sides of the

regulation, provides a basis on which pluralists might build a new, coherent strategy with respect to communications and copyright regulation. Such an approach would recognize that this regulation typically reallocates speech entitlements in a manner that is neither purely economic or speech suppressive. The regulation merits scrutiny, but also considerably more deference than the *Turner* standard accords.

Acknowledgement

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Endnotes

- 1 Jerome A. Barron, *Access to the Press – A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).
- 2 *Id.* at 1678.
- 3 There are many other governmental interventions, both statutory and judicial. Postal service subsidies and relief from defamation liability come to mind. See C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 74 n.55, 96,122; ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 75-91 (1983).
- 4 See Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365, 368-69 (codified as amended at 47 U.S.C. § 396(a)).
- 5 Interestingly, 1967 was the year that Benjamin Kaplan published his collection of lectures on copyright laying out the “low-protectionist bias” which inspires so many copyright scholars today in its promotion of “easy public access to, and use and improvement of products of the mind”. BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 125 (1967).
- 6 See generally YOCHAI BENKLER, *THE WEALTH OF NETWORKS: How SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 383-84 (2006).
- 7 See Barron, *supra* note 1, at 1668, 1675.
- 8 Some pluralist scholars have suggested that the First Amendment may in some instances require government intervention in speech markets. See, e.g., Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 783 (1987) (“state regulation of speech is consistent with, and may even be required by, the first amendment [sic]”).

- 9 See, e.g., ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 79-89 (1960); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 121-65 (1993); Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 562-79 (1991); Fiss, *supra* note 8, at 785-89.
- 10 Not all pluralists embrace instrumentalism. See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 194-224 (1989); J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 391-94.
- 11 Fiss, *supra* note 8, at 785-86.
- 12 Though styled as a "right of access" to the press, Barron did not in *Access to the Press* advocate an individual right of speakers to reply, as exists in many European jurisdictions and existed in the FCC's erstwhile personal attack rule. See *Red Lion Broad. Co., v. FCC*, 395 US 367, 378 (1969).
- 13 Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1109 (1993). See also Jim Chen, *Conduit-Based Regulation of Speech*, 54 DUKE L.J. 1359, 1408-12 (2005).
- 14 See Gregory P. Magarian, *Regulating Political Parties Under a "Public Rights" First Amendment*, 44 WM. & MARY L. REV. 1939, 1972-91 (2003).
- 15 STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 39 (2005).
- 16 See, e.g., LAWRENCE LESSIG, *FREE CULTURE* 17-20 (2005); JESSICA LITMAN, *DIGITAL COPYRIGHT* 171-91 (2001); JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* 47-50 (1996); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 537 (2004); C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 899-904, 951 (2002); Benkler, *supra* note 8, at 357-60; Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 285 (1996); Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 217 (1996).
- 17 See, e.g., Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879, 1880-81 (2000); Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173, 187 (2003). Ed Baker's position is uniquely informed by his understanding of both the speech and the press clauses of the First Amendment. Baker, *supra* note 16, at 951.
- 18 Fair use is a defense to a claim of copyright infringement based on the character, amount, and effect of the secondary use. See generally *Harper & Row, Publishers, Inc., v. Nation Enters.*, 471 US 539, 560-69 (1985); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1135-36 (1990).
- 19 537 US 186, 193 (2003).

- 20 See Alfred C. Yen, Eldred, *The First Amendment, and Aggressive Copyright Claims*, 40 HOUS. L. REV. 673, 675-76, 688, 689 n.44 (2003) (copyright laws should be subject at least to intermediate scrutiny); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 54-59 (2001).
- 21 This argument flows from the insight that injunctive relief for copyright infringements, which is a standard remedy, functions as a prior restraint of speech. See Lemley & Volokh, *supra* note 20, at 159.
- 22 Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 18, 20 (2004).
- 23 *Id.* at 18.
- 24 This First Amendment doctrine took shape in the years after *Access to the Press* was published. See, e.g., *Police Dep't of Chicago v. Mosley*, 408 US 92, 97-98, 102 (1972). See generally KATHLEEN M. SULLIVAN & GERALD GUNTHER, *FIRST AMENDMENT LAW* 212-17 (2d ed. 2003).
- 25 This argument is being made already. In opposing the imposition of net neutrality requirements on broadband wireless spectrum, Verizon Wireless has argued to the FCC that "wireless broadband service providers engage in protected speech (create content); act as a conduit for speech (distribute the content of others); and exercise editorial discretion (choose to feature certain content)". Given this editorial status, the company argues, the "open access" provisions it opposes would impermissibly "place part of a platform for protected speech under government control - much like a requirement that movie theatres open their screens to any content, rather than select the movies to be presented on their property". Verizon Wireless, Notice of Ex parte Presentation, WC Docket No. 06-150, July 24, 2007, http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519560209. See also, Randolph J. May, *Net Neutrality and Free Speech*, BROADCASTING & CABLE, Sept. 18, 2006, at 34.
- 26 See, e.g., Kevin Werbach, *Supercommons: Toward a Unified Theory of Wireless Communication*, 82 TEX. L. REV. 863, 864-67 (2004).
- 27 See, e.g., BENKLER, *supra* note 6, at 405-08.
- 28 See R. Randall Rainey, S.J., *The Public's Interest in Public Affairs Discourse, Democratic Governance, and Fairness in Broadcasting: A Critical Review of the Public Interest Duties of the Electronic Media*, 82 GEO. L.J. 269, 319-20 (1993).
- 29 See *Time Warner Entm't Co., v. FCC*, 240 F.3d 1126, 1130-36 (D.C. Cir. 2001).
- 30 See *Fox Television Stations, Inc., v. FCC*, 280 F.3d 1027, 1053 (D.C. Cir. 2002) (vacating rules prohibiting broadcast station and cable system ownership in same market and remanding national broadcast ownership cap); *Sinclair Broad. Group, Inc., v. FCC*, 284 F.3d 148, 162-65 (D.C. Cir. 2002) (invalidating limits on ownership of multiple television broadcast stations within a market).

- 31 See *Time Warner Entm't Co., v. FCC*, 93 F.3d 957, 973-77 (D.C. Cir. 1996).
- 32 *Turner Broad. Sys., Inc., v. FCC (Turner I)*, 512 US 622, 668 (1994).
- 33 See, e.g., Benkler, *supra* note 8, at 365.
- 34 See Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1806-07 (1999).
- 35 There are exceptions to this elevation of rights over values in doctrinal ghettos, like commercial speech and broadcast regulation, where the Supreme Court has privileged the value of a robust public informational environment over the right of individuals to speak. See *Cent. Hudson Gas & Elec. Corp., v. Pub. Serv. Comm'n.*, 447 US 557, 563-64 (1980).
- 36 Content-based regulations are subject to strict scrutiny and the government will prevail only if its interest is compelling and the regulations are the least restrictive alternative. See, e.g., *Police Dep't of Chicago v. Mosley*, 408 US 92, 95 (1972).
- 37 Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47-48 (1987).
- 38 See *O'Brien*, 391 US at 377.
- 39 See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189-90 (1983).
- 40 *Turner Broad. Sys., Inc., v. FCC (Turner II)*, 520 US 180 (1997).
- 41 This point has been made using other formulations. See, e.g., Michael J. Burstein, Note, *Towards a New Standard for First Amendment Review of Structural Media Regulation*, 79 N.Y.U. L. REV. 1030, 1038-41 (2004); Comment, *Constitutional Substantial-Evidence Review? Lessons from the Supreme Court's Turner Broadcasting Decisions*, 97 COLUM. L. REV. 1162, 1165-70, 1165 n.23 (1997); Note, *Deference to Legislative Fact Determinations in First Amendment Cases After Turner Broadcasting*, 111 HARV. L. REV. 2312, 2312-15 (1998).
- 42 *Turner Broad. Sys., Inc., v. FCC (Turner I)*, 512 US 622, 643-49 (1994).
- 43 *Id.* at 664, 666.
- 44 *Id.* at 646, 668.
- 45 Ellen P. Goodman, *Bargains in the Information Marketplace: The Use of Government Subsidies to Regulate New Media*, 1 J. TELECOMM. & HIGH TECH. L. 217, 258 (2002).
- 46 *Turner II*, 520 US at 211.
- 47 *Time Warner Entm't Co., v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001).
- 48 See, e.g., *Carriage of Digital Television Broadcast Signals*, 20 F.C.C.R. 4,516, 4,523-24 (Feb. 23, 2005).
- 49 As Frederick Schauer has observed, it is in defining the boundaries of First Amendment coverage that the most important decisions are made. Frederick

Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 270 (1981).

- 50 *Miami Herald Publ'g Co., v. Tornillo*, 418 US 241, 258 (1974).
- 51 See POOL, *supra* note 3, at 102-03. *But see* Baker, *supra* note 3, at 94-96.
- 52 A lower court cast some doubt on the continued viability of a distinction between common carriers and editors when it held that a law restricting telephone company entry into video businesses violated their First Amendment rights. *Chesapeake & Potomac Tel. Co., v. United States*, 42 F.3d 181, 185 (4th Cir. 1994), *vacated and remanded*, 516 US 415 (1996). See also *Denver Area Educ. Telecomms. Consortium, Inc., v. FCC*, 518 US 727, 825 (1996).
- 53 The Communications Act expressly excludes broadcasting and cable from common carrier regulation. 47 U.S.C. § 153(10) (2000). See also *Columbia Broad. Sys., v. Democratic Nat'l Comm.*, 412 US 94, 105 (1973).
- 54 See *Columbia Broad. Sys.*, 412 US at 130. See also *FCC v. League of Women Voters*, 468 US 364, 399-401 (1984).
- 55 See, e.g., *Nat'l Broad. Co., v. United States*, 319 US 190, 226 (1943).
- 56 See STUART MINOR BENJAMIN ET. AL., *TELECOMMUNICATIONS LAW AND POLICY* 450 (2d ed. 2006).
- 57 *FCC v. Midwest Video Corp.*, 440 US 689, 707 (1979). See also *Los Angeles v. Preferred Commc'ns, Inc.*, 476 US 488, 494 (1986).
- 58 See, e.g., *United States v. Playboy Entm't Group, Inc.*, 529 US 803, 806, 808, 815 (2000).
- 59 *Satellite Broad. & Commc'ns Ass'n., v. FCC*, 275 F.3d 337, 352-53 (4th Cir. 2001).
- 60 See *Chesapeake & Potomac Tel. Co., v. United States*, 42 F.3d 181, 202-03 (4th Cir. 1994). The Telecommunications Act of 1996 repealed the ban on telephone company provision of video. Telecommunications Act of 1996, Pub. L. No. 104-104, § 302(b)(l), 110 Stat. 56, 124.
- 61 *Comcast Cablevision of Broward County, Inc., v. Broward County*, 124 F. Supp. 2d 685, 692 (S.D. Fla. 2000).
- 62 Jerome A. Barron, *The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer's New Balancing Approach*, 31 U. MICH. J.L. REFORM 817, 829.
- 63 See Barron, *supra* note 1, at 1642-43.
- 64 See *id.* at 1666.
- 65 See *id.* at 1651-53.
- 66 *Lochner v. New York*, 198 US 45 (1905).
- 67 *Id.* at 64.
- 68 See Balkin, *supra* note 22, at 27-28.
- 69 See Chen, *supra* note 13, at 1443.

- 70 The same observations have been made in the commercial speech context. See Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 30 (1979). See also Frederick Schauer, *First Amendment Opportunism*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 174, 180 (Lee C. Bellinger & Geoffrey R. Stone eds., 2002).
- 71 *Turner Broad. Sys., Inc., v. FCC (Turner I)*, 512 US 622, 661-62 (1994).
- 72 See *id.* at 643-47.
- 73 See Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 771-72 (2001).
- 74 See, e.g., *Chesapeake & Potomac Tel. Co., v. United States*, 42 F.3d 181, 185 (4th Cir. 1994).
- 75 395 US 367 (1969).
- 76 *Id.* at 386-90. See also *Nat'l Broad. Co., v. United States*, 319 US 190, 226 (1943).
- 77 *Red Lion*, 395 US at 369-71.
- 78 It is in light of the market realities that "the Court essentially held that the government has the power to structure the media in a manner that the government thinks will promote the best communications environment". Baker, *supra* note 3, at 104.
- 79 *Red Lion*, 395 US at 388-89.
- 80 *Red Lion*, 395 US at 390. See also *Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc.*, 472 US 749, 783 (1985) (Brennan, J., dissenting).
- 81 Barron opposed this notion of broadcast exceptionalism two years before *Red Lion*, recognizing that resource scarcity was neither acute in broadcasting nor unique to that medium. See Barron, *supra* note 1, at 1666 ("It is to be hoped that an awareness of the listener's interest in broadcasting will lead to an equivalent concern for the reader's stake in the press, and that first amendment recognition will be given to a right of access for the protection of the reader, the listener, and the viewer").
- 82 It is not clear where satellite falls. Compare *Time Warner Entm't Co., v. FCC*, 93 F.3d 957, 978 (D.C. Cir. 1996) (satellite is subject to intermediate scrutiny for First Amendment review), with *Satellite Broad. & Commc'ns Ass'n., v. FCC*, 275 F.3d 337, 353 (4th Cir. 2001).
- 83 See, e.g., *Am. Family Ass'n., v. FCC*, 365 F.3d 1156, 1169 (D.C. Cir. 2004) (refusing to reject *Red Lion's* scarcity rationale as a "relic of the past").
- 84 Robinson, *supra* note 69, at 965.
- 85 See, e.g., Robert M. O'Neil, *Dead or Alive: How Long Witt the Red Lion Specter Haunt Free Speech and Broadcasting?*, in *RATIONALES & RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA* 33 (Robert Corn-Revere ed. 1997).

- 86 *Turner Broad. Sys., Inc., v. FCC (Turner I)*, 512 US 622, 663 (1994). *Satellite Broad. & Commc'ns Ass'n*, 275 F.3d at 366.
- 87 *Id.* at 655. Cable's role as a conduit was also important in distinguishing *Tornillo*. Cable's obligation to carry broadcast stations was not like a newspaper's obligation to carry replies because cable controlled "the physical connection between the television set and the cable network", making it a "bottleneck, or gatekeeper The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas". *Id.* at 656-57.
- 88 *Turner I*, 512 US at 649. Justice Breyer provided the fifth vote for the *Turner II* majority. In his partial concurrence, he disclaimed any reliance on the competition rationale that had been important to the other Justices upholding the carriage requirement. Nevertheless, he emphasized the structural infirmities in the market that the law addressed, including the extent to which cable's physical dependence on city rights of way imposes "a kind of bottleneck that controls the range of viewer choice" and justifies "at least a limited degree – of governmental intervention". *Turner Broad. Sys., Inc., v. FCC (Turner II)*, 520 US 180, 227-28 (1997) (Breyer, J., concurring in part).
- 89 See Robinson, *supra* note 69, at 945 (in *Turner*, the cable industry "gained a clear victory in the long-term struggle with regulators").
- 90 See Benkler, *supra* note 8, at 377-78. OWEN M. RISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 22-23 (1996); Balkin, *supra* note 10, at 404-12.
- 91 Indeed, the purpose of even content-neutral communications law is often to shape content. See *Nat'l Broad. Co., v. United States*, 319 US 190, 216 (1943). see also Baker, *supra* note 3, at 91-99.
- 92 326 US 1 (1945).
- 93 *Id.* at 20.
- 94 *Id.* at 21-23; see also *Cohen v. Cowles Media Co.*, 501 US 663, 669 (1991).
- 95 *Leathers v. Medlock*, 499 US 439, 452-53 (1991).
- 96 *Citizen Publ'g Co., v. United States*, 394 US 131, 139 (1969).
- 97 *Associated Press v. United States*, 326 US 1, 20 (1945).
- 98 See, e.g., Benkler, *supra* note 8, at 366-67.
- 99 *Turner Broad. Sys., Inc., v. FCC (Turner I)*, 512 US 622, 663-64 (1994) (quoting *United States v. Midwest Video Corp.*, 406 US 649, 668 n.27 (1972)) (plurality opinion). See also *Sinclair Broad. Group, Inc., v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002).
- 100 *New York Times Co., v. Sullivan*, 376 US 254, 266 (1964).

- 101 *Columbia Broad. Sys., Inc., v. Democratic Nat'l Comm.*, 412 US 94, 184 (1973) (Brennan, J., dissenting).
- 102 *FCC v. Nat'l Citizens Comm. for Broad.*, 436 US 775, 795, 802 (1978).
- 103 *Turner I*, 512 US at 663. see also *Turner Broad. Sys., Inc., v. FCC (Turner II)*, 520 US 180, 194 (1997).
- 104 See Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 Nw. U. L. REV. 1083, 1085-88 (1999).
- 105 Indeed, these interests are sometimes co-dependent. As Jerome Barron recognized, access to a broadcast channel or cable system is valuable because these outlets have aggregated the audience. Barron, *supra* note 1, at 1653.
- 106 *Eldred v. Ashcroft*, 537 US 186, 219 (2003); see also *Harper & Row, Publishers, Inc., v. Nation Enters.*, 471 US 539, 558 (1985).
- 107 Copyright pluralists do not deny this. See, e.g., Baker, *supra* note 16, at 931.
- 108 See Robert P. Merges, *The End of Friction? Property Rights and Contract in the "Newtonian" World of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115, 134-35 (1997); see also Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC'Y USA 1, 15 (1997).
- 109 See, e.g., Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act is Unconstitutional*, 36 LOY. L. A. L. REV. 83, 85, 95-97 (2002).
- 110 See, e.g., Redish & Kaludis, *supra* note 104, at 1097-1100.
- 111 See, e.g., *Harper & Row, Publishers, Inc., v. Nation Enters.*, 471 US 539, 582 (1985) (Brennan, J., dissenting).
- 112 Most critics focus on courts' tendencies to treat copyright and other forms of intellectual property like tangible property and accord them excessive protection. See, e.g., Michael D. Birnhack, *Copyright Law and Free Speech After Eldred v. Ashcroft*, 76 S. CAL. L. REV. 1275, 1318-19 (2003).
- 113 Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 984 (1970).
- 114 See Lemley & Volokh, *supra* note 20, at 169-170.
- 115 Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 3 (2002).
- 116 See *Eldred v. Ashcroft*, 537 US 186, 221 (2003).
- 117 See, e.g., Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1065 (2001); Netanel, *supra* note 20, at 17-24.

- 118 “The economic philosophy behind [copyright] ... is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of Authors .. .”. *Mazer v. Stein*, 347 US 201, 219 (1954). This view is grounded in the language of the Constitution’s Copyright and Patent Clause, which gives Congress the power to “promote the progress of science... by securing [to Authors] for limited times .. . the exclusive right to their .. . writings”. US CONST, art. I, § 8, cl. 8.
- 119 See, e.g., *Sony Corp., of Am. v. Universal City Studios, Inc.*, 464 US 417, 429 (1984).
- 120 *Eldred*, 537 US at 208.
- 121 *Id.*
- 122 Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2334 (2003); McGowan, *Free-Speech Critique*, *supra* note 108, at 462.
- 123 Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 109-16 (1993).
- 124 See Justin Hughes, “Receding” *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 932 (1999).
- 125 See PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 232 (1994).
- 126 See McGowan, *Free-Speech Critique*, *supra* note 108, at 463.
- 127 Balkin, *supra* note 22, at 12 (defining cultural bricolage as the use of “cultural materials that lay to hand”).
- 128 See, e.g., Rubinfeld, *supra* note 115, at 26-27.
- 129 Tushnet, *supra* note 16, at 540.
- 130 Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1189-93 (1970); Goldstein, *supra* note 113, at 1017- 20; Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283, 289-99 (1979); see also *Eldred v. Ashcroft*, 537 US 186, 219 (2003).
- 131 See Goldstein, *supra* note 113, at 1020-22; Denicola, *supra* note 130, at 293-99. For an excellent discussion of the First Amendment – copyright conflict and a critical history – see Birnhack, *supra* note 112, at 1280-92.
- 132 See Nimmer, *supra* note 112, at 1197.
- 133 See, e.g., Baker, *supra* note 16, at 906; Netanel, *supra* note 20, at 5; Tushnet, *supra* note 107, at 2-7; Lemley & Volokh, *supra* note 20, at 165-69; Diane Leenheer Zimmerman, *Information As Speech, Information As Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 674-92 (1992); Alfred C.

Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"*, 38 EMORY L.J. 393, 393-94 (1989).

- 134 Netanel, *supra* note 20, at 4-13.
- 135 See, e.g., Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 LIQUORMART, and Bartnicki, 40 HOUS. L. REV. 697, 710 (2003). See also Lemley & Volokh, *supra* note 20, at 186.
- 136 See Chemerinsky, *supra* note 109, at 93-94; Netanel, *supra* note 20, at 47-59. Others say that it is sometimes content-neutral and sometimes not. See, e.g., Rubinfeld, *supra* note 115, at 48-49.
- 137 *Eldred v. Ashcroft*, 537 US 186, 218-19 (2003).
- 138 Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, tit. I, 112 Stat. 2827, 2827-29 (1998).
- 139 Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, tit. I, 112 Stat. 2827, 2827-29 (1998).
- 140 *Eldred*, 537 US at 218. C/. *CBS v. EchoStar Commc'ns Corp.*, 265 F.3d 1193, 1210-11 (11th Cir. 2001) (copyright law is a content-neutral speech regulation); *Satellite Broad. & Commc'ns Ass'n., v. FCC*, 275 F.3d 337, 355 (4th Cir. 2001).
- 141 *Eldred*, 537 US at 221. Justice Ginsburg is generally sympathetic to First Amendment claims and, indeed, dissented in the *Turner* decisions on the grounds that the cable must-carry regulation should be subject to strict scrutiny as a content-based regulation. *Turner Broad. Sys., Inc., v. FCC (Turner II)*, 520 US 180, 234-35 (1997) (Ginsburg, J., joining in dissent).
- 142 See *Universal City Studios, Inc., v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001).
- 143 Brief for Petitioners at 39, *Eldred v. Ashcroft*, 537 US 186 (2003) (No. 01-618) (quoting *Turner II*, 520 US at 227 (Breyer, J., concurring)).
- 144 *Id.*
- 145 Yen, *supra* note 20, at 690.
- 146 *Id.*
- 147 See *Eldred v. Ashcroft*, 537 US 186, 221-22 (2003).
- 148 Both Justices Stevens and Breyer used the rationality standard to invalidate retroactive application of the CTEA under the Copyright Clause. *Id.* at 222-24 (Stevens, J., dissenting); *id.* at 242-67 (Breyer, J., dissenting).
- 149 See, e.g., *Petition to Deny, In re AT&T Inc., and BellSouth Corp., Applications for Transfer of Control*, WC No. 06-74 (F.C.C. June 5, 2006).
- 150 See, e.g., Tim Wu, *Why Have a Telecommunications Law? Anti-Discrimination Norms in Communications*, 5 J. TELECOMM. & HIGH TECH. L. 15, 16 (2006). Tim Wu, *The Broadband Debate, a User's Guide*, 3 J. TELECOMM. & HIGH TECH. L. 70 (2004). Tim Wu, *Network*

- Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141-42 (2003). Ex parte Letter from Tim Wu, Associate Professor, Univ. of Va. Sch. of Law and Lawrence Lessig, Professor of Law, Stanford Law Sch., to Marlene H. Dortch, Secretary F.C.C. (Aug. 22, 2003), CS Dkt. No. 02-52, available at http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6514683884. See also Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925 (2001).
- 151 Verizon Wireless, *supra* note 25 at 12-15. The FCC adopted certain open access, or what it called “open platform”, provisions with respect to a small portion of the wireless spectrum that will be auctioned to licensees in 2008. In re. Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, Second Report and Order at para. 195 (Aug. 10, 2007).
- 152 See Werbach, *supra* note 26, at 865.
- 153 See Netanel, *supra* note 16, at 381.
- 154 See generally JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, *DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE* 245-57 (2005).
- 155 See Werbach, *supra* note 26, at 865.
- 156 See, e.g., *id.*; Yochai Benkler, *Some Economics of Wireless Communications*, 16 HARV. J.L. & TECH. 25, 82-83 (2002); Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 HARV. J.L. & TECH. 287, 394 (1998).
- 157 To be sure, some regulation is necessary to set standards and eligibility requirements, and to deal with disputes. See Ellen P. Goodman, *Spectrum Rights in the Telecosm to Come*, 41 SAN DIEGO L. REV. 269, 403-04 (2004).
- 158 For free speech objections to broadcast regulation, see Mark S. Fowler and Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 209-10 (1982).
- 159 For an argument like this, see Stuart Minor Benjamin, *The Logic of Scarcity: Idle Spectrum as a First Amendment Violation*, 52 DUKE L.J. 1, 6 (2002) See also Comments of Cory Doctorow, Electronic Frontier Foundation in Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band, at 3, F.C.C. Docket No. 02-328 (Apr. 16, 2003).
- 160 See, e.g., Gerald R. Faulhaber & David J. Farber, *Spectrum Management: Property Rights, Markets, and the Commons*, in *RETHINKING RIGHTS AND REGULATIONS: INSTITUTIONAL RESPONSES TO NEW COMMUNICATIONS TECHNOLOGIES* 193-94.
- 161 See *Turner Broad. Sys., Inc., v. FCC (Turner I)*, 512 US 622, 665-66 (1994) (plurality opinion).
- 162 See, e.g., WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* 199-258 (2004); Netanel, *supra* note 16, at 381, Rubenfeld, *supra* note 115, at 57-58.

- 163 See Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2668-69 (1994).
- 164 See, e.g., FISHER, *supra* note 161, at 165; Neil Weinstock Netanel, Speech at the Hofstra Law School Symposium: Reclaiming the First Amendment: Constitutional Theories of Media Reform (Jan. 19, 2007).
- 165 Quite plausibly, there is a Fifth Amendment takings claim. *Kaiser Aetna v. United States*, 444 US 164, 178 (1979).
- 166 Many scholars have observed the ways in which authors use the power of copyright to encourage approved uses of their work and prevent unapproved ones. Some are approved based on moral rights or personhood theories of the artist. See, e.g., Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 335 (1988); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 968 (1982). Whatever the propriety of authors' use of copyright for non-economic purposes, it seems indisputable that authors in fact have powerful interests in controlling perceptions of their work and will use copyright to do so. Cf. Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1361 (2004).
- 167 *Harper & Row, Publishers, Inc., v. Nation Enters.*, 471 US 539, 559 (1985) (quoting *Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 255 (N.Y. 1968)).
- 168 Here I am framing this interest in post-publication alteration of one's work as a speech right. It is more commonly viewed as a moral right, rarely explicitly recognized in the Copyright Act. See Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1,2-3 (1985). Moral rights have been recognized in works of visual art whose creators sometimes have the right to prevent adulteration or destruction. 17 U.S.C. § 106(a) (2000). See also *id.* § 110(4).
- 169 *Riley v. Nat'l Fed'n of the Blind*, 487 US 781, 795 (1988).
- 170 *Eldred v. Ashcroft*, 537 US 186, 219 (2003).
- 171 LITMAN, *supra* note 16, at 144.
- 172 See, e.g., BENKLER, *supra* note 6, at 413-14.
- 173 See LITMAN, *supra* note 16, at 122. See also S. REP. No. 105-25, at 43 (1998).
- 174 For those who view the First Amendment as a guarantor of positive liberties of access to communicative resources, there is a natural affinity to political process arguments. See, e.g., Netanel, *supra* note 20, at 63 ("[T]he First Amendment must ensure that systemic political infirmities have not skewed public discourse and shortchanged the underrepresented public interest in expressive diversity".).
- 175 See, e.g., Baker, *supra* note 16, at 949.
- 176 Yochai Benkler, *Property, Commons, and the First Amendment: Towards a Core Common Infrastructure*, White Paper for the First Amendment Program, Brennan

Center for Justice at New York University School of Law 39 (Mar. 2001), available at <http://www.benkler.org/WhitePaper.pdf>

- 177 See Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519, 533-34 (1999).
- 178 See, e.g., *Broadcast and Audio Flag: Hearing Before the Conun. on Commerce, Sci., and Trans.*, 109th Cong. 52 (2006).
- 179 See, e.g., Brief for Electronic Frontier Found, et. al., as Amici Curiae Supporting Defendant-Appellee at 28-30, *Perfect 10, Inc., v. Google, Inc.*, 2007 WL 1428632 (9th Cir. July 20, 2006) (Nos. 06-55405, 06-55406, 06-55425, 06-55759, 06-55854, 06-55877). Brief for Consumer Electronics Assn. et. al., as Amici Curiae Supporting Defendant at 12-14, *Atl. Recording Corp., et. al., v. XM Satellite Radio Inc.*, 2007 WL 136186 (S.D. NY July 17, 2006) (No. 06 Civ. 3733).
- 180 See Werbach, *supra* note 26, at 898 (citing Intel as support of unlicensed uses).
- 181 See Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505, 581 (2003).
- 182 See JOE TRIPPI, *THE REVOLUTION WILL NOT BE TELEVISED: DEMOCRACY, THE INTERNET, AND THE OVERTHROW OF EVERYTHING* 227-33 (2004).
- 183 NUCHTERLEIN & WEISER, *supra* note 153, at 245-57.
- 184 Eric Eldred runs an online service that provides free book downloads, see <http://www.ibiblio.org/eldritch/>; see also Birnhack, *supra* note 112, at 1278-80.
- 185 See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 194-206 (1989).
- 186 See Baker, *supra* note 16, at 901 (“[T]he Speech Clause’s protection of individual liberty guards a person’s right to engage in the activity of communicating, not a right to profit from or receive economic return for the activity”).
- 187 “Congress shall make no law . . . abridging the freedom of speech, or of the press”. US CONST, amend. I (emphasis added). See C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* 156-57 (2007). BAKER, *HUMAN LIBERTY*, *supra* note 184, at 225- 49 (stating that the Press Clause serves the structural purposes of protecting sources of information from government influence and subjecting government to the watchdog function of the press); Baker, *Commercial Speech*, *supra* note 184, at 30-34.
- 188 See *supra* Part II.
- 189 See Baker, *Commercial Speech*, *supra* note 184, at 29-30.
- 190 Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, tit. I, 112 Stat. 2827 (1998).

- 191 The programmers' First Amendment claim was that must carry made it more difficult for them to gain carriage on scarce cable channel capacity. *Turner Broad. Sys., Inc., v. FCC (Turner I)*, 512 US 622, 634-35(1994).
- 192 C-Span.org, Company/Corporate Information, <http://www.c-span.org/about/company/index.asp?code=COMPANY> (last visited Aug. 12, 2007).
- 193 See generally Reply Comments of the C-Span Networks, 66 Fed. Reg. 16533 (Dec. 22, 1998) (codified at 47 C.F.R. pt. 76).
- 194 See generally Benkler, *supra* note 175.
- 195 *Id.* at 8.
- 196 *Id.*; see also *id.* at 8, 35-39.
- 197 *Id.* at 8.
- 198 Net neutrality regulations are a good example. See *supra* note 25. Such regulations burden large broadband operators for the benefit, arguably, not only of individual speakers, but also and perhaps primarily large application providers like Google. See generally Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847 (2006).
- 199 Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CR. REV. 123, 156-57.
- 200 Kathleen M. Sullivan, Foreword, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 80-83 (1992).
- 201 *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 US 748, 787 (1976) (Rehnquist, J., dissenting).
- 202 *Id.* Justice Rehnquist's criticism of deceptively clear speech categories is echoed in Steven Shiffrin's article, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1212-16 (1984).
- 203 Christopher L. Eisgruber, *Censorship, Copyright, and Free Speech: Some Tentative Skepticism About the Campaign to Impose First Amendment Restrictions on Copyright Law*, 2 J. TELECOMM. & HIGH TECH. L. 17, 19-21 (2003).
- 204 *Id.* at 29-30; see also Moran Yemini, *supra* note 25.
- 205 See Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 300-01 (1998).
- 206 See generally Barron, *supra* note 62.
- 207 BREYER, *supra* note 15, at 48. These objectives "include protection of the citizen's speech from government interference . . . [and] promotion of a democratic conversation". *Id.*
- 208 *Id.*

- 209 *Turner Broad. Sys., Inc., v. FCC (Turner If)*, 520 US 180, 227 (1997).
- 210 518 US 727,733 (1996).
- 211 *Id.* at 732-34.
- 212 *Wat* 752-60.
- 213 A third provision, which required cable operators to “segregate and block” programming on leased channels, was a fairly straightforward content-based speech regulation that the Court struck down under the strict scrutiny test. *Id.* at 755.
- 214 See *supra* notes 56-60.
- 215 See *Denver Area Educ. Telecomms. Consortium*, 518 US at 795-97 (Kennedy, J., concurring in part and dissenting in part).
- 216 See *id.* at 816-17 (Thomas, J., concurring in part and dissenting in part).
- 217 *Id.* at 740 (majority opinion).
- 218 See *id.* at 776-77 (Souter, J., concurring).
- 219 See *id.* at 747 (majority opinion); *id.* at 822-24 (Thomas, J., concurring in part and dissenting in part).
- 220 For approving analyses of Breyer’s opinion, see Barron, *supra* note 62, at 829-45; OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 22-23 (1996).
- 221 *Denver Area Educ. Telecomms. Consortium*, 518 US at 741-46, 760-66 (Breyer, J., concurring).
- 222 532 US 514, 536-41 (2001) (Breyer, J., concurring).
- 223 *Id.* at 517-18.
- 224 *Id.* at 536.
- 225 *Turner Broad. Sys., Inc., v. FCC (Turner If)*, 520 US 180, 227 (1997).
- 226 *Bartnicki*, 532 US at 536-38 (Breyer, J., concurring). The recorded conversation involved a public official’s threats of physical violence against a union negotiator. *Id.*
- 227 *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1957 (2006).
- 228 *Connick v. Myers*, 461 US 138, 145-47 (1983).
- 229 *Pickering v. Bd. of Educ.*, 391 US 563, 568 (1968).
- 230 *Garcetti*, 126 S. Ct. at 1951.
- 231 *Id.* at 1960.
- 232 *Id.* at 1973 (Breyer, J., dissenting).
- 233 *Id.* at 1974.

- 234 In cases that do not involve speech reallocations, Justice Breyer has not innovated, but relied on traditional First Amendment standards of review. In some cases, he has urged that speech regulation be upheld, but only because it passed muster under a strict scrutiny standard of review. See, e.g., *Ashcroft v. ACLU*, 542 US 656, 689 (2004) (Breyer, J., dissenting). *United States v. Playboy Entm't Group, Inc.*, 529 US 803, 847 (2000) (Breyer, J., dissenting).
- 235 For a criticism of the commercial speech doctrine and the *Central Hudson* intermediate scrutiny test for commercial speech regulation, see Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "The Greater Includes the Lesser"*, 55 VAND. L. REV. 693, 744-45 (2002).
- 236 The failure of intermediate scrutiny techniques to account for speaker interests is one reason Mitchell Berman endorses a "true balancing approach" for commercial speech review as opposed to intermediate scrutiny. He finds "a hint" of such an approach in *City of Cincinnati v. Discovery Network, Inc.*, which struck "down a city ordinance that barred commercial newsracks from public sidewalks while permitting noncommercial ones, . . . because the city has not carefully calculated the costs and benefits associated with the burden on speech imposed by its prohibition". Berman, *supra* note 234, at 745 n. 170 (internal quotation marks omitted).
- 237 See, e.g., *United States v. Am. Library Ass'n.*, 539 US 194, 217-18 (2003).
- 238 See generally Richard H. Fallon, Jr., *The Supreme Court, 1996 Term, Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997). For criticism of balancing in First Amendment cases, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972-95 (1987).
- 239 Justice O'Connor dissented in both *Turner* cases with three of her brethren on the grounds that the must carry requirements were content-based. See *Turner Broad. Sys., Inc., v. FCC (Turner I)*, 512 US 622, 676-77, 680-82 (1994) (O'Connor, J., dissenting); *Turner Broad. Sys., Inc., v. FCC (Turner II)*, 520 US 180, 229 (1997) (O'Connor, J., dissenting). In *Turner II*, she argued that a majority of the Court shared that view because Justice Breyer's concurrence, which provided the fifth vote, suggested that the content of local broadcast stations was relevant to Congress's adoption of must carry rules. See *id.* at 234. See generally Baker, *supra* note 3 (discussing "content-based" regulations); Stone, *supra* note 37 (discussing "content-neutral" regulations). See also Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 HASTINGS L.J. 825, 850 (1994) ("[R]ules are based on and incorporate intuitive judgments, often the very balancing they were meant to replace").
- 240 See, e.g., PHILLIP E. AREEDA, 7 ANTITRUST LAW VOL. 408, 436 (1986).
- 241 Shiffrin, *supra* note 201, at 1249.
- 242 See, e.g., *United States v. Am. Library Ass'n.*, 539 US 194, 204-05 (2003).
- 243 *Id.*
- 244 See *id.* at 198-99, 201-02.

245 See *id.* at 211-12.

246 See *id.* at 216 (Breyer, J., concurring) ('The Act directly restricts the public's receipt of information'). The Court has long treated individuals' interest in receiving information as a First Amendment right. See, e.g., *Stanley v. Georgia*, 394 US 557, 564 (1969) ('[T]he Constitution protects the right to receive information and ideas'); *Reno v. ACLU*, 521 US 844, 874 (1997).

247 *Am. Library Ass'n, Inc.*, 539 US at 217 (Breyer, J., concurring).

248 To be sure, the libraries, as government entities, are not First Amendment speakers, but then they have no editorial rights to be used against them to reduce scrutiny of a content-based regulation.

249 See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 US 150, 218 (1940). Unlike strict scrutiny in First Amendment law, this is not a rebuttable presumption of illegality.

250 See, e.g., *Chicago Bd. of Trade of Chicago v. United States*, 246 US 231, 238 (1918).

251 See WILLIAM C. HOLMES, *ANTITRUST LAW HANDBOOK* 175-85 (2002).

252 *Id.* at 185-211.

253 See *Cal. Dental Ass'n. v. FTC*, 526 US 756, 781 (1999). see generally Steven Calkins, *California Dental Association: Not a Quick Look But Not the Full Monty*, 67 *ANTITRUST L.J.* 495, 497, 550 (2000).

254 See AREEDA, *supra* note 239, at 427-28.

255 See *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 509-10.

256 *Cal. Dental Ass'n*, 526 US at 774-76.

257 See, e.g., *Bogan v. Hodgkins*, 166 F.3d 509, 514 n.6 (2d Cir. 1999).

258 HOLMES, *supra* note 250, at 185.

259 See, e.g., *United States v. Brown Univ.*, 5 F.3d 658, 670 (3d Cir. 1993).

260 See *supra* notes 193-97 and accompanying text.

3

Intellectual Property and Free Speech in the Online World

Laura Quilter and Marjorie Heins***

Reconciling the intellectual property claims of media producers with free expression and fair use rights remains a major challenge on the Internet. Caught in the middle of the conflict are online service providers – the gatekeepers to Internet access. The present report details the results of a survey of how 25 institutions, including universities, nonprofit service providers, and commercial service providers, are coping with a flood of cease and desist letters and takedown notices from copyright holders. The report details the adverse effects of mass-produced takedown notices, documents how sections of the Copyright Act that protect service providers from liability in some circumstances have led to unjustified takedowns of online material and counterproductive penalties against students, and suggests a number of “best practices” that can help online providers responsibly address both their subscribers’ and copyright holders’ rights.

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I. Introduction and Summary of Findings

Following up on our 2005 report, *Will Fair Use Survive?*,¹ the Free Expression Policy Project undertook a survey of 25 online service providers to learn how they handle notices asking them to remove material that the sender alleges violates her copyright or trademark rights. These notices typically take the form of either “cease and desist” letters or takedown notices sent in accordance with § 512 of the Copyright Act.² We wanted to learn whether service providers, including educational institutions, consider their users’ free speech interests in the course of responding to copyright and trademark owners’ complaints; and if so, how they act on those considerations. We also wanted to know how well the takedown process is working for service providers, for users, and for copyright owners.

Service providers are crucial gatekeepers, providing access to a vast quantity of opinion, news, information, and creative expression of all kinds. Service providers are also significant platforms for speech, hosting websites, mailing lists, Usenet newsgroups, bulletin boards, wikis, blogs, and discussion forums of all conceivable types. Because service providers play such a critical role in free expression, we wanted to understand the forces that determine their responses to fundamental policy questions such as when and how to terminate users or take down user-generated material from the Internet. We also wanted to understand the effects of such decisions. Our goal was to identify factors that shape service providers’ policy development. By identifying such factors, we hoped to be able to recommend changes that would better shape the environment in which service providers operate, fostering free expression while at the same time respecting the needs and interests of service providers, rightsholders, and users.

Our findings, as described in this report, can be summarized as follows:

First, we learned that large educational institutions and other service providers are swamped by notices about Peer-to-Peer filesharing (“P2P”) and “abuse” complaints relating to spam, viruses, phishing, and network security. This environment shapes service providers’ policies for handling takedown notices of all sorts. Thus, notices that raise significant free speech concerns are handled under procedures developed to mass-process a flood of P2P and “abuse” complaints.

Institutions that offer multiple types of Internet services operate on a “most restrictive” basis, failing to take full advantage of the immunities from liability, as well as the “safe harbors”, made available by the law. In particular, we found that service providers extend the takedown procedure outlined in § 512(c) of the copyright law to notices targeting P2P, which is covered by a different section, § 512(a). Section 512(a) does not require takedown. Additionally, floods of complaints about filesharing, spam, and so forth, lead to strong institutional responses that pose new threats and challenges for free speech. Among these responses are network monitoring, policing, unbalanced education about copyright, and automatic cutoff of access to the Internet or to the campus network.

Second, the flood of P2P notices places significant burdens on service providers. The situation is particularly acute for large educational institutions, which, while protected from liability for the majority of the complaints, are not protected from political pressure to respond to the complaints. The costs of responding to § 512 notices also affect free expression, by redirecting resources away from institutions’ educational and nonprofit missions, and by forcing them to trade substantive reviews and free expression defenses for automated, standardized, and risk-averse behaviors.

Third, although takedown procedures differ among educational institutions and other service providers, when in doubt, and when forced to deal with floods of notices and/or political pressure, institutions tend to take a much more restrictive stance than is warranted by the law. Ignoring possible fair use and other defenses reduces the access of both online speakers and the general reading and communicating public to the free-expression resources of the online world.

Fourth, this restrictive stance is driven in part by the confusing nature of the law and the lack of solid information and model policies for service providers. While large institutions can afford to pay for policy and copyright counsel, even they can be confused by the structure of § 512. Small institutions, whether educational, other nonprofit, or commercial service providers, depend on external sources of information, and

unfortunately, there are few outside experts and models. Some professional associations have produced useful materials in this area, but much remains to be done.

Lastly, while the institutions that operate as gatekeepers to online speech are wrestling with these questions, the situation for users is grim. Users have little access to information about how commercial service providers handle speech-related complaints, and little recourse should an educational institution or other service provider take an overly strict or inflexible approach to responding to copyright or trademark complaints.

Throughout the report, we offer a series of recommendations and proposed “best practices” for service providers. The most important of these are founded on principles **of transparency, process, and education** – principles that benefit service providers, users, and senders alike.

- *Transparency* means disclosing publicly institutional procedures for handling speech-related complaints; sharing information about how and by whom the process is used; and disclosing the costs of enforcing the claims of copyright owners.
- *Process* means establishing fair procedures – following the law closely, and not extending it to cut off Internet access, take down materials, or divulge user information without an opportunity for the user to respond to the complaint and participate in the decision-making process.
- *Education* means providing people with accurate and complete information about their legal duties and rights.

We hope this report will be of use to service providers, both as an introductory reference for § 512 and the larger legal environment of intellectual property, and as a means to assess risk and balance their own goals with their duties to their users and to copyright holders. We also hope the report will be helpful to users who have found themselves entangled in intellectual property disputes or who are concerned about their rights and responsibilities. Finally, we hope the report will advance the dialogue on free expression balances to intellectual property rights.

II. Background

A. Methodology

We conducted in-depth interviews with representatives of 25 service providers – eight educational institutions, nine nonprofits, and eight commercial service providers.³ We supplemented this research with reviews of publicly available information from 52 service providers about their policies, and discussions with experts, to develop a broader picture of policies that different service providers adopt, and the factors that affect their decisions.

We chose our 25 service providers based on market shares and known experiences with or leadership roles on copyright or free speech issues. Because we were interested in identifying best practices, we particularly sought to include service providers with experiences to share, as well as service providers with little experience. Although the service providers we talked to did not represent a random sample, we were careful to include a variety of them in our survey, ranging from small nonprofits to large for-profit corporations, and educational institutions of different sizes. In some instances, we talked with more than one institutional representative.

We gave each interviewee the opportunity to review our notes for accuracy. Most of them spoke with us only on condition of anonymity regarding specifics of their situation.

B. Terminology

Because this report crosses technological, business, and legal worlds, it necessarily contains legal and industry-specific terminology, which we have defined below.

Two major statutes protect service providers from liability for material posted by their users: § 230,⁴ which establishes a broad **immunity** from liability as a “publisher” for user-created material, and § 512 of the Copyright Act, which provides a contingent **“safe harbor”** from liability for copyright infringement. We describe these statutes in greater detail in Section C.

Although our report is focused primarily on the § 512 takedown process and therefore copyright issues, service providers do not always distinguish in practice between copyright and other types of intellectual property such as trademark or right of publicity, or even between intellectual property and other types of rightsholder complaints, such as invasion of privacy or defamation. Consequently, we specify **"copyright"** or **"copyright holder"** where appropriate, but otherwise use more general terms such as **"Intellectual Property"** (or **"IP"**).

We use **"copyright industry"** for the large industries that take mass action to enforce their copyrights, including publicity, litigation, and enforcement campaigns. **"Enforcement company"** refers to businesses set up primarily or substantially to locate potential infringing online files and send notices or complaints about them.

We use **"complaint"** to refer to any notice or letter sent to a service provider regarding a user's content. It includes both takedown notices sent under §§ 512(c) and (d), and filesharing complaints sent to Internet access providers (§ 512(a) services). **"Complaint"** also includes cease and desist letters that assert copyright, trademark, or other legal claims. We use **"takedown notices"** to describe copyright complaints sent under §§ 512(c)-(d) to request removal of hosted materials or of links to allegedly infringing content.

We also use the term **"user"**, which, while not ideal, encompasses all users of OSP services, including students, staff, and faculty at educational institutions, subscribers of commercial service providers, individual subscribers of hosting services, and subjects of indexing services. We use **"targeted user"** to refer to users who are the subject of cease and desist or § 512 takedown notices. **"Subscriber"** we reserve for those users who pay for hosting or Internet access services.

We use **"service provider"** or **"online service provider"** to refer to the broadest set of online service providers, encompassing Internet access providers, content hosts and publishing platforms, and search engines and information location tools. No other term uniquely encompasses the wide variety of services covered by the term service provider, and the term **"ISP"** ("Internet service provider") carries multiple meanings. Moreover, many services providers offer multiple services.

To refer only to specific sectors within the service provider industry, we use the following terms: **"Internet access provider"** describes entities offering dial-up, cable, DSL, or leased-line Internet access. These services are covered by § 512(a). **"Host" or "hosting provider"** describes entities that own or operate servers or networks, on which their "users" or "subscribers" place their own content, ranging from comments, email messages, websites, databases, or files such as software programs, music recordings, or video files. This category includes web hosting services such as blog hosts, video hosts (like YouTube), wikis (like Wikipedia), and mailing list archives. These services are covered by § 512(c).

Colocation services (or "colo's") provide a facility (a "data center") for machines. Typically, colocation services include Internet access, power management, and climate control; the subscriber owns the server, and is responsible for its maintenance and management.

Hosting services have proliferated in the past few years. **Web and blog hosts** permit users to develop and load websites that can include a variety of content. A minimal web host might permit only limited ability for users to manipulate their websites and publish different kinds of files. A full-scale web host permits users to run their own programs, databases, and a variety of web services, such as streaming files. **Host resellers** are webhosts that permit and facilitate their subscribers to "resell" their hosting subscriptions, thus permitting subscribers to easily become webhosts themselves.

Media and file hosts permit their users to upload files and make them available via the Internet. Media hosts – most commonly found in the commercial service provider sector – permit users to upload media files, such as videos (Bolt, Vidiac, YouTube) or photos (Flickr, Ofoto, Shutterfly). Often, these sites offer the subscriber the opportunity to restrict public access; permit public interactivity, such as commenting or keyword tagging ("tagging"); or permit the public to buy copies of the work printed on tangible goods such as mugs or t-shirts.⁵

Search engines and **"information location tools"** permit users to locate information and files. Section 512(d) defines this category broadly, to include "a directory, index, reference, pointer, or hypertext link".

Finally, **"fair use"** refers to the legal right to copy and distribute parts, or sometimes all, of a copyrighted work without permission, for purposes such as

commentary, research, and teaching. Fair use is one of several substantive defenses to claims of copyright infringement.⁶

C. The Legal Environment for Service Providers: Section 230 Immunity and Section 512 “Safe Harbors”

Service providers operate in a rapidly changing technological, economic, and legal environment. The industry itself is relatively new, and has shifted dramatically over its lifespan, from small and hobbyist-run dial-up Bulletin Board Systems (“BBS’s”) in the 1970s and ‘80s to a mass-consumer industry by the mid-late 1990s. Numerous private and proprietary commercial networks, including cell phone networks, continue to flourish, often offering access to the Internet.

This evolution did not occur in a legal and regulatory vacuum, driven only by economic and technological forces. Law and government regulation have shaped the service provider industry, particularly since the mid-1990s. Since 1996, Congress has enacted numerous laws that significantly affect service providers, beginning with the 1996 Telecommunications Reform Act.⁷ Courts, similarly, have closely reviewed the duties of service providers with respect to their users’ speech, considering the impact of both new statutes and traditional laws on the online medium. Issues have included service providers’ potential liability for “publishing” defamatory speech posted by users, for secondary copyright infringement, and for invasion of privacy.

The spate of litigation and proposed legislation spurred service providers to organize and lobby Congress. Their first efforts were in response to the legislative proposals that became the Communications Decency Act (“CDA”), which purported to regulate “indecent” speech online. Service providers initially resisted the regulation, but ultimately dropped their resistance in exchange for a section of the law that not only immunizes service providers’ from liability for efforts they may take to block material that is considered “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable”, but provides even broader immunity by declaring that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider”.⁸ While the CD A was struck

down as a violation of the First Amendment in *Reno v. ACLU*,⁹ the immunity provision, known as § 230, survived. Today, § 230 case law provides a robust set of protections for service providers against potential liability for statements made by their users, applying to numerous legal claims including invasion of privacy and discrimination.¹⁰ Section 230 is a straightforward immunity that applies to virtually all service providers.

Service providers were soon faced with another threat: possible liability for their users' copyright infringements. Section 230 specifically excludes intellectual property claims from its immunity,¹¹ and a series of cases left service providers concerned that they could be held liable for their users' infringements.¹² Consequently, large commercial service providers, primarily Internet access providers, asked Congress for relief, also seeking to stave off aggressive liability rules for which the copyright industries were lobbying. Although service providers had a strong argument that, like telephone companies, they were simply conduits, and should not be held liable for the speech of their users,¹³ Congress developed a compromise: a contingent safe harbor for service providers, exempting them from liability for their users' copyright infringements, so long as they took certain actions.¹⁴ The required actions were based on the type of service the service provider offered.

The contingent safe harbor from copyright liability, known as § 512, lays out a much more elaborate regime than the straightforward immunity provided by § 230. Sections 512(a), 512(c), and 512(d) establish criteria and procedures for three different classes of online service.¹⁵ Internet access services are covered by the straightforward safe harbor of § 512(a), which protects service providers from money damages for their subscribers' copyright infringements.¹⁶ These include broadband and leased-line services provided by Comcast, AT&T, Verizon, and the like, and Internet access (wireless or Ethernet) to campus residence halls and other buildings for students or others to use with their own laptops. Eligibility for § 512(a)'s straightforward safe harbor is *not contingent* on "taking down" allegedly infringing material. It is only contingent on § 512(i), which requires that service providers "accommodate ... and [] not interfere with standard technical measures" and "adopt [] and reasonably implement[] ... a policy that provides for the termination in appropriate circumstances of subscribers and account holders ... who are repeat infringers".¹⁷

Section 512(c) covers hosting services: the websites, chatrooms, bulletin boards, blogs, gaming networks, and wikis that reside on someone else's machine but permit users to connect and interact, and also to store, manipulate, and publish data or other material. Hosting services are given a safe harbor contingent on their "expeditious" compliance with "takedown notices". Under § 512(g), if the hosting service notifies its subscribers of § 512(c) takedowns, and accepts and processes "counter-notices", then it also receives a safe harbor from liability for wrongful takedowns.¹⁸ The counter-notice procedure thereby offers subscribers a way to get material reinstated, but only 10-14 days after the subscriber submits the counter-notice; material is thus offline for at least 10 days.

Section 512(d) offers a safe harbor to "information location tools" – including search engines – if they remove links to allegedly infringing content on receipt of a takedown notice.¹⁹ By its terms, the counter-notice applies to § 512(c) notices; however, language within the statute arguably suggests that it may also be applicable to § 512(d) notices.²⁰ Even if the counter-notice provisions are applicable to § 512(d) service providers, however, the statute offers little incentive for them to provide a "counternotice" procedure. The statutory counternotice provision offers the service provider immunity from liability to its subscriber; but it is questionable whether search engines would ordinarily be liable for failing to include content in their index. Offering a counternotice option may not always be feasible, in any case; search engine companies do not necessarily have easy access to contact information for the person or entity who posted the allegedly infringing content.

A service provider may be eligible for protection under multiple subsections of § 512,²¹ but as discussed below, may not find it feasible to treat notices differently in its procedures.

User safeguards include the § 512(g) counternotice procedure, which, however, appears to be little used (see Section III, Findings and Recommendations, below); and § 512(f), which provides penalties for "knowing material misrepresentations" made in a notice or counternotice.

While § 512 offers service providers safe harbor from liability for copyright infringements committed by their users, it is important to understand that it is not settled that service providers necessarily would be liable for such infringements in the absence of § 512. Courts have examined relatively few cases that relate to

service provider liability for their users' infringements, and those few cases have had some conflicting outcomes.²² Section 512 provides service providers certainty against the possibility of liability for money damages, as long as they follow its requirements and do not possess knowledge of conduct that would raise a "red flag" for infringement. As one scholar recently put it, § 512 is "more an encouragement than a requirement".²³

To summarize the rather convoluted statutory scheme, service providers have an immunity under § 230 for most legal claims against their users. They also have a safe harbor against copyright claims if they comply with the provisions of § 512. Takedown notices sent under § 512 therefore have legal consequences. Cease and desist letters, by contrast, may be sent to anyone; they are intended to put their recipient on notice of the claimed infringement – and often, to pressure the recipient into compliance – but they generally have no independent legal force.

Unfortunately for the best-laid plans of Congress and the rightsholder industries, even as § 512 was being passed, new technologies were rendering it obsolete. Peer-to-Peer ("P2P") software enabled users to share files directly without "hosting" their sites on a remote server, obviating the entire notice-and-takedown process elaborated by § 512. Because the files are shared directly from one user's machine to another's, and not stored on a remote server, P2P services are not easily classified according to the subparts of § 512. Moreover, P2P services themselves have used varying technologies, further complicating any attempt to fit this class of services and software into the § 512 regime. P2P software is not the only class of online service that does not fit well within § 512,²⁴ and it is certain that more services will be developed that will not fit into the specific and detailed structure. The complex and detailed system set forth in § 512, in retrospect, was overengineered, in contrast with the simple immunity established in § 230.

Because users have largely turned to P2P networks to share copyrighted files, rightsholder industries' enforcement efforts have likewise focused on P2P networks. But because P2P software does not fit closely within § 512's services categories, rightsholder industries have taken two principal approaches toward eliminating the "P2P menace". First, they have targeted P2P software developers, arguing that they are guilty of "secondary" copyright liability or even direct

infringement. These attacks have resulted in a series of P2P-related decisions, beginning with *Napster* and *Aimster*,²⁵ culminating in the Supreme Court's 2005 decision in *Grokster*²⁶ and including *UMG v. Bertelsmann*²⁷ (alleging that venture capital support of a P2P company constitutes a form of secondary, or more properly, tertiary, infringement).

The rightsholder industries' second mode of attack has been to target P2P users, rather than the P2P software developers, most often by sending notices about their alleged infringements to their service providers.²⁸ By all accounts, large-volume rightsholders have sent *at least* tens of thousands of P2P filesharing complaints, asking for material to be taken down or removed.²⁹ P2P users' service providers are, of course, acting as Internet access providers, protected by the § 512(a) safe harbor that imposes no obligation to take down material on receipt of a complaint. Nor could it; Internet access providers do not control the user's machine. The service provider's options are to ignore the complaint; notify the user about the complaint; ask or demand that she remove the material; or cut off her Internet access.

Nevertheless, based on our interviews, it appears that many service providers that offer both hosting and access services treat a P2P filesharing notice as a *de facto* § 512(c) notice, and while they cannot "take down" the file, they "take down" the user – cutting off network or Internet access. Needless to say, this is a significantly broader remedy than that offered by 512(c), which authorizes only removal of the allegedly infringing *content*.

The § 512(c)-(d) notice and takedown procedures are used very differently. According to the only study thus far on the issue, these provisions are largely used by small rightsholders of various sorts,³⁰ although in some sectors of the service provider market, such as video hosts, the situation may be different.³¹ Small copyright holders are often trying to protect photographs, poems, graphics, news, or commentaries; but a significant number of small copyright holders target competitors. Others attempt to route around § 230 by reconfiguring their privacy, trademark, defamation, and other complaints as copyright claims that can be addressed under § 512.³² Abuses, misuses, and over-uses may stem in part from legitimate confusion on the part of small rightsholders.

The ability of rightsholders to target users through their service providers was a choice Congress made, balancing the potential harms to individual users from overreaching by copyright owners against the potential gains to the copyright industries in combating copyright infringement on the Web. As previous studies have found, however, there have been significant misuses of the statute, to the likely detriment of free speech and fair use, and little apparent benefit to large rightsholders in combating copyright infringement online.³³ Service providers are caught in the middle, and their role as gatekeepers is as crucial today as it was prior to the passage of § 512 and § 230.

III. Findings and Recommendations

In section A below, we describe one striking feature of the takedown process, as revealed by our survey. We then discuss challenges and opportunities applicable to three categories of service providers – educational institutions, nonprofit service providers, and commercial service providers. In each section, we also highlight particular challenges to free expression and an open information ecology.

A. Rights Enforcement Companies: Hired Guns in the Copyright Wars

A major complaint of both educational institutions and larger commercial service providers concerned rights enforcement companies and agencies. The copyright industries hire companies such as BayTSP and NetEnforcers to detect possible copyright infringement; these companies send the vast majority of notices to the service providers we interviewed.³⁴ Other frequent industrial-sized senders include a few large individual rightsholders such as Universal or Paramount, and rightsholder associations such as the Recording Industry Association of America (“RIAA”), Motion Picture Association of America (“MPAA”), Entertainment Software Association (“ESA”), and Business Software Association (“BSA”), which send notices on behalf of their constituent members.

There are just a few rights enforcement companies, and they generally keep their clients and methods secret.³⁵ However, by all accounts, they have sent hundreds of thousands, if not millions, of machine-generated complaints, largely targeting filesharing; most of the service providers we spoke to said these complaints comprised 75-95% of their § 512 notices. The complaints receive little

or no human review before being sent,³⁶ which is unfortunate, because they are subject to inaccuracies both in identifying files and in identifying the users;³⁷ moreover, they cannot make any legal assessment of whether a file is actually infringing.

Enforcement companies generally identify files automatically with a basic search algorithm.³⁸ Such algorithms are subject to significant flaws. To the extent an algorithm is based on recognizing the names of titles or artists in filenames, it has the same flaws as any such technology. For instance, since titles themselves are not copyrighted, the same title may apply to multiple works, including public domain works. Titles of files may also indicate not that the file contains a copyrighted work, but that it contains, for instance, a noninfringing paper *about* that work.³⁹ Fingerprinting technology – another form of mechanized search – is also subject to significant flaws.⁴⁰

Both the large commercial service providers and the educational institutions in our survey reported that they routinely received complaints about copyright infringement occurring at IP addresses that were “non-routable” or “impossible”. The University of Indiana, Georgia Tech, the University of California, and its UC-Berkeley campus all received complaints about IP addresses that weren’t assigned at the time they were alleged to host infringing files, couldn’t host files, or were definitely not running filesharing software at the time in question. The commercial service provider The Planet also received complaints about IP addresses in ranges that didn’t even belong to them. Hurricane Electric, another commercial service provider we interviewed, received numerous complaints about “dummy content” files, seeded by rights enforcement companies to pollute the filesharing networks. The service providers we interviewed also described receiving multiple notices targeting the same material in a short period of time.

These machine-generated complaints, compared to “spam” by more than one service provider, are virtually costless to the sender. Unlike spam, which can be filtered or deleted by individuals with relatively minimal hassle (albeit considerable annoyance), the “takedown spam” sent by rights enforcement companies imposes a significant cost on the service provider in terms of manually managing and processing each individual complaint.⁴¹ The vast majority of these complaints appear to be generated in response to potentially infringing files accessed via Internet access services – services for which service

providers have a straightforward § 512(a) safe harbor, with no notice and takedown provisions. Of the service providers we interviewed, virtually all those offering Internet access services nevertheless respond to the complaints, at a minimum forwarding them to subscribers and tracking the process. Additionally, educational institutions and small- to medium-sized service providers often cut off Internet access on a first complaint.

With intensive processing required, a sudden flood of possibly inaccurate “takedown spam” can incapacitate any service provider department or group that provides any personal review and attention to the notices. The University of Indiana, ThePlanet, and Hurricane Electric described significant problems contacting rights enforcement companies when they received a flood of problematic notices. Staff at Indiana said that phone calls, faxes, and emails about erroneous notices, or about counternotices, were ignored or went into a “black hole”. Indiana ultimately contacted the original rightsholder’s attorney about the problem and was able to stem the tide of “impossible” complaints that way. Hurricane Electric called rights enforcement companies multiple times before “finally” getting through to someone and working it out. The attorney at ThePlanet reported that finding a human being to talk to at the company made a difference for her, because she was able to cc: the individual she knew on every response pointing out errors – more than forty a day, in one instance – until the problem was resolved. Benny Ng, at Hurricane noted that the complaints are sent with generic return addresses (such as “no-reply-copyright@company-name.com”) that make it difficult to get back in touch with the senders. He suggested that a better-streamlined process would benefit both senders and service providers.

Service providers invest significant resources in processing these machine-generated complaints – from validating their IP addresses, to contacting the targets, to processing any responses the targets offer. These costs are hidden from users and funders, though they are passed on to them. The copyright industry thus manages to externalize its copyright enforcement. For educational institutions, the costs are tucked into public and private education budgets. The significant expenses dedicated to licensing entertainment alternatives to file-sharing, creating monitoring technologies, enforcing the copyright industries’ claims, and educating students on the industries’ view of the law are difficult to account for separately, but total, no doubt, millions of dollars each year, a

remarkable public investment in private copyright enforcement.⁴² The cost is high, not just in terms of dollars and cents, but in terms of opportunities: With limited budgets and staff, time spent attending to masses of machine-generated complaints is time *not* spent dealing with other network abuse issues, such as spam and viruses. Every technical staff person we spoke with noted the trade-off, which had become particularly acute with the increase in spam over the months we conducted the interviews.⁴³

Recommendations for Further Research

- Research needs to be done with both commercial service providers and educational institutions to understand the total expenditures made on behalf of the copyright industries. Costs include, at least, the person-hours attributable to § 512 compliance, and the costs of informational material for users and subscribers. Educational institutions should include these costs in their publicly available budgets. Identifying the costs of dealing with other network problems, such as spam, viruses, and security would help put copyright policing costs in perspective.
- Research is also needed on the specific technologies and procedures used by the large notice-senders, particularly the rights enforcement companies.

B. The Institutional Contexts of Online Service Providers

1. Pressures, Costs, and Multiple Approaches in Colleges and Universities

Colleges and universities have been in the spotlight on copyright matters, and in the forefront of developing responses to the copyright industries' complaints. We spoke with ten Information Technology ("IT") administrators and attorneys at eight institutions about their experiences and the educational environment, generally: the University of California⁴⁴ ("UC" and "UC-Berkeley"), Cornell, Georgetown University, Georgia Institute of Technology ("Georgia Tech"), Indiana University, Reed College, Stanford, and the University of Texas system ("UT"). What we learned suggests that despite substantial immunities and safe harbors from liability for copyright infringement – far more than are available to any other category of service provider – educational institutions are cautious and risk-averse with respect to copyright issues, an attitude that Harvard's Berkman Center for Internet and Society recently characterized as "unduly cautious".⁴⁵

Educational institutions have access not just to the immunities and safe harbors previously discussed, but also to additional legal protections. Within copyright law alone, these include § 512(e), which protects nonprofit institutions of higher education from liability for their academic personnel's non-teaching-related infringements; §107 of the Copyright Act, which protects fair use and specifically offers educational uses as examples; and the "good faith" fair use defense, which provides that, should a nonprofit educational institution believe mistakenly but in good faith that the use was fair, courts must remit statutory damages entirely.⁴⁶

We were initially curious to learn whether educational institutions take advantage of these numerous legal protections in responding to takedown notices. In particular, do educational institutions distinguish between providing Internet access to students, for which they have a § 512(a) safe harbor; hosting services for students, for which they have a § 512(c) contingent safe harbor; and non-teaching activities of academic staff, for which they have immunity under § 512(e)? The answer, so far as we can tell, is generally no, although this is an area where it would be fruitful to do a full-scale study of educational institutions.

Despite the abundance of education-specific legal safeguards and defenses against liability for secondary copyright infringement, the colleges and universities we surveyed described institutional responses that go far beyond commercial and nonprofit service provider responses, and far beyond their legal duties. Colleges and universities described a multi-pronged approach in responding to copyright complaints, including education, monitoring, and purchasing licensed entertainment for their students; as well as responses to cease and desist and takedown notices that include termination of network access and academic discipline.

While the desire of universities to be good citizens and responsibly educate their students offers a partial explanation for the disparity between their responses and their legal duties, there seems little question that intense industry pressure, along with media and political scrutiny, affect the debate and constrain educational institutions' actions. Representatives of UC, particularly in the limelight as the nation's leading public institution, said they took a "conservative" approach, and all the other schools we interviewed indicated similarly. Indeed, the scrutiny and pressure are so intense that few educational institutions are willing to go on record with numbers of complaints received or actions taken. In the academy,

dedicated to openness and free exchange of information, this is a telling indictment of the extent to which educational institutions have borne the brunt of the copyright industry's battles.⁴⁷ Policies conceived in the face of such unremitting pressure might well be expected to be disproportionately harsh or severe in comparison with policies for other infractions, and this seems to be the case.

Our interviews also suggested that the complexity of the statutory framework contributed to educational institutions' overreactions, rendering it impractical to take different approaches to § 512(a) and § 512(c) notices. The staff we spoke with agreed that the complex structure set forth in § 512 was a source of confusion for many educators, particularly the distinctions between § 512(a) and § 512(c). Experts in the field such as Georgia Harper at UT, Tracy Mitrano at Cornell, and Karen Eft at UC reported that on listserves they often saw queries from confused IT administrators and other staff, particularly from smaller schools, and just as frequently saw misinformation passed on.

This is unsurprising: Large campuses typically have a general counsel's office, policy departments, and substantial resources to address IP complaints, but the work on the ground is most often handled by staff in IT departments. (See figure 1). Stanford, Indiana, Cornell, and UC all emphasized the importance of strong connections between the IT department and departments with legal or policy expertise, but not every school has such open channels of communication. As Reed College pointed out, some small colleges have no legal department or in-house copyright expertise, and must rely on outside legal counsel. Georgia Harper, who conducts numerous copyright workshops for educational institutions through professional associations, reported that these educational workshops were very helpful; staff at UC agreed, and thought more resources were needed, particularly to support small institutions.

Takedown, Cutoff and Discipline

Every educational institution we spoke with included punitive measures as part of its response to copyright complaints, including cutting off access to the Internet or to the institution's internal network, and referral to academic discipline processes. First-time complaints, which form the bulk of complaints for every institution we interviewed, are typically handled by the IT department. Individuals who are the

subject of multiple complaints are “escalated” to the legal or campus administrative departments, although some institutions escalate even first-time complaints.

Universities have implemented stringent policies on copyright infringement, triggering strong procedures in response even to the automated machine-generated notices that have such significant flaws. Cornell and Indiana, for instance, disable Internet access as soon as they get a complaint (except where they find obvious technical errors), and require students to pass a quiz about copyright law before access is re-enabled. Stanford forwards the complaint with information about copyright law to the student and requires a response within 24 hours. No program claimed to universally review complaints on the merits, generally because there are too many of them to review each one individually, and because filesharing is presumed to be infringement.⁴⁸ In determining who the alleged infringer was, IT departments typically review the complaint to determine whether an IP address is “impossible” or not, and a significant number of complaints are bounced due to senders’ errors in identifying the alleged infringer’s address. If the complaint is not bounced for a technical reason, then the network access / discipline procedure is triggered.

According both to our interviews and to reviews of publicly available policies, most schools cut off student access to the campus network, the Internet, or both, at some point after receiving a filesharing complaint. Cutting off network access in response to an initial P2P complaint is an extraordinarily strong measure given the safe harbor provided by § 512(a), which is contingent only on section § 512(i)’s requirement that service providers “accommodate ... and [] not interfere with standard technical measures” and adopt and reasonably implement a policy to terminate “repeat infringers”.⁴⁹ Cutting off access based on the notice alone essentially conflates “repeat infringer” with “alleged infringer”, a move that holds troubling implications for free expression and institutional due process. This practice is particularly troubling given the evidence of identification error as well as legal error in the machine-generated filesharing complaints. It is also far in excess of what is required by the § 512, which certainly does not require cutoff of Internet access for first-time infringers, much less first-time alleged infringers; educational institutions do so as a matter of institutional policy, not law. Given the pressures on educational institutions to deal with the “crisis” and police their students (“in loco parentis”, indeed), it is likely that many institutions developed their policies in crisis-mode and with an

eye to the external pressures. Some educational institutions that developed their policies in such a manner may not have had a cogent, campus-wide conversation about institutional values, needs, and proportionality. In developing or revising their copyright policies, we recommend that educational institutions examine the policies in light of their institutional values, as well as infrastructure management needs, political demands, and other policies regarding student or staff behavior, network use, intellectual property, and free expression. Ideally, institutions should craft policies that are consistent, coherent, and proportionate.

While rights enforcement companies typically request the disabling of user accounts or Internet access in each of their notices, whether for first-time or repeat infringers, service providers are shielded from having to honor such extreme requests. Even the § 512(c) takedown procedure established for hosting services authorizes only the removal of the *infringing* content, not *all* content. Disabling access to the Internet – the predominant platform for speech and information in the 21st century – is an extraordinarily harsh remedy.

However, some schools have implemented processes that ameliorate the potential free expression problems. For instance, Cornell and Georgia Tech, among others, distinguish between Internet access and network access, cutting off *only* Internet access, and leaving access to campus educational resources. While this is not ideal, it is an important first step. Educational institutions harm their students and themselves unnecessarily by cutting off access to campus networked resources in response to a complaint about filesharing on the Internet. However, even cutting off only Internet access can thwart academic purposes – university libraries are not the only source of information, and particularly for original research, Internet access is essential. Here, Stanford's policy of re-enabling Internet access with a commitment from the student to use it only for academic purposes provides a useful model. This policy properly recognizes that the Internet is a vital educational resource.

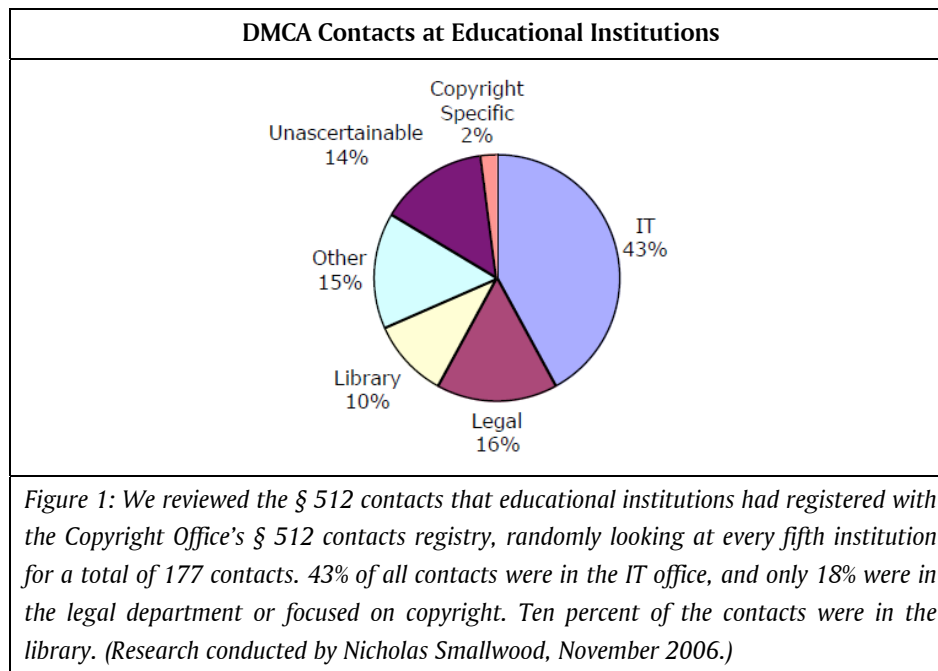
In addition to the network consequences, students accused of P2P filesharing often face academic discipline. Virtually all the policies we reviewed, as well as the descriptions from schools we interviewed, included academic discipline, up to and including expulsion. The policies often incorporate copyright infringement in the campus "terms of service", which include harsh penalties aimed at curtailing hacking, harassment, and other criminal activities. In addition to academic discipline, it is not uncommon to see language in the policies

threatening legal action or criminal liability. The schools we interviewed indicated that low rates of “recidivism” – meaning repeated receipt of filesharing complaints – meant that the most extreme disciplinary measures were rarely triggered. Indiana reported that discipline was used primarily to stop repeat infringers, and after instituting a quiz for first-time infringers, referrals to the Dean of Students diminished significantly; only the occasional student who has a “philosophical problem” with the law, or who fails to take the quiz, ends up with the Dean of Students. In other words, once a user had been targeted and gone through the institution’s process for first-time complaint targets, very few are targeted again. The schools we interviewed attributed this low “recidivism” to their extensive education and enforcement programs.

By all accounts, students file few “counternotices” in response to P2P filesharing complaints, although most of the institutions we spoke with included some information about counternotice options in their communications with students. The “Will Fair Use Survive?” report speculated that the low incidence of counternotices may in part be a result of the intimidating language included in § 512(g) for the counternotice, which states that the target agrees to accept jurisdiction of a US federal court.⁵⁰ Our conversations suggested that schools may, perhaps inadvertently, compound the intimidation factor by including this frightening language in filesharing situations – language that is meaningless for people in the US because anyone can be sued, whether or not he consents to it.⁵¹ The § 512(g) language is not required in communications about P2P filesharing complaints sent regarding § 512(a) network access services. However, it is undoubtedly a best practice for institutions that choose to respond to § 512(a) notices to implement “counternotice” and dispute procedures equivalent to those available for § 512(c) takedown notices. In both situations, potentially intimidating language, such as that specified in § 512(g), should be balanced with accurate information that explains the significance of the language.

However, it is equally important that – in contrast to the procedures required under § 512(c) and § 512(h)⁵² – institutions *not* turn student information over to anyone who has simply filed a § 512(a) filesharing complaint. Sending student information to § 512(a) complainants is a voluntary action, not authorized by the DMCA, and it may raise issues under the Family Educational Rights and Privacy Act (FERPA).⁵³ Retention of data relating to complaints also poses a policy

concern, as Reed College pointed out. While tracking “repeat infringers” may be necessary to “reasonably implement” repeat infringer policies under § 512(i), these data are educational records under FERPA and must be protected.



Network Controls: Monitoring and Policing

In addition to responding to complaints, many schools take a variety of proactive steps, including network monitoring and network “shaping” – that is, shaping the online environment by “throttling” or blocking particular kinds of traffic. Institutions might block or restrict traffic based on any number of factors: total traffic volume, data transfer protocols, network ports, file types (such as music or video files), filenames; or they might examine the data in the file. For instance, the program ICARUS, a system developed by the University of Florida, extensively monitors the network, including network port traffic and data transfer protocols. It blocks P2P traffic entirely, including private filesharing networks and server applications, and suspends access to the Internet if a data transfer that appears to be P2P is initiated.⁵⁴ The student must then agree to cease using P2P software in order to regain Internet access. Administrators at Berkeley, Stanford, Georgia Tech, and Texas said that educational institutions need to “throttle” individual

users' bandwidth use in order to prioritize educational uses. Some institutions do so via overall usage quotas; others monitor or restrict access to ports and protocols used for entertainment or P2P filesharing.

These types of policing – in particular, monitoring of student or faculty Internet use – pose risks to free expression and privacy, risks that are particularly acute in the educational setting. The educational staffers we interviewed were well aware of these risks. All pointed to their educational mission as one of the factors in their policy development, and several (at Stanford, Cornell, and Berkeley) stated outright that it would be “anathema” or against academic freedom to monitor their users' speech – although some felt that the copyright industries were pressuring them to do so.

While network management is beyond the scope of this report, we recommend campuses approach the issue with sensitivity to free speech and academic freedom concerns. First, institutions should consider whether, and what forms, of network shaping and monitoring are necessary. Cornell, rather than engaging in network shaping, charges students for total network use. This does not restrict individuals from whatever network activities they deem necessary, although it has the effect of reducing unauthorized filesharing. UC-Berkeley, similarly, restricts only total volume of bandwidth usage, and only in residential housing. Should it be necessary for network management to screen or shape content in more intrusive ways, then shaping based on transfer protocol or data port is preferable, from a free expression perspective, to screening based on filenames, filetypes, and file content. However, as staff at UC Berkeley and Georgia Tech both pointed out, particular types of technology (ports and protocols) may have legitimate educational purposes. Campuses should carefully review such technologies in light of institutional policies regarding record retention and academic freedom.

Second, monitoring and network-shaping should not trigger academic disciplinary processes, or termination of network access. Use of filesharing software alone should not be a basis for cut-off of Internet or network access. As the administrator of a computer science department at Georgia Tech put it, “any program that uses filesharing isn't implicitly a bad tool; research can be mistaken for illegal filesharing”.⁵⁵ Thus, universities should carefully consider the potential chilling effects of network monitoring. Where it is deemed essential for network maintenance purposes, the least harmful application closely ties both monitoring and security notices to users actual network risks; does not retain

such notices or logs; makes it clear to the user that the notice is part of an automated alert that does not trigger any academic or network consequences; and provides information that helps the user assess her own network information. Stanford's processes, for example, are responsive to these concerns. While Stanford monitors network use, it sends "security" notices to its users with information about detecting whether a machine has been compromised. The notices are solely informational, with no adverse consequences.

Third, any institution that purchases network monitoring technologies, or contracts out network management, should be aware of the significant free expression and privacy implications. As UC and Reed College pointed out, small colleges are particularly likely to "outsource" network management, and institutions of any size may invest in network management technologies. Educational institutions should carefully review *all* network monitoring and data retention settings, standards, and notices offered by contractors or set as defaults in network management software. These should be reviewed against institutional academic freedom and privacy guidelines.

Copyright Education

Unsurprisingly, educating students about copyright is a popular approach on college and university campuses, and one encouraged by § 512. The limited § 512(e) safe harbor for educational staffs non-teaching material, for instance, is only available if the institution "provides to all users of its system or network informational materials that accurately describe, and promote compliance with, the laws of the United States relating to copyright".⁵⁶ This accords with the mission of educational institutions, generally; Gary Schlickeiser at Reed College observed that educating students about copyright law fit with its philosophy of treating students like adults.

Schools were happy with their educational programs and felt they were successful. Indiana, for instance, attributed a decline in second-time complaints to its quiz, which requires 100% correct answers after reviewing copyright information before reinstatement to the network; Cornell has a similar program. Stanford, similarly, attributed a decline in "recidivism" to its stepped-up "education". Virtually all of the schools we interviewed include copyright information in new student orientations.

However, while educational programs are to be preferred over disciplinary approaches, their implementation poses some challenges for educational institutions. In our interviews, some staff questioned whether their effectiveness had peaked. Our interviews highlighted the cost of educational programs, a cost silently tucked away in the institutional budgets. Finally, the content and purposes of such programs, and the availability of accurate and unbiased information about copyright law and free expression, also raise concerns for institutions.

Some staff wondered whether campus copyright education had run its course. A few schools noted that the “teaching moment may have passed” with regard to copyright law and P2P filesharing. As staff at UC said, six years ago people came to universities who had never had Internet access, and that offered an educational opportunity for the university. Now, students arrive accustomed to filesharing in high school, and are surprised to find that it is under such a spotlight. Staff at Indiana observed that by the time students get to college now, their patterns, expectations, and opinions are already shaped – they’ve been downloading files at home for years. Tracy Mitrano at Cornell and Mem Beth Lavagnino at Indiana noted that efforts to engage students in the issue politically had not been very successful. While they had tried for several years to make it clear to students that information and copyright policy are political issues, the message didn’t seem to go very far.

Our interviews also made it clear that these educational programs can be quite costly. The materials available from the copyright industries were, in the view of university staff that had reviewed them, not of high quality and biased to the point of unusability,⁵⁷ leaving educational institutions to develop their own. The cost of developing, producing, and distributing materials, however, was quite high – for Indiana, tens of thousands of dollars each year. UC noted that time, effort, and money spent on educating students about copyright was time, effort, and money *not* spent educating students about other network risks, such as the dangers of posting highly personal information in their MySpace profiles. Staff at Indiana and UC noted that public institutions’ investments in copyright education effectively channel public funds into enforcing the copyright industries’ business models. Meanwhile, smaller institutions, which often lack the resources to develop their own materials, must make do with biased industry models or with whatever materials are made available by the larger schools online.⁵⁸ Most

staffers at both small and larger institutions were also not familiar with sources of consumer-oriented information, such as the clearinghouse of notices and copyright information provided by Chilling Effects.⁵⁹

Even materials developed by the institutions themselves may not be wholly neutral, given the enforcement context in which they are developed. Several schools frankly acknowledged that their purpose, when they first encounter students regarding a takedown notice, is to “scare them” with stories of what could happen.⁶⁰ Programs placed great emphasis on the direst potential outcomes, including criminal penalties, large fines, and academic consequences. One staffer indicated to us that although the university knew it was unlikely that the students would get targeted again, or sued, they chose not to share the actual statistics with the students. This aspect of copyright education, at least, is aimed at altering specific behaviors, rather than the general liberal arts critical thinking purpose that universities foster elsewhere in their curriculum. The value of such education to the copyright industries and the universities is evident; to the students, though, its value as education is somewhat less apparent.

Licensed Entertainment Subscriptions

In partial response to industry and policymaker pressure, a number of major educational institutions have signed up, since 2001, with commercial for-profit digital music services. While cost figures are scarce,⁶¹ institutions apparently pay in the tens of thousands of dollars annually to subscribe to services such as Napster 2.0, Rhapsody, Ruckus, Ctrax, MusicRebellion, RealNetworks, and iTunes. These arrangements were touted by some as educational institutions’ response to students’ filesharing. Scores, perhaps hundreds, of higher education institutions signed up during 2004-05,⁶²

However, the services have not been without their critics, and many schools have refrained from such agreements. Some students and observers have critiqued the use of education dollars or student fees on licensed music services, characterizing the expenditures as subsidizing either student entertainment or the music industry.⁶³ Georgia Harper noted that it was not part of the University of Texas’s educational mission to provide entertainment for its students. Research on the educational uses of these programs – access to music for classroom use,

for instance – would shed light on other potential benefits, as Clifford Lynch, at the Coalition for Networked Information, pointed out.

The evidence is mixed as to whether these services succeed in diminishing unauthorized filesharing. The music services and copyright industries tout the success of the services at reducing P2P network traffic. However, while some of the subscribing schools attributed the decline in P2P-related complaints in part to these services, they also acknowledged problems with the services. The services are unpopular with students, with much less uptake among than anticipated, and press accounts suggest that schools without the services reported little or no demand from students for them.⁶⁴ Interviewees whose campuses had subscribed to services noted problems with them, such as incompatibility with Macintosh or Linux systems and restrictive digital rights management (“DRM”). The DRM employed by the services prevents music purchased from being moved easily from one machine to another, or deletes the music if a student lets her subscription lapse (a “tethered download”).⁶⁵ These observations accord with analyst and industry observers, who have seen a general decline in use of the services, largely attributed to the DRM restrictions.⁶⁶ It appears that after rapid expansion into the educational markets in 2004-05, the growth of licensed entertainment arrangements may have slowed, as universities began dropping unpopular and little-used services.

Reductions in filesharing complaints (and a presumed reduction in filesharing) may also be attributable to two factors unrelated to the success or popularity of exclusive campus deals with music services. First, several of our interviewees suggested that the reduction in complaints was probably attributable to the availability of commercial alternatives that were more acceptable to consumers, most notably iTunes. Reed College and Stanford both expressed hope that the TV and movie industries would move quickly to disseminate files through iTunes and other relatively consumer-friendly formats, thus forestalling the problems the music industry had.

Recommendations

- In responding to takedown notices, educational institutions should ensure that all staff members handling copyright complaints have ready and frequent contact with a legal or policy department trained to evaluate free expression issues. The same standards apply to students and staff involved

in disciplinary proceedings. Additionally, any disciplinary proceedings should be conducted with an awareness of the significant rates of error in machine-generated complaints, and an opportunity for free expression and fair use defenses to be heard. Disclosure of student identity information in response to P2P filesharing complaints – as opposed to authorized subpoenas – is not appropriate. Section 512(h) subpoenas, moreover, apply only to § 512(c) hosting activities – not to provision of Internet access services.⁶⁷ Eliminating network or Internet access in response to a first P2P filesharing complaint is not required by § 512, and its appropriateness should be reconsidered in light of the important expressive and academic values enabled by network and Internet access.

- Educational materials for students and staff about copyright law should include not just information about penalties and the industry perspective, but also information about fair use and free expression, the political and economic contexts of copyright law, and the § 512 takedown and counter-notice process. It should also include current information about legislative initiatives and political organizations working on all sides of the issue as well as references to the Chilling Effects public clearinghouse of takedown notices, and neutral and consumer-oriented information resources such as the Chilling Effects Clearinghouse.⁶⁸ Educational institutions that have developed significant, unbiased information resources for copyright education may wish to facilitate their adoption by including Creative Commons or open distribution licenses that permit others to adapt the materials.⁶⁹
- Educational institutions should gather and make publicly available the total costs of copyright enforcement, including IT management, copyright education, licensed entertainment, monitoring, and filtering programs. This information should be put in context and compared with other costs and burdens. Due to the sensitivity of information regarding numbers of complaints received, a large-scale comprehensive research project should be developed that can offer anonymity to the institutions surveyed.

2. The Vulnerabilities and Value of Nonprofit Service Providers

(This Section has been deleted for reasons for space. For the full report, including this section, go to <http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf>).

3. Competitive Disadvantages for Commercial Service Providers

Commercial service providers offer the broadest array of services of our three categories, including Internet access, hosting, searching, and a plethora of variants. Unlike nonprofit service providers and educational institutions, which serve defined constituencies with services relevant to their mission, commercial service providers' services are limited only by market demand. We interviewed staff at eight commercial service providers of varying size and service levels: Google, focusing on its search engine procedures; Blogger, a blog hosting company owned by Google; ThePlanet, a major Internet access provider, web host, and colo provider; Hurricane Electric, a major Internet backbone, web host and colo provider; Dreamhost, also a major web host and colo provider; Hiwaay Internet Services, a medium-sized Internet access provider, web host, and colo provider; Vidiac, a medium-sized video host; and Cornerhost.com, a small web host.

Notice and Takedown Practices

While § 512 offers little incentive for substantive review of complaints, most of the service providers we interviewed stressed the value of offering some review of complaints to protect their subscribers against unwarranted harassment. For Hiwaay, reviewing complaints for validity of the underlying claim and the location of the material is a way to screen out harassment and invalid complaints, to avoid "impacting [its] customer" with an unnecessary takedown. Google noted that defending fair use was in its own business interests, and so it was important to push back on substantively invalid complaints. Dreamhost does a "sanity check" on complaints; if someone is "clearly misusing § 512 as a 'cudgel' in order to silence a critic", it confers with legal counsel on the merits of the complaint. ThePlanet screens out notices that don't conform to § 512's specifications, and those making non-§ 512 claims.

The service providers that substantively review notices report a mixed bag, including copyright complaints they perceive as legitimate, complaints that present issues of fair use, bad faith claims, and complaints presenting confusing questions of jurisdiction, law, and copyright ownership. Hurricane Electric and Blogger also described multiple incidents of webmasters including a single graphic or some text, and removing it promptly on notice. The video service Vidiac sees a wide variety of user-submitted content, from simple home videos, to video footage of events, to elaborate homemade fan videos of TV shows, with popular songs as the soundtrack. Vidiac screens out clips of obvious copyrighted

TV shows and videos, but sometimes staff “scratch their head” over the legality of fan-authored content and material from other countries.

Several service providers also reported significant numbers of complaints that raise complex issues of fact and law. Benny Ng at Hurricane Electric noted that “anyone can send in complaints to get their competitors off; I definitely have seen bad faith complaints ... typically previous business partners with some bad break-up, and they argue about the license to the material”. ThePlanet and Hurricane Electric both reported receiving multiple complaints about expired or invalid licenses for web software packages. George Poletes, formerly of ThePlanet, noted, “If you boil it down from a pure copyright notice, this is not [copyright] infringement; it’s a contract or licensing issue”. Another service provider said: “They are using [§ 512] as a tool to force people to buy a license”.

Contract, licensing and ownership issues raise complex questions of contract analysis and extrinsic evidence, even before getting to the question of copyright infringement. All the service providers reported receiving notices for a wide variety of legal claims, including trademark and even defamation claims sent under § 512. While many of the service providers give trademark claims the same *de facto* treatment as copyright claims, Dreamhost screens out these non-copyright claims, and complained that its biggest problem with § 512 is its misuse by people filing § 512 notifications to deal with non-copyright issues; dealing with these notices “takes up the vast majority of [its] time”.

However, while service providers spoke of the benefits to their users and themselves of reviewing the notices, they also expressed frustrations with the process. They felt the scales are tilted against their users, and that their hands are tied when it comes to the counternotice and putback procedure. They also took a conservative approach to the process, granting themselves little discretion in evaluating the notices. For instance, while all the service providers we interviewed tried to verify the notice senders and targeted content, they didn’t necessarily review for fair use, or took a very conservative approach to it. Vidiac was aware of fair use, but applying it in evaluating materials was sometimes tricky, and felt they “couldn’t afford” to risk being on the wrong side. Hurricane Electric will keep material online if the subscriber claims the right to the material and indemnifies them. Google expressly said it looks for fair use defenses, but earlier studies of notices suggest that even of the notices Google processes, perhaps a quarter have substantive flaws or target material with a copyright

defense.⁷⁰ While the service providers we interviewed tried to screen out clearly erroneous claims or procedurally flawed claims, they also felt they had to process the notice if it was borderline.

Whatever their criteria for accepting or rejecting a notice, the service providers reported that once a notice was accepted, they removed the material, and replaced it only if a counter-notice was filed, and only after its having been offline for 10-14 days, as specified by § 512. Most service providers received few counter-notices, and several expressed dissatisfaction with the counter-notice procedure, describing it as unfair or unreasonable. One service provider described the counter-notice procedure as “a joke”. George Poletes noted that it is complex and poorly understood, and even if counter-notices are filed, content has to be kept offline for the statutorily mandated 10-14 days. Andy Dorman of Hiwaay said:

[T]he ten day period is ridiculous, because once you’ve established that the customer, the alleged infringer, does not believe they’re infringing and they think they have a right to have it up and are willing to defend that right,... then what’s the deal with the ten days? The alleged infringer still has to have material not available to the Internet for the ten days. ... To me it’s impacting my customer. I remember one particular case a few years ago where the issue involved something essential to their business process. We were forced to shut down their business for ten days, even though we didn’t want to ... and it was very obvious that they felt in the right to use the material.

By all accounts, counter-notices are relatively few. People may not know about or understand the counter-notice procedure, or may feel intimidated by the language required in counter-notices, particularly the required statement of consent to be sued. Regardless of the merits of the situation, people may feel vulnerable to successive complaints to upstream providers, or repeated complaints to the same provider. People may simply not know how to assess the merits of a claim or their own defense.

Subscriber and User Information

One significant concern regarding commercial service provider procedures and policies is the lack of consumer access to information about them. While most service providers give users some basic information about § 512, few include

detailed information about their procedures. For example, none of the service providers in either our interview set or our larger review of publicly available policies clearly explained in their policies what “takedown” meant, and whether it included deleting files or simply disabling public access to them. Many service providers linked their copyright policy information to their terms of use or terms of service, but without a resource to compare these policies across different service providers, there is little opportunity for user understanding, choice, and competition among services. Even among the small number of service providers we interviewed, practices regarding notification to their consumers varied significantly.

However, we did identify some practices that better served subscribers. Most service providers forwarded the complaint, along with relevant information from or a link to the service provider’s terms of service. ThePlanet forwards notices that don’t comply with § 512 to its customers, even as it contacts the sender to get a compliant notice. This practice permits customers to know that a potential dispute exists, deal with any issues that may be confusing, and prepare for a compliant notice. Several of the service providers we spoke with, including Blogger and Dreamhost, provide information about Chilling Effects to their users. ThePlanet and Blogger both submit their notices to Chilling Effects, which they feel offers greater accountability, transparency, and user satisfaction, as well as facilitating assessment of their process.

Section 512(a) (Internet Access) Services

Of the service providers we interviewed, three offered both significant Internet access services (covered by § 512(a)) and hosting services (covered by the takedown procedure of § 512(c)) – Hiwaay, Hurricane Electric, and The Planet. As with educational institutions, each of these reported receiving significant numbers of machine-generated complaints. The Planet estimated 75% of its IP complaints were related to filesharing; Hiwaay estimated 90%. Hurricane Electric tracked these complaints together with mass numbers of phishing scams and other complaints, but reported perhaps a third of its total were filesharing-related. As with educational institutions, service providers that offer both Internet access and hosting services effectively opt out of the more protective § 512(a) safe harbor, electing to enforce § 512(c)-like processes for both kinds of complaint: notifying users of the complaint, and disabling Internet access in lieu of removing access to

a particular file. Like educational institutions, commercial service providers try to contact the senders to deal with floods of mistaken notices.

Section 512(d) (Information Location Tools) Services

The § 512(d) process for search engines presents a different, but equally troubling, issue. The single provider of search services that we interviewed, Google, reported that § 512(d) notices are increasing. Our interview with Google confirmed earlier research⁷¹ suggesting that these notices are most often intended to affect the sender's own, and its competitors', search rank. Such notices generally target alleged infringement of product descriptions, press releases, and other factual content. They rarely target infringing copies of movies or music. This use of § 512(d) is certainly not what Congress intended. Removal from a search engine does not remove content from the Internet, but insofar as search is the only way to access information on the Internet unless one already knows a site's web address, removal of links is a significant hindrance to disseminating or accessing information.

While it may often be difficult for § 512(d) search providers to find contact information for those whose links or content is removed, Google attempts to remedy this difficulty and to notify search engine targets when possible. Google's § 512 online complaint form requests contact information, which Google uses to notify search engine targets if it can. Search engine targets also sometimes learn of their takedown by finding the notice in Chilling Effects. Google does accept counter-notices, returning links to the database where possible. Although neither notice nor counternotice/ putback are required by the statute, this is a best practice.

Access to Information and Counsel

Our interviews suggested that access to legal counsel with appropriate expertise is important for a service provider to feel comfortable challenging notices or even making substantive assessments. Dreamhost noted that "nuisance lawsuits are a real problem in this industry", but felt comfortable dealing with them because the company has skilled legal counsel. Hurricane Electric can turn to its attorney for any grey areas or issues that aren't "cookie-cutter". Google, Blogger, and ThePlanet have in-house legal counsel, and all felt comfortable parsing the legal issues and factual situations presented by § 512 takedown notices and other complaints. Hiwaay had gotten advice from a law librarian, expert in copyright

matters, and was happy with its lawyer; it also felt comfortable reviewing notices for substantive compliance with § 512 and copyright law. By contrast, Cornerhost and Vidiac, which had not had the full benefit of experienced legal counsel, expressed uncertainty about how to apply § 512. Scott Beale, at Laughing Squid, described the situation faced by many small service providers:

That's what happens ... a small host doesn't have a legal staff and thinks they would have to hire a lawyer, so why not just get the customer to take it down because they're only paying us \$10 a month. So economically it's not worth it for most hosts. We're a reasonably priced host, not even a \$5 host – those guys [the discount host resellers] are going to totally roll.

The information access problems are not trivial. Finding counsel trained in the intricacies both of § 512's statutory framework and the technologies that startup companies employ can be "difficult", according to Vidiac, and finding affordable counsel with relevant expertise even more difficult. Cornerhost, the smallest service provider in our sample, felt daunted by the fees charged by legal counsel. Commercial service providers generally have no recourse to pro bono counsel. Trade associations, so helpful in the educational world, did not offer much for the commercial service providers we interviewed. Indeed, while there were many trade associations for service providers in the 1990s, the "dot-bust" and subsequent shifts in the service provider industry wiped many of them out. Those we surveyed had little in the way of best practices, guidelines, or other information to support their constituents.⁷²

High Priorities and High Costs

The costs of the process weigh most heavily on the small and medium-sized service providers we interviewed. Hiwaay spoke of being beset by "razor-thin margins", and Vidiac described spending as much as 10% of its budget on copyright policing.⁷³ The potential, however slim, for ruinously high damages that could wipe out their business meant that copyright management is a top priority for the service providers we interviewed. These costs could be mitigated with Venture Capital ("VC"), according to Adam Bruce with Vidiac, but VC comes with a high cost of its own: the loss of autonomy and maybe even the loss of the business.

One of the big reasons that we would have taken VC would have been purely to have had some deep pockets to help us out if we had ever ended up in a courtroom. [But] no one ever talks about the downside of taking VC... [they] can pull the rug out. ... What's the VC's out plan – to sell you to Google or whatever? I'm happy just having a small mom and pop company. ... We made the choice to not be Starbucks but to be the local coffee store. ... As soon as we take that [VC] investment we will lose the lifestyle that we all wanted when we started this company.

Bruce worried that the picture was grim for such small independent businesses, and that in an industry driven by high-stakes copyright claims, the VC solution would clear the field of independent mom-and-pop operations.

Section 512's "expeditious" removal requirement for a safe harbor ensures that copyright issues move to the top of the queue – ahead of combating spam, viruses, or network security issues. Like educational and other nonprofit service providers, commercial service providers told us that they are "deluged" and "flooded" by spam, phishing, viruses, and security threats. Copyright enforcement thus poses a significant opportunity cost for these service providers that must be weighed against these other tasks. While they were resigned to these investments, service providers reasonably questioned why they should be involved at all. As Benny Ng at Hurricane Electric pointed out, electric companies also supply users with tools to run computers and networks, but they are not forced to handle copyright complaints.

Small commercial service providers, such as Cornerhost and Jeffrey Diehl's provider (described above), also face the same vulnerabilities to upstream providers faced by small nonprofit service providers. They may lack backup and mirror sites, and may be relatively far down in a hosting chain, with multiple upstream providers as potential takedown targets. The ease and simplicity of reselling plans permit almost anyone to become a webhost, whether they have access to a lawyer or not. This ease and flexibility drives a competitive and thriving market of webhosts offering different levels of support, service, and software packages. But understanding § 512's tiered services categories and requirements, the substantive underlying rules of copyright, distinctions between copyright and other forms of intellectual property, and distinctions between

intellectual property and content protected by the § 230 immunity, are tasks beyond many attorneys, much less small webhost entrepreneurs.

Recommendations

- Commercial service providers should include information about counter-notice procedures, consumer education resources, and databases such as Chilling Effects in communications to subscribers about takedown notices. They can facilitate consumer satisfaction by disclosing their procedures, including whether substantive review is done, and how “takedown” and “putback” are implemented.
- Small commercial service providers and their subscribers, as well as rightsholders, would profit from development of a toolkit of form notices and responses, including basic information about § 512. Such a toolkit could be distributed via bar associations, trade associations, and the Internet. In particular, small commercial service providers need to understand that (a) in order to access the § 512 safe harbor, they must register an agent with the US Copyright Office, and develop and reasonably implement a policy for terminating repeat infringers; and (b) § 512 does not require removal; it merely encourages removal of material that is hosted within the meaning of § 512(c), or linked to within the meaning of 512(d), by offering a safe harbor *from potential* liability for that material.
- Econometric research on the effects of copyright enforcement on small and mid-sized businesses is indicated. In particular, does the § 512 scheme act as a market-entry barrier, or disproportionately affect the competitiveness of small- and mid-sized independent businesses?

IV. Conclusion: How Well is the Takedown Process Working?

Our conversations with service providers suggest that while the immunity offered by § 230 and the safe harbor regulatory scheme of § 512 are useful, § 512, in particular, is not working very well, and solves few of the problems it was intended to solve.

Complaints from individual rightsholders are a small fraction of total complaints. By contrast, machine-generated complaints about P2P filesharing services continue to arrive in significant numbers, especially for large service providers and educational institutions. These complaints are burdensome to service providers,

and the processes and technologies they adopt to handle mass quantities of notices threaten to chill free expression. The merits of individual filesharing complaints are almost entirely disregarded, a cost perhaps not regarded as significant by notice senders or even service providers. However, it is not an insignificant cost, and it is not one that was approved by Congress. Removal of access to the Internet is removal of access to the premier information resource and speech platform of our day, as well as an essential public utility for business, education, and communications. Significant procedural safeguards should be implemented to protect users from bearing this cost unnecessarily or wrongfully.

The process also causes collateral damage to targets of non-filesharing complaints, who are forced to try to defend their rights in a system set up by service providers to process mass volumes of filesharing complaints, rather than in a system set up to protect the users as customers or respect their free expression or academic freedom interests. Simple efficiencies of process encourage small and medium-sized service providers, and service providers that offer mixed services – Internet access as well as hosting – to implement a single, one-size-fits-all “takedown” process even for complaints for which they are granted the straightforward 512(a) safe harbor. Educational service providers similarly find it simpler to implement a one-size-fits-all procedure, and are under substantial political pressure to do so.

The filtering and monitoring of user expression, in response to P2P filesharing, is a cost that has not even been calculated, but it threatens to undermine the academic and intellectual missions of our educational institutions.

The opportunity costs imposed by the system must also be counted. The spam economics of mass numbers of machine-generated filesharing complaints undermine service providers’ ability to fight actual spam, a cost every Internet user is paying. The money our educational institutions are pouring into “copyright compliance”, at the behest of the rightsholder industry and elected officials, costs both their students and the taxpaying public.

While small service providers appear to fly under the radar of the “takedown spam”, the overall copyright environment threatens their competitiveness, and forces them into a catch-22 of risking ruinous litigation

costs and copyright damages, or removing user content with little procedural protection. Small providers should not be forced to choose between restricting their users' speech on the one hand, and operating a successful business on the other. Small service providers' lack of access to informed counsel and model policies and practices can be addressed, which will help to minimize their confusion and protect them from unnecessary liability, while protecting free expression and being responsive to rightsholders. More study is needed, as well, to understand how copyright costs affect small and independent businesses.

While the costs are high, and in some cases not yet calculated, the benefits are not equivalent. Certainly, the copyright industries have not gotten what they wanted from § 512 – an effective way to address distribution of copyrighted material over the Internet, distribution that has largely moved to the P2P filesharing networks. Ordinary rightsholders, who might prefer expeditious removal for defamatory or private communications, are stymied by § 230's broad protections; those who can fit their complaints into § 512 do so, with none of the free expression reviews ordinarily applied to defamation or privacy complaints.

In crafting § 512(c), Congress attempted to balance the risk of massive distribution of commercially copyrighted content against the risks of mistaken identity, wrongful claims, and other errors. While the law does favor rightsholders with "expeditious" takedown, it injects some balance with procedures for putting back speech, and remedies for mistaken targets. To the extent that § 512(c) is, admittedly, unbalanced in favor of rightsholders, this was arguably justified by the threat of massive copyright infringement on hosted websites.

However, the sorts of infringing activities that are, for the most part, being addressed under § 512(c) do not justify the lopsided remedy that it creates. Not all copyright matters are appropriate for the simple and, in practice, largely unreviewed processing of § 512. Many "copyright infringement" issues, moreover, fall well outside the paradigmatic situation, but nevertheless provide complainants with the same "expeditious" takedown, with no judicial review and little recourse for targeted users. Service providers reported problems that don't fit well within § 512, and pose real difficulties for any substantive analysis, raising

legal issues beyond copyright infringement. The use of copyright law to enforce rapid takedown in ownership and contract disputes, as well as the plethora of other non-copyright uses such as privacy, was almost certainly unintended by Congress.

Unfortunately, those remedies that offer some balance on the free expression side have turned out to be narrow, cumbersome, and little used. Legislative and judicial reforms have been proposed elsewhere,⁷⁴ and many of these reforms would be very helpful. In particular, removing the *ex ante* takedown procedure, while eliminating the benefit of rapid takedown, would reset the default in copyright infringement to something closer to the standard enjoyed for other speech issues. Strengthening the user protection provisions of § 512(f)-(g) would also be a significant reform. Finally, limiting the scope of § 512 to the less complicated claims of copyright infringement – reproduction and distribution of an entire work – would significantly help to avoid the problems posed by encouraging “expeditious” and unreviewed takedown of disputed material raising complex questions of fact and law, while still addressing the majority of concerns of copyright holders.

Even without legislative reform, however, individual institutions and service providers can adopt some of the best practices we have highlighted in this report, to protect their own legal and business interests, while responsibly addressing their subscribers’ and copyright holder rights. Educational institutions and other service providers, as well as their subscribers and third party copyright holders, will benefit from service providers making their policies and procedures transparent; following the law closely and not extending it in ways that unfairly penalize users and subscribers; and helping users, subscribers and copyright holders better educate themselves.

Appendix

List and Affiliations of People Interviewed

- Andrea Almeida, General Counsel, ThePlanet.
- Jonathan Bailey, Consultant.
- Scott Beale, Founder, Laughing Squid.
- Adam Bruce, President and Co-Founder, Vidiac.
- DMCA Compliance Technician, Blogger.
- Jacqueline Craig, Director of Policy, University of California Office of the President.
- Jeff Campbell, Communications Director, DreamHost.
- Jeffrey Diehl, Webmaster, 10 Zen Monkeys.
- Will Doherty, Founder and former Executive Director, Online Policy Group.
- Andy Dorman, Network Manager, Hiwaay Internet Services.
- Brent Emerson, Worker-Owner/CFO, Electric Embers Cooperative.
- Karen Eft, IT Policy Manager, University of California, Berkeley.
- Daniel Kahn Gillmor, Technology Advisor; Interactivist.net; Openflows; May First/People Link.
- Eric Goldhagen, Collective Member, Openflows; WWW Artists' Coalition.
- DMCA Compliance Coordinator, Google Inc.
- Georgia Harper, Scholarly Communications Advisor, University of Texas.
- Ardoth Hassler, Associate Vice President for University Information Services, Georgetown University.
- Mem Beth Lavagnino, Chief Information Technology Policy Officer, Indiana University.
- Mark Libkuman, Interactivist.net; Advocacy Developers.
- Clifford Lynch, Director, Coalition for Networked Information.

- Jamie McClelland, Co-Director, May First/People Link.
- Tracy Mitrano, Director of IT Policy, Cornell University.
- Chuck Munson, Collective Member, Infoshop News.
- Benny Ng, Director of Marketing, Hurricane Electric.
- George Poletes, former General Counsel, ThePlanet.
- Gary Schlickeiser, Director, Technology Infrastructure Services, Reed College.
- Lauren Schoenthaler, Senior University Counsel, Stanford University.
- Devin Theriot-Orr, Counsel, Riseup.net.
- Michal Wallace, Founder & Proprietor, Cornerhost.
- Keith Watson, Systems Support Specialist, Georgia Institute of Technology.
- Robert Whitt, DMCA Compliance Technician, Indiana University.

Endnotes

- 1 Marjorie Heins and Tricia Beckles, *Will Fair Use Survive? Free Expression in the Age of Copyright Control* (Free Expression Policy Project, 2005) (hereafter "Fair Use Report").
- 2 17 U.S.C. § 512, passed as part of Title H of the Digital Millennium Copyright Act ("DMCA").
- 3 The Appendix lists all of those interviewed and their institutional affiliations.
- 4 Section 230 is the common name for 47 U.S.C. § 230, passed, with the Communications Decency Act, as part of the 1996 Telecommunications Act.
- 5 Other types of services included in our report, but not discussed specifically, include *collaborative services hosts* that permit collaborative development of resources, such as wikis, groupware, or collaborative databases; and *communications hosts*, which offer communications services such as email, mailing lists, discussion groups, bulletin boards, chat and instant messaging, and real-time communication.
- 6 Fair use is codified at 17 U.S.C. § 107. For more information, see <http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf>
- 7 Major statutes include the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at scattered sections of 47 U.S.C.) (which included the Communications Decency Act ("CDA"), 47 U.S.C. § 223, struck down in *Reno v.*

ACLU, 521 US 844 (1997)); revisions to the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2000), ("CFAA") in 1994, 1996, and 2001; the No Electronic Theft Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997) (codified at 17 U.S.C. 101, 506-07, 18 U.S.C. 2319-20, 28 U.S.C. 994, 1498 (2000)); the Children's Online Privacy Protection Act of 1998, Pub. L. 105-277, Title Xm (1998) (codified at 15 U.S.C. §§ 6501-6506) ("COPPA"); the Child Online Protection Act, Pub. L. No. 105-277, 47 U.S.C. 231 (1998) ("COPA"; a preliminary injunction was entered against COPA's enforcement and at this writing, the case has not been finally decided; see *Ashcroft v. ACLU*, 542 US 656 (2004)); the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.) ("DMCA"); the Anticybersquatting Consumer Protection Act ("ACPA", 1999); the Children's Internet Protection Act, Pub. L. No. 106-554 (codified at 20 U.S.C. § 9134(f) (2000) and 47 U.S.C. § 254(h) (2000)) ("CIPA"), upheld in *US v. American Library Association*, 539 US 194 (2003)); the CAN-SPAM Act of 2003, Pub. L. No. 108-187 (codified at 15 U.S.C. § 7701-7713, 18 U.S.C. § 1037, 28 U.S.C. § 994 (2003))-and those are just the major federal laws.

- 8 47 U.S.C. §230(c)(i) and (ii). See *Barrett v. Rosenthal*, 40 Cal. 4th 33, 146 P.3d 510, 51 Cal. Rptr. 3d (Cal. Sup. Ct., Nov. 20, 2006), available at http://eff.org/Aegal/cases/Barrett_v_Rosenthal/ruling.pdf (review of the legislative history, pp. 17-21 of the PDF).
- 9 See note 7, *supra*.
- 10 One of the earliest, and broadest, readings of § 230 held that it establishes immunity "to any cause of action that would make service providers liable for information originating with a third-party user of the service". *Zeran v. AOL*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 US 937 (1998).
- 11 47 U.S.C. §230(e)(2). Section 230's application to state intellectual property claims, such as trade secrets, state trademark, right of publicity, or common law copyright, is unclear.
- 12 *Playboy Enterprises, Inc., v. Frena*, 839 F. Supp. 1552 (M.D. Fl. 1993) (bulletin board Frena was directly liable for violating Playboy's rights of distribution and display) and *Sega Enterprises Ltd., v. MAPHIA*, No. CIV. A. 93-4262 CW, 1997 WL 337558 (N.D. Cal. June 9, 1997).
- 13 See Jennifer Urban and Laura Quilter, "Efficient Process or 'Chilling Effects'? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act", 22 *Santa Clara Comp. & High Tech L.J.* 621 (2006) (hereafter "Takedown Notices Study"), § JH; Cassandra Imfeld and Victoria Smith Ekstrand, "The Music Industry and the Legislative Development of the Digital Millennium Copyright Act's Online Service Provider Provision", 10 *Comm. L. & Pol'y* 291 (2005); and Jessica Litman, *Digital Copyright: Protecting Intellectual Property on the Internet* (2000), for detail on the legislative maneuvering.

- 14 The Online Copyright Infringement Liability Limitation Act ("OCILLA"), Title H of the DMCA (1998), codified at 17 U.S.C. § 512.
- 15 Sections 512(b) and 512(e) provide slightly different safe harbors. Section 512(b) provides a safe harbor for network caching, but was applied to search engine caching in 2006, in *Field v. Google*, 412 F. Supp. 2d 1106 (D. Nev. 2006), and *Parker v. Google*, 422 F. Supp. 2d 492 (E.D. Pa. 2006).
- 16 Sections 512(a)-(d) offer safe harbor against money damages. All service providers are subject to court actions for injunctive relief to terminate a subscriber under § 512(i).
- 17 Failure to comply with the specifics of § 512 has cost service providers their safe harbor. In the *Aimster* case, for example, the instant message-based P2P service had failed to have a § 512(i) policy for terminating repeat infringers. *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003). In *Ellison v. Robertson*, the service provider (AOL) had failed to update its email address with the Copyright Office per § 512(c). 357 F.3d 1072, 1080 (9th Cir. 2004).
- 18 Service providers also typically preclude such liability in their "terms of service".
- 19 Even without the safe harbor, it is unlikely that links pose a significant risk of copyright liability. One case suggests links could support liability, but other cases have indicated otherwise. See *Intellectual Reserve, Inc., v. Utah Lighthouse Ministry*, 75 F. Supp. 2d 1290, 1294-95 (D. Utah 1999); compare *Perfect 10 v. Google*, 416 F. Supp. 2d 828 (S.D. Cal. 2006) (appeal pending) (no liability for linking to infringing materials); *Ticketmaster v. Tickets.com*, No. CV 99-7654 HLH(BQRX), 2000 WL 525390 (C.D. Cal. Mar. 27, 2000) (not reported) (issuing a preliminary order denying an injunction because, in part, there was no liability for linking); *Bernstein v. J.C. Penney, Inc.*, No. 98-2958 R EX, 1998 WL 906644 (C.D. Cal. Sept. 29, 1998) (linking was neither contributory nor direct infringement).
- 20 Section 512(g) offers a safe harbor "for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing...". The safe harbor is contingent on the service provider notifying the subscriber, accepting counter notification, and replacing material. Because § 512(g)(2) describes material "to which access is disabled", the provision arguably applies to § 512(d) providers as well.
- 21 17 U.S.C. § 512(n); *Perfect 10, Inc., v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, n. 26 (C.D. Cal. 2002).
- 22 The relative dearth of cases is certainly due in part to the takedown remedy offered by § 512. Those cases available have been somewhat inconsistent. For example, a couple of cases, prior to the enactment of § 512, found service providers liable. See *Sega Enterprises Ltd., v. MAPHIA*, No. CIV. A. 93-4262 CW, 1997 WL 337558 (N.D. Cal. June 9, 1997) (bulletin board MAPHIA was contributorily liable for its bulletin board users' infringements of Sega's copyrights) and *Playboy Enterprises, Inc., v. Frena*, 839 F. Supp. 1552 (M.D. Fl. 1993) (bulletin board Frena was directly liable for violating Playboy's rights of distribution and display).

- 23 Jonathan Zittrain, "A History of Online Gatekeeping", 19 *Harv. J.L. & Tech.* 253, 268 (2006).
- 24 For instance, the "age verification" services offered by an online service provider in the adult content area were troubling to a court, which considered them within § 512(d) but noted the misfit. *Perfect 10 v. Cybernet*, 213 F. Supp. 2d 1146, 1175 and n.19, *supra* note 21.
- 25 *A&M Records, Inc., v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) ("Napster I").
- 26 *MGM Studios Inc., v. Grokster, Ltd.*, 545 US 913 (2005) (reversing a judgment that filesharing services were not liable for secondary infringement because their technology was capable of substantial noninfringing uses, and strongly suggesting that the services would be liable because they knowingly induced infringement by their users).
- 27 *UMG Recordings, Inc., v. Bertelsmann AG*, 222 F.R.D. 408 (N.D. Cal. 2004).
- 28 They have also sued users directly, resulting in one decision, *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005), which held that downloading and retention of files from a P2P network was direct copyright infringement. Several others are in litigation. See *Recording Industry vs the People* at <http://recordingindustryvspeople.blogspot.com/> (last visited Jan. 13, 2007).
- 29 See Takedown Notices Study, *supra* note 13, 22 *Santa Clara Comp. & High Tech L.J.* 652, n.99.
- 30 Takedown Notices Study, *supra* note 13, 22 *Santa Clara Comp. & High Tech L.J.* at 651, found 6% and 3% of notices sent under §§ 512(c) and (d), respectively, were sent by or on behalf of the movie or music industries. The major exception was the software industry, which sent numerous notices to Google and Blogger; however, these notices generally involved alleged anticircumvention of digital locks of various types, which are not copyright infringement, and, consequently, are not eligible for the § 512 process. *Universal City Studios, Inc., v. Reimerdes*, 82 F. Supp. 2d 211, 217 (S.D.N.Y. 2000).
- 31 Video websites such as Vidiac, in our survey, and YouTube, more famously, report receiving notices from large copyright industry rightsholders. These services were not included in the Takedown Notices Study; more comprehensive, and ongoing, study is definitely needed.
- 32 Takedown Notices Study, *supra* note 13, 22 *Santa Clara Comp. & High Tech L.J.* at 651 and 678 (finding significant use of § 512 by persons asserting privacy or other non-copyright interests; more than half of notices sent regarding Google's search engine were competition-related).
- 33 Fair Use Report, *supra* note 1; Takedown Notices Study, *supra* note 13.

- 34 Few service providers were willing to share their numbers publicly – indeed, educational institutions were uniformly reticent about this, a reflection of the intense scrutiny they have received. See Section m.B.1. However, several service providers stated that at their peak, apparently 2002-2004, many thousands of P2P filesharing notices were arriving per year. Most reported that the overall volume of P2P notices seemed to be falling, although the evidence for that is equivocal – at least two institutions reported that the volume of notices varied so significantly that it was difficult to say whether the volume was increasing or decreasing.
- 35 See, e.g., BayTSP client list describing only “strong partners and affiliates” (http://baytsp.com/about_clients.html, last visited Jan. 13, 2007); NetEnforcers client list, listing only “client industries” (<http://netenforcers.com/clients.cfm>, last visited Jan. 13, 2007).
- 36 The RIAA has stated that an RIAA employee “manually reviews and verifies the information” in the notices that it sends out. Testimony of Mitch Bainwol, “Privacy and Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry”, Sen. Committee on Governmental Affairs, Hearing, Sept. 30, 2003, available at Senate Committee on Homeland Security & Governmental Affairs website, <http://hsgac.senate.gov/>, under “View all listings” under “Hearings and Nominations”. The inaccuracies in notices reported elsewhere suggest this may not always be true. See, e.g., Sonia Katyal, “The New Surveillance”, 54 *Case Western L.Rev.* 297, 345-346 (2004). Regardless of the RIAA’s practices, there is no indication that other associations or private rights enforcement companies manually review and verify the complaints. See also Electronic Frontier Foundation, *Unsafe Harbors: Abusive DMCA Subpoenas and Takedown Demands*, Sept. 26, 2003, at http://www.eff.org/IP/P2P/20030926_unsafe_harbors.pdf, for more examples.
- 37 See, e.g., *Foundation v. UPC Nederland*, Cause-List Number 1457/05 KG (Amsterdam Court of Appeal July 13, 2006), English translation available at http://www.ilrweb.com/viewILRPDF.asp?filename=foundation_upcnederland_060713AffirmanceonAppeal (finding the services do not reliably identify users or files).
- 38 See Brad King, “Pirates Beware: We’re Watching”, *Wired*, Jan. 3, 2001, available at <http://www.wired.com/news/technology/0,1282,40866,00.html>, for a more detailed description of an early iteration of rights enforcement company methods.
- 39 Such incidents are documented in the Chilling Effects database, at <http://chillingeffects.org/>. Gigi Sohn described one incident, involving a “Harry Potter” book report, in testimony at “Piracy of Intellectual Property on Peer-to-Peer Networks” before the House Subcomm. on Courts, the Internet, and Intellectual Property, of the Comm. on the Judiciary, 107th Cong. Sept. 26, 2002 (available via <http://commdocs.house.gov/committees/judiciary/>).

- 40 See generally Katyal, *supra* note 36. Copyright filtering software companies described in general terms how these technologies work (but did not discuss their failures) in *amicus curiae* briefs in the *Grokster* case. All briefs available at http://www.eff.org/IP/P2P/MGM_v_Grokster/.
- 41 This is not to minimize the tremendous costs imposed by spam; just to distinguish them in kind.
- 42 Graham Spanier, President of Pennsylvania State University and a promoter of proactive campus involvement in copyright enforcement, noted that copyright enforcement is "very costly for universities ... it ends up being reflected in the cost of tuition that goes back to students". "Campus Downloading" (2006) video, available at <http://campusdownloading.com/>.
- 43 Spam, which has become more pervasive in part due to viruses and other network security breaches, has become an even more significant problem for network administrators in 2006. See also Brad Stone, "Spam Doubles, Finding New Ways to Deliver Itself", *N.Y. Times*, Dec. 6, 2006.
- 44 We spoke with two representatives of UC, one from the UC Office of the President, and one from UC- Berkeley.
- 45 William McGeveran and William W. Fisher, "The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age" (2006), pp. 86-87, available at <http://cyber.law.harvard.edu/media/education/projectstatus> and http://cyber.law.harvard.edu/home/uploads/823/BerkmanWhitePaper_08-10-2006.pdf.
- 46 17 U.S.C. § 504(c)(2). Educational institutions enjoy a variety of other exemptions, intended to protect educational uses such as research, commentary, and scholarship, in copyright, trademark, right of publicity, and other intellectual property laws. See, e.g., the TEACH Act, 17 U.S.C. § 110(2) (copyright exemptions for distance education); Lanham Act, 15 U.S.C. § 1125(c)(3) (exemptions from trademark dilution liability for fair use, comparative advertising, parodies, criticism, news reporting, and noncommercial uses); Cal. Civil Code § 3344 (exemptions to right of publicity for news, public affairs, and other purposes). State educational institutions might also rely on the Eleventh Amendment's guarantee of sovereign immunity from federal claims.
- 47 In light of this pressure, we are particularly grateful to those institutions and individuals who did participate in our study.
- 48 P2P filesharing of copyrighted material is regularly described as "illegal" in the US media, and the US Supreme Court in the *Grokster* case assumed that it is. 545 US 913, 125 S.Ct. 2764, 2773.
- 49 Automatic termination of users repeatedly *alleged* to infringe is not required by § 512. In *Perfect 10, Inc., v. CCBill, LLC*, for instance, the court held that CCBill's

failure to “keep a log” of § 512 notifications received did not harm its § 512 safe harbor eligibility. 340 F. Supp. 2d 1077 (C.D. Cal. 2004). In *Corbis Corp., v. Amazon.com, Inc.*, Amazon’s failure to terminate zShops accounts that were repeatedly alleged to infringe did not cost it its § 512 safe harbor, because the activities were not, themselves, blatantly infringing, and Amazon could take into account fair use or other factors that might affect the evaluation of a copyright infringement claim. 351 F. Supp. 2d 1090, 1104-05 (W.D. Wash. 2004).

- 50 Fair Use Report, *supra* note 1, at 54-55.
- 51 The language is probably meaningful for people outside the US, who “consent” to jurisdiction in the US.
- 52 Section 512(h) requires a subpoena. Section 512(c) doesn’t authorize the release of information generally, but if the user files a counternotice, § 512(g) offers the safe harbor from liability to users *only* if service providers forward the notice (with the user’s identifying information) to the original complainant.
- 53 FERPA generally prohibits the release of information from a student’s education record without written permission from the student or guardian, except under certain circumstances or with a judicial order or lawfully issued subpoena. 20 U.S.C. § 1232g; 34 CFR § 99.
- 54 See Written Testimony of Norbert W. Dunkel and Rob Bird, before the House Subcomm. on Courts, the Internet, and Intellectual Property, of the Comm. on the Judiciary, 107th Cong. Sept. 22, 2005, available at <http://www.judiciary.house.gov/media/pdfs/dunkel092205.pdf> (noting that ICARUS blocks P2P as well as “residential ‘Dark Nets,’” a term used to describe private filesharing networks) and Katie Dean, “Florida Dorms Lock Out P2P Users”, *Wired News*, Oct. 3, 2003, at <http://www.wired.com/news/digiwood/1,60613-1.html> (describing blocks to server-based applications like networked games).
- 55 See also *MGM v. Grokster*, 9th Cir. 2003, Brief of Amici Curiae ACLU and libraries, available at http://eff.org/IP/P2P/MGM_v_Grokster/?f=20030926_aclu_amicus.txt, and *MGM v. Grokster*, Sup. Ct. 2004, Brief of Computer and Communications Industry Assn and Internet Archive opposing petition for certiorari, available at http://eff.org/IP/P2P/MGM_v_Grokster/20041109_Jaszi_finalbrief.pdf (both documenting numerous legal applications of filesharing software).
- 56 17U.S.C. § 512(e)(1)(c)
- 57 An opinion shared rather widely. See, e.g., Greg Sandoval, “RIAA copyright education contradictory, critics say”, *cnet News.com*, Aug. 31, 2006, at http://news.com.com/2102-1027_3-6111118.html?tag=st.util.print.
- 58 Most of the schools we interviewed made significant sets of materials available online, but not all such materials – the copyright quizzes, for instance. Institutions

could also facilitate the widespread adoption of their own developed materials by using open content distribution licenses such as Creative Commons (see <http://creativecommons.org>).

- 59 Chilling Effects is an online public clearinghouse of cease and desist letters, complaints about content, and § 512 takedown notices; as well as information about the applicable bodies of law (see <http://chillingeffects.org/>). The site is operated by Wendy Seltzer, the Electronic Frontier Foundation (EFF), and several law school clinics. (Disclosure: Laura Quilter is affiliated with the Samuelson Law, Technology & Public Policy Clinic, which maintains the § 512 section of Chilling Effects.)
- 60 This sort of “scared straight” tactic is also taken by the recording industry in its recent video, “Campus Downloading”, *supra* note 42.
- 61 Most campuses have kept the terms of their deals private. However, the rates typically are based on \$2- \$3 per student. See Brock Read, “More Colleges Strike Up Music-Sharing Deals, Despite Lukewarm Response in Dorms”, *Chronicle of Higher Education*, Aug. 22, 2005, available at <http://chronicle.com/free/2005/08/2005082201t.htm>.
- 62 Graham Spanier, “Peer to Peer Piracy on University Campuses: An Update”, Testimony to the House Judiciary Committee, Oct. 5, 2004, available at <http://president.psu.edu/testimony/articles/161.html>
- 63 See, e.g., Jefferson Graham, “More schools offer cheap music downloads for students”, *USA Today*, Dec. 12, 2004. available at http://www.usatoday.com/money/industries/technology/2004-12-12-campus-music_x.htm; Benny Evangelista, “Back to School”, *San Francisco Chronicle*, Aug. 15, 2005 (similar position expressed by UCLA); Derek Slater, “More Crummy Reporting on Penn State’s Music Service”, *A Copy/fighter’s Musings*, Nov. 6, 2003, available at <http://blogs.law.harvard.edu/cmusings/2003/11/06/more-crummy-reporting-on-penn-states-music-service/> (noting that agreements put public dollars into subsidizing the services and their selection of artists).
- 64 Our interviewees’ experiences generally accorded with press accounts. See e.g., Andrea L. Foster, “Colleges Split Over Effects of Court Ruling on File Sharing”, *Chronicle of Higher Education*, July 8, 2005, available at <http://chronicle.com/free/v51/i44/44a00101.htm>
- 65 See Ashlee Vance, “Penn Students Revolt Against Napster, DRM Invasion”, *Register.com*, Nov. 7, 2003, at http://www.theregister.co.uk/2003/11/07/penn_state_students_revolt_against/.
- 66 See, e.g., Nick Timiraos, “Free, Legal and Ignored”, *Wall Street Journal*, July 6, 2006, p. B1, available at http://onUne.wsj.com/pubUc/article/SB115214899486099107-vuo!hGUthiYcFwsQKODjegSRPwQ_20070706.html?mod=blogs.

- 67 See *Recording Industry Ass'n of America v. Verizon Internet Services, Inc.*, 351 F.3d 1229 (D.C. Cir. 2003), cert. denied, 543 US 924; *In re Subpoena to University of North Carolina at Chapel Hill*, 367 F. Supp. 2d 945 (M.D.N.C. 2005); *In re: Charter Communications, Inc., Subpoena Enforcement Matter*, 393 F.3d 771 (8th Cir. 2005).
- 68 <http://www.chillingeffects.org>
- 69 Educational service providers have better access to information, developed by their relevant professional associations, than do commercial or nonprofit service providers. Among the resources are: EDUCAUSE, which includes a database of relevant news articles, presentations, and white papers (available at <http://educause.edu/>); the National Association of College and University Attorneys ("NACUA"); and reports such as the American Association of Universities, "Campus Copyright Rights and Responsibilities" guide (available at http://aaupnet.org/aboutup/issues/Campus_Copyright.pdf).
- 70 Examining the Chilling Effects database, Heins and Beckles found that 24% of all trademark and copyright notices in the database for 2004 presented weak substantive claims or reasonable defenses (Fair Use Report, *supra* note 1, at 36); see also Takedown Notices Study, *supra* note 13 (finding that 29% of the § 512 notices sent to Google presented substantive flaws in the underlying claim or a copyright defense).
- 71 Takedown Notices Study, *supra* note 13.
- 72 Review of websites of 25 trade associations and service provider organizations found many state-based organizations no longer operational. Of the continuing organizations, only a few had any information about the DMCA, and only one, the Internet Service Providers Association (ISPA) had informational resources to help their members understand the DMCA. Research conducted by Kate Kaufmann in March 2006.
- 73 These complaints from smaller service providers mirror similar complaints cited in a recent paper, which noted that "owners of smaller ISPs have complained that they are unable to afford to keep up with the number of requests and are at risk of becoming overwhelmed that they may actually be driven out of business". Alice Kao, "RIAA v. Verizon: Applying the Subpoena Provision of the DMCA", 19 *Berkeley Tech. L.J.* 405, 418 (2004).
- 74 See, e.g., Takedown Notices Study, *supra* note 13, 22 *Santa Clara Comp. & High Tech L.J.* 652, 688-92 (summarizing various legislative reform proposals, and offering additional proposals).

4

The Moral Right of Integrity: A Freedom of Expression

*Leslie Kim Treiger-Bar-Am**

The moral right of integrity allows authors to prevent certain modifications to their artworks. The right is maintained by the author even where the ownership of the copyright in her work has passed out of her hands. An example often used to illustrate the complexities of the right is Marcel Duchamp's painting of a mustache on a replica of Da Vinci's Mona Lisa. The right is generally conceived of as an intellectual property right, and characterized as a right to reputation or a personality right. By contrast, the aim of this chapter is to develop the characterization of the integrity right in UK law as a human right of expression. This chapter will situate the integrity right directly within the doctrine of freedom of expression, and its principle of protection of speakers against distortion of their expression. Two implications of the analysis may be seen. Understood as a freedom of expression, a section 80 claimant would not need to show injury. Moreover, while a copier's defense of freedom of expression to a copyright infringement claim is sometimes viewed as brought from outside the doctrinal

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framework, with section 80 both the claim and defense may be seen as partaking of the same doctrinal framework, namely principles of freedom of expression.

The moral right of integrity allows authors to prevent certain modifications to their artworks. The right is maintained by the author even where the ownership of the copyright in her work has passed out of her hands. An example often used to illustrate the complexities of the right is Marcel Duchamp's painting of a moustache on a replica of Da Vinci's Mona Lisa.

The integrity right has been enacted as Section 80 of the UK Copyright, Designs and Patents Act 1988 ('Act'). The Act provides that an author, artist or film director has the right to prevent treatment that 'amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director'.¹ The right is conceived of as an intellectual property right. By contrast, the aim of this chapter is to develop the characterisation of the integrity right in UK law as a human right of expression, and to situate it within the doctrine of freedom of expression.

In Section 1 of this chapter, other characterisations of the right will be distinguished. Unlike the protection of reputation by the law of defamation, the integrity right protects not how others perceive the author, but the author's intrinsic autonomy of expression. Similarly, where it is labelled a personality right, the integrity right is inaccurately portrayed as protecting the author's persona, that is, the image of the author as perceived by others. Other difficulties with the personality theory will be discussed. I submit that the right is a personality right only insofar as expression is indeed integral to personality.

In Section 2, the integrity right will be shown to reflect theoretical developments supporting authors' rights of expression, from the Renaissance through to today. The postmodern critique of authors' rights and the author construct will be countered.

Section 3 of this chapter will situate the integrity right directly within the doctrine of freedom of expression. It will be seen that the rationales offered for the integrity right parallel those offered for the freedom of expression. It is on the

autonomy rationale that the freedom of expression caselaw bases its protection of speakers against the distortion of their expression. That caselaw will be explored.

Two implications of the analysis may be seen. Understood as a freedom of expression, a Section 80 claimant would not need to show injury. Neither reputational injury nor emotional or other harm to personality interests ought be required in order to state a claim under Section 80.² Injury is surely present, as indeed it must be insofar as infringement of Section 80 is a breach of statutory duty: it is injury to the author's autonomy of expression.

A further implication of viewing Section 80 as a freedom of expression is with respect to the doctrinal framework for analysis of opposing claims. Freedom of expression will often arise on the opposing side of a Section 80 claim. A defendant may claim that a modification is the modifier's expression, and hence must be protected under freedom of expression principles. While a copier's defence of freedom of expression to a copyright infringement claim is sometimes viewed as brought from *outside* the doctrinal framework, with Section 80 both the claim and defence may be seen as partaking of the *same* doctrinal framework, namely principles of freedom of expression.

1. Other Characterisations Distinguished

1.1 Reputation Right?

Section 80 implemented into UK law Article 6bis of the Berne Convention for the Protection of Literary and Artistic Works ('Berne Convention'). At the Revision Conference of Rome in 1928, at which a moral rights provision was introduced into the Berne Convention, the civil law countries, with traditions of moral rights, suggested the use of terms such as 'spiritual', 'moral' and 'personal', and reference to the 'character' of the author. The common law countries, led by the UK, objected to those terms as too vague under their legal systems. The phrase 'honour or reputation' was used as a compromise so that common law countries could meet their obligations under the Berne Convention through laws of defamation and passing off, without the need to introduce a new cause of action into their domestic laws.³

Some continue to characterise the right in the UK Act as a right of reputation. For example, in *Pasterfield v. Denham* the court cited approvingly one of Laddie's characterisations of Section 80 as protecting reputation, akin to the law of defamation.⁴ Commentators often take this approach.⁵ The term 'derogatory' in the statute is sometimes understood with its ordinary language meaning of depreciatory.

Rather, the term 'derogatory' can be seen to reflect its root 'derogate', as in taking away from, or deletion.⁶ On its legal definition in the Act, 'treatment' is defined as 'any addition to, deletion from or alteration to or adaptation of the work . . .'. Treatment is 'derogatory' where it amounts to 'distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author'. Throughout the analysis I use the term 'distortion' as a short form rather than 'derogatory treatment', to avoid this confusion.

If the right were a reputation right, then courts would be required to make aesthetic evaluations: does Duchamp's placing of a moustache on the Mona Lisa defame Da Vinci by rendering the image aesthetically inferior, or improve Da Vinci's reputation by improving the image? Even if a court were to find that the modification is an aesthetic impoverishment of the artwork, it could be argued that the wide modern publicity that Duchamp's work gave to the Mona Lisa has improved Da Vinci's reputation.

The link between the aesthetics of the modification and the author's reputation was made expressly in the pre-1988 case of *Carlton Illustrators v. Coleman & Co., Ltd.*⁷ In *Carlton*, evidence was given that the alterations were such as would damage the plaintiff's reputation as an artist because they were of aesthetically inferior quality.⁸ The argument of the plaintiff's expert in the *Pasterfield* case seems to have been based on this notion of 'derogatory'.⁹ Cornish writes of 'aesthetic prejudice'.¹⁰

The dangers of a court undertaking an aesthetic evaluation were discussed by the House of Lords in *George Hensher Ltd., v. Restawile Upholstery (Lancs) Ltd.*,¹¹ and by Justice Holmes in *Bleistein v. Donaldson Lithographing Co.*¹² It is difficult for such evaluations to be 'objective'. Also a judgment of a work's aesthetics is content-specific and hence suspect.

Relatedly, a modification may be found to insult or criticise excessively a work or its author. Is the moustached Mona Lisa an insult to the image or to Da Vinci? 'Derogatory' sometimes takes on the sense of insult.¹³ It is an author's reputational interest that is said to be protected by the integrity right on this characterisation.¹⁴ Moral rights in France include a right against excessive criticism.¹⁵ Some commentators in common law jurisdictions support it.¹⁶ English law generally is hesitant to create liability for insults or excessive criticism, as the court wrote in *Berkoff v. Burchill*.¹⁷

Most problematic for the purposes of the instant analysis, reputation surrounds how one is perceived by others. Reputation is extrinsic. Similarly, the right is said to protect the standing of the author in the eyes of the community, the admiration and recognition he receives.¹⁸ I submit that Section 80 is more intrinsic to the person. That intrinsic interest can be called the autonomy of expression.

Other interests have been named. Even where understood as a reputation right, views differ as to whether the right protects professional reputation or personal reputation as a human being.¹⁹ Sometimes the interest protected by the integrity right is identified as the author's emotions, which is then rejected as too subjective a standard.²⁰ Another frequent characterisation of the interest protected is the author's personality.

1.2 Personality Right?

The integrity right is frequently said to protect the 'intimate bond' between author and artwork,²¹ their 'unseverable personal connection'.²² Yet defining the nature of that connection is difficult and obtuse. It has been termed 'metaphysical', and the presence of the author's personality in his work has been called 'mystical'.²³ There are numerous further difficulties with this characterisation; I will discuss four.

Firstly, personality theories associate the integrity right with *persona*.²⁴ *Persona* is the external manifestation of an individual, the perception of the individual in the eyes of the community. Spence and Waldron call the integrity right a right of self-presentation.²⁵ While these authors may mean something close to what I call self-expression – Spence distinguishes the integrity right from others' perception

of the author – I find the term 'presentation' troubling. The phrase seems to presume that the author intends to present herself to others through her work, which she may not intend to do.

Netanel uses this notion of self-presentation in this way, when he writes that expression,

is part of the projection of oneself – of choosing which aspect or conception of one's identity one wishes to *present to others*. To convey one's words . . . is to define oneself publicly. It is to seek to make oneself *understood* as one wishes to be.²⁶

Similarly, Hughes describes the integrity right as protecting the public's identification of and recognition of the author.²⁷ These characterisations recall the right of reputation protected in the law of defamation: the protection of how others perceive the author. Yet the integrity right protects a right more inherent and intrinsic to the person, namely her autonomy of expression. It will be seen below that these authors also characterise the right as a right of autonomy of expression.²⁸

This same distinction arises within the freedom of expression doctrine as well. Raz and Gardner justify freedom of expression as protecting the individual's identification in the public sphere with an idea, and the resultant validation or invalidation of life choices. The interest protected then is recognition by others.²⁹ By contrast, I take the view that the freedom of expression may be justified on deontological grounds, apart from its consequential effects on listeners.³⁰

A second difficulty is that on a personality theory, integrity right protection may be conditioned upon a work being demonstrably *personal*. Copyright on the authorship norm in Europe is said to protect only works that display some imprint of personality.³¹ Ginsburg would differentiate the kind of copyright protection offered for works of high authorship, which display the author's personal imprint, and works of information, which do not.³² Yet Anglo-American copyright standards do not require an imprint of personality - neither on the UK originality standard nor on the US standard.

In England, *University of London Press v. Universal Tutorial Press*³³ sets the originality standard to require that the author is the origin or source of the

work, that is that the work was not copied. The UK standard for originality does not require a personal connection between author and artwork – except to the degree that it is the author's time, labour and effort as origin. Sherman writes that all three of the UK formulations of the requirement are 'variations on the theme that the source . . . of the work must be the individual involved. . . . There must be something of the creator in the final product which can be said to be distinctively his or hers.'³⁴

Nor does US law require a showing of *personal* expression. US law rejects a sweat-of-the-brow standard, and requires 'some minimum degree of creativity'.³⁵ Yet the Supreme Court set this standard 'without requiring any manifestly personal input'.³⁶

The UK and US standards for copyright look to *individuality* rather than *personality*. In the literary property debates in eighteenth century England, Francis Hargrave, counsel in *Becket v. Donaldson*, wrote: '[A] literary work *really* original, like the human face will always have some singularities, some lines, some features, to characterise it.'³⁷ Copinger in the first edition of his book in 1870 wrote: 'The order of each man's words is as singular as his countenance.'³⁸ Also in the US, Justice Holmes' standard in *Bleistein v. Donaldson Lithographing Co.*,³⁹ can be understood in the same light.⁴⁰

Likewise, Section 80 states no requirement that works bear an imprint of personality. The integrity right is a right of expression, protecting the self insofar as the source of the work is the self. The expression is *by* the self, not necessarily of the self.

These legal standards cohere with both the nature of creativity and the freedom of expression. Artworks may very well not be personally expressive of their creators. TS Eliot wrote that a poem is not an expression of personality but an escape from it.⁴¹ Still other artists 'take it as a challenge to produce works that betray no trace of their own personal involvement', such as with Duchamp's ready-mades.⁴² Moreover, in the freedom of expression doctrine it is not a precondition of protection that the speaker show imprimatur of personality in her speech. On US doctrine, such a requirement would be suspect as content-specific.

Third, upon a personality theory the integrity right protects an intaking rather than an outpouring. Personality theory conceives of the author's personality being incorporated into the art object,⁴³ with the artwork thus being incorporated into the personality of the author, on Radin's theory.⁴⁴ Netanel has applied Radin's theory to justify moral rights.⁴⁵

Yet expression is an outpouring rather than an intaking, as Harris has written.⁴⁶ The term expression shows that it refers to an outward unfolding: the Oxford English Dictionary defines 'express' as to press out, emit, exude.⁴⁷ The freedom of expression doctrine protects not private expression in isolation, but expression in communication.⁴⁸ So too Section 80 protects expression once communicated. It is not the privacy of expression that is protected, but the nature of others' modification of the expression.

Fourth, personality theory sounds in property. With the incorporation of the subject's personality into an object, the object becomes constitutive of personhood and supports a property claim.⁴⁹ Likewise, persona is characterised on a personality theory as it is protected in property, through publicity rights.⁵⁰ Reputation is sometimes understood as a right in property as well: Geller places reputation on a continuum with objects that authors would be entitled to protect as extensions of themselves.⁵¹

Yet Section 80 is not comfortably characterised as a property right. Alienability is one of the main indicia of property.⁵² Section 80 is inalienable, as is the integrity right in most jurisdictions. Also unlike property rights, the duration of Section 80 is limited.⁵³ Thus Section 80 is not suited to a property characterisation.

Where the integrity right is seen to protect expression, it is understood to protect the author's conduct, rather than the artwork as an object. Intellectual property law is said to have moved from a conception of the protection of action to protection of a thing, with the commodification of intangibles in the modern period. Rose, and Sherman and Bently have noted this trend.⁵⁴ Kant may be said to partake of the earlier view, looking not at the right to a book as a corporeal artifact, but to the rights involved in the discourse.⁵⁵ The interpretation of Section 80 proposed herein may be seen as a throwback to the earlier view of intellectual property as action.⁵⁶ Yet below we will see that Section 80 may be placed even more directly into the freedom of expression doctrine itself.

2. Trends Supporting the Author's Right of Expression

This Section will discuss the theoretical trends supporting rights of expression. The postmodern critique of that trend, positing that author's rights are based on a fiction, will be countered.

2.1 Socio-economic and Theoretical Trends

Historical socio-economic trends can be seen as supporting the rise of expression rights. Developments in the world of commerce and the professions led to the increasing impetus for legal protection of authors. In the Renaissance, the individual creator began to obtain privileged status in Europe.⁵⁷ Later, printing allowed authors to promote themselves as creators.⁵⁸ With the increase in the business of publishing and distributing, and the decline of patronage, writers came to see themselves as members of a professional class.⁵⁹

Legal developments also supported the rise of expression rights. Copyright's roots in censorship are well known.⁶⁰ Yet the legal trend has another aspect as well. Parallels may be seen between the development of the doctrines of copyright and freedom of expression, discussed below.⁶¹ The rise of copyright reflects the increase in the protection of individual rights generally.⁶²

The rise of the notion of the creative, expressive individual may also be seen in aesthetic-philosophical currents. Renaissance humanism brought a glorification of man's creativity.⁶³ With Enlightenment values, respect grew for each individual's freedom to develop information and insight, and to communicate it to others.⁶⁴ In the Romantic period, the notion of creative expression further developed.⁶⁵

The concept of creative expression thus extended further back than the Romantic age; it also has expanded since that period. Two changes will be noted. First, for the Romantics creation was the expression of the innermost self of the individual. The biography of the author and artist was paramount.⁶⁶ Today creative expression does not necessarily entail expression of the artist's self. We have seen that Section 80 does not require that to gain protection works must be personal or bear the imprint of their author's personality.

Second, the concept of expression expanded not only as to content, but as to subject as well. Over time, the Romantic notion of the creative genius expressing himself in art was expanded to conceive of all individuals expressing themselves. In the Romantic period, the artist was 'the paradigm case of the human being, as agent of original self-definition'.⁶⁷ Today this notion may be said to have been universalised.⁶⁸

Both expansions can be seen in Hargrave's argument in *Donaldson v. Becket* and Justice Holmes' decision in *Bleistein*. Those positions set forth standards of protection for individuality, not personality. Also the beginnings of the universalisation of the conception of individual expression can be seen there. Rose interprets Hargrave's position as shifting the focus of copyright law from the composition to the writer.⁶⁹ I would argue that this interpretation may be applied to Holmes' standard as well: that the standard evoked in *Bleistein* does not downplay the author, as Jaszi sees it,⁷⁰ but rather universalises it. I would agree with Kaplan writing that Holmes' 'insistence on individuality . . . [has] an echo in it of the Romantic gospel'.⁷¹ Indeed the uniqueness of individual expression can be seen as a Romantic conception.⁷² Yet Holmes' standard did not adopt the Romantic's notion of creative genius imprinting his personality on his artwork. Today, creative expression no longer surrounds just the creative genius. The idea of the expressive being has been universalised.

The universalisation of expression is also a democratisation.⁷³ Walter Benjamin has shown that with the mechanical reproduction of art the masses accessed and absorbed art. As readership increased, so too more readers became writers.⁷⁴ Enhanced access breeds enhanced expression. With the Internet, that process is enhanced dramatically.⁷⁵ The universalisation and democratisation of creative expression could arguably justify expanding the scope of authors and works given Section 80 protection.⁷⁶

2.2 The Myth-of-Authorship Myth

In tracing the theoretical currents in the development of the notion of autonomy of expression, the postmodern critique of that development and its support for authors' rights will be disputed.

2.2.1 The Author as Non-fiction

Postmodernism⁷⁷ critiques the author as a fiction.⁷⁸ Yet we have seen that the concept of the individual's creative expression has roots much further back than the Romantic age and has continued to develop further since that period. Some postmodern thought would deconstruct the self generally. Yet the concept of the self has been developed over the course of centuries.⁷⁹ It is the postmodern critique of the self that can be seen as the anomaly, rather than the support of it. The integrity right reflects the rise in the concept of the self and the individual.⁸⁰ The protection of the author may be seen as a part of the growing defence of human and individual rights.

Foucault wrote that the author's name indicates the status of a discourse within a society and a culture, rather than passing to a real and exterior individual who produced it.⁸¹ By contrast, it is the argument of this chapter that that real individual must be located and defended. As Rose writes, we are not ready to depart from the idea of the author that our culture holds dear, and certainly not from the notion of self that postmodernism would discard.⁸²

2.2.2 Creativity not in Isolation

A further postmodern critique of authorship argues that creativity is not attributable to an *individual* 'author'. The integrity right and copyright are said to be based on a vision of creation in privacy, with a Cartesian subject 'thinking and feeling in solitude' and then bringing works to publication.⁸³ This vision of creation from privacy is consistent with the theory of subject/object creation of artworks discussed above, with the artwork seen as the external embodiment of the author.⁸⁴

Rather, the critics argue that the creative process is interrelational. Intertextuality means that authors rely on earlier authors and texts.⁸⁵ Woodmansee writes that creative works rely on a communicative network, are the result of teamwork, and are steeped in or react to tradition.⁸⁶ The author construct is critiqued as unsuitable in an increasingly complex world of group, corporate and collaborative creativity.⁸⁷

Yet the protection of Section 80 does not depend upon the individual creating in isolation. The inter-relational nature of much creativity is a challenge for courts

to determine who is responsible for, and has rights over, which creative expression. That is an issue for the method of case resolutions, rather than a theoretical problem for the right of expression. The challenges and difficulties of method do not defeat the theory of the integrity right.

Moreover, regardless of the extent of their isolation in creation, we have seen that Section 80 protects communicated expression. Whether or not there is such a thing as private art, with the real work of art existent only in the mind of the author,⁸⁸ is irrelevant. Justifications of the integrity right on the basis of privacy⁸⁹ are thus inapposite.

Another postmodern critique on this point is that every work is copied, nothing original, and therefore that no 'author' should enjoy protection of expression.⁹⁰ The debate as to originality will not be entered here. It will be assumed for the purposes of the instant analysis that there is some originality that gives meaning to its requirement under the law.⁹¹ A primary author's creation, or transformation of what came before, must be protected – as must the transformative work of the modifier find protection. The postmodern critique recalls the need to set the limits on authorial rights: the defences to Section 80 must be read liberally, allowing for transformative use.⁹²

2.2.3 Monopoly on Presentation of Meaning

Third, the postmodern critique argues that authors' rights create a monopoly on meaning. Foucault wrote in *What is an Author?* that the author is 'the ideological figure by which one marks the manner in which we fear the proliferation of meaning'.⁹³ In the critics' view, the integrity right allows the 'authorship function' to act as a creation of stable meanings in the control of an individual producer rather than readers.⁹⁴

Here I agree with the postmodern view that meaning is created by readers, and hence that a proliferation of meanings is possible. Yet Section 80 does not create a monopoly on meaning. Section 80 protects only the author's *presentation* of her artwork.⁹⁵ It is rather the author's *message*, or presentation of form and content of her expression, that is safeguarded. Hence I would dispute Spence's characterisation of the problem of unauthorised use as changing the meaning of a work.⁹⁶ I also disagree with Hughes' drawing upon the interpretive

stance of Original Intent analysis in US constitutional jurisprudence, where the intent of the framers is examined to determine the meaning of the Constitution.⁹⁷ Rather, meaning is not a single entity that can be changed, but is diverse and subject to change at each of its readings. A proper interpretation of Section 80 must allow the proliferation of meanings.

A broad defence under the Act is necessary to protect those other meanings. A modifier's transformation of a primary work's meaning must be protected. In addition to the diversity of meanings, meanings may be collective. As Coombe writes, as human selves in human communities, we are constituted by and constitute ourselves with shared cultural symbols.⁹⁸ Thus where a work has become part of our cultural language and social fabric, the creation of a monopoly over its use must be avoided.⁹⁹ Use of a primary work that has become a cultural text must be defended, as discussed below with respect to public fora in the freedom of expression doctrine. The standard for a finding of protected transformative use must be more liberally applied for modification to a work that has itself become a public forum.

2.2.4 Authorial Intent

Relatedly, in tandem with deconstruction of the (self and the) author as a myth, the postmodern critique would reject the importance of authorial intent. In 1946, Wimsatt and Beardsley, in 'The Intentional Fallacy', argued for the distinction between a work, its author's intentions, and its reader's responses.¹⁰⁰ An author's intent, they argued, is not what the art object means. Authorial intent met with further rejection in the work of Barthes.¹⁰¹ Movements in literary criticism developed by extending the role of the text itself as the source of the work's meaning, and then the role of the reader (or audience, viewer).¹⁰²

Yet even Beardsley, a frontrunner in naming the Intentional Fallacy with respect to *interpretation* and *evaluation* of artworks, recognises that intent plays an important role in *defining* an artwork. Beardsley 'see[s] nothing wrong in limiting the class of artworks to things that have been intentionally produced'.¹⁰³ Language as a means of communication requires 'the assumption that knowledge of speakers' intentions is both desirable and available'.¹⁰⁴ So too with art, the existence of an author – an intentional agent – must necessarily be inferred by the reader for the text to have meaning.¹⁰⁵ Whereas authors do not

control the interpretation of their work and hence its meaning, they do set forth 'the basic vocabulary of signs – words, sounds and images – that serves as frame of reference for the work's meaning.'¹⁰⁶

Section 80 does not fall afoul of Beardsley's rejection of authorial intention in defining what an artwork means. Section 80 does not require ascertaining what an artwork means, nor interpreting or evaluating it, in Beardsley's terms. Rather, Section 80 protects the presentation of the artwork in a manner true to the artist's intention, for its accurate interpretation and evaluation by others. The reader has a role in Section 80, namely in the objective interpretation of an author's subjective intent, and as an interested party, but does not have the right to control the presentation. As in the freedom of expression doctrine, if the listener were entitled to determine a work's presentation – the author's 'speech' – the law would improperly allow a heckler's veto.¹⁰⁷

3. Freedom of Expression Doctrine

In this Section the integrity right will be situated within the freedom of expression doctrine. First the justifications for the integrity right will be reviewed. It will be seen that the rationales offered for the integrity right parallel the rationales for the freedom of expression doctrine. Following the discussion of rationales, caselaw will be examined. Limitations on the right will then be explored.

3.1 Rationales

3.1.1 Integrity Right Norms

The integrity right is centrally justified on the authorship norm. Geller calls it a right to 'exercise continuing control over self-expression'.¹⁰⁸ Netanel writes that it promotes 'author sovereignty and control over the process of creating and communicating intellectual works', which Netanel terms an 'autonomy-of-expression function'.¹⁰⁹ Spence calls the integrity right an expression right,¹¹⁰ and a right of autonomy.¹¹¹ Also from a critical standpoint, the integrity right is characterised as an author's right of autonomy: Jaszi describes legal constructs of authorship as 'prerogatives of the autonomous individual'.¹¹²

UK cases considering complaints of modifications to artworks, both before the Act and pursuant to Section 80, also have upheld norms of autonomy of

expression. The court in *Joseph v. National Magazine Co., Ltd.*,¹¹³ in a passage widely quoted, wrote that: '[T]he plaintiff was entitled to write his own article in his own style, expressing his own opinions.' In *Frisby v. British Broadcasting Corp.*,¹¹⁴ and in *Pasterfield*,¹¹⁵ the courts were concerned to preserve the integrity of authorial intent as to the presentation of their works.

Moral rights are also analysed on marketplace norms.¹¹⁶ Moral rights are identified as affording a bargaining chip to authors and artists, who are often in a weak negotiating position.¹¹⁷ The integrity right is further identified with 'truth-in-marketing legislation': as with trademarks, the public is entitled to be told the truth about a work's authorship and to have the work in the form in which the author intended it to reach the public.¹¹⁸

This rationale ought not be understood as the central rationale for the integrity right. The integrity right must be distinguished from the trademark function protecting goodwill. The analysis of the integrity right on a marketplace norm frames the right as essentially a protection of authorial reputation,¹¹⁹ which has been rejected in the instant analysis. Moreover, unlike copyright, moral rights arise not from the Statute of Anne and the marketplace theories that have been associated with its injunction for the encouragement of learning. Rather, moral rights arise from the authors' rights tradition on the Continent – and, as is discussed throughout this chapter, from Anglo-American principles of freedom of expression.

The other rationale for the integrity right offered commonly as an alternative to the authored-centred norm is that of cultural heritage.¹²⁰ This rationale justifies the right for the social good it brings. Yet the preservation of cultural heritage is a by-product of the primary norm of the integrity right as an individual right.

Each of the integrity right rationales focuses on a different one of the analytic elements of Author, Text, and Reader. As Dickie writes: 'There are three basic items in the artistic situation: (1) the artist, (2) the art the artist creates, and (3) the audience that experiences the work.'¹²¹ The authors' rights rationale centres on the Author. The chief concern of the marketplace rationale is lending support for the integrity of Text. The cultural heritage rationale centres on the Reader, arguing for the protection of artwork for the sake of the reading and viewing public's tradition.¹²² While the other rationales are consequentialist, the autonomy rationale is deontological.¹²³

It is submitted that it is an author-centred rationale that is the best fit for the integrity right (in the Dworkinian sense). The nature of that author-centred rationale need not surround the author's personality, nor the author's reputation. Rather, it will be seen that it is akin to the autonomy rationale for the freedom of expression.

3.1.2 Freedom of Expression Norms

The rationales offered for the integrity right parallel the rationales offered for the freedom of expression generally. The three central freedom of expression rationales justify the right on the basis of autonomy, truth, and democracy.¹²⁴ These rationales similarly centre on the Author, Text, and Reader. On the autonomy rationale, freedom of expression supports the Author's, or speaker's, choice and control over expression.¹²⁵ On the truth rationale, the freedom of expression allows for competition in the marketplace of ideas so that the truth, as the best Text, will emerge.¹²⁶ On the democracy rationale the freedom of expression is protected for the circulation of ideas so as to foster an educated governing electorate, composed of Readers.¹²⁷ While the democracy and truth rationales are consequentialist, the autonomy rationale is deontological.

The integrity right protects expressive autonomy, namely authors' choice and control over the form and content of expression. As we will see below, the rationale used by courts in freedom-of-expression cases upholding rights to control the form and content of expression is the autonomy rationale.

Of course the rationales for both doctrines do not operate in stark opposition. With the freedom of expression, the individual right is in the public interest.¹²⁸ Generally this recalls the debate as to utilitarianism/natural rights.¹²⁹ Also for copyright rationales the two systems cannot be contrasted starkly. The civil law system includes incentive rationales, and the Anglo-American copyright system includes individual rights rationales.¹³⁰ So too the author's integrity right is an individual right in the public interest.

3.1.3 The Conjunction

The conjunction between copyright and the freedom of expression has been made. The function of copyright to promote expression has been noted in the

oft-cited case *Harper & Row, Publishers, Inc., v. Nation Enterprises*, calling copyright 'the engine of free expression'.¹³¹ The historical roots of copyright and freedom of expression show that the two are in tandem.¹³² The conjunction of the two is particularly strong where freedom of expression is understood on the democracy rationale.¹³³

Some scholars have suggested conceptualising authors' rights in copyright as within the freedom of expression doctrine, with references to moral rights as well. Hughes suggests free speech requires that speech be guaranteed some integrity, with expression remaining unadulterated. Hughes continues: 'It follows that if intellectual property is expression, it merits the same guarantee.'¹³⁴ Waldron refers favourably to possible arguments for copyright based on autonomy arguments from freedom of expression: 'The choice of when and how to express oneself seems particularly strategic in the overall determination of the shape and character of one's life.'¹³⁵ Netanel sees 'the common theoretical underpinning that correlates the author's claim to continuing control with the inalienable political right of free speech'.¹³⁶ The instant analysis develops the justification for and understanding of the integrity right from within freedom of expression jurisprudence.

3.1.4 The Modifier's Freedoms of Expression

In addition to the parallels between the integrity right and freedom of expression doctrine in their rationales, they are also parallel in their conflicts. While in tandem with the freedom of expression, copyright also threatens it. Copyright's exclusive entitlement to copy and disseminate expressive works stands in tension with freedom of expression principles.¹³⁷ Courts often find that the values of freedom of expression are adequately protected *within* copyright doctrine – due to copyright's limited duration, the idea/expression dichotomy, and the fair use, or fair dealing defences.¹³⁸ Yet as copyright's scope has been extended, scholars increasingly have called for limitations to copyright *from outside* the copyright doctrine, namely from principles of freedom of expression.¹³⁹ In *Ashdown v. Telegraph Group Ltd*, the UK Court of Appeal recognised that where the right of freedom of expression conflicts with the protection afforded by the 1988 Act, the court is bound to accommodate the right of freedom of expression, which may trump the copyright.¹⁴⁰

Similarly, while the integrity right is in tandem with the freedom of expression, it also threatens it.¹⁴¹ Rights of freedom of expression may well present themselves on both sides of an integrity right claim. A modification that would transform the primary work reflects the modifier's own autonomy of expression. The rights of expression of the modifier-defendant thus need to be taken into account, and balanced with the primary author's integrity right of expression.

Under the instant analysis, it is submitted that the integrity right is itself to be understood *from within* the freedom of expression doctrine. Of course then freedom of expression principles will enter the analysis – for both the plaintiff and the defendant. A defence to the primary author's freedom of expression claim may be based on the modifier's freedom of expression. Section 80 contains no fair dealing defence (although the Act provides for numerous exceptions, in Section 81). This is not necessarily a weakness of the provision; the doctrine need not require a mechanism apart from the extension of freedom of expression principles.

3.2 Caselaw on Non-distortion

The following analysis of caselaw will show that the integrity right and freedom of expression doctrine uphold a similar principle. Caselaw will be drawn from the UK, European Court of Human Rights ('ECHR'), and US. Of course, ECHR precedents are legally relevant to UK law. Moreover, reliance on the 'Anglo-American tradition' of freedom of expression can be found in *Derbyshire County Council v. Times Newspapers Ltd.*,¹⁴² where the court wrote that arguments of American constitutional cases are already a recognised part of English law, in its free expression principle. UK courts thus may look to both sides of the Atlantic. A general comparative approach will be adopted.

3.2.1 Ashdown, Barnette, Hurley

The Court of Appeal in *Ashdown v. Telegraph Group Ltd.*, wrote: 'The prime importance of freedom of expression is that it enables the citizen freely to express his ideas and convey information . . . in a form of words of his or her choice.'¹⁴³ The Court appears to have relied on the autonomy rationale. In *Ashdown* the Court also cited *Jersild v. Denmark*, where the ECHR 'recall[ed] that Article 10 [of the European Convention for the Protection of Human Rights and Fundamental

Freedoms ('the Convention']) protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed'.¹⁴⁴ Section 80 upholds the same principle.

The First Amendment of the US Constitution has been interpreted to protect a speaker's choice and control over expression against distortion. In *West Virginia State Board of Educ v. Barnette*, the Supreme Court found unconstitutional a state regulation requiring children in public schools to salute the American flag. The individuals' right to autonomy¹⁴⁵ was safeguarded against the state's compulsion to declare a belief, or to utter what is not in one's mind.¹⁴⁶ In *Miami Herald v. Tornillo*,¹⁴⁷ the US Supreme Court held that a newspaper could not be compelled by state law to print a political figure's reply to a press critique.¹⁴⁸

In *Hurley and S Boston Allied War Veterans Council v. Irish American Gay, Lesbian and Bisexual Group of Boston*,¹⁴⁹ the Supreme Court ruled that the First Amendment would not allow a state law to compel a private body to undertake an expressive activity. In that case GLIB, an organisation of gay, lesbian and bisexual individuals of Irish descent, petitioned for the right to march in Boston's St Patrick's Day parade, organised by the Veterans Council. GLIB had obtained a state court order requiring their inclusion in the parade, pursuant to the state public accommodation statute. A unanimous Supreme Court reversed. The Court's ruling upheld the principle of autonomy: '[U]nder the First Amendment . . . a speaker has the autonomy to choose the content of his own message.'¹⁵⁰ One who chooses to speak may also decide what not to say.¹⁵¹

This principle supports the integrity right's protection against distortion of expression. Upon distortion, the speaker – or the speaker's art – is forced to say something against the will of the author. Just as with Section 80, in *Hurley* the Court rejected forced modification to or alteration of one's message.¹⁵² The Court found that the state law required speakers to 'modify the content of their expression', which the 'general rule of speaker's autonomy forbids'.¹⁵³

In *Hurley*, only the Council stated a claim pursuant to the freedom of expression. GLIB did not raise a First Amendment argument before the Supreme Court, but rather relied on the public accommodation argument against discrimination. Public accommodation requirements are limited in their application to expressive activity. In *Hurley* the parade organisers were found to

engage in expressive activity.¹⁵⁴ The counterweight of expressive activity on the other side of the conflict was not found. GLIB's associational activity was found to be insufficiently expressive.¹⁵⁵ Had a First Amendment claim been raised by GLIB, the case would have presented autonomy of expression arguments on both sides. The analysis of *Hurley* then would have been more similar to Section 80 claims under the instant analysis examining conflicts of autonomies of expression, where the modifier's freedom of expression must be protected as well.

3.2.2 Other Lines of Cases

School cases similarly have shown that a speaker, namely the school or the government, may 'take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted'.¹⁵⁶ A similar principle was upheld in the school cases of *Hazelwood School District v. Kuhlmeier*,¹⁵⁷ and *Downs v. Los Angeles Unified School District*.¹⁵⁸

These cases are to be distinguished from the principle whereby students' speech is protected in a school forum where the speech is not the school's (and also perhaps not likely to be attributed to the school, but this consideration is secondary, as discussed below). In English law, the Education (No. 2) Act 1986, Section 43 upheld this principle. The cases discussed herein are also to be distinguished from US caselaw upholding the students' right to receive ideas, as in the *Pico* Court's finding a school's removal of optional library books an unconstitutional violation of the student's right.¹⁵⁹

The principle of non-distortion of expression was upheld by the US Supreme Court also in *PruneYard Shopping Center v. Robins*.¹⁶⁰ The Court sustained a state law requiring the proprietors of shopping malls to allow visitors to solicit signatures on political petitions, where the owners' rights of expression were found not to be burdened.¹⁶¹ The expression of the shopping centre owners, as speakers, could not be compelled.

Where shopping centre cases are seen to present a conflict between the expression rights of both parties, the interest of the shopping centre owner is analogous to that of the primary author in a Section 80 claim. The shopping centre owner argues that forcing her to allow leafleters in the centre would compel her to

express their views. So too with Section 80, the primary author argues that the distortive modification compels her expression of that distorted message.

The shopping centre cases also can be seen to present a conflict of property versus expression. On such analysis, the interest of the primary author is analogous to the interest of the leafleters. With Section 80, the purchaser of an artwork may be required to allow its author to dictate which modifications to the work are acceptable. So too *PruneYard* supports the principle that a property right may need to give way to an expression right.¹⁶² In *Appleby v. UK*,¹⁶³ again a case involving a shopping centre owner disallowing a collection of signatures on the property, the ECHR found that the protection of the freedom of expression may require regulation of property rights. The main analysis in this chapter, however, is the conflict between the expression rights of the primary author and the expression rights of the modifier.

3.2.3 Collective Expression and Context; Attribution and Disavowal

With regard to collective expression and context, *Hurley* upheld a principle similar to that which I submit is the correct understanding of Section 80. But *Hurley* and many of the other cases discussed above must be distinguished from Section 80 analysis with regard to attribution and the possibility for disavowal.

On *Hurley's* reasoning, the protection of the individual continues even where her expression is in a group. The Court recognised that in expressive activity such as a parade, marchers make a collective point, yet simply by combining voices the petitioner did not lose protection.¹⁶⁴ So too with Section 80, in combining creative activity with others the expressor does not lose the right to protection of her own contribution to the creative activity, as discussed above.¹⁶⁵

Relatedly, in *Hurley* the Court accepted that contextual alteration of expression can amount to its distortion. In a parade, various 'units' of expressive messages function together. The Court ruled that a speaker could not be forced to accept the distortion of its expression by another's expression that 'affects' it.¹⁶⁶ So too with Section 80, an author may find her expression distorted by the presentation of her work in a context with which she disagrees. While the language of Section 80 has been interpreted as not necessarily protecting the primary author in a

situation of contextual distortion,¹⁶⁷ I submit that the provision should be understood to do so.

Yet the Court in *Hurley* found that attribution was an important factor in determining whether expression was distorted. The Court highlighted that compelling a speaker's adoption or presentation of another's expression was unconstitutional where it was likely that members of the public would identify the speaker with the message of the other, and where the speaker could not effectively disavow himself of the other's message. The Court underscored that GLIB's participation 'would likely be perceived' as acknowledged and perhaps supported by the Council.¹⁶⁸ The Court further noted the inability of the parade organisers to disavow the message presented by GLIB.¹⁶⁹ Similarly, the Court cited an earlier decision invalidating coerced access to the envelope of a private utility's bill, as the utility would be forced either to appear to agree with the leaflet or to respond.¹⁷⁰

The same position was taken in *PruneYard*, but with different factual findings and therefore a different outcome. The Court found in *PruneYard* that the solicitations would not likely be identified with the shopping centre proprietor and the latter could disavow any connection with the message simply by posting signs in the area where the leafleters stood.

In both *Hurley* and *Pruneyard*, then, while the Court would not allow a speaker to be compelled to express a particular message, the Court held that attribution to the speaker of the modified expression is necessary for a finding of distortion. By contrast, Section 80 supports a primary author's right to prevent a distortion even where the modified work is not attributed to or identifiable with the primary author.

I take issue with the provisions in the Act that allow for exceptions, qualifications and defences to remedies where a disclaimer is made.¹⁷¹ It is the argument of this chapter that the integrity right protects against distortions of expression not for the sake of protecting the recognition of the author in the public eye, the public perception of the author, or the primary author's reputation. Rather, the integrity right protects the author in her expression for its own sake, that is for the sake of the author's autonomy of expression. It is submitted that contextual distortion ought be seen as potentially distorting an

author's expression, but that attribution and identification need not necessarily be present for distortion to be found.

Justice Powell's concurrence in *PruneYard* recognised that a lack of attribution did not justify compelling a speaker's message. Compelling the owner to disavow a message was compelling speech where the owner had, under the First Amendment, the right *not* to speak:

To require the owner to specify the particular ideas he finds objectionable enough to compel a response would force him to relinquish his 'freedom to maintain his beliefs without public disclosure'.¹⁷²

In Justice Powell's view, the right *not* to disavow a message holds even where others would not identify the speaker with a message: '[T]he right to control one's own speech may be burdened impermissibly even when listeners will not assume that the messages expressed on private property are those of the owner'.¹⁷³ Justice Powell could concur with the Court's decision, however, insofar as the shopping centre had become a public forum, as discussed below.

The school cases also present both positions. In *Hazelwood*,¹⁷⁴ the Supreme Court found that a school has authority over expressive activities that might reasonably be perceived to bear the school's imprimatur. Yet in *Downs* the Court distinguished *Hazelwood*, and wrote that even without attribution and with opportunity for disavowal, the distortion of a speaker's expression may be unconstitutional:

Rather than focusing on what members of the public might perceive Downs' speech to be, in this case we find it more helpful to focus on who actually was responsible for the speech.¹⁷⁵

Likewise with Section 80, compelling the author to disavow, or to request a disavowal from the modifier, compels the author's speech. This is the case whether or not others would associate the author with the modified work. Laddie has taken this view of Section 80 as well.¹⁷⁶ The opportunity for the primary author to disavow the modification ought not be considered sufficient remedy.

3.2.4 Horizontal Application

As with Section 80 on the proposed interpretation, many of the cases discussed above extend freedom of expression principles to the private sphere. In some of the cases discussed above, public actors were parties to the disputes, with government either compelling expression or having its expression compelled: *Barnette* struck down the Government's compelling of expression, and in the school cases the courts held that government and schools may not be compelled to convey a message with which they disagree. Yet in many of the other cases, the Supreme Court held that a public law could not be used to force the distortion of a private speaker's expression. In *Miami Herald v. Tornillo*, the Court struck down a state law requiring that a private actor – a newspaper – be compelled to carry the expression of another.¹⁷⁷ In *Hurley*, the Court ruled that a private body could not be forced to accept the distortion of its expression by the expression of another private body, by virtue of a public law.¹⁷⁸ The shopping centre cases point to two precedents of horizontal effect in different factual situations: the owner cannot keep the leafleters from speaking, and also the leafleters cannot compel the owner to speak by virtue of public law.

The ECHR has recognised that for rights to be effective, it is not always enough for the state to refrain from interfering with them; sometimes the state must take positive action in the sphere of relations between private individuals to protect people's rights and their ability to enjoy them.¹⁷⁹ The horizontal effect of the freedom of expression in the Human Rights Act ('HRA') is off-debated.¹⁸⁰ Yet *Ashdown* applies freedom of expression principles horizontally. *Campbell v. MGN*¹⁸¹ applies freedom of expression principles horizontally. Fleming writes that 'constitutional guarantees are being increasingly applied to relations between individuals'.¹⁸² Feldman writes that rights under the Convention may affect substantive private law rules, as rights gradually lead to an adjustment of legal values affecting the whole of English law.¹⁸³

Section 80 is analogous to these horizontal private applications of the freedom of expression principle. Section 80 provides that the state cannot condone the distortion of one (private or public) body's expression by the expression of another (private or public) body. Furthermore, application of freedom of expression principles to private actors' expression may be considered a regulation of public discourse with Section 80, where the artistic expression has become a cultural text, as discussed below in the public forum analysis.

3.3 Limitations on the Right: Defences

We have seen that the integrity right supports a principle already recognised in the freedom of expression doctrine. Restrictions on the freedom of expression doctrine must be applied to the integrity right as well. Modifications could be defended against Section 80 claims on the basis of freedom of expression from a number of aspects.

As discussed above,¹⁸⁴ Section 80 cannot be interpreted as an action to prevent excessive criticism. An allegedly infringing modification must not be found liable because it amounts to excessive criticism of the primary work. Also allowing Section 80 to be used to prevent insults would fall short of the guarantees of freedom of expression for the modifier. Moreover, as seen above, a modification may transform a primary work. The modification may be protected under copyright doctrine. In any event, it may well require protection as the modifier's expression.¹⁸⁵

Another limitation on the right is that modifications should be permitted where the primary work has become a public forum.¹⁸⁶ Restrictions on expression are suspect in a public forum. Under the HRA, public authority landowners cannot exclude or impose conditions on the use of land in a manner incompatible with Article 10 of the Convention.¹⁸⁷ Even before the HRA, private expression could not be excluded from public fora without a reason withstanding administrative law scrutiny.¹⁸⁸ In US doctrine, the constitutional scrutiny of restrictions on expression in public fora is strict.¹⁸⁹

Restrictions on expression are also subjected to heightened scrutiny in apparently *private* fora that have become *public*. The shopping centre cases bring this issue to light. In *PruneYard*, the shopping centre owners were found to have opened their centres to the public at large, effectively replacing the state with respect to traditional First Amendment fora such as streets, sidewalks, and parks.¹⁹⁰ The owners were then obligated to allow the solicitations. In other areas as well, the public forum issue can be determinative of when expression must be allowed. In school cases, for example in *Downs*, the forum is not considered public, so that expression arguably distortive of other expression may be restricted.¹⁹¹

In *Hurley*, the trial court reviewed the city's involvement in the parade and found that the Council's conduct was private, without the character of state action.¹⁹² In *Hurley*, had the courts found state action, the scrutiny would have been strict. Moreover, the parade might have been seen as a public forum. On that interpretation, GLIB's right to expression may well have been upheld. Relatedly, GLIB might have received protection had the Court found that GLIB had no meaningful alternative means of expression.¹⁹³

The public forum argument could be raised by modifiers of speech in another sense as well. Where a speaker's expression becomes a cultural text, essentially part of our language, its use and modification ought be allowed. The *Hurley* decision has been critiqued for allowing the Council to control speech that was arguably not its own, but a 'cultural text'.¹⁹⁴ The Boston St Patrick's Day Parade may have had an effective monopoly on expressing Irishness. Similarly for example in *San Francisco Arts and Athletics, Inc., v. United States Olympic Committee*,¹⁹⁵ the term 'Olympics' arguably ought to have been found a public forum, and its use protected.

A primary author's work may become an integral cultural icon such that the work itself can be called a public forum. In that case its modification should not be actionable under Section 80 but rather protected, to allow the freedom of expression of members of the public.¹⁹⁶ A modification of Barbie or Mickey Mouse – or of Da Vinci's Mona Lisa – may be defensible as expressions in or of a public forum. In such cases users and modifiers may not have meaningful alternative means of communication.

We have seen that with copyright doctrine there is debate as to whether the fair dealing/fair use doctrines and other limitations *within* copyright are sufficient or if the law should recognise defences from *outside* of the copyright doctrine, namely from the freedom of expression. Yet with the integrity right understood as a freedom of expression, this debate need not be entered. Where Section 80 is understood as a freedom of expression, then principles from that doctrine necessarily enter in support and also in defence of Section 80 claims.

4. Conclusion

Intellectual property law has shifted from its pre-modern conception as protection of action to its modern notion of protection of a thing.¹⁹⁷ To the degree that this characterisation could apply to the integrity right, it is the argument of this chapter that Section 80 marks a return to a focus on the Author's conduct in expression, rather than (solely) on the Text as thing, and the Reader. Yet the integrity right may be seen not as an intellectual property doctrine, but from within the freedom of expression doctrine. Section 80 is an author's right not based on the Romantic conception of protecting a creative genius, but a human right based on a conception of individual expression.

What are the ramifications of this interpretation of Section 80? Where Section 80 is understood as a right of expression, it can be understood not to require further proof of injury for a finding of infringement. Where an author states a claim pursuant to Section 80, she ought not be required to produce evidence of injury, whether to the author's personality, reputation, privacy or feelings. Rather, prejudice may be presumed from a distortion of the author's expression.

Further, a freedom of expression argument often may be made on both sides of a Section 80 claim. The freedom of expression analysis of Section 80 illuminates a defence to Section 80 claims. A freedom of expression defence raised by a modifier need not be considered as coming from outside of the Section 80 doctrine, nor as requiring specific doctrinal exceptions, as often is thought with copyright. Rather, it arises from within the doctrinal framework of Section 80, itself as part of the freedom of expression doctrine. While understanding Section 80 as a freedom of expression would entail a liberal reading of claims, it would entail a liberal reading of defences as well.

Acknowledgement

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Endnotes

- 1 Act S 80(2)(b). The reference to s 80 throughout will refer to Chapter IV of the Act and other relevant sections such as s 103.
- 2 Not all courts adjudicating claims pursuant to s 80 have required proof of prejudice. *Morrison Leahy Music Ltd., v. Lightbond Ltd.*, [1993] EMLR 144 did not require prejudice and *Tidy v. Trustees of the Natural History Museum* [1995] 39 IPR 501 ChD required distortion or prejudice, but not both. To be contrasted are *Pasterfield v. Denham* [1999] FSR 168 and *Confetti Records v. Warner Music UK Ltd.*, [2003] ECDR 31.
- 3 S. Ricketson, 'Is Australia in Breach of its International Obligations with Respect to the Protection of Moral Rights?', *Melbourne University Law Review* 17 (1990), 474.
- 4 *Pasterfield v. Denham* [1999] FSR 168, 181; see H. Laddie, P. Prescott and M. Vitoria, *The Modern Law of Copyright and Designs* (London: Butterworths, 2000, 3rd edn), 13.19.
- 5 W. Cornish and D. Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (London: Sweet and Maxwell, 2003, 5th edn), 11-75, 11-81; *Halsbury Statutes* (London: Butterworths, 2000, 4th edn, Vol. 1, 2000 reissue), 478 (General Note); S. Stokes, *Digital Copyright: Law and Practice* (London: Butterworths, 2002), 4.26; D. Vaver, 'Authors' Moral Rights and the Copyright Law Review Committee's Report: W(h)ither Such Rights Now?', *Monash University Law Review* 14 (December 1988), 284, 288. In US commentary, see K.A. Kelly, 'Moral Rights and the First Amendment: Putting Honor Before Free Speech?', *University of Miami Entertainment and Sports Law Review* 11 (1994), 216, 232; G.J. Yonover, 'The "Dissing" of Da Vinci: The Imaginary Case of Leonardo v. Duchamp: Moral Rights, Parody and Fair Use', *Valparaiso University Law Review* 29 (1995), 937, 1000. For views that the right may be treated as akin to the law of defamation, see G. Dworkin and R.D. Taylor, *Blackstone's Guide to the Copyright, Designs, and Patents Act 1988* (London: Blackstone, 1989), 86; Ricketson, *supra* n. 3, at 474; B. Sherman and L. Bently, *Intellectual Property Law* (Oxford: Oxford University Press, 2001), 249. Actions pursuant to defamation laws have been said to provide a rough parallel to the integrity right, N. Netanel, 'Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law', *Cardozo Arts and Entertainment Law Journal* 12 (1994), 40. See *infra* other characterisations of the right by many of these authors.
- 6 The Oxford English Dictionary, <http://dictionary.OED.com> (Oxford: Oxford University Press, 2004).
- 7 *Carlton Illustrators v. Coleman & Co. Ltd.*, [1911] 1 KB 771.
- 8 At 778, 780-81.
- 9 At 180, 181. See also *British Phonographic Ind., Ltd., v. Mechanical-Copyright Protection Society Ltd.*, (no 2), Copyright Tribunal, 1 November 1991 at 108.

- 10 W.R. Cornish, 'Moral Rights under the 1988 Act', *European Intellectual Property Review* 12 (1989) at 451.
- 11 *George Hensher Ltd., v. Restawile Upholstery (Lancs) Ltd.*, [1976] AC 64 (HL).
- 12 *Bleistein v. Donaldson Lithographing Co.*, 188 US 239 (1903).
- 13 Cornish and Llewelyn, *supra* n.5, at 11-76 n. 94; C. Gatley, *Gatley on Libel and Slander* (London: Sweet and Maxwell, 2004, 10th edn), 21.38.
- 14 R.J. DaSilva, 'Droit Moral and the Amoral Copyright: A Comparison of Artist's Rights in France and the United States', *Bulletin of the Copyright Society* 28 (1980), 32.
- 15 *Ibid.* The extent to which the French moral right protects authorial reputation is in dispute, see *ibid.*; P.E. Geller, 'Copyright History and the Future: What's Culture Got To Do With It?', *Journal, Copyright Society of the USA* 209 (2000), 232; R. Sarraute, 'Current Theory on the Moral Right of Authors and Artists Under French Law', *American Journal of Comparative Law* 16 (1968), 479-80; S. Teilmann, 'His Own Unaided Work', in F. Macmillan, ed., *New Directions in Copyright Law Volume I* (Cheltenham, UK and Northampton, MA, USA: Edward Elgar, 2005).
- 16 R. Kwall, 'Copyright and the Moral Right: Is an American Marriage Possible?', *Vanderbilt Law Review* 38 (1985), 7-8; C.A. Marvin, 'The Author's Status in the United Kingdom and France: Common Law and the Moral Right Doctrine', *International and Comparative Law Quarterly* 20 (Oct 1971), 693; M.A. Roeder, 'The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators', *Harvard Law Review* 53 (1940), 572.
- 17 [1996] 4 All ER 1008 at 1013. See also DaSilva *supra* n.14, at 46; M. Spence, 'Intellectual Property and the Problem of Parody', *Law Quarterly Review* 114 (October 1998), 612.
- 18 *Copinger and Skone James on Copyright* (London: Sweet and Maxwell, 1999, Vol. 1), 11– 45; Gatley, *supra* n. 13, at 21.38, n. 27; J. Hughes, 'The Philosophy of Intellectual Property', *Georgetown Law Journal* 77 (1988), 350; Netanel, *supra* n. 5, at 24, 50, n. 124, n. 258.

Other difficulties with conceiving of the integrity right as a protection of reputation as in the law of defamation have been noted. See P. Kearns, *The Legal Concept of Art* (Oxford: Hart Publishing, 1998), 86, 198 (art is not a fact that can be falsified); Ricketson, *supra* n. 3, at 480 (duration); Roeder, *supra* n. 16, at 567 ('technical' problems regarding injunctions and special damages).

- 19 Compare *Pasterfield* [1999] FSR at 182 (reputation of artist as artist); Kwall, *supra* n. 16, at 13, 15 (professional reputation); Laddie, *supra* n. 4, at 13.19 ('reputation' signifies professional reputation and 'honour' signifies integrity as a human being); Ricketson, *supra* n. 3, at 474 (general reputation, not capacity as author); Yonover,

supra n. 5, at 967, n. 193 citing House Report on the US Visual Artists' Rights Act (professional reputation).

- 20 *Pasterfield* [1999] FSR at 182; Laddie, supra n. 4, at 13.19. Commentators reject authors' feelings as a standard, but nevertheless point to emotions in the analysis of the right: Kwall, supra n. 16, at 25, but see Kwall, supra n. 16, at n. 33 ('shame or embarrassment'); Netanel, supra n. 5, at 23-4, but see Netanel, supra n. 5, at 38 and n. 190 (reputation and feelings), 415 (describing his own discomfort and anguish at having his words conveyed in distorted form); Sherman and Bently, supra n. 5, at 249 (treating together integrity, self-perception and feelings).
- 21 Sarraute, supra n. 15, at 465.
- 22 Netanel, supra n. 5, at 5-6, 23.
- 23 DaSilva, supra n. 14, at 53; Vaver, supra n. 5, at 286.
- 24 R.R. Kwall, 'Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century', *University of Illinois Law Review* 151 (2001); N. Netanel, 'Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation', *Rutgers Law Journal* 24 (1993), 403.
- 25 M. Spence, 'Justifying Copyright', in D. McClean and K. Schubert, eds, *Dear Images: Art, Copyright and Culture* (London: Ridinghouse, 2002), 399; J. Waldron, 'From Authors to Copiers: Individual Rights and Social Values in Intellectual Property', *Chicago-Kent Law Review* 68 (1993), 876.
- 26 Netanel, supra n. 24, at 401 (emphasis added).
- 27 Hughes, supra n. 18, at 343-4.
- 28 See Section 3.1.1.
- 29 J. Raz, 'Free Expression and Personal Identification', *Oxford Journal of Legal Studies* 11 (1991), 303, 311; J. Gardner, 'Freedom of Expression', in G. Chambers and C. McCrudden, eds, *Individual Rights and the Law in Britain* (Oxford: Clarendon Press, 1994), 211. See also *Procunier v. Martinez*, 416 US 396, 427 (1974) (Marshall, J., concurring) (self-expression as a basic human desire for 'recognition').
- 30 See Section 3.1.2., and n. 123.
- 31 *Copinger and Skone James*, supra n. 18, at 4-03; Dworkin and Taylor, supra n. 5, at 95, 100; P.E. Geller, 'Must Copyright be Forever Caught between Marketplace and Authorship Norms?', in B. Sherman and A. Strowel, eds, *Of Authors and Origins* (Oxford: Clarendon Press, 1994), 172.
- 32 J.C. Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Commercial Value', *Columbia Law Journal* 90 (1990), 1865.

- 33 *University of London Press v. Universal Tutorial Press* [1916] 2 Ch 601, 608.
- 34 B. Sherman, 'From the Non-original to the Ab-original: A History', in Sherman and Strowel, *supra* n. 31, at 119. See *Express Newspapers Plc., v. Liverpool Daily Post* [1985] FSR 306.
- 35 *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 US 340, 345 (1991).
- 36 Geller, *supra* n. 31, at 172.
- 37 F. Hargrave, *An Argument in Defence of Literary Property* (London: 1774, 2nd edn), cited in B. Sherman and L. Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911* (Cambridge: Cambridge University Press, 1999), 52; also cited in M. Rose, 'The Author as Proprietor', in Sherman and Strowel, *supra* n. 31, at 48.
- 38 Cited in Sherman and Bently, *supra* n. 37, at 53 (full citation omitted).
- 39 *Bleistein*, 188 US, at 250.
- 40 While Holmes used the terms 'personality' and the author's 'personal reaction', those terms and the standard can be taken to refer to individuality rather than personal imprint. Hughes, *supra* n. 18, at 352.
- 41 Geller, *supra* n. 31, at 180.
- 42 *Ibid.*; J. Hughes, 'The Personality Interest of Artists and Inventors in Intellectual Property', *Cardozo Arts and Entertainment Law Journal* 16 (1998), 81, at 112.
- 43 Artworks have been described as infusions of authorial creative personalities, DaSilva, *supra* n. 14, at 11; extensions of authors' selves, Geller, *supra* n. 31, at 178; emanations of artistic personality, Marvin, *supra* n. 16, at 678; projections into the world of authorial personality, Roeder, *supra* n. 16, at 557, 572, 578. See also Sarraute, *supra* n. 15, at 466, 473. Hughes reviews problems of applying personality theory to moral rights, yet his is a personality theory. Hughes, *supra* n. 18, at 342-3; Hughes, *supra* n. 42.

Personality is sometimes twinned with privacy. E. Damich, 'The Right of Personality: A Common Law Basis for the Protection of the Moral Rights of Authors', *Georgia Law Review* 23/1 (1988), 39, 61; J. Merryman and A. Elsen, *Law, Ethics and the Visual Arts* (Philadelphia: University of Pennsylvania Press, 1987, vol. 1, 2nd edn), 145. The privacy aspects of the personality characterisations will be distinguished *infra*, see text at n. 89.
- 44 M.J. Radin, *Reinterpreting Property* (Chicago: University Chicago Press, 1993).
- 45 Netanel, *supra* n. 5 at 78; Netanel, *supra* n. 24, at 363. Damich also makes this connection with moral rights, Damich, *supra* n. 43, at 83 and n. 135.

- 46 J.W. Harris, *Property and Justice* (Oxford: Clarendon Press, 1996), 222, 296. Yet while Harris calls expression an outpouring, he also labels it *personality-imprinting*, which I argue it need not be.
- 47 O.E.D., *supra* n. 6.
- 48 *US v. O'Brien*, 391 US 367, 376 (1968); *Texas v. Johnson*, 491 US 397, 404 (1989); F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982), 98.
- 49 Netanel, *supra* n. 5, at 11.
- 50 T. Frazer, 'Appropriation of Personality', *Law Quarterly Review* 99 (1983), 292; R. Post, 'Rereading Warren and Brandeis: Privacy, Property, and Appropriation', *Case Western Reserve Law Review* 41 (1991), 647. Persona is also protected by misappropriation of name and likeness, sometimes called a privacy right. Yet s 80 is not a privacy right, see text at n. 89.
- 51 Geller, *supra* n. 31, at 178. See also Kelly, *supra* n. 5 (calling the integrity right a protection of reputation and in property). A reputation for whiteness has been called property in the early American south, C.I. Harris, 'Whiteness as Property', *Harvard Law Review* 106 (1993), 1707; and goodwill has been named as one meaning of the reputation right, R. Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution', *California Law Review* 74 (1986), 691.
- 52 A.M. Honore, 'Ownership', in *Oxford Essays in Jurisprudence*, A.G. Guest, ed., 1st series, (Oxford: Clarendon Press, 1961), 107, 118-19.
- 53 Act s 86.
- 54 M. Rose, 'The Author in Court: *Pope v. Curl*', *Cardozo Arts and Entertainment Law Review* 10 (1992), 492; Sherman and Bently, *supra* n. 37, at 4, 47, even while cautioning against too strict a divide between action and thing, at 50.
- 55 I. Kant, *Metaphysics of Morals in Practical Philosophy* (Cambridge: Cambridge University Press, 1996), 6:290.
- 56 Cf R.H. Rotstein, 'Beyond Metaphor: Copyright Infringement and the Fiction of the Work', *Chicago-Kent Law Review* 68 (1993), 730-31 (critiquing this shift from action to object, but calling for a return to action as perceived in the audience).
- 57 M.C. Beardsley, *Aesthetics From Classical Greece to the Present: A Short History* (Tuscaloosa and London: University of Alabama Press, 1966) (reprint New York: The Macmillan Co.), 123.
- 58 Geller, *supra* n. 15, at 222-4 (citations omitted). See also DaSilva, *supra* n. 14, at 8-9 on the historical background of the right in France.
- 59 B. Kaplan, *An Unhurried View of Copyright* (New York: Columbia University Press, 1967), 22, and generally 1-37 on the history of copyright.

- 60 Rose, *supra* n. 37, at 30; Sherman and Bently, *supra* n. 37, at 11; see also M. Rose, *Authors and Owners: The Invention of Copyright* (Cambridge Massachusetts and London: Harvard University Press, 1993), 9-30.
- 61 Section 3.1.
- 62 Geller, *supra* n. 31, at 226.
- 63 Beardsley, *supra* n. 57, at 26, 139.
- 64 Geller, *supra* n. 31, at 162-3.
- 65 Beardsley, *supra* n. 57, at 247-8, citing Wordsworth and Hugo; Geller, *supra* n. 15, at 222-4; Sherman and Bently, *supra* n. 37, at 35. On developments from the Renaissance through the Enlightenment and Romantic period, see also M. Salokannel, 'Film Authorship in the Changing Audiovisual Environment', in Sherman and Strowel, *supra* n. 31, at 57-8.
- 66 Beardsley, *supra* n. 57, at 249.
- 67 C. Taylor, *The Ethics of Authenticity* (Cambridge Massachusetts: Harvard University Press, 1991), 62.
- 68 *Ibid.*
- 69 Rose, *supra* n. 37, at 48-9.
- 70 P. Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of "Authorship"', *Duke Law Journal* 455 (1991), 482.
- 71 Kaplan, *supra* n. 59, at 35 (footnote omitted).
- 72 S. Lukes, *Individualism* (Oxford: Basil Blackwell, 1973), 17.
- 73 Hughes relates the democratisation of copyright protection to 'the rise of liberalism and a society of autonomous, equal citizens', *supra* n. 42, at 119.
- 74 W. Benjamin, 'The Work of Art in the Age of Mechanical Reproductions', H. Zohn, trans., in H. Arendt, ed., *Illuminations* (New York: Harcourt Brace and World, 1968), x.
- 75 Geller, *supra* n. 15, at 263.
- 76 G. Tedesky, 'Intellectual Property and Personal Rights', *Mishpatim* 19 (1980), 392 (in Hebrew), and S. Stromholm, *Right of Privacy and Rights of the Personality: A Comparative Survey* (Working Paper prepared for the Nordic Conference on Privacy organised by the International Commission of Jurists – Norstedt Stockholm: 1967), 124-5, have suggested that the distortion of words ought be actionable generally. Analysis of the scope of s 80 coverage and protection is beyond the scope of this chapter.

- 77 The critiques may be said to derive from structuralism and poststructuralism, as well as deconstruction. See J.V. Harari, 'Critical Factions/Critical Fictions' in J.V. Harari, ed., *Textual Strategies: Perspectives in Post-Structuralist Criticism* (London: Methuen, 1980); Jaszi, *supra* n. 70, at 456-7. The various schools of thought will not be developed in the instant analysis, but will be referred to generally as 'postmodern'.
- 78 The view may be traced from Foucault's 'What is an Author?' to Barthes' 'Death of the Author'. D. Saunders, 'Dropping the Subject', in Sherman and Strowel, *supra* n. 31, at 99, n. 14, notes the differences in their approaches.
- 79 R.C. Solomon, *A History of Western Philosophy since 1750: The Rise and Fall of the Self* (Oxford and New York: Oxford University Press, 1988).
- 80 DaSilva, *supra* n. 14, at 9; Geller, *supra* n. 31, at 222-4; Rose, *supra* n. 37, at 30; Saunders, *supra* n. 78, at 107 (socio-economic trends, and the development of the subject and individual rights, 'overlapped fortuitously'). On the rise of individualism, see Lukes, *supra* n. 72, at 47-51; C. Taylor, *Sources of the Self* (Cambridge: Cambridge University Press, 1989), 11, 195-6.
- 81 M. Foucault, 'What is an Author?', in Harari, *supra* n. 77, at 147.
- 82 Rose, *supra* n. 60 at 142.
- 83 See Geller, *supra* n. 31, at 179 (footnote omitted); Sarraute, *supra* n. 15, at 466, 471.
- 84 Netanel, *supra* n. 24, at 354.
- 85 See Rose, *supra* n. 37, at 55 (current literary thought emphasises that texts permeate and enable each other). Also reading requires earlier texts, Rotstein, *supra* n. 56, at 737.
- 86 M. Woodmansee, 'On the Author Effect: Recovering Collectivity', in M. Woodmansee and P. Jaszi, eds, *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham and London: Duke University Press, 1994), 17. See also Benjamin, *supra* n. 74, at 223; Sherman and Bently, *supra* n. 37, at 29, 37-8, 57 n. 46 (citation omitted).
- 87 See Hughes, *supra* n. 42, at 91 (citations omitted). Kaplan, *supra* n. 59, at 117; yet Kaplan sees a place for moral rights, *ibid.*, at 78, 120.
- 88 Beardsley, *supra* n. 57, at 323-4, discussing Croce and Collingwood.
- 89 See, for example, Geller, *supra* n. 31, at 160; Hughes, *supra* n. 18, at 289, 355-8; and cites *supra* at n. 43.
- 90 See, for example, J. Litman, 'The Public Domain', *Emory Law Journal* 39 (1990), 965; Rotstein, *supra* n. 56, at 737, 756; Saunders, *supra* n. 78, at 99-100 citing T. Eagleton, *Literary Theory: An Introduction* (Minneapolis: University of Minnesota

Press, 1983), 138 ('There is no such thing as literary "originality", no such thing as the "first" literary work: all literature is intertextual').

- 91 See *supra* text at n. 33-n. 40 (individuality of expression).
- 92 See *infra* text at n. 141, and Section 3.3.
- 93 Foucault *supra* n. 81 at 159.
- 94 Jaszi, *supra* n. 70, at 497. Cf J. Hughes, '"Recoding" Intellectual Property and Overlooked Audience Interests', *Texas Law Review* 77 (1999), 923 (on the utility for readers of stable meanings).
- 95 'Presentation' as used here does not signify an author's concern to present her artwork for the recognition of others, as discussed *supra* text at n. 24 - n. 30.
- 96 Spence, *supra* n. 25, at 399.
- 97 Hughes, *supra* n. 18, at 347. See discussion of Original Intent in L.K. Treiger, 'Protecting Satire Against Libel Claims: A New Reading of the First Amendment's Opinion Privilege', *Yale Law Journal* 98 (1989), 1215, n. 86.
- 98 R.J. Coombe, 'Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue', *Texas Law Review* 69 (1991), 1864. Coombe also writes of the politics of control over meaning, *ibid.*, at 1861; see also Waldron, *supra* n. 25, at 885.
- 99 Spence, *supra* n. 17, at 610-11 (where a text has become shorthand for a range of meaning for which no adequate alternative means of expression exists, collective meanings are created).
- 100 W.K. Wimsatt, Jr. and M.C. Beardsley, 'The Intentional Fallacy', *Sewanee Review* LIV/3 (1946), 468-88, reprinted in R.B. West, Jr., ed., *Essays in Modern Literary Criticism* (New York: Rinehart, 1952), 174-89.
- 101 R. Barthes, 'Death of the Author', in S. Heath, trans., *Image, Music, Text* (London: Fontana Press, 1977), 147; R. Barthes, 'From Work to Text', in *ibid.* Barthes advocated liberating the text by refusing to fix a meaning to it; yet as seen above, the instant analysis does not depend upon fixation of a meaning.
- 102 See R. Chartier, 'Figures of the Author', in Sherman and Strowel, *supra* n. 31, at 8, for a description of movements in literary criticism that develop a sociology of readers and an 'aesthetic of reception'. Beardsley describes art theoretical developments taking a similar course, Beardsley, *supra* n. 57, at 338, 364-5 (Formalism, Art for Art's Sake, New Critics, Dewey). See *infra* text at n. 121-n. 123 on the three elements of Author, Text and Reader.
- 103 M.C. Beardsley, *Aesthetics: Problems in the Philosophy of Criticism* (Indianapolis and Cambridge: Hackett Publishing, 1981, 2nd edn), xix (defining art as 'an arrangement of conditions intended to be capable of affording an experience with

marked aesthetic character'). See also G. Dickie, *Art and the Aesthetic: An Institutional Analysis* (Ithaca and London: Cornell University Press, 1974), 46 (art is a concept which 'necessarily involves human intentionality'); N. Zangwill, 'Art and Audience', *The Journal of Aesthetics and Art Criticism* 57/3 (Summer 1999), 315 (authorial intention enables distinctions to be made between art and non-art).

- 104 A. Sheppard, *Aesthetics* (Oxford and New York: Oxford University Press, 1987), at 103; *ibid.*, at 160-61 n. 7 (citing analyses of intention in relation to action, in relation to language, and in application to art).
- 105 S. Knapp and W.B. Michaels, 'Against Theory', in W.J.T. Mitchell, ed., *Against Theory: Literary Studies and the New Pragmatism* (Chicago and London: University of Chicago Press, 1985), 16-17.
- 106 Netanel, *supra* n. 24, at 405.
- 107 *Redmond-Bate v. DPP* (2000) HRLR 249 at 18; G. Gunther and K.M. Sullivan, *Constitutional Law* (Westbury New York: Foundation Press, 1997, 13th edn), 1085-91.
- 108 Geller, *supra* n. 31, at 159-60. The authorship norm is central to justifications for copyright as well. Geller, *ibid.*, at 166; Ginsburg, *supra* n. 32, at 1892. It is the argument herein that s 80 can be situated within the freedom of expression doctrine, yet its relation to copyright is not rejected.
- 109 Netanel, *supra* n. 24, at 382 and 382 n. 161; Netanel, *supra* n. 5, at 23-4.
- 110 Spence, *supra* n. 17, at 609.
- 111 Spence, *supra* n. 25, at 399.
- 112 Jaszi, *supra* n. 70, at 502.
- 113 [1959] Ch. 14, 20.
- 114 [1967] Ch. 932, 951.
- 115 *Pasterfield* [1999] FSR at 182. See also *Carlton Illustrators v. Coleman & Co. Ltd.*, [1911] 1 KB 771.
- 116 See, for example, H. Hansmann and M. Santilli, 'Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis', *Journal of Legal Studies* 26 (1997), 95. As to copyright justifications on marketplace norms, see *Twentieth Century Music Corp., v. Aiken*, 422 US 151 (1975) (Stewart, J.); Geller, *supra* n. 31, at 159, 164.
- 117 P. Banki, 'The Moral Rights Debate in Australia', in P. Anderson and D. Saunders, eds, *Moral Rights Protection in a Copyright System* (Brisbane: Griffith University, 1992), 11 (moral rights are about money, putting authors in a better bargaining position); Vaver, *supra* n. 5, at 288.

- 118 Follow Up to the Green Paper on Copyright and Related Rights in the Information Society COM (96) 568 final, 20 November 1996, at 27, cited in Stokes, *supra* n. 5, at 68; Vaver, *supra* n. 5, at 287-8.
- 119 Vaver, *supra* n. 5, at 288.
- 120 DaSilva, *supra* n. 14, at 48-51 (on the California Act); Kwall, *supra* n. 16, at 16; Netanel, *supra* n. 5, at 46 and n. 230; Vaver, *supra* n. 5, at 287, 289.
- 121 G. Dickie, *Introduction to Aesthetics: An Analytic Approach* (New York and Oxford: Oxford University Press, 1997), 121. These elements are used in hermeneutic analysis; yet the analysis herein does not surround determination of meaning, see above, Section 2.2.3.
- My use of 'Text' focuses on the textual (or visual or musical) aspect of the work, as contrasted with the act of creating it by the Author or the act of interpreting it by the Reader. This use is to be distinguished from its use by Barthes, 'From Work to Text', *supra* n. 101, at 163 (a text is created not in the act of writing but in the act of reading). It is perhaps closer to the legal sense of 'work' as the individual product, see Jaszi, *supra* n. 70, at 471 n. 60 (distinguishing 'work' from Foucault's use of that term as a translation from the French 'oeuvre' referring to the body of literary production attributed to a particular 'author').
- 122 Where the focus is on preservation, the rationale can be said to centre on the Text, protecting the artworks as objects. See *supra* text at n. 54-n. 56.
- 123 The terms 'deontological' and 'consequentialist' are used here to contrast the two in the sense of process, that is a deontological rationale justifies the thing for itself, and a consequentialist rationale justifies the thing for the sake of its results. I do not take the position that only a deontological system is an ethical one; I do not deny that a system of ethics can involve and even be based upon consequentialist goals.
- 124 *R v. Home Secretary of State for the Home Department, ex p Simms* [1999] 3 WLR 328, 337, [1999] 3 All ER 400, 408 per Lord Steyn.
- 125 *Board of Educ, Island Trees Union Free School Dist No 26 v. Pico*, 457 US 853, 866 (1982) (fostering self-expression); C.E. Baker, *Human Liberty and Freedom of Speech* (New York and Oxford: Oxford University Press, 1989), 49-59; R. Dworkin, *Freedom's Law* (Cambridge Massachusetts: Harvard University Press, 1996), 201 and R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978), 198; Schauer, *supra* n. 48, at 67-72.
- 126 *Abrams v. US*, 250 US 616, 630 (1919) (Holmes, J., dissenting); *Whitney v. California*, 274 US 357, 375 (1927) (Brandeis, J., concurring).
- 127 Hughes has referred to the analogues between the integrity right on the cultural heritage rationale and the freedom of expression on the democracy rationale. Hughes *supra* n. 18, at 364.

- 128 Dworkin (1996), *supra* n. 125, at 201; Schauer, *supra* n. 48, at 48.
- 129 Dworkin (1978), *supra* n. 125, at 198-200. On the coexistence of norms, see J.L. Coleman and J.G. Murphy, *The Philosophy of Law: An Introduction to Jurisprudence* (Boulder and London: Westview Press, 1990), 88-9.
- 130 Geller, *supra* n. 31, at 165; J.C. Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America', in Sherman and Strowel, *supra* n. 31, at 135; A. Strowel, 'Droit d'auteur and Copyright: Between History and Nature', in Sherman and Strowel, *ibid.*, at 235.
- 131 471 US 539, 558 (1985).
- 132 Geller, *supra* n. 31, at 164; P. Samuelson, 'Copyright, Commodification, and Censorship: Past as Prologue - But to What Future?' in N.W. Netanel and N. Elkin-Koren, eds, *The Commodification of Information* (The Hague: Kluwer Law International, 2002), 68; Waldron, *supra* n. 25, at 857 n. 47.
- 133 N.W. Netanel, 'Copyright and a Democratic Civil Society', *Yale Law Journal* 106 (1996), 288.
- 134 Hughes, *supra* n. 18, at 359 (citation omitted).
- 135 Waldron, *supra* n. 25, at 876.
- 136 Netanel, *supra* n. 24, at 413. See M. Spence (Clarendon Series, forthcoming), situating copyright within expression theory.
- 137 P. Goldstein, 'Copyright and the First Amendment', *Columbia Law Review* 70 (1970), 983.
- 138 *Eldred v Ashcroft*, 537 US 186, 219-21 (2003).
- 139 N.W. Netanel, 'Recent Developments in Copyright Law: From the Dead Sea Scrolls to the Digital Millennium', *Texas Intellectual Property Law Journal* 9 (2000), at 35 and n. 133, and citations therein; N.W. Netanel, 'Locating Copyright within the First Amendment Skein', *Stanford Law Review* 54 (2001), 1; J. Rubinfeld, 'The Freedom of Imagination: Copyright's Constitutionality', *Yale Law Journal* 112 (2002), 1.
- 140 [2002] QB 546, paras. 45, 58.
- 141 See, for example, Kelly, *supra* n. 5; G.J. Yonover, 'Artistic Parody: The Precarious Balance: Moral Rights, Parody, and Fair Use', *Cardozo Arts and Entertainment Law Journal* 14 (1996), 93, 114-16.
- 142 *Derbyshire County Council v. Times Newspapers Ltd* [1993] 1 All ER 1011.
- 143 [2002] QB 546 at para 31. The Court also looked to the public's interest in the receipt of information: the reader on occasion will have a protected interest in receiving information in a particular form, at para 43.

In *Ashdown*, the Court considered the claimants' copyright claim as pitting property rights against expression rights, *ibid.*, at para 39. The analysis herein looks to situations where rights of expression are in conflict. See discussion of *Pruneyard* *infra* text at n. 162– n. 163.

144 Series A No 298 (1995) 19 EHRR 1, para 31.

145 319 US 624, 631 (1943) ('self-determination').

146 319 US at 633-4.

147 *Miami Herald v. Tornillo*, 418 US 241 (1974).

148 Netanel writes of the 'right to express one's ideas in the manner of one's choosing, in terms of both content and form of presentation', citing *Cohen v. California*, 403 US 15 (1971). Netanel, *supra* n. 24, at 413.

149 *Hurley and S Boston Allied War Veterans Council v. Irish American Gay, Lesbian and Bisexual Group of Boston*, 515 US 557 (1995).

150 515 US at 573. See also *ibid.*, at 574 (citing the 'principle of autonomy to control one's own speech'); *ibid.*, at 576 ('the speaker's right to autonomy over the message').

151 *Ibid.*, at 573.

152 *Ibid.*, at 577, 581.

153 *Ibid.*, at 578.

154 Compare a later case involving exclusion of a homosexual scout master from the Boy Scouts. The degree of expressive activity of the association and the scout master was under debate by the Court. *Boy Scouts of America v. Dale*, 530 US 640 (2000).

155 515 US at 566. By contrast, in *Boy Scouts*, Justice Stevens presumed that joining a parade is 'inherently expressive': *Boy Scouts*, 550 US at 695 n22 (Stevens, J., dissenting).

156 *Rosenberger v. Rector and Visitors of University of Virginia*, 515 US 819, 833 (1995) (citation omitted).

157 *Hazelwood School District v. Kuhlmeier*, 484 US 260 (1988).

158 *Downs v. Los Angeles Unified School District*, 228 F.3d 1003 (2000).

159 457 US 853.

160 *PruneYard Shopping Center v. Robins*, 447 US 74 (1980).

161 The requirement was set by the California court's interpretation of a state law. The US Supreme Court did not disavow its earlier rulings that the First Amendment did

not require shopping centre owners to allow leafleters. The Court allowed the state to set a higher level of protection than under the First Amendment.

- 162 *Pruneyard*, 447 US at 80-81. See Section 3.2.4 below.
- 163 *Appleby v. UK* (2003) 37 EHRR 38 (App No 44306/98).
- 164 515 US at 568-9.
- 165 Text at n. 83-n. 89.
- 166 515 US at 572.
- 167 See, for example, *Laddie*, supra n. 4, at 13.18.
- 168 515 US at 575.
- 169 515 US at 579-80.
- 170 At 575, citing *Pacific Gas & Electric Co., v. Public Utilities Commission of Cal*, 475 US 1 (1986) (plurality opinion).
- 171 Ss 80(5), 80(7), 81(6)(c), 82(2)(b), 103(2).
- 172 447 US at 98 (Powell, J., concurring) (citation omitted).
- 173 *Ibid.*, at 100.
- 174 *Hazelwood*, 484 US at 270-73.
- 175 228 F.3d at 1011.
- 176 *Laddie*, supra n. 4, at 13.19 (derogatory treatment infringes even where it is clear that the author has not consented to and is not responsible for the modification).
- 177 418 US 241. Arguably both the newspaper whose expression was compelled and the political candidates whose replies were to be printed were public actors.
- 178 *Hurley* may have been an incorrect horizontal application of freedom of expression principles: the parade arguably should have been considered a public forum.
- 179 *Appleby* (Article 10); *Plattform 'Ärzte für des Leben' v. Austria* Series A No 139 (1988) 13 EHRR 204, para 38 (Article 11(1)). See also D. Feldman, *Public Law* (Oxford: Oxford University Press, 2004), at 7.152, 7.154, 9.02.
- 180 Feldman (2004), supra n. 179, at 19.61 (citation omitted).
- 181 *Campbell v. MGN* [2004] EMLR 15.
- 182 J. Fleming, 'Libel and Constitutional Free Speech', in P. Cane and J. Stapleton, eds, *Essays for Patrick Atiyah* (Oxford: Clarendon Press, 1991), 333, 334.
- 183 Feldman, supra n. 179, at 19.66.

- 184 Text at n. 13-n. 17.
- 185 Text at n. 90-n. 92, and Section 3.1.4. Discussion of the methodological analysis whereby a transformative use is found is beyond the scope of this chapter.
- 186 This application to the integrity right of the public forum principle from the freedom of expression doctrine is analogous to the application to copyright of the public domain principle from property doctrine; see, for example, Litman, *supra* n. 90.
- 187 D. Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford: Oxford University Press, 2002, 2nd edn), 1015.
- 188 *Ibid.*, at 1014, citing *R v. Landes Borough of Barnet, ex parte Johnson* (1990) 89 LGR 581, CA, affirming (1989) 88 LGR 73, DC (council could not deny access for political organisation to attend festival). For a different view on this point, see E. Barendt, *Freedom of Speech* (Oxford: Clarendon Press, 2001), 321.
- 189 *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 US 788, 800 (1985).
- 190 447 US 74, 90 (1980) (Marshall, J., concurring).
- 191 228 F.3d at 1012.
- 192 515 US at 566.
- 193 *Ibid.*, at 577-8. See also *Pruneyard* (examining whether leafleters had alternative locations).
- 194 M. Sunder, 'Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertization of Free Speech in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*', *Stanford Law Review* 49 (1996) at 157. I agree with Sunder's critique of allowing control over the use of cultural symbols and discursive spaces. Yet I disagree with Sunder's view that the *Hurley* principle necessarily allows for the creation of a monopoly on meaning. Rather, the decision allows control over the presentation of authorial expression.
- 195 *San Francisco Arts & Athletics, Inc., v. United States Olympic Committee*, 483 US 522 (1987).
- 196 See Coombe, *supra* n. 98, at n. 84 (using the shopping centre cases as an analogy in the trademark area).
- 197 Text at n. 54.

Freedom of the Press 2.0

*Edward Lee**

In today's digital age, copyright law is changing. It now attempts to regulate machines. Over the past twenty years, and particularly with the advent of the Internet, copyright holders have increasingly invoked copyright law to regulate directly – indeed, even to prohibit – the manufacture and sale of technology that facilitates the mass dissemination of expressive works. Although the concerns of copyright holders about the ease of digital copying are understandable, the expansion of copyright law to regulate – and, in some cases, to prohibit – technologies raises a troubling question. Can the government regulate under copyright law technologies that facilitate the dissemination of speech, consistent with the First Amendment? If so, are there any limits to what the government can do? Or does copyright law have constitutional carte blanche to regulate technologies, without any First Amendment scrutiny? Because copyright law, dating back to the first Copyright Act of 1790, traditionally refrained from regulating technologies directly, these questions were scarcely considered before. But, today, these questions have vital importance as copyright law and other

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laws proposed in service of copyright holders contemplate even greater regulation of emerging technologies that are revolutionizing the ability of individuals to create expressive content on the Internet, in the “Web 2.0” culture of user-created content. However, despite their importance, these questions have escaped attention in legal scholarship. This Article attempts to answer these questions by tracing the historical development of the “freedom of the press” that led to the Framers’ inclusion of the concept in the First Amendment.

I. Introduction

Ever since the days of the printing press, copyright law has affected the regulation of technology that mass produces books and other works for dissemination to the public. But, historically, it only did so indirectly. Instead of regulating the technology of the printing press itself, the first copyright act in England, known as the Statute of Anne, only regulated the products of printing, i.e., who owned the exclusive rights to print and publish works of authorship.¹ The printing press itself was left off-limits from monopoly and government control,² marking a profound change from the prior regime of the British Crown under which the printing presses were regulated in virtually all respects, including a strict limit on the total number of presses allowed in England.³ That limitation on the number of printing presses, along with the requirement of licensing and registration before any work could be published,⁴ effectively served the dual ends of censorship and monopoly. Limiting the number of presses was intended to limit publications deemed heretical or piratical.⁵ In other words, control over the technology effectuated control over content. The Statute of Anne replaced this repressive regime of press regulation with a system of authors’ rights,⁶ which did not regulate any aspect of the printing press or the machines of mass publication.⁷ Copyright law thus was borne with a freedom of the press – an aversion to government control over the technology that enables the mass publication of speech. This basic corollary of copyright – a freedom of the press – lasted for well over two hundred years.⁸

Today, however, copyright law has begun to change. It now attempts to regulate machines. Over the past twenty years, particularly with the advent of the

Internet, copyright holders have increasingly invoked copyright law to regulate directly – indeed, even to prohibit – the manufacture and sale of technology that facilitates the mass dissemination of expressive works. In 1984, Universal City Studios and Disney unsuccessfully asserted a claim of secondary liability under copyright law to stop Sony's manufacture of video recorders.⁹ The Supreme Court rejected what it characterized as an "unprecedented" attempt by copyright holders to stop production of a technology.¹⁰ The Court held that Sony could not be held secondarily liable for the copyright infringement of users of its devices: Liability does not attach to the mere distribution of a technology that is "capable of substantial noninfringing uses."¹¹

In 2005, the Court revisited the Sony doctrine in *Grokster*, a case involving two distributors of peer-to-peer software used by some individuals for illegal music file sharing.¹² In *Grokster*, the Court clarified that the Sony decision established a "safe harbour" for the design and distribution of technologies that are capable of substantial noninfringing uses, but the Sony safe harbor does not shield defendants who attempt to "actively induce" others to use their products for copyright infringement.¹³ Although the Sony safe harbor offers some immunity to technology developers, it is not blanket immunity.¹⁴

Parallel to these developments in copyright law was the 1998 enactment of the Digital Millennium Copyright Act (DMCA), which even more directly regulates technologies of production by prohibiting the manufacture and sale of technologies that can be used to circumvent encryption of copyrighted works.¹⁵ Although these circumventing technologies may be different in kind from technologies that themselves mass produce copies like printing presses or copiers, the DMCA anti-circumvention law shares a similar aim with the aforementioned claims that seek to use secondary liability to regulate technologies directly, instead of regulating the mere acts of copying.

This major shift in copyright law to encompass the direct regulation of technology can no doubt be attributed to advances in digital technology, especially those related to the Internet and forms of digital copying. Digital technology makes it easier for everyone to make near perfect copies instantaneously, often in ways that constitute copyright infringement. In the future, we can only expect more lawsuits brought by copyright holders to regulate

technology that enables the mass production, copying, and dissemination of works. The music and movie industries already have attempted to regulate digital video recorders (DVRs) such as TiVo through copyright litigation¹⁶ and all digital receivers for radio and television under the controversial “broadcast flag” proposal in Congress.¹⁷

Although the concerns of copyright holders about the ease of digital copying are understandable, the expansion of copyright law to regulate – and, in some cases, prohibit – technologies raises a troubling question. Can the government use copyright law to regulate technologies that facilitate the dissemination of speech, consistent with the First Amendment? If so, are there any limits to what the government can do? Or does copyright law have constitutional carte blanche to regulate technologies, without any First Amendment scrutiny?

Because copyright law traditionally refrained from regulating technologies directly, these questions were scarcely considered before. Today, however, these questions have vital importance as copyright law and other laws proposed in service of copyright holders contemplate even greater regulation of emerging technologies that are revolutionizing the ability of individuals to create expressive content on the Internet in the “Web 2.0” culture of user-created content. Unfortunately, despite their importance, these questions have escaped attention in legal scholarship. This Article attempts to answer these questions by tracing the historical development of the “freedom of the press” that led to the Framers’ inclusion of the concept in the First Amendment. My core thesis is twofold: (i) the Framers understood the freedom of the press as the freedom of the printing press, specifically, that the printing press should be free of intrusive governmental regulation, including restrictions on technology imposed under copyright law; and (ii) today, the Sony safe harbor operates as a “First Amendment safeguard” within copyright law that is designed to protect the freedom of the press and the development of speech technologies.

Part II discusses the history of the freedom of the press and its connection to the origin of copyright law. The historical materials before and during the ratification of the Bill of Rights indicate that the Framers understood “the press” in “the freedom of the press” to refer primarily to the machine of the printing press, and not to any notion of an institutional “press” (of journalists) as we more

commonly understand it today.¹⁹ While the concept also stood more broadly for the freedom of individuals to print and publish materials, such as pamphlets and local newspapers, one of the most important animating principles of the freedom of the press was a technological one.²⁰ The freedom of press encapsulated the basic ability of individuals to use the printing press – the only technological means of mass publication then in existence – free from excessive governmental intrusion, such as prohibitions on the technology itself imposed by the British Crown. Indeed, the historical materials related to the framing of the Free Press Clause of the First Amendment to the US Constitution indicate that it was understood as a direct limitation on the Copyright and Patent Clause (Copyright Clause)²¹ and Congress's power to grant copyrights.²²

This Article fills a serious gap in the literature by tracing the historical connections between the freedom of the press and the origin of copyright law and between the Copyright and the Free Press Clauses. Most scholars tracing the Copyright Clause or the history of copyright have simply ignored the important role the freedom of the press played in the genesis of copyright law as we understand it today.²⁶ It is perhaps even more of a mystery that the Supreme Court has overlooked this important history, too. By tracing the history of the freedom of the press in England and in early America and by examining the drafting history and debate of the Free Press Clause, this Article seeks to put copyright in its *full* historical perspective. From the beginning of copyright, there was a deep skepticism of allowing government to control or prohibit a technology that facilitated the mass publication of speech.²⁷ The freedom of the press encapsulated that skepticism, and the Free Press Clause codified it into law.²⁸ All future attempts by Congress to regulate technologies through copyright law must answer to this history.

II. The Freedom of the Press and Copyright Law's Origin

After nearly three hundred years of existence, dating back to the Statute of Anne in England, one would think that the history of copyright law would be well understood by now. It is not. Courts, historians, and commentators have hardly considered, much less understood, the important relationship between the historical development of the freedom of the press and the origin of copyright law that was fundamental to copyright law's original design. Copyright law

began in England as a less restrictive alternative to the Crown's restraints on the printing press,²⁹ including severe limits on the total number of presses that were allowed.³⁰ The origin of copyright law was one in which the notion of the freedom of the press operated as an important limit on government control over technology; attempts by government to dictate or limit the extent to which the public could use technologies of mass publication were viewed as suspect.³¹ The Framers and ratifying states of the US Constitution embraced this tradition even more strongly, recognizing this important limit in the Free Press Clause.³² This history is detailed below.

A. The Freedom of the Press and Copyright in England

The origin of copyright law cannot be understood without understanding the larger, historical context in which it arose. Indeed, no history of copyright law can be considered accurate without an account of the freedom of the press. One of the central points of this historical account is that the birth of copyright in England coincided with and reinforced the emerging concept of the freedom of the press.³³ The Statute of Anne, the first English copyright act enacted in 1710,³⁴ was a part of the eventual dismantling of the old regime under the Crown that regulated virtually all aspects of the printing press.³⁵ This dismantling of the old system was brought about by a growing recognition of the concept of the freedom of the press.³⁶ Copyright law reflected this new freedom by granting no authority to the government, publishers, or authors to limit the technology of the printing press.³⁷ Thus, instead of allowing government to control or limit the printing press to fight "piracy" of published works, as had been effectuated under the prior regime, copyright law originated as a direct, less restrictive alternative to government control of the presses.

1. **The Old System of Press Regulation:** The protection for an individual's use of the printing press – free of intrusive governmental regulation – was a response to the repressive regime of strict regulation of the press that enabled the Crown and later Parliament to control the production of all printed materials in England from the 1500s until the early 1700s.³⁸

Indeed, the Crown controlled the printing presses in virtually all aspects. The Crown instituted (1) a system of monopolies over printing under which the Crown limited the number of printing presses and master printers and gave authority to

print materials to only a select few, notably, the Stationers' Company,³⁹ and (2) a system of licensing under which all materials had to be approved for publication.⁴⁰ The two systems were, in fact, both parts of the same system of regulation of printing in England that was established under the Tudor reign.⁴¹

Spurred by the religious schism from the Catholic Church, Henry VIII imposed the first prepublication licensing requirement under the Proclamation of 1538.⁴² In 1557, Philip and Mary (a devout Catholic) granted the royal charter of incorporation to the Stationers' Company, a guild of printers and publishers that became the only authorized group allowed to print books (other than those individuals who were granted printing patents directly from the Crown).⁴³ Although Henry and Mary were on opposite sides of the religious schism, both saw the importance of regulating the presses as a way to control the content of publications, particularly, religious views.⁴⁴

Building on these restrictions, Elizabeth I issued the Star Chamber Decree of 1586, which was "the most comprehensive regulation of the press of the entire Tudor period."⁴⁵ The Decree required that all printers register their presses with the Stationers' Company and that no presses could be set up outside of the London area (except for one press each at Cambridge University and Oxford University).⁴⁶ All presses were subject to warrantless searches by wardens of the Stationers' Company; any violations of the Decree resulted in the destruction of the nonconforming printing press.⁴⁷ The Decree went even further, banning the use of any printing press established within the six months preceding its enactment, in order to reduce the number of printing presses to "so small a number" that the Archbishop of Canterbury and Bishop of London deemed proper.⁴⁸ The Decree also imposed a licensing system on the publication of works under which all works were required to be approved by ecclesiastical authorities before publication,⁴⁹ a requirement mirrored in the Stationers' Company's own ordinance that required its member printers to obtain prepublication licenses from its officers.⁵⁰

This strict regulation of the printing press ruled England for well over a century, extending through the Stuart reign under James I and Charles I into the governance under Parliament, albeit with a gradual decrease in effectiveness.⁵¹ Importantly, the regulation of the press instituted by the Crown included not only

a regime of licensing and monopoly grants for printing (two facets that are more commonly discussed in legal scholarship),⁵² but also the direct regulation of the technology of the printing press itself.⁵³ Starting with Elizabeth, the Crown limited the total number of printing presses in England and who could operate them.⁵⁴ Indeed, the express goal of the Decree was to *reduce* the total number of printing presses in England from the status quo.⁵⁵ If used without authorization from the Crown, the printing press effectively became contraband.⁵⁶ Throughout this period, “unauthorized” presses arose.⁵⁷ Such presses were illegal and, if found, were subject to seizure and destruction by the Stationers.⁵⁸ The Stationers had the power to conduct (effectively warrantless) searches in order to confiscate illegal presses and materials.⁵⁹ Backed by a royal charter and the Printing Acts, the Stationers exercised a sweeping power over the press in order to protect their copyrights and combat piracy.⁶⁰ In Professor Patterson’s apt phrase, the Stationers were the “policemen of the press.”⁶¹

This strict regulation of the press instituted by the Crown was replicated – and even further tightened – under Parliament’s rule beginning in the mid-1600s following the execution of Charles I.⁶² The Printing Acts of 1649, 1653, and 1662 carried forward the repressive printing controls, including the restrictive limits on the number of printing presses.⁶³ Indeed, the Act of 1662 stated that there was “no surer means” of reducing the licentiousness of the press “*than by reducing and limiting the number of Printing-Presses*, and by ordering and settling the said Art or Mystery of Printing by Act of Parliament, in manner as herein after is expressed.”⁶⁴ To that end, the Printing Act of 1662 strictly limited the total number of master printers in all of England to twenty and the printing presses each could own to just two.⁶⁵ The goal was to reduce, by “death or otherwise”, the number of master printers to twenty.⁶⁶

From the beginning, this regime of controlling who could print, what could be printed, and how many presses could be used served the dual purposes of censorship and monopoly. As copyright historian Mark Rose explains, “censorship and trade regulation became inextricable, and this was a marriage that was to endure until the passage of the Statute of Anne in 1710.”⁶⁷ The Stationers’ Company effectively held a perpetual monopoly over all book printing in England.⁶⁸ Backed by the Crown, the printers controlled the presses and everything that was printed. The authors themselves generally held no rights to

print their works.⁶⁹ The Stationers sought the maintenance of these strict limits on the number of presses as a way to increase their monopoly over the printing industry and to stop the “piracy” of works published by unlicensed printers.⁷⁰ Unlike the Crown, they were not so much concerned about censorship as they were about controlling the entire publishing industry.⁷¹ Controlling the presses—the only technology of mass publication – enabled the Stationers to protect their monopoly for over a century.⁷²

2. The Transition to the Freedom of the Press and a Reformed System of Copyright:

During the repressive regime of press regulation in the 1600s, a counter-movement for a “freedom of the press” began. In 1629, Michael Sparke, who ran an unauthorized press, charged that the Star Chamber decree “directly intrench[es] on the hereditary liberty of the subject’s persons and goods.”⁷³ Without referring to the “freedom of the press” explicitly, John Milton wrote *Areopagitica* in 1644,⁷⁴ in which he criticized the Crown’s regulation of the press: “If we think to regulate printing, thereby to rectify manners, we must regulate all recreations and pastimes, all that is delightful to man.”⁷⁵ Although Milton, an official censor himself at one time,⁷⁶ probably condoned some forms of regulation of speech that were “utterly maleficent”, he advocated for unlicensed printing that left truth to be sorted out in debate.⁷⁷ Other authors including Samuel Hartlib,⁷⁸ William Walwyn,⁷⁹ and Henry Robinson,⁸⁰ wrote in favor of a freedom in “printing” or the “press.” John Lilburne, a key leader in the Leveller party, advocated for the freedom of the press and “that the Presse might be open for us as you.”⁸¹ In 1649, the Leveller party petitioned Parliament to recognize a freedom of the press: “As for any prejudice to Government thereby, if Government be just in its Constitution, and equal in its distributions, it will be good, if not absolutely necessary for them, to hear all voices and judgments, which they can never do, but by giving freedom to the Press”⁸²

The same banner was taken up by John Locke, one of the most influential political thinkers of his time. In *Liberty of the Press*, written in 1694 and 1695,⁸³ he argued for man’s “liberty to print whatever he would speak.”⁸⁴ One of Locke’s key insights was to recognize a connection between the freedom of the press and the need to reform the publishing monopoly held by the Stationers’ Company.⁸⁵ He suggested moving to a system of copyright in which authors, not publishers, held the rights for a limited term.⁸⁶ Similarly, Daniel Defoe, writing in 1704

about “the Regulation of the Press”, described a “Liberty in Printing”⁸⁷ and also called for the recognition of rights for authors in their works, particularly against “Press-Piracy” (a precursor to what we now call copyright infringement).⁸⁸ Importantly, both Locke and Defoe attempted to reconcile the recognition of copyrights for authors with the freedom of the press.⁸⁹ At bottom, the two issues were intertwined.

Concurrently, there were several efforts in Parliament to reinstate a licensing system after the Printing Act was not renewed, such as the Bill for Regulating of Printing and Printing Presses in February 1695.⁹⁰ That bill allowed the trade to be “open to all Persons” and contained no limit on the number of presses, but was later amended in November of that same year to limit the presses to certain locations within England to protect the Stationers from competition.⁹¹ The Stationers again invoked fears of book “piracy” in an effort to have Parliament pass tighter regulation of the printing industry.⁹² None of these bills ever passed, however.⁹³ The sentiment for a freedom of the press had begun to take hold. In 1695, when the Printing Act was allowed to lapse, the change was monumental:

There were no more restrictions on the number (or location) of printers, or on the numbers of journeymen or apprentices. There were no restrictions of the import of books. Above all, there was no longer any legal obligation to enter new books on the Stationers’ Register, and, . . . certainly no guarantee that the courts would uphold the claims of the copy-owning booksellers.⁹⁴

As before, when the Star Chamber was abolished, the Stationers lobbied heavily for re-securing their old rights.⁹⁵ Eventually, they asked for property rights in the books they printed instead of a reinstatement of the Printing Act, which appeared to have fallen out of favor.⁹⁶ But they received something very different when, in 1710, Parliament enacted the Statute of Anne, the first copyright act in England.⁹⁷ The Act established, “for the Encouragement of Learning,” a system of copyrights for authors limited to a fourteen year term, renewable once.⁹⁸

Although the ideas of freedom of the press, authors’ rights, and copyrights of limited duration were not necessarily viewed as a systematic bloc, they worked together to free the printing press from governmental and monopoly control. If

an individual had the “liberty to print whatever he would speak,”⁹⁹ then neither the Stationers nor the Crown could control the number of printing presses and printers, or what could be printed. Additionally, if authors held the right to print their own works, neither the Stationers nor the Crown could have a monopoly on the entire printing industry.¹⁰⁰ But, to avoid substituting one monopoly for another, Parliament decided the copyrights that authors received should be of limited duration.¹⁰¹ With this change, the technology of the printing press was no longer subject to government control.

Of the innovations in this reformed copyright system, the most underappreciated among legal scholars is its approach to technology. Perhaps this is understandable as commentators have more often focused on what the Statute of Anne said, instead of what it did not say. Of course, what the Statute of Anne said was that (1) copyright had a limited term and (2) the rights accrued to authors.¹⁰² While significant, these two more commonly recognized innovations of the Statute of Anne pale in comparison to the revolutionary change effectuated by its departure from the past press regulations. Notably, the Statute of Anne did *not* attempt to limit the number of printing presses or printers, or otherwise regulate the presses as was the case under the Printing Acts.¹⁰³

The significance of this sea change cannot be overstated. For over one hundred years, the Printing Acts (and the earlier Star Chamber Decree of 1586) ruled the presses in England until the final Act lapsed in 1695.¹⁰⁴ The Stationers tried desperately to have another Printing Act enacted; indeed, thirteen bills were rejected between 1695 and 1704.¹⁰⁵ But, instead of a Printing Act, the Statute of Anne was enacted. When viewed in this historical context, the most important innovation of the Statute of Anne was probably contained in what it did not say: the Statute of Anne made no attempt to control the printing presses as the Printing Acts did before.¹⁰⁶ No longer could the Crown or Parliament control the technology of the presses to protect publishers from piracy. Nor, for that matter, could the newly recognized class of authors assert any statutory power over the technology. This sea change ushered in a reformed system of copyright shaped, and ultimately limited, by the freedom of the press.

The connection between copyright and the freedom of the press is also evidenced in the original understanding of the freedom of the press. It is well recognized that copyright originally developed in reaction to the advent of the

printing press, which multiplied exponentially the number of copies of a work that could be made.¹⁰⁷ What is often overlooked today, however, is that the freedom of the press also developed in response to the printing press.

Indeed, the freedom of the press historically meant the freedom of *the printing press*. In seventeenth and eighteenth century England, “press” referred to the technology of the printing press or, more generally, to the publishing of any material by the printing press.¹⁰⁸ The “press” only later became associated more narrowly with journalism.¹⁰⁹ Samuel Johnson’s *Dictionary of the English Language*, for example, defined “press” in 1778 as “[t]he instrument by which books are printed.”¹¹⁰ No definition included any reference to the modern understanding of the press as agents who report news.¹¹¹ The freedom of the press stood broadly for “the personal liberty of the writer to express his thoughts in the more improved way invented by human ingenuity in the form of the press.”¹¹² It marked a sentiment that government should not be allowed to control or interfere with the public’s ability to use the technology that enabled the mass production of speech.

Blackstone took a more limited view of the freedom of the press as consisting of “no previous restraints upon publication, [but] not in freedom from censure from criminal matter when published.”¹¹³ Even under this more limited view, however, he tied the freedom of the press in England to the end of the press regulation under the Printing Acts,¹¹⁴ “which limited the number of printers, and of presses which each should employ, and prohibited new publications unless previously approved by proper licensers.”¹¹⁵ In this key passage, Blackstone specifically recognized how the Crown’s limits on the technology – and not just the prepublication licensing system – operated as restraints on the freedom of the press.¹¹⁶ After the Printing Acts expired, “the press became properly free . . . and has ever since so continued,” Blackstone concluded.¹¹⁷

This brief history of the freedom of the press and copyright law in England illuminates several important points for understanding the tradition in which copyright law developed, first in England and later in the United States. First, demands for a freedom of the press were intended to stop the government’s and the Stationers’ control over the printing press.¹¹⁸ Second, copyright law developed *in conjunction with* the notion of the freedom of the press, as a part of

the effort to dismantle monopoly control over the printing press and what could be printed by whom.¹¹⁹ Finally, the copyright system replaced a regime of press regulation in which the government could control and limit the technology of the press itself with a reformed system of authors' rights that left the printing presses free of regulation.¹²⁰ Copyright was born with the freedom of the press, not against it.¹²¹

B. The Freedom of the Press and Copyright in Early America

This part explains how the Framers understood a connection between copyright law and the freedom of the press, and, specifically, a connection between the Copyright Clause and the Free Press Clause. The connection was one of limitation: the Free Press Clause limited the Copyright Clause.

1. The Connection Between the Copyright Clause and the Free Press Clause:

Most conventional accounts of the Framers' understanding of copyright focus primarily, if not exclusively, on the Copyright Clause, which was part of the Constitution ratified in 1788.¹²² This account, however, only tells half the story. The adoption of the Free Press Clause in the Bill of Rights was equally as important to the origin and design of copyright in the United States.¹²³ At the center of both copyright and the freedom of the press in the early Republic was the technology of the printing press.¹²⁴ It would be no exaggeration to describe the Free Press Clause as "the companion-piece of the Copyright Clause," as Professors Patterson and Joyce suggest.¹²⁵

a. Documentary Evidence Related to the Framing: First, let us begin with the Copyright Clause, which states that Congress shall have the power "[t]o 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."¹²⁶ Similar in design to the Statute of Anne, the Copyright Clause authorizes the grant of copyright to authors for limited times, to promote the progress of learning.¹²⁷ Although the historical record related to the Framers' adoption of the Copyright Clause is rather scant (we have records of Madison's and Pinckney's several proposals, but no records of any Convention debate),¹²⁸ it is fairly well accepted that the Framers drafted the Clause in reaction to the abuses of monopoly grants under the Crown in England.¹²⁹ As the Supreme Court has recognized, the

Copyright Clause “was written against the backdrop of the practices – eventually curtailed by the Statute of Monopolies – of the Crown in granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public.”¹³⁰ Accordingly, the Clause acts as both “a grant of power and a limitation.”¹³¹ Madison’s journal indicates that the Framers agreed upon the Copyright Clause, which had been introduced during the last weeks of the Convention, with no one speaking against it.¹³²

But the history of the Copyright Clause did not end with the Constitution’s ratification in 1788.¹³³ Another important element came when the Free Press Clause in the Bill of Rights was proposed, debated, and ratified.¹³⁴ In the popular debates concerning the ratification of the Constitution, one of the main objections of the Antifederalists was the absence of specific recognition for the freedom of the press.¹³⁵ George Mason of Pennsylvania, one of the Framers at the Convention, wrote, “[t]here is no declaration of any kind for preserving the liberty of the press.”¹³⁶ Richard Henry Lee, a Virginian Antifederalist who wrote under the pseudonym Federal Farmer, stated: “The people’s or the printers ['] claim to a free press [] is founded on the fundamental laws, that is, compacts, and state constitutions, made by the people. The people, who can annihilate or alter those constitutions, can annihilate or limit this right.”¹³⁷ The Antifederalists feared that, without a Bill of Rights, Congress could “restrain the printers, and put them under regulation.”¹³⁸ Among the Antifederalists’ concerns about the lack of a Bill of Rights, the need for a free press clause was paramount.¹³⁹

The Federalists recognized the strength of the Antifederalists’ objection, even after the Federalists had succeeded in avoiding the inclusion of a Bill of Rights in the drafting of the Constitution. During the state ratification process, therefore, the Federalists attempted to allay the Antifederalists’ concerns.¹⁴⁰ James Wilson, a Framers at the Convention and a leading Federalist, gave an impassioned speech at the State House Yard in Philadelphia to address the Antifederalists’ objections; Wilson’s speech was widely published in thirty-four newspapers across twenty-seven towns.¹⁴¹ Concerning the freedom of the press, Wilson contended:

[T]he liberty of the press, which has been a copious subject of declamation and opposition: what controul can proceed from the federal government, to shackle or destroy that sacred palladium of national freedom? *If, indeed, a power similar to that which has been granted for the regulation*

of commerce, had been granted to regulate literary publications, it would have been as necessary to stipulate that the liberty of the press should be preserved inviolate, as that the impost should be general in its operation. . . . In truth, . . . the proposed system possesses no influence whatever upon the press; and it would have been merely nugatory, to have introduced a formal declaration upon the subject; nay, that very declaration might have been construed to imply that some degree of power was given, since we undertook to define its extent.¹⁴²

Wilson's rejoinder to the Antifederalist objection voiced the mainline position of the Federalists: if no power was expressly given to Congress in the Constitution, Congress could not infringe upon any right within that area.¹⁴³

But what is most notable in Wilson's address is his small concession (italicized above) that a free press clause would be needed if Congress had a power "to regulate literary publications."¹⁴⁴ Apparently, Wilson did not view the Copyright Clause, which gives Congress the power to grant exclusive rights over literary works, as a power that "regulate[s] literary publications." Wilson, however, offered no explanation on why the Copyright Clause did not constitute such a power as one might reasonably think. After all, copyrights certainly do regulate the copying and dissemination of literary publications.¹⁴⁵ Wilson's terse explanation left the Federalist position open to attack.

And attack the Antifederalists did. The Antifederalists specifically pointed to the Copyright Clause as the power by which the new Congress could control the technology of the printing press,¹⁴⁶ as had been the case in England under the Printing Acts.¹⁴⁷ As Robert Whitehall of Pennsylvania explained:

Tho[ugh] it is not declared that Congress have a power to destroy the liberty of the press; yet, in effect, they will have it *They have a power to secure to authors the right of their writings.* Under this, they may license the press, *no doubt*; and under licensing the press, they may suppress it.¹⁴⁸

Federalist James Iredell offered a more lengthy response to the Antifederalists' argument, specifically emphasizing the coexistence of a reformed

copyright system and the freedom of the press in England following the enactment of the Statute of Anne.¹⁴⁹ In this passage, it becomes manifest how closely the issues of copyright and the freedom of the press were associated in the minds of the Framers:

The liberty of the press is always a grand topic for declamation, but the future Congress will have no other authority over this than to secure to authors for a limited time an exclusive privilege of publishing their works. This authority has been long exercised in England, where the press is as free as among ourselves or in any country in the world; and surely such an encouragement to genius is no restraint on the liberty of the press, since men are allowed to publish what they please of their own, and so far as this may be deemed a restraint upon others it is certainly a reasonable one, and can be attended with no danger of copies not being sufficiently multiplied, because the interest of the proprietor will always induce him to publish a quantity fully equal to the demand. Besides, that such encouragement may give birth to many excellent writings which would otherwise have never appeared. *If the Congress should exercise any other power over the press than this, they will do it without any warrant from this constitution, and must answer for it as for any other act of tyranny.*¹⁵⁰

Hugh Williamson, a Framer at the Constitutional Convention and Federalist from North Carolina, expressed similar views:

We have been told that the liberty of the press is not secured by the new Constitution. Be pleased to examine the Plan, and you will find that the liberty of the press and the laws of Mahomet are equally affected by it. The new government is to have the power of protecting literary property; the very power which you have by a special act delegated to the present congress. There was a time in England, when neither book, pamphlet, nor paper could be published without a license from government. That restraint was finally removed in the year 1694 and, by such removal, their press became perfectly free, for it is not under the restraint of any license. Certainly the new government can have no power to impose restraints.¹⁵¹

The debate between the Antifederalists and Federalists over the freedom of the press is quite significant in three respects. First, both sides explicitly

considered the possibility that copyright could infringe upon the freedom of the press if enacted with a licensing system, as Whitehall pointed out, no doubt referring to the old British system.¹⁵² Even Iredell, a Federalist, appeared to concede that copyright can act as a “power over the press” when he explained that Congress would be acting unconstitutionally if it exercised “any *other* power over the press” – meaning any power other than copyright.¹⁵³

Second, both the Antifederalists and Federalists referred to the practices in England as the source of their arguments – the Antifederalists pointed to the former system of press regulation under the British Crown to support their criticism of Congress’s copyright power, while the Federalists pointed to the reformed system of copyright after the Printing Acts had lapsed and the Statute of Anne was enacted as the basis for their rejoinder.¹⁵⁴ These references further validate the importance of considering the English history of copyright in attempting to understand the Framers’ views of copyright and the freedom of the press.

Third, and most importantly, both the Antifederalists and Federalists shared a common ground in rejecting the old regime of press regulation under the British Crown. In other words, no Framer on either side of the debate over copyright or the freedom of the press suggested that the restrictions under the Printing Acts should be adopted under the new Constitution.¹⁵⁵ For example, Iredell, who would later become an original Supreme Court justice,¹⁵⁶ did not dispute that a licensing system would infringe the freedom of the press. Instead, he referred to the reformed copyright system under the Statute of Anne in England – “where the press is as free as among ourselves or in any country in the world” – as the model for understanding the scope of Congress’s power under the Copyright Clause.¹⁵⁷

Iredell, however, conceded a very important point: “If the Congress should exercise any other power over the press than this, they will do it without any warrant from this constitution, and must answer for it as for any other act of tyranny.”¹⁵⁸ He thus admitted that even without a free press clause, Congress would be without constitutional authority to “exercise any other power over the press” through copyright law other than the basic kind of system of authors’ rights modeled after the Statute of Anne – i.e., “no other authority over this than

to secure to authors for a limited time an exclusive privilege of publishing their works.”¹⁵⁹

Although Iredell did not specifically concede that the kind of technology limits on the total number of presses imposed by the Crown in England would be unconstitutional, such a conclusion necessarily follows from his statement. He viewed the Copyright Clause power as quite limited: “Congress will have no other authority over this than to secure to authors for a limited time an exclusive privilege of publishing their works.”¹⁶⁰ Congress cannot “exercise any other power over the press than this.”¹⁶¹ For Congress to impose a limit on the printing press under copyright law, even if to protect authors’ copyrights, would be to “exercise [a greater] power over the press” and would, therefore, be unconstitutional.¹⁶²

Because Iredell represented the Federalist position, his concession is even more significant in light of the Antifederalists’ success in obtaining the adoption of the Bill of Rights, including the Free Press Clause, in 1791. The First Amendment states: “Congress shall make no law . . . abridging the freedom of speech, or of the press”¹⁶³ This explicit recognition of the freedom of the press in the Bill of Rights only further solidified the connection between the freedom of the press and Congress’s copyright power. As Madison, the introducer of the amendment, described, “the article of amendment, instead of supposing in Congress a power that might be exercised over the press, provided its freedom was not abridged, was meant as a positive denial to Congress of any power whatever on the subject.”¹⁶⁴ The connection between the Free Press Clause and the Copyright Clause was direct: one limited the other. Given the debate during the ratification of the Constitution and the drafting of the Bill of Rights, we can fairly conclude that the Framers understood the freedom of the press to specifically limit the ability of government to restrict the printing press under copyright law, whether in the form of technology limits or a prepublication licensing system.

Admittedly, there is no single piece of documentary evidence of the Framers’ intent that expressly states the constitutional principle outlined above. But that is the case with most, if not all, questions of constitutional law. Moreover, the documentary evidence related to the debates over the Free Press Clause is much

more extensive than that related to the Copyright Clause. Indeed, there is more documentary evidence related to the Framers' views of the relationship between copyright and the freedom of the press than there is about the originality and limited times requirements, both of which the Supreme Court has defined in interpreting the Copyright Clause.¹⁶⁵ Individuals on both sides of the debate over the Free Press Clause drew explicit connections between the scope of copyright and the freedom of the press.¹⁶⁶ Both sides also referred to the history of copyright and the freedom of the press in England – a history that, as explained above, shows the close connection between copyright and the freedom of the press following the dismantling of the repressive system of press regulation that ruled England for over 150 years.¹⁶⁷ As quoted above, Whitehall and Williamson both expressly described the “licensing” system in England as odious and unconstitutional under the new Constitution.¹⁶⁸ It is thus fair to infer from these passages that the Framers viewed the technology controls under the Printing Acts (i.e., the limits on the number and ownership of presses) with similar disfavor. The technology limits on the printing press and the licensing requirement both were crucial parts of the Printing Acts, as is evident in Blackstone's description of the freedom of the press.¹⁶⁹ It would be difficult to imagine that the Framers so expressly disfavored the licensing system of the Printing Acts, yet tacitly approved the restrictive technology limits on the press imposed by those same Acts.

b. Textual Analysis of the Free Press Clause

- i Original Meaning of “the Press.”* Further support for this position can be found in a close analysis of the text of the Free Press Clause. As originally understood, the Free Press Clause was meant to protect the printing press.¹⁷⁰ Thus, technology limits on the press, such as upon the number of presses, would be anathema to the very notion of the freedom of the press.

At the time of the Framing, the term “the press” referred to the printing press.¹⁷¹ In fact, it was common to refer to the printing press simply as “the press.”¹⁷² Thomas Sheridan's dictionary defined the press in 1780 as “the instrument by which books are printed;” no definition of “press” included journalists or news reporters as a collective group or institution.¹⁷³ The centrality of the printing press to the whole concept of the freedom of the press is evident in Jefferson's description of Virginia's proposal of a free press clause amendment

to the Constitution: "Besides other objections of less moment, she will insist on annexing a bill of rights to the new constitution, i.e., a bill wherein the government shall declare . . . *[p]rinting presses free.*"¹⁷⁴

While the "press" also may have been understood to refer to the small-time printers and agents involved in printing or, more generally, to the collective enterprise of printing or publishing, the early understanding of the press did not refer to our modern notion of journalists or news reporters as an institution or group.¹⁷⁵

The absence of journalists from the early definition of "press" is understandable. It bears out the fact that the technology of the printing press preceded, by several hundred years, the development of journalism.¹⁷⁶ Journalism as an occupation or profession had yet to fully develop by the late 1700s.¹⁷⁷ In early America, printing presses were small-time operations, which consisted of one or two people and required much labor.¹⁷⁸ Printers did not typically investigate news on their own; instead, they usually reported the news by copying it from other sources.¹⁷⁹ While political reporting and commentary comprised a good deal of the material printed in early America, the commentary, typically in pamphlets, was more partisan propaganda than objective news reporting.¹⁸⁰ As Bernard Bailyn describes, "they were always essentially polemical, and aimed at rapidly shifting targets: at suddenly developing problems, unanticipated arguments, and swiftly rising, controversial figures."¹⁸¹ The pamphlets were written by amateur writers who held other occupations as "lawyers, ministers, merchants, or planters."¹⁸²

Early newspapers were also highly partisan, at times even tied to a political party.¹⁸³ This politicization reflected the earlier enlistment of newspapers for the political cause against Great Britain.¹⁸⁴ Historians have even gone so far as to describe this early period of American newspapers as "the era of the party press."¹⁸⁵ The description is hardly an exaggeration given that the Federalists and Antifederalists both had their own newspapers.¹⁸⁶ To the extent that news was reported without a slant, the information tended to consist of recounts of foreign news from foreign papers.¹⁸⁷ Domestically, news had a much more political slant.¹⁸⁸ Not until the Civil War did US newspapers embrace more

neutral, fact-based news reporting as the predominant industry standard (a transformation that coincided with the development of the telegraph).¹⁸⁹ It took several decades more for “objectivity” to be recognized as the standard for news reporting.¹⁹⁰

Given the partisan state of newspapers and pamphlets during the Framing, it seems evident that the Framers had a much broader notion of “the press” than pure news reporting. The printing press did more than simply report news stories; at the time of the Framing, it offered a conduit for people to express opinions, especially (but not only) political ones. An important feature of the freedom of the press was its technological focus. The printing press was revolutionary because it enabled mass production and dissemination of speech by a technology that was theoretically open to all, not just to monks who scribed books or Stationers who ran the presses in England with the Crown’s backing.¹⁹¹

As Andrew Bradford, founder of *The American Weekly Mercury*, wrote in 1734, the freedom of the press was “a Liberty, within the Bounds of Law, for any Man to communicate to the Public, his Sentiments.”¹⁹² Under the well-known alias *Cato*, libertarian writers John Trenchard and Thomas Gordon wrote in 1733 of “the free Use of the Press, which is open to all.”¹⁹³ Later, writing against the Sedition Act of 1798, Madison explained that the US Constitution created a government “altogether different” from the British regime, one that recognized “a different degree of freedom in the use of the press.”¹⁹⁴ The inclusion of the word “use” in “the free use of the press” and “freedom in the use of the press” makes it unmistakably clear that Madison, Trenchard, and Gordon were referring to the machine of the printing press. Jefferson made it even clearer in a letter to Madison: “[A]mong other enormities, [the Sedition Act] undertakes to make printing certain matters criminal, tho’ one of the amendments to the Constitution has expressly taken . . . *printing presses* . . . out of their coercion.”¹⁹⁵

When the Free Press Clause was drafted by Madison, the Framers had numerous examples of free press clauses or statements from which to draw.¹⁹⁶ It is evident in these predecessor materials that the technology of the printing press was chief among the concerns for protection, as shown by Professor Anderson in his exhaustive account of the history of the Free Press Clause.¹⁹⁷ Even before the

American Revolution, the Continental Congress declared in an address to Quebec in 1774:

The importance of this [freedom of the press] consists, besides the advancement of truth, science, morality, and arts in general, *in its diffusion* of liberal sentiments on the administration of Government, *its ready communication* of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.¹⁹⁸

Here, the Continental Congress saw the importance of the printing press in disseminating viewpoints.

States during the Revolutionary War recognized similar concerns about protecting the press. Nine of the eleven state constitutions adopted during this period expressly recognized the freedom of the press.¹⁹⁹ Indeed, the state governments at this time may have perceived the freedom of the press as even more important a right to protect than the freedom of speech, given that only one state, Pennsylvania, expressly recognized the freedom of speech as well.²⁰⁰ The original state constitution of Pennsylvania recognized: "That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained."²⁰¹

Though the Framers at the Constitutional Convention did not adopt a Free Speech Clause or a Bill of Rights, several Framers – George Mason of Virginia, Elbridge Gerry of Massachusetts, and Charles Pinckney of South Carolina – did suggest it late in the Convention.²⁰² (It is noteworthy that Pinckney was also responsible for several Copyright Clause proposals.²⁰³) The movement for a free press clause later resurfaced in the ratifying debates.²⁰⁴ In ratifying the US Constitution (then absent a Bill of Rights), Virginia proposed the inclusion of a free press clause with language similar to the Pennsylvania Constitution: "That the people have a right to freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of liberty and ought not to be violated."²⁰⁵ Madison, who was eventually persuaded of the need for a Bill of Rights, adopted the Virginia language in his proposed Free

Press Clause.²⁰⁶ Eventually, the language was modified to what is now contained in the First Amendment.²⁰⁷

Legal scholars have long underappreciated the central importance technology played in the concept of the freedom of the press, as well as the importance it had for copyright law. The freedom of the press was perhaps best encapsulated by English barrister Francis Ludlow Holt, who wrote in his book, published in the United States in 1818, “[t]he liberty of the press . . . properly understood, is the personal liberty of the writer to express his thoughts in the more improved way invented by human ingenuity in the form of the press.”²⁰⁸ As Professor Anderson has concluded, “Contemporaneous references uniformly indicate that freedom of the press meant freedom to express one’s views through use of the printing press.”²⁰⁹

At its core, the freedom of the press was designed to protect speech technology. The printing press allowed the mass publication of works of all kinds, increasing exponentially the number of people who could publish their own works and have access to countless works published by others. To speak anachronistically, the printing press was the Internet of its day. It transformed the world from handwritten material scribed by monks into a world of printed material mass produced by machines. People felt it necessary to protect this revolutionary technology from governmental control, given the century and a half of Crown and Parliament control over virtually all aspects of the presses, including their total number, ownership, and use in England. Once press regulation was dismantled in favor of a freedom of the press, copyright law could claim no authority for restricting the press.

- ii. **Relationship Between “Speech” and “the Press”:** This interpretation is further supported by the textual construction of the Free Speech and Press Clauses. The clauses are written together to prohibit Congress from “abridging the freedom of speech, or of the press.”²¹⁰ The construction makes it likely that the Framers meant “of speech” and “of the press” to be interpreted in parallel manner.²¹¹ In the first clause, “of speech” modifies or describes “freedom” – but not as a possessive. In other words, freedom of speech does not mean “speech’s freedom,” as if speech itself possessed freedom. It is the *individual* who possesses the freedom of speech.

Interpreting “the freedom of the press” in a parallel fashion, it becomes clear that “the press” does not refer to an institutional press (as in journalists). For such a construction would mean that “of the press” is used as a possessive, rendering the freedom of the press to mean “the (institutional) press’s freedom” – as if the institutional press had a separate right recognized for itself, an interpretation propounded by the late-Justice Stewart (but without success to the entire Court).²¹²

The more plausible construction of “the freedom of speech, or of the press” is that all individuals possess the freedom of speech *and* of the press, the latter making it clear that government should not be allowed to control or restrict speech-facilitating technologies.²¹³ This dual understanding of the freedom of speech and the freedom of the press as protecting separate, but related, rights comports with the interpretive principle to avoid rendering constitutional text mere surplusage.²¹⁴

Granted, this reading effectively interprets “or” to mean something closer to “and” in this context. But the drafting history and text of the First Amendment support this interpretation. Below I describe the progression of the drafting language of the Free Press Clause,²¹⁵ indicating that the Framers likely understood “or” in “the freedom of speech, or of the press” as a conjunction describing two separate, but related rights – the freedom of speech *and* the freedom of the press.²¹⁶

The first quote below is Virginia’s proposal, which contained language similar to the Pennsylvania Constitution.²¹⁷ Madison substantially adopted the Virginia language in his free press clause proposed to the House.²¹⁸ The House Committee of the Eleven made a stylistic change to Madison’s proposal, shortening the construction to “the freedom of speech, and of the press.”²¹⁹ The House Committee of the Whole then approved the language and reported it to the House in August 1789.²²⁰ The House proposal combined the Speech and Press Clauses with Madison’s proposal for Assembly and Petition Clauses.²²¹

In September 1789, the Senate considered the Bill of Rights proposals, including the Free Press Clause.²²² The Senate inserted “Congress” into the proposed free speech and press clauses, and “or” was substituted in place of

“and.”²²³ The Senate modeled its language on the House proposal for the Bill of Rights Religion Clauses, which initially read: “Congress shall make no law establishing religion, or prohibiting the free exercise thereof; nor shall the rights of conscience be infringed.”²²⁴ Eventually, the Senate combined the language of the proposed Religion, Free Press and Speech, Petition, and Assembly Clauses into one amendment.²²⁵ After a report from Madison, the House proposed what was eventually the final language adopted in the Bill of Rights.²²⁶

The following quotations show the development of the Free Press Clause, described in detail above:

1. **VIRGINIA PROPOSAL:** “That the people have a right to freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated.”²²⁷
2. **MADISON PROPOSAL TO HOUSE:** “The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.”²²⁸
3. **HOUSE LANGUAGE:** “The freedom of speech, and of the press, and the right of the people peaceably to assemble, and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed.”²²⁹
4. **SENATE FIRST CHANGE:** “That Congress shall make no law abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances.”²³⁰
5. **SENATE SECOND CHANGE:** “Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition to the government for the redress of grievances.”²³¹

- 6. HOUSE FINAL CHANGE (ADOPTED IN BILL OF RIGHTS):** "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."²³²

This drafting history confirms that the Framers viewed the freedom of the press as a separate but related right to the freedom of speech. In order to understand the meaning of "or" in "the freedom of speech, or of the press," we need look no further than the Religion Clauses that precede the Free Speech and Free Press Clauses. The word "or" was first introduced in the Religion Clauses, and, probably for stylistic reasons when the two sets of clauses were combined, the Senate changed the prior wording "the freedom of speech, and of the press" to "the freedom of speech, or the press."²³³ Yet the House was not satisfied with that wording and clarified the language to "the freedom of speech, or of the press," further noting a separate dimension to the press compared to speech.²³⁴ The two Religion Clauses are similarly differentiated by the word "or," in the phrase "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."²³⁵ Under the Court's precedents, the Establishment Clause and the Free Exercise Clause protect two separate but related rights.²³⁶ By parallel construction, the Free Speech and the Free Press Clauses should as well.

Principles of grammar further support this interpretation. When used after the negative "no", the word "or" commonly operates as a conjunction joining different elements of equal status – effectively operating in a similar fashion as "and" does without the use of the negative. For example, if I wanted to identify two of my possessions, I might say, "I own a house and car." But if I did not own either, I would say, "I own no house or car." It would be at least a poor choice of words, if not grammatically incorrect, for me to say "I own no house and car." Similarly, in the First Amendment, the use of the negative "no" in "Congress shall make no law" necessitates the use of "or" to differentiate the separate things forbidden by the Amendment. It would have been an awkward choice of construction if Congress had drafted the Amendment using the conjunction "and" in combination with the negative "no". The Amendment would then have clumsily read: "Congress shall make no law respecting an establishment of

religion, *and* prohibiting the free exercise thereof; *and* abridging the freedom of speech, *and* of the press; *and* the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”²³⁷ Under such a version, one plausibly could argue that the First Amendment would not be violated unless the law in question violated all of the rights listed – i.e., a law that respects the establishment of religion *and* prohibits the free exercise thereof; *and* abridges the freedom of speech, *and* of the press; *and* the right of the people peaceably to assemble, and to petition the government for a redress of grievances. Such a construction, however, would reduce the First Amendment to a nullity.

Based on the historical materials and text of the Free Press Clause, the most plausible reason why the “freedom of the press” was recognized in addition to “freedom of speech”²³⁸ was the perceived need to specify protection for the use of the machine itself. Around the time of the Framing, some questioned whether anyone ever could have a natural or inherent right to use a machine, which had been developed by man “in a late progress of society.”²³⁹ But, as Holt wrote,

To this it may be answered, that the rights of nature, that is to say, of the free exercise of our faculties, must not be invidiously narrowed to any single form or shape. They extend to every shape, *and to every instrument*, in which, and by whose assistance, those faculties can be exercised. . . . “The same character, therefore, of natural rights is conveyed to every right which is natural in its origin and *principle through all the possible modes and instruments of exercising and launching it into action and employment.*”²⁴⁰

Thus, the freedom of the press is designed to address – or, at least, to clarify that the entire Free Speech and Press Clauses cover – a governmental restriction on speech technology. Based on the drafting history, the inclusion of both “speech” and “the press” within the First Amendment freedoms, and the historical documents relating to the Framers’ debate over the Free Press Clause, we can reasonably conclude that the freedom of the press originally indicated constitutional protection specifically for the printing press and the ability of individuals to utilize this technology free of government control.²⁴¹ While the freedom of speech protects an individual’s basic right of expression, the freedom of the press is meant to ensure that speech technologies are free of governmental control.²⁴²

Endnotes

- 1 See Statute of Anne, 1710, 8 Ann., c. 19 (Eng.) (providing only for “the sole Liberty of Printing and Reprinting” held by authors or those to whom authors have given or sold their rights).
- 2 *Id.*
- 3 See *infra* notes 39, 46, 48, 54–55 and accompanying text.
- 4 See *infra* notes 49–50 and accompanying text.
- 5 See FREDERICK SEATON SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476–1776, at 51–52 (1952) (describing sixteenth century efforts by British Crown to control religious content of publications).
- 6 See *infra* notes 96 –102 and accompanying text.
- 7 See *infra* note 103 and accompanying text.
- 8 See *infra* notes 243–54 and accompanying text.
- 9 *Sony Corp. of Am., v. Universal City Studios, Inc.*, 464 US 417, 421 (1984).
- 10 *Id.*
- 11 *Id.* at 442.
- 12 *Metro-Goldwyn-Mayer Studios, Inc., v. Grokster, Ltd.*, 545 US 913 (2005).
- 13 *Id.* at 933–37.
- 14 *Id.*
- 15 See 17 U.S.C. § 1201(a)(2) (2000).
- 16 See, e.g., Complaint, *Metro-Goldwyn-Mayer Studios Inc., v. ReplayTV, Inc.*, No. 01 – 09801 (C.D. Cal. Nov. 15, 2001), available at http://www.mpaa.org/legal_cases/replaytv/ReplayTV_MGM.pdf (demonstrating attempt at such litigation); see also Jessica Litman, *The Sony Paradox*, 55 CASE W. RES. L. REV. 917, 919–20 (2005) (discussing lawsuits filed against DVRs and other devices).
- 17 The “broadcast flag” mandate would require “all devices capable of receiving broadcast DTV signals [to] include pre-approved technology that would limit the redistribution – but not the copying – of any DTV programming whose broadcast signal included a special bit of data (the Broadcast Flag).” See Molly Shaffer Van Houweling, *Communications’ Copyright Policy*, 4 J. TELECOMM. & HIGH TECH. L. 97, 103 (2005) (discussing failure of broadcast flag order). The Federal Communications Commission (FCC) promulgated a broadcast flag rule, but the D.C. Circuit held that the rule fell outside the FCC’s authority. *Am. Library Ass’n v. FCC*, 406 F.3d 689, 703 (D.C. Cir. 2005). The Senate has considered several

broadcast flag bills, including one proposed by Senator Fritz Hollings. S. 2048, 107th Cong. (2002).

- 19 See *infra* note 175 and accompanying text.
- 20 See *infra* notes 191–95 and accompanying text.
- 21 US CONST. art. I, § 8, cl. 8.
- 22 See *infra* notes 133–51 and accompanying text.
- 26 Legal scholarship examining the connection between copyright and the freedom of the press or the connection between the Copyright and Free Press Clauses has been scant. Even Melville Nimmer, who wrote a seminal article about the connection between copyright and the First Amendment and an article specifically on the Free Press Clause, did not draw the connection. See Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1186–1204 (1970) [hereinafter Nimmer, *Copyright*] (attempting to reconcile copyright and First Amendment); Melville B. Nimmer, *Introduction – Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975) (discussing meaning of “freedom of the press”).

The most extensive discussion on the connection between copyright and the freedom of the press is provided in a short essay by L. Ray Patterson and Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders’ View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the US Constitution*, 52 EMORY L.J. 909 (2003). In other scholarship, only passing reference is made. See, e.g., BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 6 (1967) (referring to freedom of press in recounting demise of Stationers’ Company); LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 20–27 (1968) (describing press control in England); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 17–18 (1987) [hereinafter *Free Speech*] (noting historical relationship of copyright, free speech, and press); Lior Zemer, *The Making of a New Copyright Lockean*, 29 HARV. J.L. & PUB. POL’Y 891, 898–905 (2006) (describing connection between Locke’s understanding of freedom of press and his view of copyright as right for authors).
- 27 See *infra* notes 33–43 and accompanying text.
- 28 See *infra* notes 121–262 and accompanying text.
- 29 See *infra* notes 33–42 and accompanying text.
- 30 See *infra* note 54 and accompanying text.
- 31 See *infra* notes 69–106 and accompanying text.
- 32 See *infra* notes 241–54 and accompanying text; see also US CONST. amend. I.
- 33 The Crown’s power to control the press was, from its inception, unlimited. SIEBERT, *supra* note 5, at 28. During the sixteenth and seventeenth centuries, the Crown

controlled the entire printing industry by allowing printing only through (i) special grants of printing patents or royal prerogatives to individuals who were favorites of the Crown or (ii) the Stationers' Company, a chartered guild of printers and publishers. MARK ROSE, *AUTHORS AND OWNERS* 12 (1993).

- 34 Statute of Anne, 1710, 8 Ann., c. 19 (Eng.); see also Anuj Desai, *Big Entertainment Needs a Sequel to the Highly Anticipated Flop: MGM v. Grokster*, 41 GA. L. REV. 579, 584 (explaining term copyright may be attributed to Statute of Anne).
- 35 See *infra* notes 60–67 and accompanying text.
- 36 See *infra* notes 73–97 and accompanying text.
- 37 See Act of May 31, 1790, ch. 15, 1 Stat. 124 (1790) (repealed 1831) (containing no direct regulation of printing press).
- 38 See ROSE, *supra* note 33, at 30–33. I discuss the English history of copyright, given its clear influence on the Framers and the early American development of copyright law. See Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 909, 911–12 (2002) (discussing colonial and constitutional ties to English copyright law). Copyright can be traced back even earlier to patent privileges in Venice and Rome. See CHRISTOPHER L.C.E. WITCOMBE, *COPYRIGHT IN THE RENAISSANCE* 21–52 (2004) (discussing development of “the *privilegio*,” a type of copyright legislation in fifteenth century Venice and Rome).
- 39 See PATTERSON, *supra* note 26, at 27 (noting that Queen Mary's most important official act was chartering Stationers' Company); ROSE, *supra* note 33, at 12 (noting that royal charter gave guild monopoly on printing).
- 40 See SIEBERT, *supra* note 5, at 47–63 (chronicling licensing system in England from time of Henry VIII).
- 41 See *id.* at 28 (noting that what Henry VIII began, his daughter Elizabeth completed).
- 42 *Id.* at 49.
- 43 *Id.* at 65. Initially, the printers who owned the printing presses also served as the publishers of the works. See PATTERSON, *supra* note 26, at 45–46 (detailing various arrangements between printers and publishers). Over time, printers and publishers (or “booksellers”) came to be separate entities. *Id.*
- 44 See SIEBERT, *supra* note 5, at 51–52 (comparing goals of Henry VIII and Mary in controlling presses).
- 45 *Id.* at 61.
- 46 Star Chamber Decree for Orders in Printing, 1586, 28 Eliz., §§ 1–2; SIEBERT, *supra* note 5, at 69.
- 47 Star Chamber Decree for Orders in Printing § 2.

- 48 *Id.* § 3.
- 49 *Id.* § 4; see also SIEBERT, *supra* note 5, at 69 (providing regulation requiring ecclesiastical authorities to approve new master printers).
- 50 SIEBERT, *supra* note 5, at 71.
- 51 *Id.* at 107–12.
- 52 E.g., Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283, 284–85 (1979).
- 53 See *infra* notes 110–17 and accompanying text.
- 54 SIEBERT, *supra* note 5, at 61–62. In 1560, there were eight or ten master printers; by 1600, there were thirty. *Id.* at 56.
- 55 Star Chamber Decree for Orders in Printing, 1586, 28 Eliz., § 3.
- 56 *Id.* § 2.
- 57 See, e.g., SIEBERT, *supra* note 5, at 99 (describing Kingston press and attempts to keep it out of authorities' hands).
- 58 *Id.* at 85.
- 59 See Raymond Astbury, *The Renewal of the Licensing Act in 1693 and Its Lapse in 1695*, 32 LIBRARY 296, 296 (1978).
- 60 See PATTERSON, *supra* note 26, at 6 (describing censorship efforts).
- 61 *Id.*
- 62 See SIEBERT, *supra* note 5, at 221 (listing several press control regulations).
- 63 See, e.g., *id.* at 221, 228, 238 (describing authorization of Council of State to determine number of presses).
- 64 Licensing of the Press Act, 1662, 14 Car. 2., c. 33 (Eng.) (emphasis added).
- 65 *Id.* §§ 11–12.
- 66 *Id.* § 11.
- 67 ROSE, *supra* note 33, at 13; see also *id.* at 15 (“Since both copyright and censorship were understood in terms of regulation of the press, it was difficult even to think about them as separable practices.”).
- 68 See *id.* at 15 (noting Stationers' Company monopoly).
- 69 See *id.* at 22 (describing Parliamentary edict of 1642, one of few acts that gave authors any rights).
- 70 See SIEBERT, *supra* note 5, at 68 (discussing Stationers' Company).

- 71 See *id.* at 134–36 (describing tight control Stationers' Company had over printing industry).
- 72 See *id.* at 86 (noting success of regulations during Elizabeth's reign).
- 73 *Id.* at 140.
- 74 JOHN MILTON, AREOPAGITICA 394 (Encyclopedia Britannica 1952) (1644). The work, in fact, was published without the required license. WILLIAM E. HOCKING, FREEDOM OF THE PRESS: A FRAMEWORK OF PRINCIPLE 4 (Leonard W. Levy ed., Da Capo Press 1972) (1947).
- 75 MILTON, *supra* note 74.
- 76 SIEBERT, *supra* note 5, at 196.
- 77 HOCKING, *supra* note 74, at 5 (stating Milton's belief that truth and falsehood should grapple freely).
- 78 SIEBERT, *supra* note 5, at 192.
- 79 *Id.* at 193 ("[T]he Press may be free for any man that writes nothing highly scandalous or dangerous to the state." (quoting Walwyn)).
- 80 *Id.* at 194–95 (quoting Robinson as advocating "greater liberty of speech, writing, Printing").
- 81 *Id.* at 199–201.
- 82 *Id.* at 201.
- 83 JOHN LOCKE, LOCKE: POLITICAL ESSAYS 329–38 (Mark Goldie ed., Cambridge University Press 1997).
- 84 *Id.* at 331.
- 85 See *id.* at 332 (noting Stationers' Company monopoly).
- 86 *Id.* at 337.
- 87 DANIEL DEFOE, ESSAY ON THE REGULATION OF THE PRESS 12 (Basil Blackwell 1704).
- 88 *Id.* at 27.
- 89 See JOHN FEATHER, PUBLISHING, PIRACY AND POLITICS 56 (1994) (describing Defoe's views); LOCKE, *supra* note 83, at 330–34 (criticizing Licensing Act of 1662).
- 90 RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY 7 (2004).
- 91 *Id.* at 13–14.

- 92 *Id.* at 18; see also SIEBERT, *supra* note 5, at 307 (noting Stationers' argument that failure to revive bill would result in impoverishment of English families and "enriching of Dutch printers").
- 93 DEAZLEY, *supra* note 90, at 28; SIEBERT, *supra* note 5, at 306.
- 94 FEATHER, *supra* note 89, at 50.
- 95 See *infra* note 105 and accompanying text (discussing Stationers' efforts to have another Printing Act enacted).
- 96 See generally DEAZLEY, *supra* note 90, at 1–29 (discussing various legislation and proposed legislation leading up to Statute of Anne).
- 97 Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).
- 98 *Id.*
- 99 LOCKE, *supra* note 83, at 331.
- 100 See ROSE, *supra* note 33, at 47–48 (suggesting that authors were included in Statute of Anne in order to prevent monopolies). Patterson notes that the switch from publishers to authors being entitled to copyrights did not pose any threat of press control because "even the most prolific author would produce a fraction of press output." Patterson, *Free Speech*, *supra* note 26, at 18.
- 101 See ROSE, *supra* note 33, at 47 ("Parliament . . . was concerned about stationers' monopolies, and so the statutory copyright was limited in term.").
- 102 *Id.* at 4.
- 103 See Statute of Anne, 1710, 8 Ann., c. 19 (Eng.). The reasons for Parliament's inability to enact continued printing controls were probably several, including division within Parliament and the ineffectiveness of the old regime. See SIEBERT, *supra* note 5, at 260, 300–01, 306 (noting some reasons for failure to enact printing controls). The demise of the Printing Acts was also precipitated by antipathy for them and the growing calls for the freedom of the press; by the 1700s, it was no longer politically tenable for the government to openly oppose the freedom of the press. See *id.* at 305 ("The rhetoric of the times called for tactical expressions of political belief in the freedom of the press.").
- 104 See ROSE, *supra* note 33, at 32 (describing history of expiration of final Printing Act).
- 105 See DEAZLEY, *supra* note 90, at 28 – 29 ("This concluded the thirteenth attempt in just under ten years to provide some form of statutory regulation for the press . . .").
- 106 See Statute of Anne, 1710, 8 Ann., c. 19 (Eng.). Even with the lapse of the Printing Acts, the freedom of the press was not necessarily guaranteed or complete. Those who advocated for a freedom of the press were willing to allow some limitations, such as liability for certain printed material under the common law. See DEAZLEY,

supra note 90, at 4 (noting that writers of treasonous and seditious books still could be punished under common law). Prosecutions for seditious libel continued into the 1800s in England. See WILLIAM H. WICKWAR, *THE STRUGGLE FOR THE FREEDOM OF THE PRESS, 1819–1832*, at 102 (1928) (“In 1819 prosecutions for seditious and blasphemous libel were set going all over the country . . .”). The same question over seditious libel and its relationship to the freedom of the press would recur in the United States with the Sedition Act of 1798, which expired in 1801 and was never renewed. See *N.Y. Times Co., v. Sullivan*, 376 US 254, 276 n.16 (1964) (“The [Sedition] Act expired by its terms in 1801.”).

107 ROSE, *supra* note 33, at 3–4.

108 WICKWAR, *supra* note 106, at 13–14 (“THE FREEDOM OF THE PRESS must be held to embrace the whole practice of printing, and to refer as much to the printing-press as to its products.”).

109 See *id.* (stating that application of “THE PRESS” to journalism began in early nineteenth century). In early 1695, only one newspaper existed: the official government newspaper, *London Gazette*. DEAZLEY, *supra* note 90, at 11.

110 SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (6th ed. 1778).

111 *Id.*

112 FRANCIS LUDLOW HOLT, *OF THE LIBERTY OF THE PRESS* (Anthony Blecker ed., Stephen Gould 1818) (1812), excerpted in *FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT 18–19* (Harold L. Nelson ed., 1967).

113 WILLIAM BLACKSTONE, *4 COMMENTARIES* 151 (Robert Bell ed., 1771) (emphasis added).

114 *Id.* at *152 n.a.

115 *Id.*

116 *Id.*

117 *Id.*

118 See *supra* notes 73–89 and accompanying text.

119 See *supra* notes 97–100 and accompanying text.

120 *Id.*

121 Two years after the Statute of Anne was passed, Parliament enacted the Stamp Act of 1712, which imposed a duty on all paper used for printed materials. See DEAZLEY, *supra* note 90, at 43–44 (discussing taxes relevant to “book trade”). Although the Stamp Act may have been enacted in part to restrict the amount of material published by the press, the penalty for failure to pay the duty on paper was the loss of copyright (“all Property therein”) in the underlying work—a result that was arguably consistent with the freedom of the press in that it immediately allowed everyone to

“freely print and publish” the work. *Id.* at 44 (quoting Stamp Act, 1712, 10 Ann., c. 18 (Eng.)). The Stamp Act remained controversial in England, however, with critics attacking it as a form of censorship. See Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 GEO. L.J. 257, 263 (1985) (“[D]uties proved highly successful in squelching the more inexpensive and popular publications.”). The Act was finally repealed in 1861. *Id.* In 1765, Parliament enacted a similar Stamp Act for the American colonies, in order to help recover the costs of the Seven Years War, but the Act was repealed within a year due to the vocal protests of the colonists against “taxation without representation.” *Id.* at 263–64.

- 122 See, e.g., BRUCE W. BUGBEE, *GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW* 1–2 (1967) (discussing adoption of Copyright Clause at Constitutional Convention).
- 123 See Patterson & Joyce, *supra* note 26, at 944 (examining Founders’ views on relationship between Free Press and Copyright Clauses).
- 124 *Id.* at 910.
- 125 *Id.* at 946.
- 126 US CONST. art. I, § 8, cl. 8.
- 127 Patterson & Joyce, *supra* note 26, at 944.
- 128 See Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress of Science as a Limitation on Congress’s Intellectual Property Power*, 94 GEO. L.J. 1771, 1775 (2006) (analyzing Copyright Clause based on several related proposals).
- 129 See Ochoa & Rose, *supra* note 38, at 909, 909–13, 925–27 (discussing abuse of monopoly grants in England and Framers’ aversion to monopolies).
- 130 *Graham v. John Deere Co.*, 383 US 1, 5 (1966).
- 131 *Id.*
- 132 BUGBEE, *supra* note 122, at 1.
- 133 Patterson & Joyce, *supra* note 26, at 910.
- 134 *Id.* The Free Speech Clause was also relevant to copyright, but much less discussed during the Framing compared to the Free Press Clause.
- 135 See George Mason, *Objections to the Constitution of Government Formed by the Convention* (1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 13 (Herbert J. Storing ed., 1981) (objecting to lack of protection for liberty of press).
- 136 *Id.*
- 137 Letter from the Federal Farmer XVI (Jan. 20, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 329 (Herbert J. Storing ed., 1981).

- 138 David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 468–69 (1983).
- 139 *Id.* at 467–68.
- 140 See William T. Mayton, *From a Legacy of Suppression to the “Metaphor of the Fourth Estate,”* 39 STAN. L. REV. 139, 143 (1986) (discussing history of Framers’ debate on free press).
- 141 *Id.* at 144 n.27.
- 142 James Wilson, *An Address to a Meeting of the Citizens of Philadelphia*, reprinted in 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 529 (1971) (emphasis added).
- 143 *Id.*
- 144 *Id.*
- 145 See BLACK’S LAW DICTIONARY 361 (8th ed. 2004) (defining copyright as “property right in an original work of authorship . . . giving the holder the exclusive right to reproduce . . . [and] distribute . . . the work”).
- 146 Leonard W. Levy, *On the Origins of the Free Press Clause*, 32 UCLA L. REV. 177, 209–10 (1984).
- 147 See *supra* notes 50–96 and accompanying text. The Antifederalists also pointed to Congress’s powers to tax and to define offenses against the law of nations, as well as the Supremacy Clause, as potentially giving Congress the power to curb the freedom of the press. See A Plebeian, Spring 1788, reprinted in *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS* 111 (Neil H. Cogan ed., 1997) (arguing tax power and Supremacy Clause can be used to limit speech); Cincinnatus, Nov. 1, 1787, reprinted in *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS*, *supra*, at 106 (arguing powers to make treaties can be used to restrict speech); The Federal Farmer, Jan. 20, 1788, reprinted in *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS*, *supra*, at 109 (arguing tax power can be used to limit speech); Timoleon, Nov. 1, 1787, reprinted in *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS*, *supra*, at 104–05 (arguing tax power and Supremacy Clause can be used to limit speech).
- 148 2 RATIFICATION OF THE CONSTITUTION BY THE STATES: PENNSYLVANIA, *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 454 (Merrill Jensen ed., 1976) (first emphasis added).
- 149 JAMES IREDELL, *OBSERVATIONS ON GEORGE MASON’S OBLIGATIONS TO THE FEDERAL CONSTITUTION* (1788), reprinted in *PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 1788–1788*, at 360–61 (Paul L. Ford ed., De Capo Press 1968) (1888).
- 150 *Id.*

- 151 HUGH WILLIAMSON, REMARKS ON THE NEW PLAN OF GOVERNMENT (1788), *reprinted in* 1 SCHWARTZ, *supra* note 142, at 551.
- 152 See *supra* note 148 and accompanying text.
- 153 IREDELL, *supra* note 149, at 361 (emphasis added).
- 154 See *supra* notes 146–47, 149–50 and accompanying text.
- 155 *Id.*
- 156 See SCHWARTZ, *supra* note 142, at 932 (noting Iredell's position as Supreme Court justice).
- 157 IREDELL, *supra* note 149, at 361.
- 158 *Id.*
- 159 *Id.*
- 160 *Id.*
- 161 *Id.* (emphasis added).
- 162 *Id.*
- 163 US CONST. amend. I.
- 164 JAMES MADISON, REPORT ON THE VIRGINIA RESOLUTIONS (Jan. 1800), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 143 (Philip B. Kurland & Ralph Lerner eds., 1987).
- 165 See *Eldred v. Ashcroft*, 537 US 186, 199 (2003) (discussing "limited Times" requirement); *Feist Publ'ns., Inc., v. Rural Tel. Serv. Co.*, 499 US 340, 345 (1991) (defining originality requirement under Copyright Clause).
- 166 See *supra* notes 126–56 and accompanying text.
- 167 *Id.*
- 168 See *supra* notes 148, 151 and accompanying text.
- 169 BLACKSTONE, *supra* note 113, at 152 n.a.
- 170 See *supra* notes 126–69 and accompanying text.
- 171 David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 446 (2002); see also JEFFREY L. PALSEY, THE TYRANNY OF PRINTERS: NEWSPAPER POLITICS IN THE EARLY AMERICAN REPUBLIC 25–26 (2001) (describing technology of printing press in early America).
- 172 Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371, 1401–02 (2003) ("When the First Amendment was written, the 'press' was literally the same as the printing press, merely a tool that any citizen could use to

speak.”); see also WILLIAM E. BERRY ET AL., *LAST RIGHTS: REVISITING FOUR THEORIES OF THE PRESS* 156–57 (John C. Nerone ed., 1995) (arguing that “the press” referred to printing press, not newspaper press).

- 173 See 2 THOMAS SHERIDAN, *A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE* 1780 (Scolar Press Limited 1967) (defining “press” without reference to journalists or reporters).
- 174 Letter from Thomas Jefferson to C.W.F. Dumas (Feb. 12, 1788), in *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS*, *supra* note 147, at 116 (emphasis added).
- 175 Noah Webster’s first American dictionary published in 1828 did include the additional definition of “press” to include “[t]he art or business of printing and publishing,” with the following example: “A free press is a great blessing to a free people; a licentious press is a curse to society.” NOAH WEBSTER, *AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* (Johnson Reprint ed. 1970). The definition was third in the order, following (i) “An instrument or machine by which any body is squeezed” and (ii) “A machine for printing; a printing-press.”
- 176 Compare *infra* note 177 and accompanying text, with SIEBERT, *supra* note 5, at 22 (noting that first printing press in England dates to 1476).
- 177 See Anderson, *supra* note 171, at 446 (“When the First Amendment was written, journalism as we know it did not exist.”).
- 178 HAZEL DICKEN-GARCIA, *JOURNALISTIC STANDARDS IN NINETEENTH-CENTURY AMERICA* 18–19 (1989).
- 179 *Id.*
- 180 See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 2–4 (1967) (discussing prevalence of pamphlet as form of political discourse).
- 181 *Id.* at 4.
- 182 *Id.* at 13–14.
- 183 See PALSEY, *supra* note 171, at 21 (noting that editors valued “partisanship and party organization”).
- 184 See *id.* at 41 (“American political leaders expected that newspapers that had once been instruments of resistance would now be tools of governance.”). Earlier, the history of newspapers in England had followed a similar partisanship. See DEAZLEY, *supra* note 90, at 11–12 (discussing party biases of English newspapers).
- 185 DICKEN-GARCIA, *supra* note 178, at 32.
- 186 *Id.* at 36.
- 187 See DONALD H. STEWART, *THE OPPOSITION PRESS OF THE FEDERALIST PERIOD* 21–22 (1969) (noting prevalence of foreign news in American press).

- 188 See *id.* at 28 (discussing how many influential papers were “rabidly partisan”).
- 189 See DICKEN-GARCIA, *supra* note 178, at 52–55, 60 (discussing how public demand for facts about Civil War deemphasized opinion function of press).
- 190 See *id.* at 98 (noting that full embodiment of objectivity did not emerge until late nineteenth or early twentieth century).
- 191 See ROSE, *supra* note 33, at 9, 12 (discussing historical regulations on printing books).
- 192 LEONARD W. LEVY, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 41 (1966).
- 193 *Id.* at 31.
- 194 4 ELLIOT’S DEBATES ON THE FEDERAL CONSTITUTION 569–70 (1901).
- 195 Letter from Thomas Jefferson to James Madison (June 7, 1798), in 8 THE WORKS OF THOMAS JEFFERSON 434 (P. Ford ed. 1904) (emphasis added).
- 196 See *infra* notes 197–201 and accompanying text.
- 197 See generally Anderson, *supra* note 138, at 455–94 (examining history of Free Press Clause).
- 198 ADDRESS TO THE INHABITANTS OF QUEBEC (1774), reprinted in 1 SCHWARTZ, *supra* note 142, at 223 (emphasis added).
- 199 Anderson, *supra* note 138, at 464–65.
- 200 *Id.* at 465.
- 201 1 SCHWARTZ, *supra* note 142, at 266 (emphasis added). The Pennsylvania state constitution referred to the printing press in another clause: “The printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of government.” *Id.* at 273.
- 202 Anderson, *supra* note 138, at 467.
- 203 Ochoa & Rose, *supra* note 38, at 922–23.
- 204 See Andersen, *supra* note 138, at 471 n.97 (“[Virginia, New York, and North Carolina] demanded the adoption of an amendment guaranteeing freedom of the press.”).
- 205 *Id.* at 473.
- 206 *Id.* at 478.
- 207 See generally *id.* at 475–86 (discussing drafting of and revisions to First Amendment). I recount the changes to the language of the Free Press Clause in the next Part.

- 208 HOLT, *supra* note 112, at 18–19; see also THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION 518 (1868) (“[W]e understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords.”).
- 209 Anderson, *supra* note 171, at 446 n.90.
- 210 US CONST. amend. I.
- 211 See Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1267 (1992) (“[T]he two rights in the federal Bill are in *pari materia*; each must be construed in relation to the other, and it would be curious if freedom of the printed word were drastically more truncated than freedom of oral expression.”).
- 212 Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633 (1975) (“[T]he Free Press Clause extends protection to an institution.”).
- 213 My interpretation of “press” is consistent with the Supreme Court’s broad understanding of the term. The Court has never adopted the position that only members of the press can invoke the Free Press Clause. See *Pennekamp v. Florida*, 328 US 331, 364 (1946) (Frankfurter, J., concurring) (“[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it.”).
- 214 See *Marbury v. Madison*, 5 US 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect.”); *Myers v. United States*, 272 US 52, 229 (1926) (McReynolds, J., dissenting) (noting same principle). See generally Akhil Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1 (1998) (providing further discussion of this interpretive principle).
- 215 See *infra* notes 218–32 and accompanying text.
- 216 See *infra* notes 218–32 and accompanying text.
- 217 See *infra* note 227 and accompanying text.
- 218 See *infra* note 228 and accompanying text.
- 219 2 SCHWARTZ, *supra* note 142, at 1050.
- 220 *Id.* at 1122; see also *infra* note 229 and accompanying text.
- 221 See 2 SCHWARTZ, *supra* note 142, at 1026 (discussing Madison’s proposals); *id.* at 1122 (discussing House’s tentative agreed proposals in August 1789).
- 222 2 SCHWARTZ, *supra* note 142, at 842.
- 223 *Id.*

- 224 See *id.* at 1122 (providing House language).
- 225 *Id.* at 1153; see also *infra* note 231 and accompanying text.
- 226 See *infra* note 232 and accompanying text.
- 227 2 SCHWARTZ, *supra* note 142, at 842.
- 228 *Id.* at 1026.
- 229 *Id.* at 1122.
- 230 *Id.* at 1149.
- 231 *Id.* at 1153.
- 232 *Id.* at 1160. The Senate agreed to the change. *Id.* at 1163.
- 233 2 SCHWARTZ, *supra* note 142, at 1149 (emphasis added); see also *supra* note 230 and accompanying text.
- 234 2 SCHWARTZ, *supra* note 142, at 1160 (emphasis added); see also *supra* note 232 and accompanying text.
- 235 *Id.*
- 236 See *Cutter v. Wilkinson*, 544 US 709, 719 (2005) (noting Establishment Clause requires separation of church and state, while Free Exercise Clause requires noninterference with religious practices).
- 237 The drafters of the First Amendment did use “and” in the last set of clauses involving the right of assembly and the right to petition for redress of grievances. See US CONST. amend. I. It is not clear why the drafters chose to use “and” with these last two rights, even though a parallel construction with the rest of the Amendment might suggest that “or” should have been used in this context.
- 238 Levy and Anderson both conclude that the freedom of the press originated before the freedom of speech. See LEONARD LEVY, *LEGACY OF SUPPRESSION* 5–6 (1960) (stating that freedom of speech developed as offshoot of freedom of press); Anderson, *supra* note 138, at 487 (concurring with Levy). Most state constitutions recognized the freedom of the press, but only one (Pennsylvania) recognized the freedom of speech. Anderson, *supra* note 138, at 487.
- 239 HOLT, *supra* note 112, at 19.
- 240 *Id.* at 19 (emphasis added).
- 241 See *supra* notes 215–40 and accompanying text.
- 242 See *supra* notes 238–40 and accompanying text.

New Media in Old Bottles? Barron's Contextual First Amendment and Copyright in the Digital Age

*Neil Weinstock Netanel**

The free speech concern is not so much that commercial mass media fail to air unorthodox views - the Internet after all is chockfull of dissident voices - but rather that media and telecommunication conglomerates might successfully bring the Internet to heel, drive out new media, and subject digital communication to their proprietary control. Hence, to a large extent, the fulcrum of ensuring real opportunities for expressive diversity has moved from calls for speakers' right of access to broadcast and print media to issues involving network neutrality and copyright.

This Article focuses on one part of that equation: copyright and its role in shaping public discourse in the digital arena. It focuses in particular on (1) incumbent mass media's untoward use of copyright as a vertical restraint to stifle the new media that provides platforms for peer speech; (2) copyright's

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continuing part in underwriting traditional media, a salutary function that stands in some tension with the media's use of copyright to suppress new media competition; and (3) copyright's potential for enabling powerful new media, like Google, to threaten expressive diversity in the digital age in much the same way that incumbent media has overwhelmingly dominated public discourse in the print and broadcast era.

In his seminal 1967 article, *Access to the Press – A New First Amendment Right*, Jerome Barron argued that First Amendment doctrine is predicated on the unrealistic, romantic notion that speakers share a rough equality of opportunity to compete in the marketplace of ideas.¹ That view, he underscored, ignores the mass media's overwhelming dominance of public discourse.² In the face of mass media dominance, to protect speakers' right to preach atop a soapbox or leaflet on street corners does virtually nothing to serve the First Amendment's interest in full and free discussion of the widest variety of competing ideas.³ We must, rather, direct First Amendment doctrine to how public discourse actually operates in practice, to be fully cognizant of the different functions the various media serve and how speakers can effectively air their views. In that light, to focus solely on restraining government from suppressing speech is to overlook the propensity of private power to deny speakers effective access to potential audiences. As Barron insisted, only the mass media "can lay sentiments before the public, and it is they rather than government who can most effectively abridge expression by nullifying the opportunity for an idea to win acceptance."⁴

Barron's argument for a First Amendment right of access presupposes that only the highly concentrated mass media can accord speakers a meaningful platform to impact debate on important issues of the day. As Barron elucidated, "unorthodox points of view which have no claim on broadcast time and newspaper space as a matter of right are in poor position to compete with those aired as a matter of grace."⁵ Yet forty years later, in our Internet age, it is by no means clear that mass media will long continue to exert such a hold on public discourse. The Internet features a bountiful, vibrant stew of individual expression, peer discussion, social networks, political organization, cultural commentary, and

user-generated art. In particular, amateur online journalists, from bloggers to posters of videos on YouTube, regularly compete with established media for audience attention and sometimes break stories that are later picked up by the press. Traditional mass media also face growing competition from a variety of new media enterprises. Some new media provide individuals with online platforms for speech, conversation, and virtual community. Others, like Google News, aggregate digital expression from all over the Internet on a single site and give users tools easily to find just what news stories, blogs, video clips, or Web sites they want to see.

Given this emergence of Internet speech, Barron's call for a robust, egalitarian First Amendment may well be best met today not by a right of access to the mass media, but by meaningful opportunities to bypass the mass media. Our interest in rigorous debate among diverse and antagonistic voices might be best served not by requiring media giants to act as quasi-common carriers, but by insuring that peer communication, user-generated content, and new media will continue to level the playing field. The free speech concern is not so much that commercial mass media fail to air unorthodox views – the Internet after all is chockfull of dissident voices – but rather that media and telecommunication conglomerates might successfully bring the Internet to heel, drive out new media, and subject digital communication to their proprietary control. Hence, to a large extent, the fulcrum of ensuring real opportunities for expressive diversity has moved from calls for speakers' right of access to broadcast and print media to issues involving network neutrality and copyright. The bulk of scholarly and activist attention (among those who sympathize with Barron's proactively egalitarian vision of the First Amendment) has moved from how to regulate mass media to promote expressive diversity to how to ensure that individual speakers and new media have access to the conduits of digital communication and are able to build upon and disseminate the salient images, sounds, and texts that make effective communication and self-expression possible.

This Article focuses on one part of that equation: copyright and its role in shaping public discourse in the digital arena.⁶ In Part I, I return to Barron's still cogent call for a "contextual approach" to the First Amendment. Barron's proposal for a speakers' right of access to the media has sparked decades of debate, the details of which are beyond this Article's scope.⁷ Rather, I take up

Barron's general vision of a proactively egalitarian First Amendment and assess how it might apply in the digital arena, touching upon speakers' right of access in passing. I ask, in particular, whether we should aspire to mass media bypass rather than access, and whether the multiplicity of new media and Internet sites for user-generated expression actually can and should supplant traditional mass media. I conclude that peer speech over the Internet can serve as an effective means for speakers to convey their messages, even if online peer speech is "effective speech" in a different, more complex manner than speaker access to the mass media. Yet I also conclude that traditional mass media play a vital, ongoing First Amendment role and, accordingly, that we should aim to preserve the place and vitality of the mass media even as we insist on giving considerable free play to peer expression.

I then turn to copyright's part in furthering First Amendment goals. Copyright law is part and parcel of what Thomas Emerson has termed our "system of freedom of expression," the elaborate matrix of speech-related entitlements, institutions, and regulatory regimes that both inform and supplement the First Amendment.⁸ As the Supreme Court has iterated, copyright serves as an "engine of free expression."⁹ It provides an incentive for the creation and dissemination of a broad range of original expression, subsidizes a robust sector of authors and media enterprises independent from government subsidy, and highlights the value of individuals' creative expression in our public discourse. But in so doing, copyright law inevitably favors some media and potential speakers, and some types of expression, over others. Copyright both underwrites original expression and impedes uses of existing expression. It supports independent authors and publishers, but has also come to entrench copyright industry incumbents and burden new media.

Part II addresses copyright's potential for burdening speech. It focuses in particular on incumbent mass media's untoward use of copyright as a vertical restraint to stifle the new media that provides platforms for peer speech. Part III then examines the other side of the coin: copyright's continuing part in underwriting traditional media, a salutary function that stands in some tension with the media's use of copyright to suppress new media competition. Finally, Part IV considers copyright's potential for enabling powerful new media to

threaten expressive diversity in the digital age in much the same way that incumbent media has overwhelmingly dominated public discourse in the print and broadcast era.

I. The Contextual Approach and the Digital Context

Barron cogently argued that the First Amendment requires real, effective, and widespread opportunities for dissident speakers to communicate their message to an audience, not merely a right to be free from government censorship. For that reason, Barron insisted, the First Amendment has meaning only within actual context, taking into account the social, political, technological, and market realities of our day.¹⁰ When mainstream mass media dominate public discourse, and unorthodox voices can reach a large audience only through broadcast television and large circulation newspapers, the autonomy of the press must give way to the broader free speech interest in robust debate. First Amendment rights are not absolute trumps against government regulation. Rather, given that the opportunity for effective discussion exists only in the mass media, "the interests of those who control the means of communication must be accommodated with the interests of those who seek a forum in which to express their point of view."¹¹

Barron's contextual approach invites us to assess his argument for a First Amendment right of access to the press in our current context. The emergence of the Internet, with its countless opportunities for individual speakers to reach a global audience, might radically undermine the factual premise of Barron's argument.¹² In 1967, only those who owned a press, or who owned a broadcast station and held an FCC broadcast license, could reach a mass audience. Today, anyone with access to a computer or smart phone can disseminate text, images, sounds, and video the world over. In our era of ubiquitous "cheap speech," some commentators insist, we have no need for speaker rights of access to the print and broadcast media (even if we did before the digital era); indeed, we have little justification for imposing any regulation on the mass media to further expressive diversity and informed public discussion of important issues.¹³

Yet, as other commentators have rightly responded, with all its promise to empower individual speakers, the digital arena actually presents a far more complex picture.¹⁴ At the very least, the Internet's free speech promise is vulnerable to media and telecommunications conglomerates' reassertion of

dominance through copyright and propertizing broadband distribution networks. Many (though far from all) Internet speakers convey their messages or artistic visions through creatively appropriating and remixing salient images, music, texts, and videos from popular culture. Others quote liberally from mainstream news reports or from corporate, government, or church documents to expose their failings. And while new media, including news aggregation, user-generated video, and social network sites, present vibrant platforms for online speech and community, they also facilitate considerable unlicensed copying of mass media content.

As a result, many Internet speakers and new media have incurred the wrath – and copyright infringement lawsuits – of studios, record labels, and publishers.¹⁵ Such new media and the speakers who use them also rely upon ready access to well-functioning, universally available, high-speed digital communications networks, like the Internet. Yet traditional media and telecommunications firms seem poised to convert open broadband communications networks to dedicated channels for distribution of proprietary content. Traditional media's successful assertion of proprietary control over content and digital communications networks would remake the Internet into something more like cable TV and other traditional media markets. The result would be a significant contraction of the free-flowing expressive diversity and bottom-up speech that the Internet makes possible.¹⁶

Moreover, even absent that radical return to predigital market structure, the overwhelming abundance of Internet speech might ironically work to make the spectrum of expression that actually reaches an appreciable audience narrower than Internet enthusiasts sometimes assume. Much depends upon which mechanisms people use to guide them in determining what speech to see and hear. Traditional media firms still enjoy a significant advantage in capturing audience attention through brand recognition, marketing, and investing in high-production-value, star-studded content. As such, media firms might be able to assert dominance over the digital arena simply by standing out from the din of far more cheap speech than individuals can process. Alternatively, as I discuss in Part IV, new media-filtering mechanisms, including search engines, content aggregation sites, and fora for user-generated content, might pose their own issues of bias and deny an effective voice to certain speakers.

I have thus far focused on the threat that mass media might drown out iconoclast Internet speech. Yet the digital arena presents a complex picture from the converse perspective as well. To the extent the Internet's promise is of a universe free of mass media and populated entirely by yeomen speakers, that promise might actually run counter to First Amendment goals. As I will shortly discuss, mass media and other concentrations of expressive power actually serve important First Amendment functions. Somewhat counterintuitively perhaps, we should thus aspire to preserve a degree of nonegalitarian expressive power, so long as plentiful opportunities for unorthodox expression are available as well.

A. Benkler and Baker: Torchbearers for Barron's Project in the Internet Era

Given the Internet's uncertain promise for free speech, how might we apply Barron's clarion call for a contextual First Amendment to the context of the digital arena? To navigate these shoals, I draw upon two particularly thoughtful contemporary torchbearers for Barron's overall project, Yochai Benkler and Ed Baker. Only Baker echoes Barron's proposal for a First Amendment right of access per se. But both Benkler and Baker take up the cudgel for contextual First Amendment law and policy, one that would afford meaningful opportunities for individual expression and robust debate among diverse and antagonistic sources.

In his book *Wealth of Networks*, Benkler both celebrates the free speech potential of online peer communication and warns against reassertion of control by media and telecommunications conglomerates.¹⁷ Benkler presents a fundamental opposition between mass media and peer speech. Critics have long lambasted the commercial news and entertainment media for sacrificing quality to serve the bottom line. The media, they charge, routinely produces bland, uncontroversial expression designed to put audiences in a buying mood and to attract a broad cross section of viewers, readers, and listeners without unduly offending any of them.¹⁸ Yet as Benkler details, the mass media's free speech limitations are actually far more profound than what media critics characterize as profit-driven distortions.¹⁹ The mass media, whether it be the advertiser-supported ABC or the government-funded BBC, has traditionally operated on an industrial, "one-way hub-and-spoke" model in which speech is produced and

packaged at the center by a small set of hierarchical organizations and then distributed to audiences at the edge.²⁰ Individuals in this model are passive recipients of finished media goods, not active participants in ongoing conversation expressing creativity, informing public opinion, and shaping culture.²¹

Benkler emphasizes that, in contrast, digital network communication provides countless outlets for speakers of all shapes and stripes to express their views. And no less important than this sheer multiplicity and diversity of speech, digital networks offer a radically different process and character of discourse.²² Blogs, collaborative creations like Wikipedia, online spaces like YouTube for individuals to post and to critique one another's creative works, and numerous other fora are sites for ongoing conversation, debate, creative expression, and information sharing. The content is ever growing and changing as participants add new entries and observations, correct misinformation, and subject previous entries to often searing criticism.²³ This discourse is far more transparent, and its production more embedded in mutual social relations, than the mass media model. Moreover, for many such sites, discussants focus on what interests them without regard to building audience share or, indeed, whether the texts, graphics, video, or music they create and exchange are marketable. As Benkler eloquently summarizes:

What emerges in the networked information environment . . . will not be a system for low-quality amateur mimicry of existing commercial products. What will emerge is space for much more expression, from diverse sources and of diverse qualities. Freedom – the freedom to speak, but also to be free from manipulation and to be cognizant of many and diverse options – inheres in this radically greater diversity of information, knowledge, and culture through which to understand the world and imagine how one could be.²⁴

For Benkler, then, our primary concern should not be to ensure speaker access to the mass media or even to impose structural regulation on the media to promote competition and diverse ownership. Rather, First Amendment goals are best served by allowing peer communication to flourish and preventing the mass media from reasserting the one-way hub-and-spoke model in the digital network arena. Radically distributed clusters of inquiry, debate, and collective action

make up the backbone of our system of free expression in the digital age. Mass media are dinosaurs, doomed to serve as just one more niche in the welter of online conversation and cultural production.²⁵ In turn, speakers' rights of access to the media are mere artifacts of outdated, social democratic administrative regulation of the twentieth century.²⁶

Benkler's vision of open networks and untrammelled peer communication presents a very different understanding of effective speech than Barron's. Barron placed prime importance on robust public debate of the pressing issues facing our nation, not each individual speaker's active participation in the discussion.²⁷ In Barron's understanding, effective speech means that views one shares are disseminated to a mass audience through the media, not necessarily that one has the opportunity actually to present those views. As he explained, the "contextual approach highlights the importance of the degree to which an idea is suppressed in determining whether the right to access should be enforced in a particular case."²⁸ Not all speakers need to have an opportunity to present their views in a newspaper's or broadcaster's programming. A speaker's right of access depends on whether the speaker's view is indeed suppressed and underrepresented in the relevant media and community. The existence of competition among similar media and provision of access to others who have already expressed the view that a given speaker seeks to convey would weaken that speaker's access claim.²⁹

From Benkler's perspective, on the other hand, effective speech lies in actively engaging in network conversation. Online fora enable few nonmedia speakers to reach a mass audience directly. But in the digital age, reaching a mass audience is no longer the be all and end all of effective speech. Effective speech lies no less in online platforms for communicating and coalescing with others from distant places.³⁰ Effective speech means finding meaning and exchanging views in any of a multitude of online agoras of one's choosing. It entails personal engagement in new forms of social networks, communities, and communicating groups, organized around a seemingly infinite array of topics, themes, messages, and practices. To be certain, peer speakers can sometimes act as media watchdogs and sources of mass media news stories and opinion. Yet for Benkler, equally important is the opportunity to affect public opinion through links among multiple, dispersed sites for unfiltered online conversation that join together around common concerns.³¹

Hence, for Benkler and others who champion online peer communication,³² the representative speech that Barron proffered falls far short of egalitarian First Amendment values. In their view, it is not enough in the digital age to enable self-chosen proxies to present unorthodox points of view in the mass media on behalf of like-minded others. Effective speech, rather, lies in each individual's ability to express herself through online conversation and debate with others who share her interests, even if they reside across the globe.³³ Concomitantly, the ability to form dynamic social and political relationships centered on such online conversation is no less central to meaningful free speech than is addressing a mass audience on issues of broad concern to a territorial polity.³⁴

In his book *Media Concentration and Democracy*, Ed Baker adheres to an understanding of effective speech and of a system of free expression more in line with Barron's.³⁵ Like Benkler, Baker both lauds peer communication and highlights the discourse-skewing propensity of our increasingly concentrated mass media. Baker also shares Benkler's understanding of individual free speech as fundamentally a right of personal autonomy (albeit with important implications for collective self-governance).³⁶ Yet in addressing the role of the mass media in our system of free expression, Baker would advance First Amendment goals not by bypassing the mass media, but through media regulation designed to promote diverse ownership of press outlets and greater editorial independence of professional journalists.³⁷ Much in line with Barron, he would also require that large media entities "provide fair access for alternative views and voices."³⁸

Baker's differences from Benkler follow both a descriptive and normative dimension. Baker recognizes that the Internet adds to effective diversity of expression "by dramatically reducing the time, cost, and consequent geographic limits of *distribution*."³⁹ But he emphasizes that reduced distribution cost can also magnify economies of scale and thus lead to greater market concentration in the production of certain commercial content.⁴⁰ Hence, while the Internet leads to greater expressive diversity overall, it might actually reduce diversity of the expression that market actors produce.⁴¹

And for Baker, commercial media expression still matters – perhaps even matters most – given the media's continuing dominance of public discourse and

power to shape public opinion. Echoing Barron, Baker emphasizes that the formal or technical capability of individual speakers to reach an audience does little to yield a more democratic distribution of communicative power.⁴² With regard to the Internet, the familiar problem is the overabundance of cheap speech.⁴³ Even if Benkler accurately portrays digital networks as bounteous founts of peer speech, what really matters is how many people are listening to this speech, not that individuals can regularly vent their views in some discrete corner of cyberspace. Merely posting a blog or YouTube video does not guarantee that anyone will see it; indeed, the more speech digital networks make possible, the more audience attention becomes an exceedingly scarce commodity. And, Baker details, established media are generally much more adept at capturing individuals' attention than are bloggers and YouTube creators.⁴⁴ As a result, "Internet audience attention tends to be incredibly concentrated and largely colonized by major corporate interests."⁴⁵

Mind you, Baker does not entirely lament that result. Unlike Benkler, he underscores the importance of the mass media's continuing fourth estate role in our system of free expression. The institutional press has the financial resources, which volunteer peer-to-peer speakers and online bloggers lack, to engage in investigation, writing, and editing.⁴⁶ The press also has a unique professional and institutional commitment (albeit a commitment that requires regulatory buttressing) to conduct serious, independent journalism. As a result, Baker contends, we are far from the day in which Benkler's peer discussants can assume the watchdog and other fourth estate roles of the institutional press.⁴⁷

B. Mass Media and Peer Speech in the Digital Arena

While I join in celebrating peer expression, I share Baker's skepticism about digital networks' capacity radically to upend the balance of effective communicative power. I also agree with Baker in insisting that the institutional press plays a vital role in our system of free expression, a role we would not want to jettison in favor of yeomen speakers even if the Internet were to offer that possibility. As I have detailed elsewhere, despite the mass media's painfully evident flaws, its fourth estate function remains indispensable even in the age of networked peer communication.⁴⁸

Liberal democracies require both a rough consensus regarding the most important public issues to be addressed and a truly *public* discourse in which opposing perspectives on those issues are confronted.⁴⁹ With its expressive power and venerable institutional role, the mass media is uniquely situated to define the public agenda by focusing on a discrete set of salient issues,⁵⁰ to act as a watchdog against government and nongovernmental centers of power, and to catalyze and represent public opinion before government, political party, and corporate officials.⁵¹ The mass media also provide a framework for robust debate, albeit within a mainstream consensus, including through investigative journalism, pundit debates, op-ed pages, book reviews, and letters to the editor, in which readers, viewers, and listeners consistently come across opposing views.⁵² Finally, traditional news mass media, and especially their elite representatives like *The New York Times* and *The Washington Post*, serve as reasonably reliable sources – in line with their institutional commitment to professional, industry-wide standards of candor, quality, and accuracy in reporting – for the information upon which individual elucidation and public discourse depend.⁵³

Bloggers, amateur journalists, and peer discussants can certainly serve as valuable adjuncts to the press and indeed as media gadflies and sources of media coverage. But, as studies show, the blogosphere is largely parasitic on media coverage, with little original reporting.⁵⁴ Digital network discussion also appears to be highly fractured and balkanized. Conservative and liberal bloggers, for example, rarely link to blogs across the political divide – and even when they do, views from opposing camps can generally be found only by following a link; unlike op-ed pages and letters to the editor, they are not interspersed side-by-side.⁵⁵ Bloggers also lack the financial resources for investigative reporting and fact checking that mass media enjoy.⁵⁶ Nor do they have the institutional commitment to accuracy. Indeed, stories have already surfaced of political and corporate operatives putting bloggers on their payroll or even masquerading as nonpartisan, objective bloggers themselves.⁵⁷ And tellingly for peer speech's relative ability to fulfill a fourth estate role, a recent study finds that the public views the traditional news media as far more trustworthy than bloggers and other Internet sources.⁵⁸

In sum, yeomen speakers cannot and should not be seen as replacements for the institutional press. Even in the digital arena, large, financially robust, nongovernmental organizations devoted to reporting the news of the day play an indispensable First Amendment role. In particular, commercial media still supply an invaluable and unequaled layer of accreditation, fact checking, agenda setting, and wide-ranging and systematic investigative reporting, while reaching a mass audience and representing public opinion before powerful decisionmakers.

Yet, while casting doubt on peer speakers' capacity to supplant or assume the media's fourth estate role, I do not mean to understate their contribution to public discourse. The Internet certainly provides a means for many individuals to engage in effective speech. Online fora present new platforms for individual, community, and political expression and conversation. Much of this speech is of a different sort than Barron contemplates in arguing for a First Amendment right of access to the media: it involves direct participation in niche online conversation and community rather than having one's viewpoint heard by a mass audience.

But the blogosphere and other types of peer speech can also percolate to influence media coverage and the public agenda. Indeed, peer speech serves as a valuable adjunct to the institutional press and a partial corrective to commercial media's inevitable failings and distortions. As such, a robust network featuring manifold opportunities for online peer communication does, I think, provide a rough analog and adequate substitute for the First Amendment right of access to the mass media that Barron championed under very different circumstances forty years ago.

A telecommunications and media policy informed by Barron's contextual First Amendment perspective thus aims to foster both multiple sites for peer speech *and* the continued vitality of the commercial press. Following Barron's understanding, our system of free expression requires not just a diversity of content, but a plurality of types of speech and speakers. It must embrace commercial mass media, cottage industry publishers, professional authors, publicly funded artists and media, nonprofit organizations and political activists, digital new media, and a host of sundry creators and discussants who exchange their opinions, expression, and personal reworkings of bits and pieces of popular culture without any expectation of monetary remuneration.

How does copyright law fit into that matrix? I begin to answer that question by focusing on how copyright burdens peer expression and the new media that provide platforms for such expression.

II. Copyright as a Burden on Speech

Copyright law shapes public discourse in several ways. In addition to providing an economic incentive for the creation and dissemination of original expression, copyright tends to favor media that control vast inventories of existing copyrights, including publishers, motion picture and television studios, record labels, and news organizations. Concomitantly, copyright burdens the speech of those who wish to build upon existing expression in conveying their message. In an era in which mass media sounds, texts, and images are common reference points for a wide audience, that burden is borne most heavily by independent and nonmarket speakers who must risk either a copyright infringement lawsuit or procure copyright licenses they can often ill-afford. The all too frequent result is self-censorship from the get-go.⁵⁹

A. Copyright Burdens in the Digital Arena

This "censorial" speech burden weighs particularly heavily in the digital arena because digital technology makes it so easy to appropriate, manipulate, edit, and rearrange existing expression. The ensuing remix culture, in which millions refashion and combine portions of mass media works to create their own expression, runs headlong into the commercial media's assertion of copyright control. Broad, lengthy copyrights thus stand as an obstacle to the free-flowing peer communication that Benkler rightly champions as an important new component of our system of free expression.

Yet another way in which copyright law can burden speech is when the incumbent mass media use copyrights as vertical restraints to foreclose potential new media competitors. How does this occur and why does it constitute a burden on speech? New digital media cover a broad spectrum, including (1) social networking and user-generated content sites, like MySpace and YouTube, as well as more subject-matter-specific sites, like Free Republic, FanFiction.net, and Machinima.com, which provide fora for users to post their own creative expression, to post and comment on existing expression, and to engage in

discussion generally; (2) search engines, like Google, and content aggregation sites, like Google News and Google Book Search, which enable users to search massive stores of expression and information online; and (3) tools for digital copying, distribution, and storage, like peer-to-peer file-trading networks and network-enhanced digital video recorders, which enable users to find, copy, store, access, and share vast quantities of existing works.

These new media counter the dominance of incumbent media conglomerates and create opportunities for individuals to reach a broad audience in numerous ways. Social networking and user-generated content sites provide online spaces where speakers can reach audiences most directly and find discussants who share common interests. Except for the rare amateur video that becomes a breakaway hit on YouTube, site participants do not reach an audience anywhere near the size and breadth of the readers and viewers of commercial mass media. Nevertheless, the sites offer audiences of considerably larger size and geographical scope than were available to the street corner pamphleteer of old. Through a combination of filtering, subject matter focus, and search engine technology, they also enable participants to find others of like interest, rather than being lost in the welter of expression that populates the Internet. And, as Yochai Benkler emphasizes, they enable interaction, sharing of information, and bottom-up organizing that offer both a more active participation in public discourse than under the hub-and-spoke model of analog media and an opportunity for grassroots impact on political agenda-setting as well as decisionmaking.⁶⁰

Search engines and content aggregation sites are not designed to provide a forum for new expression per se. Rather, they make vast libraries of existing expression and information, ranging from the entire Internet to just news organization and blogger Web sites, readily accessible for readers, viewers, and listeners. The collection, organization, and diffusion of knowledge have long played a vital role in our system of free expression.⁶¹ Yet digital communication and storage hold the promise of taking that role to an entirely new level, making virtually the entire store of the world's recorded knowledge available online. Moreover, search engine and content aggregation sites effectively organize and make that knowledge available in ways that dramatically improve our ability to find and use the information we need.

Search engines and digital content aggregators have inherent First Amendment value simply in helping audiences find and sort through information and expression that would otherwise be beyond their reach. In doing so, moreover, these new media also help to loosen media conglomerates' hold and provide opportunities for a more diverse range of speakers to reach an audience. Media conglomerates owe their economic and expressive power as much to their control over content distribution as to their dominance in content creation.⁶² When Barron wrote his seminal article, dissenters and iconoclast speakers needed both access to mass media distribution networks and proximity to popular mass media content to reach a broad audience.⁶³ While popular commercial content still dominates the typical response to users' news search queries, search engines and digital content aggregators provide a new, highly effective distribution channel. As such, these new media afford a greatly enhanced opportunity for nonmainstream speakers to reach an audience.

Consider Google News, for example.⁶⁴ The Google News Web site uses Google's search engine algorithms to gather news stories from 4,500 English language sources and arrange them in order of importance.⁶⁵ The Google News home page displays leads and links to news stories selected by Google's algorithm. Each story features a headline and lead from one news source, followed by links to that source, six other identified news sources, and a page containing further links to all news sources reporting on the story.⁶⁶ Readers may also conduct word searches within the Google News material and may customize the Google News page to highlight stories on topics of personal interest or from certain regions of the world. As such, Google News is an invaluable tool for anyone wanting to assess and compare how a wide variety of press outlets from around the world cover a given story or to find news coverage of topics of general or personal import with a single click, without having to go to the multiple Web sites of individual newspapers.

The Google News search algorithm is a filter and thus necessarily contains its own biases.⁶⁷ But Google News regularly gives prominence to news sources, such as blogs and foreign news outlets, that are not mainstream US news media. The Google News aggregation site accordingly presents an expressive universe that is considerably more diverse – in terms of both range of content and multiplicity of voice – than site visitors would otherwise encounter, certainly as

compared to US readers' offline reading habits, but also when measured against online audience share.⁶⁸ As indicated in Table 1, for example, the Nielsen/Netratings listing of the top twenty most visited news Web sites for January 2008 indicates that, except for Yahoo News and Google News, all of the sites are individual sites of major American newspapers and broadcasters or news aggregation sites controlled by major American media. No newspaper or broadcaster Web site likely to present a considerably different perspective on many issues than that of US mainstream commercial media news are part of the top twenty.

Table 1: Nielsen/Netratings Top News Sites in the US for January 2008⁶⁹

1.	Yahoo! News
2.	CNN Digital Network
3.	MSNBC Digital Network
4.	AOL News
5.	NYTimes.com
6.	Tribune Newspapers
7.	Gannett Newspapers
8.	ABCNEWS Digital Network
9.	USATODAY.com
10.	Google News
11.	Fox News Digital Network
12.	WorldNow
13.	washingtonpost.com
14.	CBS News Digital Network
15.	McClatchy Newspapers Digital
16.	Hearst Newspapers Digital
17.	Topix
18.	Advance Internet
19.	IP Websites
20.	Associated Press

Table 2 presents the top twenty news sources appearing on the Google News home page for January and February 2008, as measured by Newsknife in a

readers otherwise partake.

Table 2: Top Twenty News Sites Appearing on Google News for January and February 2008, Ranked by Newsknife and Noting the Number of Times the Sites Appear in Each of the Seven Links for Each Story Featured on the Google News Home Page⁷⁰

Cont...

...cont								
14	CNN International	5	6	6	6	4	2	4
15	Int'l Herald Tribune	2	7	2	8	7	J	5
16	Guardian Unltd., UK	2	1	5	9	8	6	10
17	USA Today	6	2	6	1	7	4	2
18	CBS News	1	10	4	0	4	J	2
19	Wall St. Journal	3	4	4	6	4	4	1
20	TIME	4	5	6	2	2	1	1

Although known primarily for facilitating millions of unauthorized downloads of copyrighted material, peer-to-peer file-trading networks similarly perform a salutary function in lessening incumbent commercial media's hold over content distribution and thus enhancing expressive diversity. In addition to facilitating downloads, file-trading networks provide navigation tools and aggregate content. They provide a platform for searching a vast library of sound recordings and videos to find those of interest to the user.

In making it possible for users to search for and gain access to hundreds of thousands of sound recordings and videos, file-trading networks have much in common with search engine aggregators like Google News and, indeed, Google.⁷¹ As with Google News search results, file-trading network downloads are dominated by popular commercial media hits.⁷² But peer-to-peer file-trading networks also create openings for authors and artists who are not affiliated with major labels, publishers, and studios to reach a sizeable audience. They likewise afford an outlet for the creative appropriations, remixes, and mashups that, through digitally intertwining elements of disparate well-known works, have emerged as a potent art form and vehicle for social critique and political commentary. So even if those who trade digital files of mass media products are not themselves engaged in "speech" (and I have argued elsewhere that they are not),⁷³ peer-to-peer file-trading networks, like social networking, user-generated content, search engine, and content aggregation sites, may well provide a salutary structural contribution to our system of free expression by providing unprecedented opportunity for unorthodox and nonmarket speakers to reach an audience.

Yet to one degree or another, each of these new media also encourage, facilitate, or directly engage in copying and disseminating existing copyrighted expression. The incumbent media have responded with a barrage of copyright infringement lawsuits. Recent, highly publicized cases include record label and movie studio lawsuits against MySpace and YouTube;⁷⁴ publisher and authors guild lawsuits against Google Book Search;⁷⁵ news agency lawsuits against Google News;⁷⁶ newspapers' lawsuit against Free Republic;⁷⁷ record label and movie studio lawsuits against peer-to-peer software and service providers Napster, Grokster, Aimster, Streamcast, and others;⁷⁸ and record label and movie studio lawsuits and threatened lawsuits against providers of consumer copying equipment and services such as ReplayTV, TiVo, XM Satellite Radio, MyMP3.com, and Cablevision.⁷⁹

The copyright industry plaintiffs are clearly motivated by what is likely a justified fear of losing licensing revenue. But that is only part of their motivation. In most of these cases, indeed, the plaintiffs refused to settle the lawsuit on terms that would permit the new media defendant to continue to operate without fundamental alteration in return for paying a copyright license fee.⁸⁰ Rather, the lawsuits are also efforts to stifle new media competition. Like many mature industries, studios, record labels, and publishers are heavily invested in their existing business models, distribution networks, and infrastructure. They have every incentive to seek to sideline innovative technologies that would be disruptive to their core business.⁸¹

Indeed, as I have detailed elsewhere, incumbent commercial media have a long history – as old as copyright itself – of using "copyrights as vertical restraints to foreclose potential competitors in content distribution."⁸² The record label, book publisher, news agency, and motion picture studio lawsuits against new media fall solidly within that mold.⁸³ The studios' dealings with Google-owned YouTube are a case in point. As noted in the press, the studios seek not only to require YouTube to prevent users from posting unlicensed clips from studio movies and TV programs, but also "to protect their decades-old way of doing business – controlling not only their programming but the advertising revenue and distribution outlets."⁸⁴ Viacom's lawsuit against Google and YouTube comes in the wake of the parties' failure to agree on terms for licensing Viacom content on YouTube, a failure that can be explained largely by Viacom's unwillingness to

relinquish the premium for controlling distribution.⁸⁵ The recently announced News Corp.-NBC Universal partnership to establish an alternative to YouTube and to license their content only to Google rivals stems from a similar motive.⁸⁶ As one media analyst put it, "[t]he media companies don't want to be forced to only work with one distribution entity."⁸⁷

Media firms' desire to avoid subservience to a potential new media behemoth is understandable. But their repeated use of proprietary copyrights to drive out potential rivals to their own distribution business has rightly raised regulatory concerns. Indeed, motion picture studios, record labels, music publishers, and broadcasters have repeatedly run afoul of antitrust authorities when colluding to suppress competition.⁸⁸ Congress also stepped in on a number of occasions to prevent media firms from using their copyrights as a vertical restraint. The Copyright Act, accordingly, contains several provisions codifying compromises that allow proprietors of new content delivery platforms, including cable and satellite television operators, webcasters, and early record labels, to engage in limited distribution of copyrighted works in return for paying a statutory fee rather than having to obtain copyright holders' consent.⁸⁹ Likewise, music performance rights societies ASCAP and BMI operate subject to antitrust decrees requiring them to license all radio broadcasters on "reasonable" terms that are subject to judicial oversight.⁹⁰

As crafted by Congress and the courts, the compulsory licenses aim to maintain copyright law's economic incentives to create and disseminate new expression. But they deprive incumbents of the use of copyright to foreclose potential rivals directly, by refusing to license, or indirectly, by expropriating the surplus that provides an incentive for the development of new content delivery platforms. And, almost across the board – from cable television's multiple channels to webcasters' niche programming – by freeing new technological distributors from copyright incumbents' vertical restraints, the compulsory licenses have created alternative outlets for independent speakers and helped to foster expressive diversity.

Not surprisingly, however, commercial media incumbents continue to seek to enforce proprietary copyright against new technology media, and both the courts and Congress have recently tilted towards the incumbents' claim that copyrights are inviolable property. As a result, a number of new media, including MP3.com,

peer-to-peer file-trading systems and user-generated video sites, have been enjoined from further infringing copyright (or facilitating others' infringement) and then driven out of business when the copyright industry plaintiffs refused to license.⁹¹ It remains to be seen how the industry lawsuits against their powerful, well-heeled rival, Google, will play out – whether courts will similarly enable the incumbents to use copyright as a veto or whether some combination of courts and Congress will spur a compromise.

In sum, copyright has emerged as a significant bottleneck to competition from new media distributors in the digital arena. Moreover, the continued use of copyright as a vertical restraint threatens to extend media incumbents' control over distribution just when the economics of digital markets undermine the traditional basis and justification for that control. In the analog, hard-copy world, copyright industry distributors rightly earn a premium because their vast networks for physical transportation, retail chain marketing, and broadcasting are critical to getting original expression to audiences. Furthermore, the substantial cost of establishing a large-scale distribution network, as much or more than copyright law, often prevents the entry of serious competitors. But digital technology changes this analysis. Distribution now costs next to nothing. Any studio, label, publisher, and, most importantly, individual author can make a work available to a global audience simply by posting it on a Web site or releasing it onto a peer-to-peer network. Moreover, content aggregators can act as gateways to libraries of content far more vast than that of a single media distributor or brick-and-mortar retail chain. Digital technology thus makes possible distribution that can aggregate decentralized, widely dispersed sources on a single content aggregator site. In so doing, it can provide consumers with ready access to nearly universal, all-inclusive libraries of content through a single gateway (or competing all-inclusive gateways). If copyright law can prevent that highly efficient regime of new media distribution, it will do so at the cost of distorting the market and impeding expressive diversity.

III. Funding Traditional Media

In some tension with copyright's deleterious use to entrench large media conglomerates, copyright also plays a salutary role in underwriting robust, financially independent commercial media. As I have explained elsewhere, copyright plays an important structural role in our system of free expression by

providing a mechanism for authors, publishers, and media firms to gain financial sustenance from the market rather than to rely upon government subsidies.⁹² The commercial media are able to fulfill their fourth estate function only because of their fiscal independence. Indeed, as Ed Baker points out, high-quality investigative journalism is an expensive enterprise. To engage in that activity, commercial firms must likely earn supranormal profits (and must have a continuing commitment to investing those profits in high-quality journalism).⁹³ So while we do not want to create a system of free expression so dominated by media conglomerates that other voices have no effective outlet,⁹⁴ nor do we want to diminish media firms' market sustenance to such an extent that they will be unable effectively to serve their fourth estate role.

As Baker points out, the Internet threatens to erode financial support for quality journalism in two principal respects. First, relatively expensive, high-quality journalism may lose out in economic competition to Internet cheap speech.⁹⁵ Digital technology and the Internet drastically reduce the cost of creating and distributing many types of content, but not all content.⁹⁶ In particular, digital technology does little to reduce the investment of labor and skill required to engage in sustained investigative journalism and produce well-edited, thoroughly fact-checked product.⁹⁷ Nor does it enable the commercial press to capture a greater share of the social value of quality journalism, which, because of its vital fourth estate function, redounds to the benefit even of those who never pay to receive it.⁹⁸ To the extent cost reductions enable nonmarket speakers, such as bloggers, to make their voices heard, our First Amendment goal of expressive diversity is well served. But the cost reductions can affect competition among different types of commercial content creations as well. Those types of content that can now be produced and distributed more cheaply will gain a competitive edge over those, such as quality journalism, that enjoy relatively lower cost reduction without a commensurate ability to capture more of the social value they generate. And, as Baker aptly points out:

As the cost of creating certain content (i.e., products) goes down, the incentive to spend on competing high cost categories typically also goes down. In competition with the now more cheaply produced content, the noncheapened (or less cheapened) categories are less valuable to their creators/owners, with the result that their production will typically be reduced or abandoned.⁹⁹

If the cost of creating fluff and diverting entertainment drops appreciably more than that of producing quality journalism, a prospect that appears likely, our public discourse may be significantly impoverished.

Second, the Internet has the potential dramatically to reduce advertising revenue to traditional media.¹⁰⁰ In particular, search engines appear to be siphoning off an increasing share of the advertising pie. As Baker notes, by the middle of 2005, the combined advertising revenue of Google and Yahoo! already rivaled that of the three major prime-time TV networks.¹⁰¹ This diversion of revenues is "not just a transfer from traditional media to new media but, to a significant degree, a transfer away from the support of journalists and other content creators to the support of distributors of online content."¹⁰²

A similar scenario may unfold with online news aggregators, like Google News. As discussed above, by linking to news stories from a variety of sources in response to search inquiries, Google News provides a tremendously valuable service.¹⁰³ However, Google News could well divert advertising revenue from the very newspapers and newspaper Web sites that underlie it. That threat does not arise from Google's copying and display of short snippets from newspaper articles per se. Few who would otherwise turn to the article itself would find the headline and first couple lines a satisfactory substitute. But those who read their news online may well go to the Google News aggregation Web site rather than the Web site of a single newspaper or news agency to find the articles of interest to them. Essentially, Google News might harm newspapers by commoditizing them and by appropriating reader loyalty from particular papers to itself. That effect might increase over time. Indeed, survey research reports that 66% of high school students in the US get news from the Google and Yahoo news aggregation sites, versus only 34% from local newspaper and 21% from national newspaper sites.¹⁰⁴

Google's automated search and display of headlines and article snippets is what enables it to provide its news aggregation service several orders of magnitude more efficiently than manual news clipping and summaries. In defense against copyright infringement claims, Google contends that headlines are not copyrightable, and that its copying and display of article leads are fair use.¹⁰⁵ Regardless of whether Google is correct, it is, again, the Google News service as a whole, not Google's minimal copying and display of online newspaper stories, that might harm the newspapers.

How, then, should a copyright law animated by First Amendment values respond? Part of copyright's purpose and its "engine of free expression" function is to encourage investment in producing expression. That purpose is ill-served by allowing a search engine aggregator to appropriate the value of newspapers' investment in the articles they post on their Web sites. But to hold a search engine firm liable for displaying short snippets of online material could well cripple the very tool that makes the Web so valuable: the ability to quickly find information of interest and import from among the billions of pages available.

Some observers, including the Pew Research Center's Project for Excellence in Journalism, suggest that online news aggregators should be required to pay for referencing newspaper leads and headlines.¹⁰⁶ This need not be accomplished by according newspapers a proprietary copyright in that expression; rather, the Copyright Act could be amended to accord news aggregators a statutory license, much like cable television operators enjoy a statutory license to retransmit broadcast programming in return for paying royalties set by a Copyright Office tribunal.

Such news aggregation statutory licensing proposals merit further exploration. Yet, all in all, I think First Amendment values are best furthered by holding Google News's replication of headlines and opening sentences to be fair use. Newspapers will have to respond by attempting to strengthen customer loyalty and providing more attractive content and features on their Web sites. Newspapers might even compete with Google by providing their own niche news aggregation services, perhaps powered by their editorial judgment, as an adjunct to their own stories and columns. And rather than cannibalize its service by usurping advertising revenues from the newspaper Web sites that Google News aggregates, Google might come to partner with newspapers in advertising and producing content. Indeed, Google has agreements to sell ads in the print editions of fifty major newspapers, including *The New York Times* and *The Washington Post*, while a consortium of seven newspaper chains has entered into a partnership "to share content, advertising and technology" with Yahoo.¹⁰⁷ These scenarios certainly have their minefields as well as opportunities; but at bottom, as in other areas, copyright should serve to promote the creation and dissemination of expression, not prop up traditional business models.

VI. New Media Giants

To accord search engine and content aggregators limited privileges to copy and display copyrighted content, whether as fair use or under a statutory license, serves a dual purpose. Most obviously, depriving copyright holders of a veto grounded in proprietary copyrights prevents them from holding up highly valuable services like Google News. But the absence of a copyright holder veto also helps to preserve competition in the market for search engines and content aggregators. Proprietary copyrights can be assigned or exclusively licensed; thus, to the extent that copyrights accord exclusive rights to aggregate and display copyrighted content (including the display of short segments of works), Google or another search engine giant might be able to procure exclusive licenses to aggregate and display seminal works. But if, in contrast, any search engine can aggregate and display content as a fair use or under a statutory license, that potential for a search engine giant to use exclusive licenses to consolidate market dominance is averted.¹⁰⁸

Depriving copyright holders of the right to exclude in order to maintain competition in ancillary markets is a time-honored practice. It extends back to the very first statutory license, the compulsory mechanical license, enacted as part of the Copyright Act of 1909.¹⁰⁹ The compulsory mechanical license gives anyone who wishes to distribute a recording of a musical composition that the composer has previously licensed for distribution the right to do so upon payment of the statutory fee to the composer (or in most cases, the music publisher who has acquired the mechanical rights). The compulsory license was enacted to break up the monopoly of the Aeolian Company, which through exclusive licenses with eighty-seven members of the Music Publishers Association, had cornered the right to cut piano rolls of the vast majority of copyrighted music of the day.¹¹⁰ The statutory two-cent royalty and compulsory license provision guaranteed that other piano roll recorders – and eventually record labels – could record songs free of exclusive licenses granted to any single company, thus guarding against future music copyright monopolies.

Guarding against market dominance by new media giants like Google by preventing them from acquiring exclusive rights to search, aggregate, and display content, has a First Amendment as well as market competition

dimension. Many new media markets, including those for search engines, content aggregators, and broad-based social networking and user-generated content sites, exhibit much the same centripetal force as traditional mass media. These media markets, both new and traditional, are characterized by high fixed costs and relatively low marginal costs.¹¹¹ The result is a declining average cost per unit of production, substantial economies of scale, and high barriers to entry.¹¹² For that reason, media, information, and telecommunications markets typically have built-in tendencies towards high levels of concentration and oligopoly.¹¹³

Demand-side network effects can exacerbate these tendencies. Amateur video creators want to post their work on the site with most viewers and viewers want to view the videos that everyone else is discussing. A search engine produces more useful results the more it is used – since frequent use enables the search engine provider to refine its search algorithm in response – and the more useful the results, the more people want to use the search engine.¹¹⁴ Similarly, social networking sites and peer-to-peer file-trading systems are also generally more valuable to any given user the more other users are on the network. Such network benefits can quickly tip the scales in favor of a single new media network as users stampede to the network that gives them the ability to communicate with the greatest number of other users.¹¹⁵

We already see the impact of these centralizing forces in various new media. Google dominates the search engine market.¹¹⁶ Google's YouTube dominates the market for user-generated videos.¹¹⁷ Facebook and MySpace dominate the social network market.¹¹⁸

These new media are built on a model that is very different than traditional mass media's hub and spokes. They are fundamentally platforms for user-generated speech and, in the case of search engines and content aggregators, user access to as broad a swath of expression as possible. But every filtering mechanism and usable platform comes with biases, and new media giants regularly institute constraints that narrow the range of expression. For example, YouTube limits the length of user-generated videos to ten minutes.¹¹⁹ It also prohibits sexually explicit content, graphic violence, "gross-out videos of accidents,"¹²⁰ and, until recently, "war footage if it's intended to shock or

disgust."¹²¹ Following its war footage guideline, YouTube has removed dozens of videos depicting combat in Iraq, including those protesting US military action.¹²² Finally, in defense against Viacom's billion dollar lawsuit claiming that YouTube facilitates massive copyright infringement, Google recently deployed digital filters that preemptively block many creative mashups, as well as users' exact copies of television show segments, from appearing on the site.¹²³

Google News also has certain biases. First, since it only aggregates "news," it must determine what constitutes a "news" site as opposed to opinion or fiction. Second, although Google News covers 4,500 news sites,¹²⁴ it does not encompass the entire universe of possible sites even in that category. In that vein, some right-wing sites have accused Google of terminating its listing of right-wing blogs and e-zines on the grounds (which the critics argue are specious) that Google received complaints of hate speech at those sites.¹²⁵ Third, an academic study, completed in 2005, found that of the articles that Google News featured, 40% were from nontraditional news sources and that this led Google News to be more biased towards one extreme or another on particular issues than was Yahoo News, of which only 24% of the results came from nontraditional news sources.¹²⁶ Perhaps that study led Google to cut back somewhat on its prominent display of nonmedia blogs and e-zines, which seems since to be the case. Finally, the Google News algorithm features news stories based on (1) the story's "freshness," and (2) the "global editorial interest" based on the number of original articles reporting on the story by news organizations worldwide.¹²⁷ That raises the possibility of a bandwagon effect, whereby news media's judgment of the most worthy stories will also be the top stories on Google News.

Biases and filters are not inherently untoward; indeed, some biases and filters are unavoidable if an information platform is to be usable. But they do suggest the desirability of a competitive new media market, offering alternative sources of information (and aggregation), much like in traditional media markets. If YouTube removes antiwar videos, our First Amendment interest in robust debate and expressive diversity is best served by the availability of such videos on other readily accessible, easily locatable, and commercially viable Web sites. Hence, to the extent copyright law can be tailored to enhance competition and expressive diversity by denying new media firms the possibility of acquiring exclusive rights to display, aggregate, and distribute entire swaths of copyrighted content, it should be so tailored.¹²⁸

Conclusion

Applying Jerome Barron's contextual approach to the First Amendment in today's digital arena counsels a continuing need for government actively to promote expressive diversity and widespread opportunities for effective speech. Yet under current conditions, instituting a right of access to the mass media is far from the only means to accomplish that end and might not be the best means. Among other items in the regulatory toolkit, copyright law can and should be harnessed to the task of Barron's contextual First Amendment vision. Copyright, which the Supreme Court has famously labeled "the engine of free expression,"¹²⁹ has long been understood to further First Amendment values. In the digital arena, this must entail tailoring copyright law to foster online peer communication and the new media that make such communication possible, while continuing to underwrite a vibrant, financially robust institutional press. Judicious application of the fair use doctrine and statutory licensing can also help to ensure that new media giants will not dominate public discourse like the old.

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Endnotes

- 1 Jerome A. Barron, *Access to the Press – A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641 (1967) [hereinafter Barron, *Access to the Press*].
- 2 *Id.* at 1641–2.
- 3 See *id.* at 1643.
- 4 *Id.* at 1656.
- 5 *Id.* at 1641.

- 6 In focusing on copyright, I do not mean to suggest that the issue of open versus proprietary communication networks (what is frequently referred to as the issue of network neutrality) is less significant for First Amendment policies. On network neutrality, see Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23 (2001); Susan P. Crawford, *Network Rules*, 70 LAW & CONTEMP. PROBS. 51 (2007); Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925 (2001); Tim Wu & Christopher S. Yoo, *Keeping the Internet Neutral?: Tim Wu and Christopher Yoo Debate*, 59 FED. COMM. L.J. 575 (2007).
- 7 Frederick Schauer has argued, for example, that (1) a government-enforced right of access would abridge the free speech rights of press owners, (2) unorthodox viewpoints can find expression in niche newspapers like the *Daily Worker*, and (3) putting aside the limited availability of broadcast licenses, media concentration stems from the social fact that most audiences prefer to read mainstream newspapers rather than unorthodox, niche ones. See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 126-28 (Cambridge Univ. Press 1982). I think that Schauer's argument gives too little weight to how the law shapes media markets and to the importance for democratic governance of government facilitation of robust debate among a wide variety of antagonistic sources. Indeed, the Supreme Court has rightly identified expressive diversity as a "basic tenet of national communications policy" because "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Turner Broad. Sys., Inc., v. FCC*, 512 US 622, 663-64 (1994) (quoting *United States v. Midwest Video Corp.*, 406 US 649, 668 n.27 (1972) (plurality opinion)). My aim in this Article, however, is not to defend Barron's call for a First Amendment right of access per se, but to assess how his general vision of an egalitarian First Amendment might apply in the digital arena.
- 8 See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 3-5 (Random House 1970).
- 9 See *Harper & Row, Publishers, Inc., v. Nation Enters.*, 471 US 539, 558 (1985).
- 10 See Barron, *Access to the Press*, *supra* note 1, at 1653.
- 11 *Id.* at 1656.
- 12 For an illuminating, skeptical account of whether the Internet offers individual speakers more opportunities, with explicit reference to Barron's article, see Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. (forthcoming Sept. 2008) (manuscript at 3-6, on file with the Cornell Law Review).
- 13 See Yochai Benkler & Lawrence Lessig, *Net Gains: Will Technology Make CBS Unconstitutional?*, NEW REPUBLIC, Dec. 14, 1998, at 12, 14 (suggesting that an abundance of open networks and untrammelled peer communication will render

broadcast licensing and other media regulation an unconstitutional abridgement of freedom of speech); Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083, 1129-31 (1999) (arguing that the affordability and democracy of the Internet as an information- gathering and -disseminating tool removes any need for a right of expressive access by private individuals and entities to privately owned information); Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CAL. L. REV. 371, 382-83 (2006) (describing views of proponents of media deregulation, in contrast to opponents); Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1846-17 (1995) (predicting that the Internet will usher in an era of "cheap speech").

- 14 See, e.g., CASS R. SUNSTEIN, *REPUBLIC.COM* 16, 56-62 (Princeton Univ. Press 2001) [hereinafter SUNSTEIN, *REPUBLIC.COM*]; Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389, 1391-94 (2004).
- 15 See *infra* notes 74-79.
- 16 See Susan P. Crawford, *The Internet and the Project of Communications Law*, 55 UCLA L. REV. 359, 372-74 (2007) [hereinafter Crawford, *The Internet*] (describing telephone and cable companies' efforts to "monetize" their Internet access networks by removing nondiscrimination rules and providing favored transport to the applications and content they provide); Andrew Currah, *Hollywood, the Internet and the World: A Geography of Disruptive Innovation*, 14 INDUSTRY & INNOVATION 359, 360 (2007) (arguing that the major picture studios aim to use Digital Rights Management ("DRM") backed proprietary control over content "to transform the networked environment into a secure, predictable and 'well mannered' marketplace," one that conforms with the studios' traditional business model).
- 17 YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 2 (Yale Univ. Press 2006).
- 18 See, e.g., Barron, *Access to the Press*, *supra* note 1, at 1645-47; see also BENKLER, *supra* note 17, at 196-211 (reviewing three basic critiques of the media); W. RUSSELL NEUMAN, *THE FUTURE OF THE MASS AUDIENCE* 28-30 (Cambridge Univ. Press 1991) (summarizing the viewpoint of critical media theorists and other critics that commercial media trivializes political life).
- 19 See BENKLER, *supra* note 17, at 179-85, 212-33.
- 20 *Id.* at 179.
- 21 See *id.* at 179-80.
- 22 See *id.* at 212-13.
- 23 See *id.* at 216-17.

- 24 *Id.* at 168-69.
- 25 *See id.* at 55-56.
- 26 *See id.* at 159-60.
- 27 *See supra* notes 10-11 and accompanying text.
- 28 Barron, *Access to the Press*, *supra* note 1, at 1677-78.
- 29 *Id.* at 1678.
- 30 *See* BENKLER, *supra* note 17, at 9.
- 31 *See id.* at 256.
- 32 *See, e.g.,* Crawford, *The Internet*, *supra* note 16, at 388-89 (discussing the creative potential of online networked communication).
- 33 *See* BENKLER, *supra* note 17, at 272.
- 34 *Cf.* PIERRE LÉVY, *COLLECTIVE INTELLIGENCE: MANKIND'S EMERGING WORLD IN CYBERSPACE* 61-82 (Robert Bononno trans., Plenum Publ'g 1997) (touting the Internet's potential to engender new forms of community and democratic politics).
- 35 C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* (Cambridge Univ. Press 2007) [hereinafter BAKER, *MEDIA CONCENTRATION*].
- 36 *See* BENKLER, *supra* note 17, at 8-9, 161-69. *See generally* C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (Oxford Univ. Press 1989) (defending an individual "liberty" theory for freedom of speech, as opposed to a "marketplace of ideas" theory).
- 37 *See* BAKER, *MEDIA CONCENTRATION*, *supra* note 35, at 164.
- 38 *Id.* at 186.
- 39 *Id.* at 101.
- 40 *See id.* at 101-02.
- 41 *See id.*
- 42 *See id.* at 121-22.
- 43 *See supra* note 13 and accompanying text.
- 44 *See* BAKER, *MEDIA CONCENTRATION*, *supra* note 35, at 107-08.
- 45 *Id.* at 197; *see also* Timothy Wu, *Application-Centered Internet Analysis*, 85 VA. L. REV. 1163, 1180 (1999) (concluding aptly that given the increasing cost of attracting users to one's website, "describing today's World Wide Web as a free and open forum of equal speech is a bit delusional").

- 46 See BAKER, *MEDIA CONCENTRATION*, *supra* note 35, at 197.
- 47 See *id.*
- 48 NEIL WEINSTOCK NETANEL, *COPYRIGHT'S PARADOX* 95-99 (Oxford Univ. Press 2008).
- 49 See STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 179-82 (Univ. of Chi. Press 1995) (discussing John Stuart Mills's thesis that a liberal state requires a robust exchange of view); CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 186-87 (Oxford Univ. Press 1997) (contending that liberal democracy requires a realm of discursive exchange in which citizens can test their preferences and produce better collective decisions).
- 50 See Maxwell McCombs et al., *Issues in the News and the Public Agenda: The Agenda-Setting Tradition*, in *PUBLIC OPINION AND THE COMMUNICATION OF CONSENT* 281, 292 (Theodore L. Glasser & Charles T. Salmon eds., Guilford Press 1995) (noting that given competition among issues for saliency among the public, "the public agenda typically consists of no more than five to seven issues").
- 51 See DAVID L. PROTESS ET AL., *THE JOURNALISM OF OUTRAGE: INVESTIGATIVE REPORTING AND AGENDA BUILDING IN AMERICA* 244-19 (Guilford Press 1991) (noting, on the basis of detailed case studies of investigative reporting, that government officials tend to respond to investigative reporters and media exposés before interest groups or the public at large take up the issues, thus treating the press as if it were the public).
- 52 In particular, op-ed pages presenting a wide spectrum of opinions penned by regular columnists became an established feature of most newspapers in the years following Barron's call for a right of access to the press. *The New York Times* seems to have initiated the practice in 1970. ERIC ALTERMAN, *SOUND AND FURY: THE MAKING OF THE PUNDITOCRACY* 131 (Cornell Univ. Press 1999). The use of op-ed columns might have been further spurred in response to litigation, culminating in the Supreme Court's ruling in *Miami Herald Publishing Co., v. Tornillo*, 418 US 241, 242-13, 258 (1974). In that widely discussed case, Jerome Barron unsuccessfully defended a political candidate's right to reply to newspaper criticism under state law in the face of the newspaper's argument that the requirement that it publish the reply abridged its freedom of speech. See Jerome A. Barron, *Access to the Media – A Contemporary Appraisal*, 35 *HOFSTRA L. REV.* 937, 942 (2007) (noting "soul-searching and self-examination" among the press, leading to newspapers' appointments of ombudsmen and "the emergence of op-ed pages in many of the country's leading dailies," following the Supreme Court's decision in *Tornillo*).
- 53 See NETANEL, *supra* note 48, at 98.
- 54 See Lada Adamic & Natalie Glance, *The Political Blogosphere and the 2004 US Election: Divided They Blog* 10-11 (2005), available at <http://www.blogpulse.com/papers/2005/AdamicGlanceBlogWWW.pdf> (studying blog linking patterns during the 2004 election campaign); PROJECT FOR EXCELLENCE IN JOURNALISM, *THE STATE OF THE NEWS MEDIA 2006: AN ANNUAL REPORT ON AMERICAN JOURNALISM, A DAY IN THE LIFE OF*

THE MEDIA: BLOGS (2006), http://www.stateofthenewsmedia.com/2006/printable_daymedia_blogs.asp (studying blog content generally).

- 55 Adamic & Glance, *supra* note 54, at 8 (finding that only fifteen percent of conservative and liberal bloggers' links are to blogs across the political spectrum). For a discussion of the problem of excessive insularity in the context of the Internet, see ANDREW L. SHAPIRO, *THE CONTROL REVOLUTION, HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW* 105-11 (PublicAffairs 1999), and SUNSTEIN, *REPUBLIC.COM*, *supra* note 14, at 54-73.
- 56 See Daniel W. Drezner & Henry Farrell, *The Power and Politics of Blogs* 4 (2004), available at <http://www.danieldrezner.com/research/blogpaperfinal.pdf>.
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- 58 See PRINCETON SURVEY RESEARCH ASSOCS. INT'L, *LEAP OF FAITH: USING THE INTERNET DESPITE THE DANGERS, RESULTS OF A NATIONAL SURVEY OF INTERNET USERS FOR CONSUMER REPORTS WEBWATCH* 23, 26 (2005), available at <http://www.consumerwebwatch.org/pdfs/princeton.pdf>.
- 59 For a more detailed account of copyright's speech burdens, see NETANEL, *supra* note 48, at 109-53.
- 60 See BENKLER, *supra* note 17, at 10-11, 180.
- 61 See Peter S. Menell, *Knowledge Accessibility and Preservation Policy for the Digital Age*, 44 HOUS. L. REV. 1013, 1019-0 (2007) (tracing efforts to preserve, catalogue, and provide access to knowledge to Ptolemaic Egypt).
- 62 See BENJAMIN M. COMPAINE & DOUGLAS GOMERY, *WHO OWNS THE MEDIA?: COMPETITION AND CONCENTRATION IN THE MASS MEDIA INDUSTRY* 326-27, 375-76, 378-80 (3d ed., Lawrence Erlbaum Assoc. 2000) (discussing record labels and motion picture studios); Currah, *supra* note 16, at 365 (noting that motion picture studios resist Internet distribution because it threatens their sunk cost and core competency in the distribution of physical media).
- 63 See Barron, *Access to the Press*, *supra* note 1, at 1641-12, 1647.
- 64 Google News, <http://news.google.com> (last visited Mar. 30, 2008).

- 65 *Id.*
- 66 See *id.*
- 67 For further discussion on these biases, see *infra* Part IV.
- 68 For example, Google News often cites to blogs and online media such as Slashdot.org, Monsters.com, Critics.com, and Huffingtonpost.com. See Google News, <http://news.google.com> (last visited Mar. 30, 2008).
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- 77 L.A. Times v. Free Republic, No. CV 98-7840-MMM, 1999 WL 33644483, at *1 (C.D. Cal. Nov. 8, 1999), *enforced*, 2000 WL 1863566, at *1 (C.D. Cal. Nov. 16, 2000) (entering permanent injunction).
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- 79 See, e.g., Complaint, MPAA v. ReplayTV, No. 01-09801 (C.D. Cal. Nov. 14, 2001).
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- 87 *Id.* (quoting UBS Warburg media analyst Aryeh Bourkoff).
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- 93 See BAKER, *MEDIA CONCENTRATION*, *supra* note 35, at 28-37.
- 94 Moreover, Baker convincingly demonstrates that conglomerates are less likely to reinvest profits in high quality journalism than are smaller journalism-dedicated enterprises. See *id.* at 35-36.
- 95 *Id.* at 119.
- 96 Goodman, *supra* note 14, at 1439-40.
- 97 See BAKER, *MEDIA CONCENTRATION*, *supra* note 35, at 115; Goodman, *supra* note 14, at 1442.
- 98 See BAKER, *MEDIA CONCENTRATION*, *supra* note 35, at 116; Goodman, *supra* note 14, at 1415.
- 99 BAKER, *MEDIA CONCENTRATION*, *supra* note 35, at 119; cf. Crawford, *The Internet*, *supra* note 16, at 367-69 (discussing audience migration from television and print media to the Internet).
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Restricting Fair Use to Save the News: A Proposed Change in Copyright Law to Bring More Profit to News Reporting

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This article deals with the current state of the news industry and the rapidly declining number of national newspapers. It examines the present condition of the media, and the economic and public policies behind protecting news. The article then discusses the current means of protecting information, through copyright and misappropriation law, before proposing a change in the Copyright Act to better allow the news industry to reap profits from top-caliber news reporting.

I. Introduction

Thirty-five years ago the news was different. Back then, newspapers earned their reputations and readership through quality journalism.¹ Readers chose which paper to read based on its reputation for top news reporting and its history of uncovering big stories. Reporters like Woodward and Bernstein could spend

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months putting facts together building a story that would captivate the country and put the *Washington Post* in the hands of millions for years to come. Things are different now.

Today, if the *Washington Post* uncovered a monumental story and published it on its front page, readership would not change. The story would be on every major news web site in minutes. All the twenty-four hour news stations would be reporting on the story within the hour. Even though the other media companies would give the *Post* credit for the story, the advertising revenue would not change hands. No consequential profit would fall upon the *Post* for the facts uncovered.

On the other side of the country, things are just as bad. *The LA Times* is currently laying off reporters, closing its foreign offices, and firing editors.² Media corporation investors are calling for only three national newspapers, and the industry is falling in line behind them.³ However, the future does not have to be so bleak.

With just a slight change to the current fair use doctrine, the *Washington Post* could recover its loyal readership and reap revenue once again for its top-caliber news reporting. For twenty-four hours, national news web sites could state the *Post's* headlines with a link to the *Post's* home page to distribute the information to readers. The same day a story breaks, evening news channels could pay to license the facts and allow the *Post* to recover more profit. The *LA Times* could reap revenue from its many reporters while newly self-employed freelance journalists could find financial success in doing what they do best – researching and writing stories.

This Article proposes a change to current copyright law to bring more profit to news reporting. The alteration centers around allowing journalists, and the companies they work for, to own 98% of the investigated and researched facts they uncover for twenty-four hours after the story is first published. Part II examines the current state of the media and the effect of the Internet on the news business. Part III summarizes the economic and public policies behind protecting information. Part IV analyzes current copyright law's protection of information while Part V does the same with misappropriation law. Part VI describes the proposed amendment to current copyright law, points out a few legal and practical obstacles to be resolved, and ultimately concludes that the benefits far outweigh the potential problems.

II. The Current State of the Media and the Internet's Effect on the News Business

A. Frontline's News War

In February 2007, PBS's flagship public affairs show *Frontline* aired a four part series examining the challenges facing mainstream news media and the news media's reaction.⁴ *Frontline* producer and correspondent Professor Lowell Bergman⁵ drew upon more than eighty interviews with key figures in the print, broadcast, and electronic media.⁶ The results of this series are staggering and demand that the law adapt to aid this "fourth branch of [US] government . . ."⁷

Jeff Fager, the Executive Producer of CBS's *60 Minutes*, stated that he is looking to the Internet for his future and that broadcast journalism is going to end up on the Internet.⁸ "[Y]ou don't see anybody between 20 and 30 getting their news from the evening news," Fager said, "you see them getting it online."⁹ He continued by stating that online advertising figures are up 30% to 40% each year.¹⁰

Eric Schmidt, the CEO of Google, stated that "[b]eing online is the future."¹¹ While many organizations have only talked about the Internet revolution, "the fact of the matter is the time is now."¹² "People who bet against the Internet, who think that somehow this change is just a generational shift, miss that it is a fundamental reorganizing of the power of the end user."¹³ Schmidt concluded his interview by stating that "the consumption for news is up, but the way in which people consume news has changed, and it's affected newspapers in a business sense pretty negatively."¹⁴

John Carroll, the former editor of the *Los Angeles Times*, estimates that "85 percent of the original reporting that gets done in America gets done by newspapers," and that "most of the other media that provide news to people are really recycling news that's gathered by newspapers."¹⁵ When describing the business model of the news industry, Carroll stated that the "typical newspaper makes a 20 percent operating margin. That's roughly double what the typical Fortune 500 company makes."¹⁶ The problem, however, is that profits from newspapers "will vanish over the next few years as the major papers lose advertising dollars to the Web almost as fast as they're losing readers."¹⁷

In concluding his investigatory look at the news industry, Professor Bergman interviewed Charles Bobrinskoy, Vice Chairman of Ariel Capital Management.¹⁸ According to Bobrinskoy,

the problem is [] that the people who are writing the *LA Times* [] want to be writing about international events. They want to be writing long-term pieces about why Bush went to war in Iraq. And we're saying – and the people at the Tribune are saying – there are other people writing those stories.¹⁹

He then said "there's a role for probably three national newspapers – *The Wall Street Journal*, *The New York Times*, and *USA Today*. Each has its own niche; all three are national newspapers. We don't think there's any demand for a fourth."²⁰

B. Other Media Statistics

The Pew Research Center for the People and the Press is an independent opinion research group that studies attitudes towards the press, politics, and public policy issues.²¹ In March and April 2004, Pew, in collaboration with the Project for Excellence in Journalism and the Committee of Concerned Journalists, conducted a survey of 547 national and local reporters, editors, and media executives.²² The results of the survey indicate that "[j]ournalists are unhappy with the way things are going in their profession."²³ Sixty-six percent of journalists at national media outlets believe that journalism is going in the wrong direction with increased bottom line pressure "seriously hurting" the quality of news coverage.²⁴ As a comparison, when the same survey was conducted in 1995, only 41% believed bottom-line pressure was hurting news coverage.²⁵ Finally, the same survey found that there is almost universal agreement among those who worry about growing financial pressure on the media to pay less attention to complex stories.²⁶

From April to May 2006, the Pew Research Center conducted its biennial news-consumption survey among 3204 adults.²⁷ The results pertaining to the Internet indicated that nearly one-in-three Americans get their news online three or more days per week.²⁸ The results also indicated a trend in online news readership broadening as well as increasing.²⁹ In 1996, less than 2% of Americans regularly got their news online; in 2000, the number was up to 23%;

and in 2004, just less than 30% of Americans read online news three or more days per week.³⁰ Further, the increase in online news readership is not concentrated in young people.³¹ In 2000, 30% of Americans between 30 and 34 years old regularly got news online.³² In 2006, the number was up to 47%.³³ For older Americans, in 2000 only 25% of people between the ages of 35 and 49 regularly got news online, and in 2006, the number was up to 37%.³⁴

The summary of Professor Bergman's "News War" piece and the Pew research indicates that the standard business model of news gathering is in, or has gone through, a state of flux. News profits are coming from different sources, and the industry is trying to adapt. Current investors realize that news gathering as it is presently understood will not create the profits media corporations have appreciated in the past;³⁵ however, the news and its importance to society has not changed. Fewer news agencies will result in control over the types of news stories that are investigated and the way in which they are reported.³⁶ In a recent paper for Harvard University's Joan Shorenstein Center on the Press, Politics, and Public Policy, Jill Carroll³⁷ said this about the future of news reporting:

As citizens in a democracy we have the privilege and obligation to shape our policies thoughtfully and conscientiously in a direction we, after informed debate, feel is in our national interest. As a world power we have a moral obligation to use our influence responsibly and thoughtfully. This can only happen if the electorate has enough information upon which to decide what policies most closely reflect their views and the direction in which they want the country to go. The media is an important part of making that happen. The quality of the information provided by the news media determines to a large extent the quality of the national debate and resulting policies. Having many sources of good quality, in-depth, insightful, well-informed [] reporting is essential to keeping the national debate vigorous and churning. This moral argument won't hold sway in many boardrooms, but the financial incentives to produce good quality [] news should. Hopefully financial decision makers will have the foresight to realize they are drastically undervaluing [] news coverage and have the wisdom to hang onto and invest in this valuable asset.³⁸

If what Carroll says is true, the media will be forced to trust the foresight of media investors to put the bottom-line aside and do what is best for the country. If that outcome seems unlikely, then the legislature must step in and correct the problem before it erodes the electorate's knowledge and our democracy in general.

III. The Economic and Public Policies behind Protecting Information

A. Law and Economics on Information in General

Judge Posner³⁹ explains the unique role of intellectual property with a simple example.⁴⁰ Someone who steals the Judge's car deprives him of valuable property that costs money to acquire.⁴¹ The thief pays nothing and free-rides on the purchase and investment of the car.⁴² Likewise, if someone copies the Judge's novel, software, or new molecular entity for the treatment of disease that was created through considerable expense including money, time, and risk, the thief has reduced the income of the work and destroyed the exclusive use of the property.⁴³ But the correlations are imperfect.⁴⁴ The car thief *deprives* the Judge of his property; the copier does not – the Judge would retain it and remain free to license or sell it.⁴⁵ While copying may reduce the income from the work, because of the loss in exclusive use, the reduction may not be great.⁴⁶ "It may even be zero, if for example the person who 'pirated' [the] software did so only for his personal use, and not to resell it, and if in addition he could not have afforded [its] price so that . . . not . . . even a single sale" would be lost.⁴⁷

From Judge Posner's simple example, one can begin to see how information, and the protection of it, can be much more difficult to explain than traditional property rights. Information itself is not tangible.⁴⁸ It can be put in a tangible form, but recording it in a medium does not change its essentially intangible character.⁴⁹ Some scholars describe information as "infinitely expandable and malleable,"⁵⁰ while others characterize it as when a person or persons or tradition ascribes a particular meaning to data.⁵¹ In addition, information is inherently "leaky."⁵² It may be shared readily by many people through virtually limitless forms and can be characterized as a public good.⁵³ A resource can be considered a public good when a current user does not lose anything as new

users are added.⁵⁴ In contrast, "a private good is a commodity which once consumed by one person, cannot be consumed by another."⁵⁵ In addition, information itself is "nonrivalrous."⁵⁶ Because one person's consumption diminishes another's, ordinary commodities are "rivalrous."⁵⁷ "However, if one person uses an idea, it remains undiminished for other users, so ideas are nonrivalrous."⁵⁸

The public good and nonrivalrous nature of intellectual property in general, and information in particular, is what makes it such an interesting subject for economists and lawyers to debate.⁵⁹ "Excluding non-paying consumers from access to public goods by means of a legal apparatus is extremely costly" and difficult.⁶⁰ Additionally, with respect to acts of speech,⁶¹ constitutional guarantees of full freedom maximize its value, promote vigorous competition, stimulate innovation, and disseminate ideas.⁶² Conversely, free-riding on information that has taken expense to generate will eliminate any incentives to produce the information in the first place.⁶³ If all consumers were to free-ride, information producing members of society would dedicate their efforts to other better paid activities, resulting in the loss of important cultural assets of considerable social value.⁶⁴ "Somewhere between the two extremes [] lies what economists term a "social optimum," and copyright law is the mechanism that is generally used to attempt to reach this point."⁶⁵

The US Constitution states "The Congress shall have Power To . . . 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."⁶⁶ The intent behind this grant of power, further discussed later in this article, is that the restrictions on writings, discoveries, and intellectual property in general actually increase their supply.⁶⁷ When inventors, artists, and authors receive property rights in their creations, the law induces the development and exercise of their talent and avoids the underproduction of useful ideas and original forms of expression.⁶⁸ "Unfortunately, this solution may foster economic inefficiency of a different sort" – monopolies.⁶⁹

While consumers regard substitute products as imperfect, the holder of the property right will confront a downward sloping demand curve for the right of access to his work. If he wishes to maximize his profits, he will continue to grant

access until the point where the marginal revenue earned from the access equals the marginal cost.⁷⁰ The property owner's technique will have two economic consequences: first, he will reap monopoly profits – money, that would have remained with consumers had the work been priced where the marginal cost of producing it equaled the demand for it, will now go to the property holder; and second, consumers who value the work at more than its marginal cost, but less than its monopoly price, will not buy it.⁷¹ Subsequently, a lawmaker who wishes to maximize efficiency must determine, with respect to each type of intellectual product, "the combination of entitlements that would result in economic gains that exceed by the maximum amount the attendant efficiency losses."⁷² The "gains" associated with legally granted property rights are the value to consumers of those intellectual products that would not have been generated were inventors, artists, and authors not granted those rights.⁷³ Stated more simply, "any property rights in excess of those required to stimulate creative activity are counterproductive."⁷⁴

B. Law and Economics and the News

On copyright law in particular, "[t]here is little reason to suspect that authors of law review articles, road maps, and detective stories will respond identically to a fixed set of economic stimuli. Thus the Copyright Act discriminates among broad classes of writings."⁷⁵ Furthermore, the Act discriminates on which works to grant property rights to at all.⁷⁶ While John Locke's theories of property state that rights can be acquired in something not already owned simply by virtue of the labor expended to gather or produce, current copyright law disagrees.⁷⁷ Gathering information can certainly require labor, and in the context of the news can be a very expensive, risky, and time consuming task – yet there is no copyright protection.

As discussed in the next section, current copyright law does not protect facts or hot news.⁷⁸ Second-comers can freely utilize the information in a news story with total disregard to the high initial costs.⁷⁹ While the original information gatherer incurs both the cost of gathering information plus the cost of reproduction, the second-comer only bears the cost of reproduction.⁸⁰ "Consequently second comers can sell their own products incorporating the appropriated information at a lower price than that of the products offered by the original information provider."⁸¹ This example raises an important economic

point. It is necessary to distinguish between the delivery good used to consume the intellectual property, and the informational property itself. "[A] delivery good is not, in general, a public good, and hence it is easy to establish markets for delivery goods" as opposed to the information itself.

Within the context of the news business, thirty-five years ago hot news was consumed through the delivery goods of printed newspapers, radio, and television. While many people could consume one newspaper, or listen to a single radio or television broadcast, there were still great reproduction costs involved in creating the consumable good. Additionally, time was a big factor.⁸² While radio and television news broadcasts could be created fairly quickly, consumers would generally listen or watch the broadcasts at the same time each day. Subsequently, each individual broadcast company could choose when to release their story so as not to give competitors time to repeat the broadcast during peak hours. In the same way, newspapers would keep their hot news private until it was too late for competitors to write and print in their market until the next day.⁸³ While time zone changes posed additional hurdles to this scenario, as discussed later, the news media found a solution.

The largest difference between the description of the news business thirty-five years ago and the news business today is the twenty-four hour news services. In addition to reproduction time and expense being reduced for producing delivery goods, the way in which people consume news has changed. No longer will a headline on the *Washington Post* cause profits to rise that day. People will simply consume the news on their usual arbitrarily chosen homepage, or twenty-four hour news channel, because the *Post's* story will inevitably be rewritten and added to the competitor's feed in minutes. The reproduction costs and time for second-comers to repeat or copy information in a tangible product are beginning to approach zero.

In 1970, then Professor, now Supreme Court Justice, Stephen Breyer⁸⁴ wrote an article describing his opinion of the copyright legislation Congress was in the process of creating.⁸⁵ While overly antagonistic of any increases in copyright protection, he concluded that technological innovations were reducing the costs of copyright infringement and conceded that "[t]he copiers cost advantage is fairly large."⁸⁶ He went on to state that even without copyright protection, an

initial publisher still enjoys significant "lead time" advantages over copiers.⁸⁷ "By the time a copier chooses a book, prints it, and distributes it to retailers, he may be six to eight weeks behind, by which time the initial publisher will have provided retailers with substantial inventories."⁸⁸ While very few books are currently consumed electronically, technology is still moving forward. If consumers today did not mind reading a book electronically, it is conceivable that a first publisher's lead time could be as little as only a few hours within the present state of technology. Would this outcome change Justice Breyer's opinion on copyright protections?

IV. Current Copyright Law Protection of Information

A. History and Original Intent

The Copyright Clause of the US Constitution finds its roots in England with the Statute of Anne (enacted in 1710).⁸⁹ The goal of the statute was to encourage learning and ensure that copyright law would not be used to censor speech by granting authors, rather than printers, the monopoly on the reproduction of their works.⁹⁰ The framers of the Constitution "relied on this statute when drafting the Copyright Clause of our Constitution, which reads, 'The Congress shall have the Power . . . to promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings.'⁹¹ In 1790, "Congress directly transferred the principles from the Statute of Anne into the copyright law of the United States" by passing the first American federal copyright statute.⁹²

The judicial decisions concerning the first federal copyright laws focused on labor invested in the work.⁹³ The types of work at issue in early copyright disputes were most often maps, school primers, calendars, and law books.⁹⁴ "No matter how banal the subject matter, if the author's work resulted from original efforts, rather than from copying preexisting sources," the author would receive copyright.⁹⁵ In an article about early American copyright law, Professor Jane Ginsburg⁹⁶ lists the subject matter of the first few thousand copyright deposits and claims as:

540 newspapers (157 newspapers for 1790-92, 383 for 1798-99), 441 titles in Political Science (207 for 1790-92, 234 for 1798-99), 302 titles in

History (117 for 1790-92, 185 for 1798-99), 270 titles in Social Science (125 for 1790-92, 145 for 1798-99), and 61 Fourth of July orations for 1798-99. By contrast, the publication of novels appears fairly modest: 43 titles for 1790-92 and 119 for 1798-99.⁹⁷

The ability to copyright maps illustrates a unique aspect of early copyright law because maps are much less likely to be granted copyright today.⁹⁸ Given the historical context, a likely congressional objective in the first Copyright Act must have been to reward the labors of those who chartered unexplored territories.⁹⁹ But explorative labor was not a prerequisite for copyright, since the first Congress also extended the protection to charts and books which typically borrowed information from other sources, or demonstrates artistic labor.¹⁰⁰ For the first Copyright Act then, legislative intent was as concerned with "extending copyright protection to fact works as to works of fancy."¹⁰¹

The original scope of copyright was not as broad as it is today. First, the original Copyright Act granted authors copyright protection for fourteen years, with the possibility of renewal for another fourteen years.¹⁰² In contrast, current copyright law allows protection for the life of the author plus seventy years after the author's death.¹⁰³ Second, competing and derivative works as we know them today did not exist. Early copyright law might forbid a second-comer's copying from the first publication, but the law did nothing to stop publishing of a competing work if the competitor acquired the same information from primary sources.¹⁰⁴ Copyright thus protected the first author from thieves but not against those whose investments into primary sources produced a higher net yield.¹⁰⁵

"By the mid to late nineteenth century, however, courts and commentators began to offer a different characterization of authorship, and a correspondingly different rationale for copyright coverage."¹⁰⁶ In two decisions, *The Trademark Cases*¹⁰⁷ and *Burrows-Giles Lithographic Co., v. Sarony*,¹⁰⁸ the Supreme Court clarified the Constitution's terms of "authors" and "writings."¹⁰⁹ "Authors" was defined as "he to whom anything owes its origin,"¹¹⁰ and "writings" was defined as requiring originality.¹¹¹ Further cases "viewed authorship as an emanation of the author's personality... protectable because it incorporates . . . its creator's unique individuality."¹¹² Originality, the "*sine qua non* of copyright,"¹¹³ thus changed from centering on the independence of the author's labors to the distinctiveness of the work's conception.¹¹⁴ "Subjective judgment, rather than

diligent collection, would be the locus of the work's originality."¹¹⁵ It would be misleading, however, to say that the labor oriented approach had been abandoned. The two views continued to coexist, and at times even worked together into the early twentieth century.¹¹⁶

By the late 1960s, Congress began deliberations over proposed legislative changes to the US Copyright Act.¹¹⁷ There was extensive debate over how comprehensive the changes should be, especially on the subject of increased protection and duration.¹¹⁸ The debates lasted for close to a decade before the 1976 Act was passed, which controls copyright law today.

As a proponent of reducing copyright protection, Justice Stephen Breyer argued in a paper published in the Harvard Law Review that the case for expanding copyright law had not been made.¹¹⁹ The paper described his research and analysis, ultimately concluding that the data did not support a benefit of copyright in books.¹²⁰ He suggested that to "abolish protection would not produce a very large or very harmful decline in . . . book production."¹²¹ Instead, he stated that abolition of copyright "should benefit some readers by producing lower prices, eliminating the cost . . . to copy, and increasing the circulation of the vast majority of books that would continue to be produced."¹²² Despite Professor Breyer's opinion, however, Congress passed the Copyright Act of 1976, modifying the previous 1909 version slightly.¹²³ The modifications included: (1) an increase in the length of copyright protection; (2) removal of the copyright renewal requirements;¹²⁴ (3) codification of the previous common law concept that ideas are not copyrightable;¹²⁵ and (4) introduction of a doctrine known as "fair use," which explicitly allowed the use of copyrighted works for "news reporting."¹²⁶

This fourth change of the 1976 Act dates back to the years of the *Trademark Cases*, in the mid-nineteenth century, when federal courts began to hold that conduct seemingly prohibited by the copyright statute did not give rise to liability.¹²⁷ In the early cases, whether the defendant's conduct constituted a "fair use" was not always differentiated from whether there was copyright infringement; however, by the mid-twentieth century, courts began to more consistently hold that "fair use" was a distinct affirmative defense to acts of

copyright infringement.¹²⁸ After the doctrine was established in US Copyright Code, federal courts continued to mold the law without guidance from the Supreme Court until the mid 1980s.¹²⁹

B. Current Copyright Law

Current copyright law allows original works of authorship to receive protection immediately upon their creation.¹³⁰ The basic requirements for protection are that the work must fall within the scope of copyright law, must be original, and must be fixed in a tangible medium of expression.¹³¹ Compared to patent law, the requirements are not nearly as stringent, and "the duration of copyright protection is much longer than the term of patent protection."¹³² The current objectives of copyright are: (1) to advance social utility by increasing the supply of intellectual products and facilitating their distribution; (2) to enforce the author's natural rights to recovering the fruits of his labor; (3) to protect the author's interest in portraying the way his creations are presented to the world; and (4) to align the law with society's conceptions of decent behavior.¹³³

Beyond these inherent objectives and explicit requirements is where copyright law has been molded by the opinions of federal courts. In *Feist Publications, Inc., v. Rural Telephone Service Co., Inc.*, the Supreme Court reviewed the history of copyright case law to better understand the intentions behind whether or not a phone book's alphabetical listings were copyrightable.¹³⁴ The Court, referencing *The Trademark Cases* and *Burrows-Giles* discussed earlier, stated the "[W]ritings which are to be protected are *the fruits of intellectual labor*, embodied in the form of books, prints, engravings, and the like."¹³⁵ The Court went on to conclude from these cases that "one who discovers a fact is not its 'maker' or 'originator.'¹³⁶

Oddly, the most recent Supreme Court case cited in the *Feist* opinion was *Harper & Row, Publishers, Inc., v. Nation Enterprises*,¹³⁷ in which the Court granted a biography publisher the right to recover from a magazine publisher who had printed a 300-word excerpt of facts, from the biography of President Ford, before it was released.¹³⁸ The *Harper* opinion included statements about how the monopoly created by copyright "applies equally to works of fiction and nonfiction," and how the monopoly rights granted to the biography served their

"intended purpose of inducing the creation of new material of potential historical value."¹³⁹ While the opinion also included statements that facts are not copyrightable,¹⁴⁰ it concluded by stating "copyright assures those who write and publish factual narratives . . . that they may at least enjoy the right to market the original expression contained therein as just compensation for their investment."¹⁴¹

The contradictorily applied precedent in *Feist* has caused some observers to state that "[t]here is room for argument that the *Feist* court misapplied prior Supreme Court interpretations of the Patent-Copyright Clause."¹⁴² Specifically, *The Trademark Cases*' "intellectual labor" requirement for a "Writing" might be satisfied by the "identification and assembly of information into a compilation, without regard to the subjectivity of the selection or arrangement."¹⁴³ Additionally, in *Burrows-Giles*, the "author" to whom a work "owes its origin," could be the maker of a compilation of information, without regard to creativity.¹⁴⁴ Overall, however, neither of the late nineteenth century decisions address the scope of copyright protection, and thus should not be used to support a constitutional limitation of a copyright claim.¹⁴⁵

In addition to the older copyright cases, in *Harper* and *Feist* the Supreme Court cited the provision of the new 1976 Copyright Act that provided that ideas are not copyrightable.¹⁴⁶ This provision explicitly states that "[i]n no case does copyright protection for an original work of authorship extend to any idea . . . or discovery, regardless of the form in which it is described, illustrated, or embodied."¹⁴⁷ While this focus on the Act is more reasonable than the Court relying on ambiguous case law from the nineteenth century, it remains unclear why if Congress intended that facts not be copyrighted, they simply would not say "in no case does copyright protection extend to facts." The legislative history behind the new section included in the 1976 Act only adds to the confusion, because it states that the purpose of the section "is to restate, in the context of the new single Federal system of copyright, that the basic dichotomy between expression and idea," and to leave it "unchanged."¹⁴⁸ Thus, in order to determine the legislative intent, one may look at the federal common law before 1976 as it applies to ideas, expressions, and facts.

In 1950, the Seventh Circuit held in *Toksvig v. Bruce Publishing Co.*, that an author's research into the life of Hans Christian Anderson, from almost

exclusively Danish primary sources over the course of three years, should be copyrightable.¹⁴⁹ Specifically, the court found infringement when a subsequent author spent less than a year researching English sources, including plaintiff's book, to write her own book about Anderson's life.¹⁵⁰ While the court's ruling could be justified on the explicit copying of twenty-four passages,¹⁵¹ the holding is much broader and clearly states that the plaintiff biographer had a protectable interest in her research.¹⁵²

In 1966, the Second Circuit rejected the Seventh Circuit's *Toksvig* holding in its *Rosemount Enterprises, Inc., v. Random House, Inc.*, opinion concerning the biography of Howard Hughes.¹⁵³ The Seventh Circuit had received criticism in its holding,¹⁵⁴ but in 1981, the Fifth Circuit additionally chose to follow the Second Circuit in *Miller v. Universal City Studios, Inc.*, when deciding a case on a television film based on a non-fictional book about a kidnapping.¹⁵⁵ The Fifth Circuit stated that the "issue is not whether granting copyright protection to an author's research would be desirable or beneficial, but whether such protection is intended under the copyright law."¹⁵⁶ It is interesting that the Fifth Circuit would have made such a comment, however, because they were working under the 1976 Copyright Act, and even cited its legislative history¹⁵⁷ concerning the provision on the copyright of ideas being based on previous federal court case law which was split on this issue.¹⁵⁸

On the subject of news reporting specifically, the fair use doctrine of the 1976 Copyright Act may pose an explicit limitation on any recovery for infringement. Section 107 states "the fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, *news reporting*, teaching . . . or research, is *not* an infringement of copyright."¹⁵⁹ Because of this provision, even if a court was to hold and find that the facts of a news story are copyrightable, if a subsequent news writer used them it would most likely be considered a "fair use."

To determine whether a use is fair, the Act lists four factors for courts to consider: "(1) the purpose and character of the use, including whether such use is of a commercial nature, or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used . . . ; and (4) the effect of the use on the potential market"¹⁶⁰ When considering

whether a subsequent non-researched, copied news story is a "fair use," courts may find that the reasons listed for determining fair use actually cut against a subsequent reporter. If, for example, the second user found the story online and posted a rewritten form on a large commercial site, the use would be commercial to attract web surfers to the web page thereby increasing traffic and advertising revenue, would steal the facts or "heart" of the news story, would take the whole news story as opposed to just a headline, and would decrease the web traffic on the original author's web page. While these arguments seem probable, no plaintiff has ever brought a case for infringement of its news story, and the explicit listing in the Act that "news reporting" is allowed undercuts the argument greatly.¹⁶¹ In cases in which liability has been shrunk or limited by the fair use doctrine to produce a seemingly unfair result, some commentators have called for a "reverse fair use doctrine," where liability would be expanded when the rationale for copyright protection is confounded by a loophole in the copyright statute.¹⁶²

In review, the more recent *NBA v. Motorola, Inc.*, Second Circuit opinion best summarizes the current national judicial opinion over the copyright of facts: "[t]he 'fact/expression dichotomy' is a bedrock principle of copyright law that 'limits severely the scope of protection in fact-based works . . . [n]o author may copyright facts or ideas.'"¹⁶³ For this reason, in order to grant news reporters copyright in their researched stories for twenty-four hours, Congress would have to amend the Copyright Act. The most logical way to accomplish such a change would be to simply add a line in the fair use doctrine to clarify that the idea and expression provisions do not apply to hot news facts, and to then note that hot news stories would not be subject to the fair use provision for twenty-four hours after they are first published. Despite the previous case law concerning facts and congressional intent, "the Constitution as we know authorizes Congress to create copyright, but leaves the details to Congress,"¹⁶⁴ "whatever the Supreme Court's prior interpretations of the Patent-Copyright Clause, Congress may nonetheless supply the content of that clause¹⁶⁵ and change it as they see fit.

V. Misappropriation and Other State Law Protection of Information

A. A Brief History of Misappropriation

In addition to the potential protection of information offered by federal copyright law, state laws may offer protection as well. The most applicable doctrine is the tort of misappropriation initially created by the Supreme Court in the now extinct federal common law.¹⁶⁶ The first case to recognize misappropriation was *International News Service (INS) v. Associated Press*.¹⁶⁷

The *INS* dispute arose during World War I between two competitors who gathered and sold news to newspapers: the Associated Press (AP) and the International News Service (INS).¹⁶⁸ During the early part of the war, William Randolph Hearst, who owned INS, sympathized with the Germans.¹⁶⁹ Because of Hearst's sympathies, British censors prevented INS correspondents in England from sending dispatches of the war to America.¹⁷⁰ INS was subsequently forced to copy AP's dispatches when supplying its subscribers with news.¹⁷¹ While, for the most part, INS employees obtained the news in a lawful manner (generally by purchasing early editions of AP newspapers),¹⁷² there were instances of reporters clandestinely reading AP bulletin boards and copying AP dispatches verbatim.¹⁷³

There were no elements of copyright infringement raised in AP's suit against INS, however, in Justice Pitney's majority opinion in favor of AP, he stated that there was a "quasi-property" interest in the news, created by the "expenditure of labor, skill, and money," which gave AP the right to prevent a competitor from using it.¹⁷⁴ He reasoned that a "purchaser of a single newspaper [could] spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with [AP's] right to make merchandise of it . . . but to transmit that news for commercial use, in competition . . . is a very different matter."¹⁷⁵ He then stated that INS was "endeavoring to reap where it has not sown . . . and a court of equity ought not to hesitate long in characterizing it as unfair competition in business."¹⁷⁶

The Supreme Court sustained the injunction of the lower court and allowed AP to protect its investment by preventing INS from copying news items for an

undefined period, until which AP could realize its investment and all commercial value in the news had "passed away."¹⁷⁷ The Court justified its recognition of the new misappropriation law on three distinct reasons: (1) a labor theory of property; (2) commercial immorality; and (3) the preservation of the incentive to invest in information gathering.¹⁷⁸ The first justification of misappropriation has a direct link to the natural rights "sweat of the brow" rationalization for intellectual property law in general.¹⁷⁹ Despite the intangible nature of news, it still takes time and labor to gather and thus has value. The second justification, outlining the commercially immoral aspect of INS's tactics, "functions as a form of unfair competition law punishing the commercially immoral conduct of competitors."¹⁸⁰ Finally, the preservation of incentive to invest justification of misappropriation law, exemplifies the Court's value in news and the risks of *not* "plac[ing] the daily events of the world at the breakfast table of [] millions."¹⁸¹

No summary of the *INS* decision is complete without addressing the separate concurring opinion of Justice Holmes and the dissent of Justice Brandeis. While agreeing with the majority's decision, Holmes rejected a broad interpretation of *INS*-style misappropriation by the courts.¹⁸² He stated that the only ground of complaint that should be recognized, without legislation, is the implied misstatement of *INS* in not citing that its information came from AP.¹⁸³ He concluded "that within the limits recognized by the decision of the Court the defendant [*INS*] should be enjoined from publishing news obtained from the Associated Press for-hours after publication by the plaintiff unless it gives express credit to the Associated Press."¹⁸⁴

As for Justice Brandeis' dissent, while in agreement with the majority that *INS* had acted unjustly towards AP, he simply disagreed that judicial creation of a property right in news was an appropriate response.¹⁸⁵ Although the common law had in the past created new rules to deal with new situations, Justice Brandeis thought that this situation so severely affected the public interest that a judicial approach was dangerous.¹⁸⁶ He "charged that the majority pinion ignored the public's interest in the dissemination of news,"¹⁸⁷ and that in cases like this, laws affecting new property interests must be weighed by public policy and defined by the legislature in the patent and copyright statutes.¹⁸⁸

B. Contemporary Applications of Misappropriation Law

Despite the extinguishment of federal misappropriation common law by the *Erie Doctrine* twenty years after it was created, the doctrine of misappropriation "has blossomed in state courts."¹⁸⁹ In *Twentieth Century Sporting Club v. Transradio Press Service*,¹⁹⁰ the Supreme Court of New York cited the doctrine of misappropriation to prevent an unlicensed eavesdropper from restating the commentary of a licensed ringside announcer.¹⁹¹ In *McCord Co., v. L.A. Plotnick*,¹⁹² the California Second District Court of Appeal utilized the misappropriation doctrine to halt publication of bank credit rates, copied from a trade newspaper.¹⁹³ In *Associated Press v. KVOs, Inc.*,¹⁹⁴ the Ninth Circuit, acting in diversity jurisdiction, found a radio station liable for lifting breaking news accounts in newspapers.¹⁹⁵

The doctrine essentially remained as it was created in *AP v. INS* until the 1964 Supreme Court *Sears-Compco*¹⁹⁶ decisions, in which, the Supreme Court indicated that state law prohibitions against copying could conflict with the constitutional and congressional intent of free access to works left unprotected by federal law.¹⁹⁷ In each case, the Court reversed a decision under state unfair competition laws that prohibited the copying of unpatentable light fixtures.¹⁹⁸ While the Court's opinion explicitly outlawed states from providing patent-like protection to unpatentable items, it stated that states were still allowed to prevent consumer deceit by imposing liability upon those who deceive the public by palming off their copies as originals.¹⁹⁹ Applied broadly, the language in *Sears-Compco* strongly suggested that protection of intellectual property under state law would be preempted whenever it conflicted, even indirectly, with the objectives of federal copyright and patent laws.²⁰⁰ Applied more narrowly to copyright law, the Court seemed to be saying that state misappropriation claims would only be allowed where competitors had not cited their source of information.

Less than ten years later, the Court addressed state copyright claims directly in *Goldstein v. California*,²⁰¹ in which, "the Court held that each individual state could have unique interests in protecting certain intellectual property under state copyright laws, as long as those state laws did not interfere with federal copyright laws."²⁰² "The Court distinguished the *Sears-Compco* line of cases on the grounds

that those cases dealt with state patent protection in an area Congress had specifically decided not to regulate."²⁰³ The next year, in *Kewanee Oil Co., v. Bicron Corp.*,²⁰⁴ the Court clarified its holding in *Goldstein* and explicitly stated "that the states were free to make trade secret legislation in any area that Congress had chosen not to regulate."²⁰⁵ It concluded that "[t]he only limitation on the States is that in regulating the area of patents and copyrights they do not conflict with the operation of the laws in this area passed by Congress."²⁰⁶ Subsequently, "*Goldstein* and *Kewanee* permit state regulation of intellectual property unless it conflicts with the objectives of federal law."²⁰⁷

Two years after *Kewanee*, Congress passed the 1976 Copyright Act which addressed the issue of state law preemption directly.²⁰⁸ Section 301 states "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by this title."²⁰⁹ The Act goes on to list four specific examples where preemption should not exclude state protection.²¹⁰ While the statute does not address the issue of preemption with respect to state misappropriation claims directly, the legislative history may elucidate congressional intent.

The House committee report concerning the proposed preemption section addition to the Copyright Act stated:

state law should have the flexibility to afford a remedy (under traditional principles of equity) against a consistent pattern of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting "hot" news, whether in the traditional mold of *International News Service v. Associated Press*, 248 US 215 (1918), or in the newer form of data updates from scientific, business, or financial data bases.²¹¹

While seemingly clear that the new preemption section would not apply to state misappropriation claims, this portion of the legislative history pertains to a version of the bill which specifically would have listed various "unpreempted" actions including misappropriation.²¹² The bill which actually passed deleted misappropriation as a state cause of action expressly saved from preemption.²¹³ Subsequently, the question remains whether Congress intended an INS-type state cause of action to be allowed, or if such a cause of action was specifically excluded.

C. Misappropriation Preemption after the Copyright Act of 1976

Section 301 of the Copyright Act requires preemption when a state regulation: (1) concerns a work of authorship that is fixed in a tangible medium of expression; (2) covers copyrightable subject matter as defined by the copyright statute; and (3) creates legal and equitable rights equivalent to those within the general scope of the Copyright Act.²¹⁴ Since the statute clearly outlines when preemption should occur, courts should be able to turn to the explicit language of the statute to determine whether a state law is preempted.²¹⁵

The first requirement, fixation in some tangible medium of expression, will almost always be satisfied by the inherent requirements of information dissemination.²¹⁶ The second condition, for a state law misappropriation claim to be preempted by federal law, would most likely be satisfied as well.²¹⁷ While academics have debated over this question at length,²¹⁸ misappropriation protection of information falls within the subject matter of copyright because works of authorship, which include ideas and facts, are mentioned as copyrightable subject matter in section 102(b).²¹⁹ "Lack of originality will cause the factual elements of an informational work to be uncopyrightable, but the informational product itself will still be considered copyright subject matter for preemption purposes."²²⁰ Interpreting the subject matter requirement differently would allow state law protection of unoriginal and uncopyrightable works.²²¹ Some courts have held that such a result would "nullify the preemption provision itself."²²²

The third provision, requiring misappropriation claims to create legal and equitable rights equivalent to those within the Copyright Act, is easily met as well.²²³ State claims explicitly bar competitors from unfair borrowing and provide monetary damages for misappropriated information.²²⁴ These remedies and rights are equivalent to those in section 106 of the copyright statute.²²⁵

Unfortunately, while this method of statutory interpretation concerning the survival of misappropriation from preemption seems obvious, courts have routinely found it to be inadequate and confusing.²²⁶ In response to the confusion, some courts have adopted the "extra element" test.²²⁷ Under this test, if "an 'extra element' is 'required instead of or in addition to the acts of reproduction, performance, distribution or display, in order to constitute a

state-created cause of action, then the right does not lie within the general scope of copyright and there is no preemption.¹²²⁸ A more recent Second Circuit decision cited this test and questioned in *dicta* "the extent to which a 'hot-news' misappropriation claim based on *INS* involves extra elements and is not the equivalent of exclusive rights under a copyright."²²⁹ In concluding that "some form of such a claim survives preemption,"²³⁰ the court improperly relied on the legislative intent and committee reports of the Copyright Act discussed earlier. Since the Supreme Court has not discussed this issue, and no court has addressed it directly in its holding, the answer is still unknown.

Two broader arguments regarding whether the Copyright Act preempts state misappropriation claims are (1) that the implicit policy of the Act reveals a federal strategy favoring free copying of information and (2) that the Patent-Copyright Clause of the Constitution implies a rejection of state authority to offer parallel protection.²³¹ With respect to the former argument, commentators have stated that by declaring facts outside the subject matter of copyright in section 102(b), Congress intended that facts are free to be copied, and that no court is to construe the federal copyright monopoly to inhibit that freedom.²³² The implication for state laws is that if Congress intends federal law to allow facts to be freely copied, state law cannot usurp the national policy.²³³

In summary, it seems clear that there is no standardized national policy of whether state laws concerning the misappropriation of facts are preempted by federal copyright laws. Additionally, with respect to national news specifically being misappropriated on the Internet, it is obvious that individual state misappropriation laws will not provide clear messages to large media corporations. There needs to be a uniform national statute controlling the usage of non-researched publicly available facts in second-comer news stories.

D. Other State Law Protection of Information

Other proposed state law remedies for the protection of information include the breach of an express or implied-in-fact contract. These remedies should withstand preemption but would likely pose additional problems. "A breach of contract claim must establish an agreement involving a *quid pro quo*, performance by the plaintiff of all conditions precedent, and breach of the contract by the defendant."²³⁴ Because these elements are different from the

elements of an infringement action, the contract action would not be seen as equivalent and should escape section 301 preemption.²³⁵ A contract claim could be filed in situations where authors required users to pay for the use of materials even though the facts and research were in the public domain.²³⁶ If users violated the express use of the materials, and thus the contract, users could be forced to pay penalties for the improper use or dissemination of materials.²³⁷ While this scenario seems promising, it is unclear how difficult it would be to track the millions of users on an Internet news web site, how information may be disseminated to competitors, and how to determine which state's laws would apply.²³⁸

VI. Restricting Fair Use to Save the News

A. The Proposed Change to Copyright Law

Justice Holmes's concurrence in *AP v. INS* states that a proper remedy for the AP against INS would be to enjoin INS "from publishing news obtained from the Associated Press for-hours after publication . . . the number of hours . . . to be settled by the District Court."²³⁹ Building on this idea, this Article proposes a change in current copyright law to allow reporters and the newspapers or companies they work for to find profit in "hot news" gathering. By giving reporters the rights to a very time-limited monopoly in their stories and investigative reporting, news agencies will find additional profits in news gathering and subsequently increase the amount of news gathering and reporting overall.²⁴⁰ "In general, the law should allow restrictions on ideas that increase their supply."²⁴¹

Since federal misappropriation common law (including the *AP. v. INS* decision) is now extinct,²⁴² and current state misappropriation law would be preempted if it were to overreach into federal copyright law,²⁴³ the only way to grant protection to news reporters would be an amendment to the current Copyright Act. The best place to make the change would be in Section 107, the fair use provision, because it already allows "fair use of a copyrighted work . . . for purposes such as . . . news reporting."²⁴⁴ The change could be subtle, only allowing the fair use provision of the Copyright Act to include news reporting twenty-four hours after its original publication, or the change could be major, including a whole new section of copyright law concerning news reporting.

Either way, the amended provision should include these key points: (1) the protection would not extend to traditional news headlines – to allow third parties the ability to advertise a competitors story and link to it;²⁴⁵ (2) the protection would only last for twenty-four hours – so that after a reporter has realized a profit in his story, the story could subsequently be reproduced freely to allow the dissemination of ideas; and (3) the reporter's rights in the story could not be used to restrict a purely nonprofit organization from posting the story.²⁴⁶ As with all laws, the enforcement and refinement of their meaning must come from the courts, with clear legislative intent from Congress as a guide. The legislative intent in this case would be clear in that Congress would be legislating to encourage news reporting by allowing reporters temporary rights in their stories, yet still allowing the dissemination of ideas by making the monopoly rights temporary and not comprehensive.

The difficulty in the details of the law would be particular verbiage to determine which reporter discovered what facts, and what constitutes first publishing for a grant of twenty-four hour rights. Because of this foreseeable problem, Congress and the courts may decide that the plaintiff has the burden of proving that the story was uncovered through their inimitable research, and that they published the story first. Additionally, to reduce the risk of increased litigation precluding publishers from publishing stories that might be borderline, the maximum amount of damages could be set at the cost of litigation plus the amount of profits the defendant gained from publishing the story during the time the plaintiff had monopoly rights to it.

As a result of these constraints, the only likely impact the law would have is to prevent the rewriting and dissemination of the type of large investigative stories that are published on average less than a dozen times per year. Additionally, with the requirement that the story be researched, one could not claim rights in a matter-of-fact story like a building fire or earthquake. However, if a reporter were to research a specific rescue operation associated with a large catastrophe that was not known to another similarly situated second reporter, the first reporter could gain temporary rights to the story.

To better understand the implications, the proposed change can be envisioned by comparing potential worlds of copyright-law-extremes on a scale.

One extreme would be to have a huge fair use doctrine. Free speech would be tremendous, and individuals, companies, and news agencies could report and say whatever they wanted without any consequences or potential copyright infringement lawsuits. Under this scenario very few news stories would be written due to a lack of incentive for reporters to write if their words could simply be taken verbatim without any remedy available. In contrast, the other extreme would be a world without a fair use doctrine. Free speech would be limited, and people would be required to have licenses to use any idea, quote, or even a single fact from another's work. There would be more than enough incentive for reporters to research and write stories, but ideas would not be disseminated due to high transaction costs. Neither one of these extremes exists today, nor are they being proposed. This article merely suggests a slight tip of the scale in the second direction. The change is necessary due to a lack of top notch investigative news stories in the market, and can be applied easily by lowering transaction costs, and the ease in information being transmitted quickly in today's high-tech world.

B. What Power Would Congress Use?

After the Supreme Court's landmark ruling in *Feist*, clarifying that under no circumstances may facts be copyrighted,²⁴⁷ Congress may have potential constitutional limitations in enacting an amendment to the Copyright Act as described. Subsequently a review of Congress's copyright power as well as additional sources of congressional power is necessary.

The Feist opinion's repeated invocation of constitutional constraints on copyright protection of information has been criticized for erecting "unnecessary if not insuperable barriers to alternative sources of protection for information."²⁴⁸ Commentators have argued that the "Supreme Court[s] review of these kinds of congressional findings [] should be extremely deferential,"²⁴⁹ however, the Court has proceeded differently. In the context of the Patent-Copyright clause, the Court had previously announced considerable deference to congressional definitions of the content and scope of the limited monopoly.²⁵⁰ In *Feist* though, the Supreme Court suggests that "the Constitution has become less 'permissive' as to Congress' authority to determine the content of its power."²⁵¹

The most recent decision concerning copyright law and congress's power may show the Court moving away from the dicta stated in *Feist*. In *Eldred v. Ashcroft*, the Supreme Court deferred to Congress's judgment in declaring that the Copyright Term Extension Act met the "limited times" requirement of the Copyright Clause.²⁵² While citing an earlier opinion, the Court held that "[i]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors . . . in order to give the public appropriate access to their work product."²⁵³ The Court went on to state that Congress must have a rational basis in exercising its authority,²⁵⁴ and that the preamble of the Clause (which states that copyright protection must be to "promote the Progress of Science") "is not a substantive limit on Congress' legislative power."²⁵⁵ The Court concluded its opinion in *Eldred* by stating that "the Copyright Clause empowers Congress to determine the intellectual property regimes that . . . will serve the ends of the Clause."²⁵⁶

Even if Congress cannot use its Copyright Clause power to protect information in the manner described in this Article, it may be able to legislate under the broader Commerce Clause. While the more specific Copyright Clause would limit the more general Commerce Clause, Congress might have the power to enact a misappropriation statute if the law set forth a scheme of protection qualitatively different from a copyright regime. Trademarks, which are legislated under the Commerce Clause,²⁵⁷ supply a pertinent analogy. Since the information protection here differs substantially from current copyright protection with respect to the short time period, the legislation may not be seen as equivalent to copyright, and subsequently allowable.

Overall, the *Eldred* holding should provide Congress with ample leeway to enact a change in copyright law to protect hot news. Nevertheless, since *Feist*, commentators have theorized on broader powers of Congress that would be available to protect information. Those theories would generally apply to the methods described here for protecting hot news.²⁵⁸

C. First Amendment Challenges

In addition to constitutional limitations restricting the power of Congress, the First Amendment may pose a hurdle as well. "Generally, copyright does not significantly interfere with first amendment values because it protects only the

form of expression contained in the copyrighted work," while allowing the author's ideas to circulate freely.²⁵⁹ However, granting reporters a twenty-four hour monopoly on their story's facts could stand as a major upset to First Amendment rights and may even be considered a prior restraint.

The key to protection of hot news being compatible with the First Amendment is that not-for-profit copying and disbursement of the information would be allowed, and injunctions would not be a possible remedy. The worst punishment an infringer could face is reimbursing the twenty-four hour news owner for the lost profits associated with the unlicensed use. Also, this proposed protection would in no way restrict later authors from using a previous author's facts or work for a parody, so long as that use was not for profit.

When comparing property interests granted by the Copyright Clause to freedoms associated with the First Amendment, two considerations arise.²⁶⁰ First, one should consider whether the Copyright Clause is a limited exception to the First Amendment, or whether it is compatible. If copyright were an exception to the First Amendment, then proprietary rights in information could not coexist with the First Amendment outside the copyright scheme.²⁶¹ "If copyright does not constitute the only permissible source of information protection, then its coverage of information need not be tightly limited."²⁶² Second, a statute to protect hot news and the First Amendment share certain goals. Both seek to protect the progress of knowledge and flow of information: the statute through incentive for gathering information, and "the First Amendment through the principle of the public interest in access to information."²⁶³ "[T]he incentive and access principles must be kept in balance."²⁶⁴ If access were to overbear, "the resulting diminution of incentives might lead to the production of fewer works to which to gain access."²⁶⁵

When tailoring this statute, or any statute, to attenuate First Amendment objections, the effect of limiting protection against for-profit commercial copying is key. "Imposing liability only on other compilers [of news] addresses the main economic actors," while still allowing free speech over the subject matter.²⁶⁶ Another method of tailoring the statute could be to require compulsory licenses²⁶⁷ "This device ensures other compilers access to the information, albeit for a fee. Once access is available, however, the First Amendment does not necessarily

command that it be gratis."²⁶⁸ Finally, a statute granting hot news protection might promote First Amendment interests by offering later users an incentive to disseminate to recover their licensing fee. In this respect, the First Amendment goals would certainly be accomplished as well as the inducement for gathering the news.

The Supreme Court's depiction of the relationship between the Copyright Clause and First Amendment in *Eldred* may also shed light on how the Court would view a statute protecting hot news.²⁶⁹ In *Eldred*, the Court stated that "[t]he 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."²⁷⁰ While the court continued to state that the Act's distinction between idea and expression "strikes a definitional balance between the First Amendment and the Copyright Act,"²⁷¹ it concluded: "when . . . Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."²⁷² The Court generally continued its *post-Feist* tradition of deferring to Congress for copyright specifics.²⁷³ If this same reasoning continues, the Court would most likely respond similarly to a new Act by Congress protecting hot news.

D. Possible Problems and Other Solutions

In addition to potential constitutional scrutiny problems associated with a statute protecting hot news, other feasibility issues may arise as well. Larry Kramer,²⁷⁴ the former president of CBS digital media and former Editor of the *San Francisco Examiner*, commented that "the press needs to feed off each other on controversial stories."²⁷⁵ Kramer cites examples of large stories in the last fifty years, like Watergate, and states that "without that added boost [of other newspapers publishing the articles], the story could have very well died on the vine."²⁷⁶ Kramer goes on further to address the difficulty in defining "hot news," and states that "[e]nforcing new 'fair use' laws for the Internet in general is the way to go."²⁷⁷ Professor Bergman,²⁷⁸ on the other hand, agrees that "the originators of the information have to find an economic model where they can recoup profits from their trouble," but does not necessarily agree or disagree with this proposal.²⁷⁹ Like Kramer, he is concerned with the enforceability of the proposal, but adds that "the economic potential of the web is not going to pay

for quality journalism as we know it."²⁸⁰ Professor Bergman would like to see "rewards" for news research and development but is unsure how best to structure the process.²⁸¹

Overall, most leaders in the field of journalism, and journalists themselves, seem to agree that bottom-line pressures and profits are "seriously hurting" the quality of news coverage.²⁸² While this proposal may have minor workability issues associated with its function – which would only last for twenty-four hours – it would transform bottom-line profits from hurting news coverage to helping it. The impact would be most profound on the Internet, where the free flow of information and ease in re-posting stories within a twenty-four hour period is most prevalent. However, the enforceability of and compliance with the proposal is actually easiest on the Internet – one can simply link to the original author's story online. In sum, the benefits outweigh the potential problems, and the risk of legislative inaction to aide this "fourth branch of government"²⁸³ is too great.

VII. Conclusion

The quality of journalism in the twenty-first century is declining. Only a handful of large media companies and investors own the few national newspapers left in the country, and they are demanding that profits increase. The popularity of the Internet and its effect on news gathering and local newspaper earnings has been damaging. The predicament is not improving, with the current business solution moving towards having fewer news gathering journalists.

In order to save the news and the diverse flow of information myriad reporters provide, the legislature must intervene. The government can stimulate the media directly – through direct control – or attempt to stimulate news gathering through economic means. While the proposal described in this article is not flawless, it would allow the media to generate profits and bottom-line revenues through the news. Business leaders and investors will align their companies to create the most profits, and if profits are allowed to come from top notch reporting, then that is what the future will hold.

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Endnotes

- 1 See J.Y. Smith & Noel Epstein, *Remembering Katherine Graham*, WASH. POST CO., (July 18, 2001), available at <http://www.washpostco.com/history-kgraham-obituary02.htm>.
- 2 *Frontline: News War Part III, What's Happening to the News* (PBS television broadcast Feb. 27, 2007) [hereinafter *Frontline: News War*], available at <http://www.pbs.org/wgbh/pages/frontline/newswar/view/>.
- 3 *Id.*
- 4 *Frontline: News War Introduction* (Feb. 13, 2007) [hereinafter *News War Intro*], <http://www.pbs.org/wgbh/pages/frontline/newswar/etc/synopsis.html>.
- 5 Lowell Bergman, Professor of Journalism, UC Berkeley Graduate School of Journalism; former CBS News "60 Minutes" Senior Executive Producer; recipient of numerous journalism awards including numerous Emmys, five Alfred I. duPont-Columbia University silver and golden Baton awards, three Peabodys, a Polk Award, a Sidney Hillman award for labor reporting and the James Madison Freedom of Information Award for Career Achievement from The Society of Professional Journalists, <http://journalism.berkeley.edu/faculty/bergman/> (last visited Apr. 21, 2007).
- 6 *News War Intro*, *supra* note 4.
- 7 H.L. Fu & Richard Cullen, *Defamation Law in the People's Republic of China*, 11 TRANSNAT'L LAW 1, 5 (1998) (citing Frederick Schauer, *Social Foundation of the Law of Defamation: A Comparative Analysis*, MEDIA L. 263, 264 (1993)).
- 8 Interview with Jeff Fager, Executive Producer, 60 Minutes (Nov. 29, 2006), available at <http://www.pbs.org/wgbh/frontline/newswar/interviews/Fager.html>
- 9 *Id.*
- 10 *Id.*
- 11 Interview with Eric Schmidt, CEO, Google (Nov. 20, 2006), available at <http://www.pbs.org/wgbh/pages/frontline/newswar/interviews/schmidt.html>.
- 12 *Id.*
- 13 *Id.*
- 14 *Id.*

- 15 Interview with John Carroll, Former Editor, LA Times (July 8, 2006), available at <http://www.pbs.org/wgbh/pages/frontline/nswar/interviews/carroll.html>.
- 16 *Id.*
- 17 *Frontline: News War*, (PBS television broadcast Feb. 27, 2007), available at <http://www.pbs.org/wgbh/pages/frontline/newswar/etc/script3.html>.
- 18 "Ariel Capital Management is a privately owned, Chicago-based money management firm...with more than \$15.5 billion in assets." Ariel Capital Management, *Our History*, <http://www.arielcapital.com/content/view/101/1127> (last visited Apr. 21, 2007).
- 19 Interview with Charles Bobrinskoy, Vice Chairman, Ariel Capital Management (Oct. 30, 2006) [hereinafter Bobrinsky Interview], available at <http://www.pbs.org/wgbh/pages/frontline/newswar/interviews/bobrinskay.html>.
- 20 *Id.*
- 21 Pew Research Center for the People and the Press, About the Center, <http://people-press.org/about/> (last visited Apr. 22, 2007).
- 22 *Pew Research Center for the People and the Press, Bottom-Line Pressures Now Hurting Coverage, Say Journalists*, May 23, 2004 [hereinafter Bottom-Line Pressures], <http://people-press.org/reports/display.php3?PageID=825>.
- 23 *Id.*
- 24 *Id.*
- 25 *Id.*
- 26 *Id.*
- 27 *Online Papers Modestly Boost Newspaper Readership*, Pew Research Center for the People and the Press July 30, 2006, available at <http://people-press.org/reports/display.php3?ReportID=282>.
- 28 *Id.*
- 29 *Id.*
- 30 *Id.*
- 31 *Id.*
- 32 *Online Papers Modestly Boost Newspaper Readership*, *supra* note 27.
- 33 *Id.*
- 34 *Id.*
- 35 Bobrinsky Interview, *supra* note 19.

- 36 Menahem Blondheim, *Rehearsal for Media Regulation: Congress Versus the Telegraph- News Monopoly*, 56 FED. COMM. L.J. 299, 314-18 (2004) (describing the way in which the Associated Press controlled national news and the opinions of Americans before Congress stepped in to break up the monopoly).
- 37 Reporter, *Christian Science Monitor*, Fall 2006 Joan Shorenstein Center on the Press, Politics and Public Policy, Cabot Fellow, http://www.hks.harvard.edu/presspol/research_publications/papers/working_papers/2007_1.pdf.
- 38 Jill Carroll, *Foreign News Coverage: The US Media's Undervalued Asset* 13-14 (Joan Shorenstein Ctr. on the Press, Politics & Pub. Policy, Working No. 2007-1, 2007), available at http://www.ksg.harvard.edu/presspol/research_publications/papers/working_papers/2007_1.pdf (while Ms. Carroll's paper explicitly addresses the importance of foreign news coverage and the growing trend of US news organizations to close foreign bureaus, the implications and suggestions parallel the growing national trend of cutting back on reporting in general).
- 39 Judge, US Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School [hereinafter Judge], <http://www.law.uchicago.edu/faculty/posner-r>.
- 40 *Id.*
- 41 *Id.*
- 42 *Id.*
- 43 *Id.*
- 44 Judge, *supra* note 39.
- 45 *Id.*
- 46 *Id.*
- 47 Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 622 (2003).
- 48 Pamela Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. U.L. REV. 365, 368 n.18 (1989) (citing 15 C.F.R. § 379.1 (1988) ("The US export control regulations concerning 'technical data' recognize this principle. These regulations require an export control license for exchanges of technical data between US citizens and foreign nationals, without regards to whether the data are in tangible form (written on paper) or in intangible form (as in oral conversations)").
- 49 *Id.*
- 50 *Id.*

- 51 Raymond T. Nimmer & Patricia Ann Krauthaus, *Information as a Commodity: New Imperatives of Commercial Law*, 55 LAW & CONTEMP. PROBS. 103, 106 (1992) (additionally characterizing data as "signals, symbols, or at most discrete facts.").
- 52 Samuelson, *supra* note 48, at 369.
- 53 *Id.*; Rex Y. Fujichaku, *The Misappropriation Doctrine in Cyberspace: Protecting the Commercial Value of "Hot News" Information*, 20 U. HAW. L. REV. 421, 427 (1998) (citing William M. Landes & Richard Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989) ("A distinguishing characteristic of intellectual property is its 'public good' aspect")); RICHARD WATT, COPYRIGHT AND ECONOMIC THEORY 3 (ed., Edward Elgar Publishing 2000) (1963).

A public good is characterized by admitting more than one user, with no user's consumption requiring any less consumption by any other user. Information in general, and intellectual property in particular, is a public good since no current user possesses any less when new users are added to the set of consumers.

Id.
- 54 WATT, *supra* note 53, at 3.
- 55 Fujichaku, *supra* note 53, at 427 n.29 (citing PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 980-81 (13th ed. 1989)).
- 56 ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 311 (ed., Princeton Univ. Press 2000) (orig. publication) (explicitly stating that "ideas are nonrivalrous," however, in this context "information" is synonymous with "idea"); Madhavi Sunder, *IP3*, 59 STAN. L. REV. 257, 283 (2006).
- 57 COOTER, *supra* note 56, at 311.
- 58 *Id.*
- 59 WATT, *supra* note 53, at 3.
- 60 *Id.*
- 61 Defined by *Black's Law Dictionary* as "[t]he expression or communication of thoughts or opinions in spoken words; something spoken or uttered." BLACK'S LAW DICTIONARY (8th ed. 2004).
- 62 COOTER, *supra* note 56, at 311.
- 63 Sunder, *supra* note 56, at 283 ("Because information is assumed by its nature to be nonrivalrous and nonexcludable, free-riding will eliminate any incentives to produce information.").
- 64 WATT, *supra* note 53, at 4.

65 *Id.*

66 US CONST. art. 1, § 8, cl. 8.

67 COOTER, *supra* note 56, at 312 ("In the special case of intellectual property, restrictions on ideas actually increase their supply."); Robert C. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516, 519 (1981).

68 William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1700 (1988).

69 *Id.*

70 *Id.* at 1701.

71 *Id.* at 1702.

72 *Id.* at 1703.

73 Denicola, *supra* note 67, at 519.

74 *Id.*

75 *Id.*

76 *Id.*

77 Samuelson, *supra* note 48, at 369 (citing J. LOCKE, TWO TREATISES OF GOVERNMENT §§ 27-28 (3d ed. 1698)).

78 Fujichaku, *supra* note 53, at 434.

79 *Id.* at 428.

80 *Id.*

81 *Id.*

82 See *id.* at 429.

Just as important as the cheap cost of reproduction is the speed at which copying is done. A period of time usually exists after the publication or public dissemination of information before others can appropriate the information for their own uses. This lead time advantage is a crucial consideration to the original information provider in estimating the earnings return on its initial investment.

Id.

83 Cf. Fujichaku, *supra* note 53, at 429 ("An information product which has been available on the market for a significant period of time before commercial rivals are

able to copy the information provided may be better able to recoup investment costs than a product which is copied soon after its public release.").

- 84 Associate Justice, US Supreme Court; former Professor of Law, Harvard Law School. The Justices of the Supreme Court, Stephen G. Breyer Biography, [http:// www. supremecourtus.gov/about/biographiescurrent.pdf](http://www.supremecourtus.gov/about/biographiescurrent.pdf) [hereinafter Breyer's Biography].
- 85 Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).
- 86 *Id.* at 296.
- 87 *Id.* at 300.
- 88 *Id.*
- 89 *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1260 (11th Cir. 2001).
- 90 *Id.*; Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1873 n. 29 (1990) ("act is to discourage piracy and is 'for the Encouragement of Learned Men to Compose and Write useful Books'" (citing An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, 1710, 8 Anne, ch. 19) [hereinafter Ginsburg I].
- 91 *Suntrust Bank*, 268 F.3d at 1260-61 (citing US CONST. art. I, § 8, cl. 8).
- 92 *Id.* at 1261.
- 93 Ginsburg I, *supra* note 90, at 1874.
- 94 *Id.* at 1873.
- 95 *Id.*
- 96 Morton L. Janklow Professor of Literary and Artistic Property Law, Columbia Law School.
- 97 Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Policy in Revolutionary France and America*, 64 TUL. L. REV. 991, 1002 (1990).
- 98 See *Amsterdam v. Triangle Publ'ns, Inc.*, 189 F.2d 104 (3d Cir. 1951); *Key Maps, Inc., v. Pruitt*, 470 F. Supp. 33 (S.D. Tex. 1978) (It should be noted that the Court of Appeals for the Ninth Circuit has taken issue with the Third Circuit's decision in *Amsterdam*. However, even when map copyrights are sustained, protection will be rather thin. *United States v. Hamilton*, 583 F.2d 448, 451 (9th Cir. 1978)).
- 99 Robert A. Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. COPY. SOC'Y USA 560, 564 (1982).

100 *Id.*

[F]irst-hand exploration and discovery could not likely have been regarded as a prerequisite to copyright protection, since the first Congress also extended copyright protection to charts and to books, and it must have been understood that charts typically borrow and recapitulate information available from other sources, and that books often recount prosaic themes in a prosaic manner.

Id.

101 *Id.*

102 Act of May 31, 1790, ch. 15, sec. 1, 1 Stat. 124.

103 17 U.S.C. § 302(a) (1998).

104 Ginsburg I, *supra* note 90, at 1876.

105 *Id.* at 1877.

106 *Id.* at 1874.

107 Trademark Cases, 100 US 82 (1879).

108 *Burrows-Giles Lithographic Co., v. Sarony*, 111 US 53 (1884).

109 *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co., Inc.*, 499 US 340, 346 (1991).

110 *Burrows-Giles Lithographic*, 111 US at 58.

111 *Trademark Cases*, 100 US at 94.

112 Ginsburg I, *supra* note 90, at 1874.

113 *Feist Publ'ns*, 499 US at 345.

114 Ginsburg I, *supra* note 90, at 1874.

115 *Id.*

116 *Id.* ("The two views continued to coexist; indeed, sometimes they have been collapsed: if the author did not copy the work from a prior source, the work must be "his own" and therefore original.").

117 Breyer, *supra* note 85, at 284.

118 *Id.*

119 Breyer, *supra* note 85, at 284.

120 *Id.* at 321.

121 *Id.*

122 *Id.*

- 123 L. David McBride, *Copyright: Same Song, Different Verse: Parody as Fair Use After Campbell v. Acuff-Rose Music, Inc.*, 48 OKLA. L. REV. 627, 629 (1995) ("The current law of copyright is controlled by the Copyright Act of 1976. . . . The 1976 version of the Act modified slightly the 1909 version.").
- 124 *Id.*
- 125 *Miller v. Universal City Studios*, 650 F.2d 1365, 1369 (5th Cir. 1981).
- The idea-expression dichotomy was given express statutory recognition in the 1976 Copyright Act. Section 102(b) provides: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such a work."
- Id.* (citing 17 U.S.C. § 102(b) (2007)). Despite the fact that the idea and expression distinction was not part of the previous 1909 Copyright Act, the legislative history may indicate that Congress did not intend to change the scope of current common law copyright law. On the subject of the idea and expression provision, the legislative history states: "Its purpose is to restate, in the context of the new single Federal system of copyright, that the basic dichotomy between expression and idea remains unchanged." H.R. Rep. No. 94-1476, at 5659, as reprinted in 1976 U.S.C.C.A.N. 5659, 5670.
- 126 17 U.S.C. § 107 (2007).
- 127 Fisher III, *supra* note 68, at 1662-63.
- 128 *Id.* at 1663.
- 129 *Id.* (explaining how the Supreme Court's equal division in the Justice's votes prevented the issuance of a Fair Use decision until the *Sony Corp., v. Universal City Studios* and *Harper & Row Publishers v. Nation Enterprises* cases).
- 130 Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1013 (1997).
- 131 *Id.*
- 132 *Id.*
- 133 Fisher III, *supra* note 68, at 1668-69 (citing *Sony Corp., of Am. v. Universal City Studios, Inc.*, 464 US 417 (US 1984); *Harper & Row Publishers*, 471 US 539 (1985) (paying attention to these underlying goals, the Supreme Court has suggested, would facilitate both the interpretation of the factors enumerated above and identification of other appropriate criteria in future cases.)).
- 134 *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co., Inc.*, 499 US 340, 346 (1991).

135 *Id.*

136 *Id.* at 347.

137 *Id.* at 345.

138 *Id.* at 340.

139 *Harper & Row Publishers*, 471 US at 546.

140 *Id.* at 547.

141 *Id.* at 556-57.

142 Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protections of Works of Information After Feist v. Rural Telephone*, 92 COLUM. L. REV. 338, 374 (1992) [hereinafter Ginsburg II].

143 *Id.*

144 *Id.*

145 *Id.* There is also considerable legislative precedent for expansive congressional interpretation of copyright terms based on the Plant Patent Act. See *id.* at 376-77 (discussing Congress interpreting the definitions of "Inventor" and "Discoveries" in the Patent Clause to still allow individuals to obtain patents in asexually reproducible plants they may have simply come upon).

146 *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co., Inc.*, 499 US 340, 356 (1991) ("Section 102(b) is universally understood to prohibit any copyright in facts."); *Harper & Row Publishers*, *All US* at 556.

147 17 U.S.C. § 102(b) (2007).

148 H.R. Rep. 94-1476, at 56, as reprinted in 1976 U.S.C.C.A.N. 5659, 5670.

149 *Toksvig v. Bruce Publ'g Co.*, 181 F.2d 664, 668 (7th Cir. 1950).

150 *Id.* at 666-67.

151 *Id.* at 666.

152 *Id.*

153 *Rosemount Enters., Inc., v. Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966).

154 Gorman, *supra* note 99, at 588-89.

155 *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (1981).

156 *Id.* at 1369.

157 *Id.* n.2.

158 *Id.*

159 17 U.S.C. § 107 (2007) (emphasis added).

160 *Id.*

161 Paradoxically, it should be noted that for fictional works, the only allowable fair use is one of parody or comment.

162 Posner, *supra* note 47, at 633.

We could think of liability in such a case as based on a "reverse fair use" doctrine. Fair use shrinks liability in some cases of copying; the reverse doctrine would expand liability when the rationale for copyright protection was present but a possible loophole in the copyright statute threatened to allow the defendant to avoid liability.

Id.

163 *NBA v. Motorola, Inc.*, 105 F.3d 841, 847 (2d Cir. 1997) (citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 US 340, 356 (1991); *Harper & Row Publishers v. Nation Enters.*, 471 US 539, 547 (1985) (listing the rule improperly by saying "fact/expression dichotomy" instead of the correct "idea/expression dichotomy").

164 WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 107 (2003).

165 Ginsburg II, *supra* note 142, at 375.

Even if Congress cannot claim ultimate authority to interpret those portions of the Constitution that bear neither on separation of powers nor on individual rights, Congress should enjoy substantial discretion in implementing its constitutional prerogative to "promote the Progress of Science." Congress' determination of what endeavors constitute the "Writings" of "Authors" should be viewed as an exercise of fact-finding by the body most competent to evaluate the efficacy of the means chosen to promote the constitutional goal.

Id.

166 At the time the misappropriation doctrine was recognized, federal courts sitting in diversity jurisdiction over a state law claim were free to apply, or create, federal common law to the case. However, in 1938 the Supreme Court overturned *Swift v. Tyson*, and henceforth required all federal courts sitting in diversity jurisdiction over a state law claim to apply state common law to the case. *Erie R.R. Co. v. Tompkins*, 304 US 64, 74 (1938).

167 *Int'l News Serv. v. Associated Press*, 248 US 215, 238 (1918).

168 LANDES & POSNER, *supra* note 164, at 105.

169 *Id.*

170 *Id.*; Fujichaku, *supra* note 53, at 440.

171 LANDES & POSNER, *supra* note 164, at 105; Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411, 412 (1983).

172 Baird, *supra* note 171, at 412.

173 Samuelson, *supra* note 48, at 388.

174 *Int'l News Serv., v. Associated Press*, 248 US 215, 239-40 (1918).

175 *Id.*

176 *Id.*

177 *Id.* at 245-46; Fujichaku, *supra* note 53, at 441-42.

178 Fujichaku, *supra* note 53, at 442.

179 *Id.*

The Court claimed a "quasi property" interest in breaking news which AP expended resources and money to procure. This interest inured to AP because of the time and resources spent by AP to gather the news which is a direct link to the labor theory of property, wherein property rights are deserved out of respect for a person's expended labor. INS therefore could not permissibly "reap where it has not sown"; the rationale for misappropriation liability thereby has a direct link to the natural rights, "sweat of the brow" justification of copyright.

Id.

180 *Id.* at 442.

181 *Int'l News Serv.*, 248 US at 235.

182 *Id.* at 247 (Holmes, J., dissenting).

183 *Id.* at 248.

184 *Id.* (reasoning that if INS subscribers realized INS was gathering news from the AP, they would change news services to gather the news sooner.).

185 Samuelson, *supra* note 48, at 393.

186 *Id.*; *Int'l News Serv.*, 248 US at 232 (Brandeis, J., dissenting) ("Justice Brandeis simply disagreed that judicial creation of a property right in news was an appropriate response. More was at stake in the case than righting an injustice. To give relief required more than the application of old rules to new facts; it required making a new rule.").

187 *Id.* at 393-94.

188 *Id.*

"Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it," and then only when the legislature has undertaken to define the boundaries of such rights, as in the patent and copyright statute. In Justice Brandeis' opinion, the injustice perpetrated by INS should have been righted, if at all, by the legislature.

Id. (citing *Int'l News Serv.*, 248 US at 250).

189 Ginsburg II, *supra* note 142, at 355.

190 300 N.Y.S. 159 (1937).

191 *Id.* at 161.

192 239 P.2d 32 (Cal. Ct. App. 1951).

193 *Id.*

194 80 F.2d 575 (9th Cir. 1935), *rev'd for lack of jurisdiction*, 299 US 269 (1936).

195 *Id.*

196 *Sears, Roebuck & Co., v. Stiffel Co.*, 376 US 225 (1964); *Compco Corp., v. Day-Brite Lighting, Inc.*, 376 US 234 (1964).

197 David E. Shipley & Jeffrey S. Hay, *Protecting Research: Copyright, Common-Law Alternatives, and Federal Preemption*, 63 N.C.L. REV. 125, 152 (1984).

198 *Id.* (citing *Sears*, 376 US at 225-27, 233 and *Compco*, 376 US at 234-35, 239).

199 *Compco*, 376 US at 238.

200 Shipley & Hay, *supra* note 197, at 153.

201 412 US 546 (1973).

202 Heather Richtarcsik, *Misappropriation in Massachusetts and Around the Country: How Technology will Utilize this Tort*, 35 NEW ENG. L. REV. 717, 736 (2001).

203 *Id.*

204 416 US 470 (1974).

205 Richtarcsik, *supra* note 202, at 737.

206 *Kewanee*, 416 US at 479.

207 Shipley & Hay, *supra* note 197, at 154.

- 208 17 U.S.C. § 301 (1998) (crediting Pub.L.No. 94-553, § 101, 90 Stat. 2572 (1976).
- 209 17 U.S.C. § 301(a) (1998).
- 210 17 U.S.C. § 301(b) (1998) (Specific examples of unpreempted state regulations include: (1) regulations involving subject matter that does not come within the subject matter of copyright, including works of authorship not fixed in any tangible medium of expression; (2) any cause of action arising from events occurring before January 1, 1978; (3) activities violating legal and equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright; and (4) state and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected under section 102(a)(8)). *Id.*
- 211 H.R. Rep. No. 94-1476, at 132 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5748.
- 212 Denicola, *supra* note 67, at 517 n.7.
- 213 *Id.*
- 214 17 U.S.C. § 301(a)
- 215 Fujichaku, *supra* note 53, at 463.
- 216 *Id.* ("Fixation may be in print, on a web page displayed on a computer screen, or in computer media.").
- 217 Contrast Denicola, *supra* note 67, at 542 n.7, with Fujichaku, *supra* note 53, at 463.
- 218 *Id.*
- 219 17 U.S.C. § 102(b) (2007).
- 220 Compare Fujichaku, *supra* note 53, at 463, with Denicola, *supra* note 67, at 517 n.7 ("copyright does not extend to facts per se, they are outside the subject matter of copyright and thus state protection is not preempted. See 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.01[B][2][b] (1978).).
- 221 Fujichaku, *supra* note 53, at 464.
- 222 *Id.* (citing *Fin. Info., Inc., v. Moody's Investors Serv. Inc.*, 808 F.2d 204 (2d Cir. 1986), *cert. denied*, 484 US 820 (1987); *Durham Indus., Inc., v. Tomy Corp.*, 630 F.2d 905 (2d 1980)).
- 223 Fujichaku, *supra* note 53, at 464.
- 224 *Id.*
- 225 *Id.*
- 226 *Id.* at 467.

- 227 *Id.*
- 228 *Computer Assocs. Int'l, Inc., v. Altai, Inc.*, 982 F.2d 693, 716 (2d Cir. 1992) (quoting NIMMER, *supra* note 220, § 1.01[B], at 1-14-15).
- 229 *Nat'l Basketball Ass'n., v. Motorola, Inc.*, 105 F.3d 841, 850 (2d Cir. 1997).
- 230 *Id.*
- 231 Ginsburg II, *supra* note 142, at 361-62.
- 232 Gorman, *supra* note 99, at 604.
- 233 *Id.*
- 234 Shipley & Hay, *supra* note 197, at 171.
- 235 *Id.*
- 236 *See id.* at 171-72.
- 237 *Id.*
- 238 For a greater discussion of state contract claims used as an alternative to misappropriation for the protection of information, see Shipley & Hay, *supra* note 197, at 152.
- 239 *Int'l News Serv., v. Associated Press*, 248 US 215, 248 (1918) (Holmes, J., dissenting) (while Justice Holmes's concurrence discussed allowing INS to continue its use of the Associated Press stories if express credit was given, his focus was on the unfairness in the timeline of readers purchasing news from the first and most easily accessible source, and where the profits from that purchase should go).
- 240 *See COOTER, supra* note 56, at 312 ("copyright and patent law grant creators the right of exclusive use of their creation for a fixed period of time. Much like temporary monopoly, exclusive use-rights can create extraordinary profits.").
- 241 *Id.*
- 242 *See Erie R.R. Co., v. Tompkins*, 304 US 64 (1938) (overruling earlier precedent, and holding that there is no federal general common law, thus confining the federal courts to act only as interpreters of law originating elsewhere).
- 243 *Supra* text accompanying notes 212-231. Additionally, commentators have cited the inability of misappropriation law to deal with protection of information properly. Fujichaku, *supra* note 53, at 475 ("Common law misappropriation, because of its potential to interfere with access to public domain material, its discredited sweat of the brow theoretical justification, and its general amorphous nature, should be abolished in favor of a national statutory system which would take into account these concerns.").

244 17 U.S.C. § 107 (2007).

245 Thus a news web site like CNN.com could post a headline describing the story in brief, and then link readers to whatever web site has the monopoly rights to the story.

246 An example of this third scenario would include a blogger commenting on the story, or even posting it on a web page. It would not include a company like Google who makes advertising dollars to post the story on their web page.

247 *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co., Inc.*, 499 US 340, 350 (1991).

248 Ginsburg II, *supra* note 142, at 341.

249 *Id.* at 375.

250 *Deepsouth Packing Co., v. Laitram Corp.*, 406 US 518, 530 (1972) ("[t]he direction of Art[icle] I is that Congress shall have the power to promote the progress of science and the useful arts. When, as here, the Constitution is permissive, the sign of how far Congress has chosen to go can come only from Congress.").

251 Ginsburg II, *supra* note 142, at 376.

252 *Eldred v. Ashcroft*, 537 US 186, 204 (2003).

253 *Id.* at 205 (citing *Sony Corp., v. Universal City Studios*, 464 US 417, 429 (1984)).

254 *Id.* at 205 n.10.

255 *Id.* at 211.

256 *Id.* at 222.

257 See 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 5.3, at 5-6 (4th ed. 2008).

258 See Ginsburg II, *supra* note 142, at 369 (For a more detailed discussion of broader powers of Congress applied to protecting information).

259 Denicola, *supra* note 67, at 540.

260 Ginsburg II, *supra* note 142, at 385.

261 *Id.* ("As a result, informational subject matter outside the scope of copyright could not be protected against copying."

262 *Id.*

263 *Id.* at 386.

264 *Id.* (quotes authority directly).

265 *Id.*

- 266 Ginsburg II, *supra* note 142, at 386 (while Prof. Ginsburg is referring to compilations of facts, the parallel to news related facts can be easily drawn.).
- 267 *Id.*
- 268 *Id.* at 386-87.
- 269 *Eldred v. Ashcroft*, 537 US 186, 219 (2003).
- 270 *Eldred*, 537 US at 219. Additionally, legislative intent for the first Copyright Act included protecting facts just as much as expression. Gorman, *supra* note 99, at 564.
- 271 *Eldred*, 537 US at 219 (citing *Harper & Row Publishers v. Nation Enters.*, 471 US 539, 556 (1985)).
- 272 *Id.* at 221.
- 273 *Id.* at 222.
- 274 Guest Lecturer, Harvard Business School; current advisor to CBS Interactive; former President of CBS Digital Media; former Editor, San Francisco Examiner; former Assistant Managing Editor, *Washington Post*. Biography of Larry Kramer, <http://www.cbsnews.com/stories/2005/10/19/utility/main954393.shtml> (last visited June 1, 2007).
- 275 E-mail from Larry Kramer, Advisor, CBS Interactive, to Ryan T. Holte, Student, UC Davis School of Law (May 16, 2007, 10:48:00 EST) (on file with author).
- 276 *Id.*
- 277 *Id.*
- 278 Bergman, *supra* note 5.
- 279 Interview with Lowell Bergman, Professor of Journalism, UC Berkeley Graduate School of Journalism, in Berkeley, Cal. (Apr. 10, 2007).
- 280 *Id.*
- 281 *Id.*
- 282 Bottom-Line Pressures, *supra* note 22.
- 283 Fu & Cullen, *supra* note 7, at 1 n.23 (citing Schauer, *supra* note 7, at 264).

Defending the Public Domain – The First Amendment, the Copyright Power, and the Potential of *Golan v. Gonzales*

*J Blake Pinard**

*This article argues that the recent Tenth Circuit decision in *Golan v. Gonzales* is the *Eldred* potential realized – that *Golan* is the second step to *Eldred*'s first on the path to judicial enforcement of First Amendment protections abridged by the ever broadening grasp of copyright. Part II discusses the relevant copyright and First Amendment principles, laws, and cases, emphasizing the forces guiding the judicially struck balance between the two. Part III presents the factual and procedural history of *Golan*, including its position in the context of the broader challenges being made to the current United States copyright scheme. Part IV analyzes the unanimous opinion in *Golan*. Part V discusses the circuit split over the proper interpretation of *Eldred*, of which *Golan* is a part, and the split's likely route to the Supreme Court. Part VI suggests that the language of *Eldred*, the purposes behind copyright and*

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the First Amendment, and the inconsistency of the alternative approach all support the conclusion that the Tenth Circuit in Golan properly interpreted the Supreme Court's guidance in Eldred. Part VII concludes.

I. Introduction

The First Amendment to the Constitution of the United States provides unequivocally that "Congress shall make no law . . . abridging the freedom of speech or of the press";¹ yet this has not been the case since Congress's first exercise of the Progress Clause: the Copyright Act of 1790.² The Progress Clause,³ which serves as the basis of United States Copyright Law, provides Congress the power "[t]o 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."⁴ On its face, the Progress Clause appears incompatible with the First Amendment, in that it "abridg[es] the freedom of speech" and "of the press"⁵ by prohibiting all speech that is protected by the clause's grant of "exclusive Right[s]" to "Authors and Inventors."⁶

Despite the blatant conflict, courts have generally refused to recognize the First Amendment as a wholesale restraint on copyright.⁷ Consistent with the general trend in federal courts,⁸ in 1985 the Supreme Court in *Harper & Row Publishers, Inc. v. Nation Enterprises* held First Amendment scrutiny of copyright unnecessary because copyright itself has built-in freedom of speech protections in the form of the idea/expression dichotomy and the fair use exception.⁹ In 2003, the Court in *Eldred v. Ashcroft* tweaked this proposition to provide that copyright is not categorically immune from challenges under the First Amendment, but that First Amendment scrutiny is necessary where Congress "alter[s] the traditional contours of copyright protection."¹⁰ Although the Court did not find First Amendment scrutiny necessary under the facts present in *Eldred*, the Court's recognition that copyright's built-in First Amendment protections will not always be adequate subtly suggested the potential for increased judicial recognition of the First Amendment as an actual – rather than nominal – restraint on copyright.¹¹

This note argues that the recent Tenth Circuit decision in *Golan v. Gonzales*¹² is the *Eldred* potential realized¹³ – that *Golan* is the second step to *Eldred*'s first on the path to judicial enforcement of First Amendment protections abridged by the ever broadening grasp of copyright. Part II discusses the relevant copyright and First Amendment principles, laws, and cases, emphasizing the forces guiding the judicially struck balance between the two. Part III presents the factual and procedural history of *Golan*, including its position in the context of the broader challenges being made to the current United States copyright scheme. Part IV analyzes the unanimous opinion in *Golan*. Part V discusses the circuit split over the proper interpretation of *Eldred*, of which *Golan* is a part, and the split's likely route to the Supreme Court. Part VI suggests that the language of *Eldred*, the purposes behind copyright and the First Amendment, and the inconsistency of the alternative approach all support the conclusion that the Tenth Circuit in *Golan* properly interpreted the Supreme Court's guidance in *Eldred*. Part VII concludes.

II. Background Law

A. The United States Copyright Regime

The Progress Clause of the United States Constitution grants to Congress the power "[t]o 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."¹⁴ Congress first exercised this power through the Copyright Act of 1790 with the purpose of creating "[a]n Act for the encouragement of learning."¹⁵ The First United States Congress relied heavily on English law in forming the beginning of United States Copyright law with the Copyright Act of 1790.¹⁶ The Act granted copyright protection for an initial term of fourteen years conditioned on the work being registered and a copy deposited with an official repository.¹⁷ The term was renewable for another fourteen-year term so long as the work was reregistered.¹⁸

The first of what would be many extensions of the copyright term came with the 1831 revision of the original act, extending the initial term of copyright protection to twenty-eight years while leaving the renewable term of fourteen years unchanged.¹⁹ The Copyright Act of 1909 further extended the potential renewal period to twenty-eight years, while maintaining the initial term at

twenty-eight years.²⁰ Each of these extensions applied to both existing and future copyrights; however, the extensions were not applied to copyrighted works whose terms had expired, regardless of whether the works would have been protected had the extension been in effect during their original terms.²¹ The 1909 Act further extended the reach of copyright by codifying the concept of a derivative work, that is a work based on a pre-existing work.²² Prior to that point, "the term 'copy' was interpreted literally – an author had the right only to prevent others from copying and selling her particular work, but had no power against modifications."²³

The Copyright Act of 1976 overhauled United States copyright law by modifying the method for calculating the term of copyright protection, abandoning a fixed term system in exchange for a variable standard.²⁴ The former standard provided for a fixed term of copyright protection with an option for a fixed renewal term; under the 1976 Act, the term of copyright protection became the life of the author plus fifty years.²⁵ This act aligned the United States copyright term with the predominate international term under the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).²⁶ The 1976 Act applied not only to works published on or after its effective date of January 1, 1978, but also to previously published works, to which the Act granted a fixed seventy-five year term beginning on the date of publication, thereby extending those works' previous copyright protection under the 1909 Act by nineteen years.²⁷ The 1976 Act also did away with all conditions precedent to protection. Prior to 1976, copyright protection only attached once the work was both registered with the Copyright Office and published. Under the 1976 Act, a work was protected immediately upon creation – that is, once "fixed in any tangible medium of expression" – regardless of whether it was then or ever published or registered.²⁸

The latest term extension came in the Copyright Term Extension Act of 1998 (CTEA), also known as the Sonny Bono Act.²⁹ The CTEA lengthened the term of copyright protection to life of the author plus seventy years for works published after January 1, 1979, the effective date of the 1976 Act.³⁰ The CTEA also extended the copyright protection of works published prior to 1979 by adding another twenty years of protection, thus increasing the works' protection to a fixed term of ninety-five years from the date of publication.³¹ This extension effectively

froze the public domain. No work published in or after 1923 will enter the public domain until at least 2019, assuming no further extensions by Congress.

B. Justifications for Granting Copyright Protection

Copyright protection effectively grants the right holder a monopoly over use of the work. Elementary economic theory provides that a monopoly will produce fewer goods at a higher price as compared to a competitive market.³² Thus, as monopolists, copyright holders provide the public fewer of their creative works at higher prices than would be created in a competitive market. On its face, such a result is undesirable because society prefers more goods to less; therefore, granting such exclusive rights, as did the Framers of the Constitution, demands justification.

In drafting the Progress Clause, the Framers limited the purpose for which Congress may grant a copyright protection. Congress's copyright power reaches only to the extent necessary to promote "the Progress of Science and useful Arts."³³ This "[p]rogress" was to be achieved through the creation of and public access to a large base of knowledge.³⁴ The Framers steadfastly rejected the notion that an author has a natural or moral right to exclusive control of his work.³⁵ The Framers instead were instrumentalists, recognizing copyright as a monopoly, and thus an evil allowed only as necessary for the promotion of learning.³⁶ James Madison recognized monopolies as "justly classed among the greatest nuisances in government;" yet, his belief in the importance of "literary works and ingenious discoveries" to the health of a nation led him to find copyright "too valuable to be [wholly] renounced."³⁷

The Constitution not only limits the purpose for which Congress may grant copyright, but also limits the term for which Congress may grant such protection to "limited Times."³⁸ The restriction of copyright protection to "limited Times" is further evidence of the Framers' view that copyright should be granted only as an instrument for the promotion of progress and not as a right of its own accord. Limiting the term of protection would be inconsistent with the view that copyright is a natural right, but is wholly appropriate where copyright is viewed as a mere instrument for a greater good. The Supreme Court has consistently accepted this construction of the Progress Clause, recognizing that "the primary objective of copyright is not to reward the labor of authors,"³⁹ finding instead that the "sole

interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors."⁴⁰

C. Justifications for Protecting the Freedom of Speech

Traditionally, three rationales have been put forth to justify the freedom of speech.⁴¹ In his powerful concurrence in *Whitney v. California*, Justice Brandeis discussed these three justifications.⁴² First, the freedom of speech was seen by the Framers as essential to the health of free democracy; as Brandeis recognized, the Framers "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."⁴³ Renowned copyright and First Amendment scholar Melville Nimmer describes this function of the freedom of speech as necessary for the enlightenment of the voters in order to ensure wise decisions of governance.⁴⁴ Thus, the freedom of speech operates in intimate symbiosis with the democratic process such that the corruption of one is the corruption of both.

The second justification provided by Brandeis is described by Nimmer as free speech "as an end in itself because the very nature of man is such that he can realize self-fulfillment only if he is free to express himself."⁴⁵

The final justification, Brandeis provides, is to forego the dangers created by not guaranteeing free speech.⁴⁶ Brandeis's *Whitney* concurrence warns "that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies."⁴⁷ Nimmer describes this as the "safety valve" factor.⁴⁸ Thus, the three justifications for the freedom of speech are the enlightenment function, the self-fulfillment function, and the safety-valve function.

D. A Conflict and a Judicially Struck Balance

The First Amendment prohibits the abridgment of the freedom of speech.⁴⁹ Copyright law passed under the Progress Clause abridges speech by prohibiting unauthorized use of copyright protected speech.⁵⁰ Under a strict reading of the First Amendment, "it is difficult to see how any copyright law can be regarded as constitutional";⁵¹ yet, the Supreme Court has held that "the Framers intended copyright itself to be *the engine of free expression*."⁵²

Although "intuitively in conflict," the Progress Clause and the First Amendment "were drafted to work together."⁵³ The Supreme Court recently recognized the significance of the contemporaneous adoption of the Progress Clause and the First Amendment, providing: "This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles. Indeed, copyright's purpose is to *promote* the creation and publication of free expression."⁵⁴ Yet, concluding that the two are theoretically compatible is far from understanding how copyright and the First Amendment actually coexist.

Courts have generally struck the balance between First Amendment protections and copyright on the premise that copyright has built-in First Amendment accommodations in the form of two doctrines limiting the scope of copyright: the idea/expression dichotomy and the fair use doctrine.⁵⁵ Each safeguard arguably contours the reach of copyright to avoid unconstitutional infringement on the freedom of speech.

Copyright law in the United States distinguishes between ideas and expressions and affords copyright protection only to the latter.⁵⁶ The idea/expression dichotomy addresses "the danger . . . that an individual might gain monopoly privileges over an idea," a result that would be antithetical to the interest of the First Amendment.⁵⁷ The Supreme Court in *Harper & Row Publishers, Inc., v. Nation Enterprises* recognized that "no author may copyright facts or ideas. The copyright is limited to those aspects of the work – termed 'expression' – that display the stamp of the author's originality."⁵⁸ The Supreme Court went on to rule that the "idea/expression dichotomy 'strike[s] a definitional balance between the First Amendment and [copyright] by permitting free communication of facts while still protecting an author's expression."⁵⁹ The Supreme Court further recognized in *Eldred v. Ashcroft* that the result of this limitation on copyright is that "every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication."⁶⁰ Thus, "copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by the work."⁶¹ Where the freedom of speech seeks to guarantee the enlightenment of people through the free-flow of ideas,⁶² courts accept the idea/expression dichotomy as a means of permitting such flow of ideas and thus avoiding conflict with the First Amendment.

The second safeguard, the fair use doctrine, affords a privilege for the limited use of both the idea and expression of copyrighted material without permission from the rights holders where the use is "for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research."⁶³ Although now codified, the fair use doctrine originated as a "judge-made right developed to preserve the constitutionality of copyright legislation by protecting First Amendment values."⁶⁴

E. The Eldred Decision

For proponents of copyright reform, the Supreme Court's decision in *Eldred v. Ashcroft* initially seemed a crushing blow.⁶⁵ The *Eldred* petitioners made two claims regarding the Copyright Term Extension Act (CTEA):⁶⁶ first, they challenged the CTEA as a violation of the "limited Times" provision of the Progress Clause, and second, they challenged the CTEA as a content-neutral regulation of speech failing the heightened judicial scrutiny required by the First Amendment.⁶⁷ In a 7-2 decision, the Court rejected both arguments, yet explicitly recognized that copyright would not be immune from First Amendment scrutiny in all cases.⁶⁸

The petitioners claimed that although the new copyright term under the CTEA – the life of the author plus seventy years – was valid, the application of that new standard to extend the protection of already published and copyrighted works violated the "limited Times" provision of the Progress Clause.⁶⁹ The petitioners premised this argument on the contention that an initial term that could be extended was by definition not "limited"; that is, once set a term is "fixed" and "unalterable."⁷⁰ The Court rejected this reading of the term "limited," holding instead that "limited" only requires that the term be initially confined within certain bounds, not that it be forever fixed.⁷¹

Second, the petitioners claimed that, as a content-neutral regulation of speech, the CTEA should be subjected to strict judicial scrutiny under the First Amendment.⁷² Rejecting this argument, the Court found that strict scrutiny review is unnecessary, not only because copyright law has built-in safeguards, but also because the CTEA itself includes additional protections.⁷³ The Court recognized support for its holding in the long history of similar congressional extensions of

the term of copyright protection.⁷⁴ However, most importantly, the *Eldred* Court found that where Congress does not act in accordance with history, but instead "alter[s] the traditional contours of copyright protection," a more searching First Amendment scrutiny must be conducted.⁷⁵

In virtually all subsequent cases, *Eldred* has been read to set the standard for First Amendment review of both new copyright legislation and changes to existing copyright legislation.⁷⁶ Although the *Eldred* "traditional contours" standard has been widely adopted, a clear split has developed among several circuits over its interpretation.⁷⁷

F. The Berne Convention

In *Golan v. Gonzales*, the Tenth Circuit considered a challenge to the Uruguay Round Agreement Act (URAA),⁷⁸ an act to bring United States Copyright law into compliance with the principal multi-national treaty controlling copyright law, the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).⁷⁹ As of April 2007, 163 countries were signatories to the Berne Convention.⁸⁰ There are three general requirements to membership: (1) member-states must grant works originating in other member-states the same copyright protections granted to works created by its own nationals;⁸¹ (2) copyright protection cannot be contingent on formalities (i.e., protection must attach automatically);⁸² and (3) member-states must grant a minimum term for copyright protection amounting to life of the author plus fifty years.⁸³

Article 1 of the treaty illustrates the moral rights perspective taken by the Berne Convention, providing that the Convention forms a "Union for the protection of the rights of authors in their literary and artistic works."⁸⁴ This moral justification for copyright protection stands in clear contrast to the instrumental view adopted by the Framers of the United States Constitution.⁸⁵ Because joining the Berne Convention would have required major changes to the United States copyright regime, especially with regard to the moral rights standards imposed by the treaty, the United States initially refused to join; however, with the enactment of the Berne Convention Implementation Act of 1988, the United States became a party to the treaty.⁸⁶ Despite signing, the United States refused to comply with Article 18 of the Convention, which required signatory countries to

extend copyright protection to any work still protected in the work's home country.⁸⁷ Article 18 would have required the United States to grant protection to many foreign works that were in the public domain. Because of this, the United States refused to apply the treaty retroactively and applied the provision only with regard to works published after March 1, 1989.⁸⁸

G. The Uruguay Round Agreement Act

Following harsh international criticism for its unilateral refusal to comply with Article 18 of the Berne Convention, the United States eventually agreed to full compliance at the Uruguay Round negotiations of the General Agreement on Tariffs and Trade (GATT).⁸⁹ Congress subsequently adopted the URAA, which implemented the provisions agreed upon at the Uruguay Round negotiations.⁹⁰ In 1993, during the Uruguay Round, GATT was updated as GATT 1994, which established the World Trade Organization (WTO).⁹¹ Title V of the URAA implements the Agreement on Trade-Related Aspects of Intellectual Property Rights, which requires WTO members to comply with Article 18 of the Berne Convention.⁹²

Article 18 of the Berne Convention requires that member-nations provide copyright protection to those foreign works whose protection has not yet expired in their country of origin.⁹³ Article 18 applies retroactively such that although the United States did not join the Berne Convention until 1988, Article 18 required it to extend protection to all works that were still protected by copyright in their country of origin, regardless of whether that work had already passed into the public domain within the United States.⁹⁴ In order to comply with Article 18's requirement of retroactive application,⁹⁵ protection had to be restored to many foreign works still protected in their country of origin that had fallen into the public domain in the United States.⁹⁶ Section 514 of the URAA amended United States' copyright law to restore copyright protection to such foreign works.⁹⁷ The plaintiffs in *Golan* challenged the URAA's removal of works from the public domain as a violation of their right to free expression under the First Amendment.⁹⁸

III. Statement of the Case: *Golan v. Gonzales*

A. The Plaintiffs

The *Golan* plaintiffs, in different ways, all relied on works in the public domain for their livelihood.⁹⁹ Section 514 of the URAA injured each plaintiff by removing those works from the public domain and reinstating copyright protection.¹⁰⁰ For example, Lawrence Golan is a professional symphony, opera, and ballet conductor as well as the director of the orchestral studies program at the University of Denver's Lamont School of Music.¹⁰¹ As a university director, he is "obligated to teach works by important classical and contemporary foreign composers including composers from the 20th century" to students who "depend on these public domain works for a well-rounded education."¹⁰² Unfortunately, many of these standard works are no longer freely available in the public domain because of the URAA. As a result, students are unable to learn much of the "industry's 'standard repertoire' for auditions, competitions, and public performances."¹⁰³

Another plaintiff, the late Richard Kapp, was an accomplished pianist and an internationally renowned conductor.¹⁰⁴ Kapp testified that he "depended on the availability of musical works in the public domain for performances and recordings for over thirty-five years."¹⁰⁵ Kapp went on to explain that "copyrighted works impose significant performance fees and much higher sheet music rental costs than public domain works Thus, given budget constraints, the vast majority of the works his orchestras perform[ed] [had to] come from the public domain."¹⁰⁶ Other plaintiffs, Luck's Music Library and Edwin F. Kalmus, distributed orchestral sheet music from the public domain to orchestras, symphonies, universities, and schools.¹⁰⁷ Similarly, plaintiffs Ron Hall and John McDonough distributed films that had passed into the public domain.¹⁰⁸ Luck's Music Library, Kalmus, Hall, and McDonough have all had to eliminate much of their catalog because of the URAA.¹⁰⁹ Each plaintiff in their own way furthered the dissemination of cultural works to the public, and each has been forced by the URAA to stop or substantially curtail this dissemination.

B. At the District Court

The plaintiffs filed the complaint on September 19, 2001, in the United States District Court for the District of Colorado alleging that both the CTEA and the

URAA were unconstitutional for their violation of the Progress Clause, the First Amendment, and the Due Process Clause.¹¹⁰ Soon after, on August 23, 2002, the district court put the case on administrative retirement subject to the United States Supreme Court's ruling in *Eldred*.¹¹¹ Following the decision in *Eldred* on January 15, 2003,¹¹² the plaintiffs filed an amended complaint modifying their claims based on the *Eldred* decision.¹¹³ The Government immediately filed a motion to dismiss all claims, asserting that *Eldred* "affirmed the constitutionality of the CTEA" and "articulated in great detail the Supreme Court's view of the scope and meaning of the Copyright Clause in a way that discredit[ed] [the] Plaintiffs' challenges to the URAA."¹¹⁴ The district court granted the Government's motion as to the plaintiffs' claim that the CTEA violated the Progress Clause's "limited times" provision, but denied the motion as to all other claims.¹¹⁵

Following discovery, the parties filed cross-motions for summary judgment.¹¹⁶ The Government's motion¹¹⁷ urged the Court to follow a decision handed down during the *Golan* discovery period by the United States District Court for the District of Columbia in *Luck's Music Library Inc. v. Gonzales*, which held that the URAA is constitutional and not subject to First Amendment review.¹¹⁸ The plaintiffs' motion for summary judgment reinforced their two arguments: (1) that the URAA extends beyond the power granted Congress under the Progress Clause, and (2) that the URAA altered the "traditional contours of copyright protection" and thus required First Amendment review.¹¹⁹ The district court granted the Government's motion for summary judgment and denied the plaintiffs', finding that Congress had not overstepped the bounds of the Progress Clause in passing the URAA.¹²⁰

C. Appeal to the Tenth Circuit

On July 18, 2005, the plaintiffs filed an appeal to the United States Court of Appeals for the Tenth Circuit. The plaintiffs made three primary contentions: (1) the URAA's removal of works from the public domain abridges the First Amendment right to free expression; (2) the restoration of copyright protection to works in the public domain exceeds Congress's power under the Progress Clause; and (3) the current term of copyright as extended by the CTEA has become so long as to violate the "limited Times" requirement of the Progress Clause.¹²¹ In an opinion by Judge Robert Henry, the Tenth Circuit vacated the

district court's First Amendment ruling, affirmed all else, and remanded with orders for the district court to subject Section 514 of the URAA to First Amendment scrutiny.¹²²

The Tenth Circuit's decision was a result of its careful interpretation of *Eldred v. Ashcroft*.¹²³ In *Eldred*, the Supreme Court established a standard of review for use when copyright also regulates speech, providing that where copyright legislation "alter[s] the traditional contours of copyright protection" it must be subjected to First Amendment scrutiny.¹²⁴ The *Golan* plaintiffs argued that the district court erred by failing to apply the *Eldred* standard, claiming specifically that the URAA "disrupted the traditional contours of copyright protection" by removing works from the public domain.¹²⁵ The plaintiffs further argued, through thorough discussion, that historical precedent does not support Congress's removal of works from the public domain; thus, the URAA alters "tradition" under the *Eldred* standard, thereby requiring First Amendment scrutiny.¹²⁶ In response, the Government argued that the "traditional contours of copyright protection" are limited to copyright's built-in First Amendment safeguards – the idea/expression dichotomy and the fair use doctrine; therefore, First Amendment review is unnecessary because the URAA alters neither safeguard.¹²⁷

Although *Eldred* provides the standard for considering the free speech implications of a copyright law, it provides little guidance regarding its application. Therefore, the Tenth Circuit began its review by refining this standard through consideration of what the phrase "traditional contours" entails. The court recognized that "the term [traditional contours] seems to refer to something broader than copyright's built-in free speech accommodations."¹²⁸ The court rejected the Government's argument that "traditional contours" is limited to the idea/expression dichotomy and the fair use doctrine.¹²⁹ With this conclusion, a split formed, as the Ninth Circuit¹³⁰ and the District Court for the District of Columbia¹³¹ have, to the contrary of the Tenth Circuit, agreed with the limited view of "traditional contours" proposed by the Government.

1. The Tenth Circuit's Framework for "Traditional Contours" Analysis

The Tenth Circuit separated the "traditional contours" analysis into a functional and a historical component. The functional component, represented by "contour," encompasses the general form or structure of copyright law.¹³² Under it, the court

reviews whether "the ordinary procedure of copyright protection" has been altered by Congress.¹³³ This procedure includes the way in which the reach of copyright protection is bounded by the public domain.¹³⁴ Considering the historical component, Judge Henry provided that the *Eldred* Court's qualification of the "contours" as "traditional" suggests "that Congress's historical practice with respect to copyright and the public domain must inform our inquiry."¹³⁵

a. The Functional Component

The Tenth Circuit, considering the functional component, recognized as a "contour" the sequence in which a work moves through copyright, and thus considered whether the URAA altered that sequence.¹³⁶ Until Section 514 of the URAA, every statutory scheme maintained the same sequence. The sequence begins with an author's creation of an original expression. Copyright law then grants the expression a limited period of copyright protection and, upon expiration, the work passes permanently into the public domain.¹³⁷ The URAA distorts this sequence such that the public domain is not always the end, and may sometimes even be the beginning.¹³⁸ Thus, the Tenth Circuit concluded that "by copyrighting works in the public domain, the URAA has altered the ordinary copyright sequence,"¹³⁹ a "traditional contour [] of copyright protection," and must be subjected to First Amendment scrutiny.

Further, in consideration of the functional component, the court in *Golan* identified a second "contour" of copyright – the *character* of works in the public domain.¹⁴⁰ With abundant citation, the court established the great judicial weight behind the proposition that works within the public domain cannot be copyrighted.¹⁴¹ The court concluded that, by copyrighting works in the public domain, the URAA "extend[ed] a limited monopoly to expressions historically beyond the pale of such privileges," and thus "contravened a bedrock principle of copyright law" altering its "traditional contours."¹⁴²

b. The Historical Component

Turning to the historical component, the *Golan* court concluded that "[t]he history of American copyright law reveals no tradition of copyrighting works in the public domain."¹⁴³ The Tenth Circuit's inquiry looked to whether removal of works from the public domain is consistent with the Framers' view of copyright law and

Congress's historical practices. Regarding the Framers' view, the court recognized, as has a consensus of scholars, that the Framers' view on copyrighting works in the public domain is "probably not just unclear but also unknowable"¹⁴⁴ because the common law of the United States at the time the states ratified the Constitution "was in a highly uncertain state on the subject of copyrights."¹⁴⁵ Further, other standard sources of the Framers' intent, such as the Federalist Papers and Madison's notes from the Constitutional Convention, give little attention to the subject.¹⁴⁶ Because of the scarcity of supporting evidence, the court refused to conclude that the Framers viewed removal of works from the public domain as consistent with the copyright scheme.¹⁴⁷

Regarding congressional practice, the court considered certain war time acts that "may have had the effect of removing a very small number of works from the public domain," concluding that such limited actions under unusual and non-traditional circumstances are not sufficient to establish removal of works from the public domain as a "traditional contour," especially where the passing of the acts was not necessarily even constitutional.¹⁴⁸ Thus, the court held that "under both the functional and historical components of our inquiry, Section 514 has altered the traditional contours of copyright protection."¹⁴⁹

2. Applying Eldred's Three Factors

The *Golan* court next considered Section 514 of the URAA in light of the three factors that led the *Eldred* Court to find the CTEA is consistent with copyright's "traditional contours."¹⁵⁰ First, the *Eldred* Court concluded that the speech interests at issue involved the right to repeat the speech of others, which is entitled to less protection under the First Amendment than one's own speech.¹⁵¹ Second, the *Eldred* Court found that copyright law's "built-in First Amendment accommodations – the idea/expression dichotomy and fair use defense" adequately protected the First Amendment interests at stake in the case.¹⁵² Finally, the *Eldred* Court noted that Congress included additional protections in the CTEA beyond copyright's own built-in safeguards in order to ensure the public's access to protected expression.¹⁵³ Thus, the Tenth Circuit applied these three factors to the URAA: (1) the nature of the speech involved and the relative amount of First Amendment protection it is afforded, (2) the adequacy of copyright's built-in protections, and (3) the additional protection of First Amendment interests within the legislation at issue.¹⁵⁴

a. The Nature of the Speech at Issue

Regarding the first factor, the Tenth Circuit began by characterizing the nature of the free speech interests at issue. The court acknowledged that, at the time the works at issue passed into the public domain, the plaintiffs possessed a non-exclusive, unrestrained right to use the works.¹⁵⁵ Consequently, the Tenth Circuit recognized that the First Amendment protects such a right.¹⁵⁶ Further, the manner in which the plaintiffs used the works guaranteed them especially strong protection because "[t]he Supreme Court has emphasized that the right to artistic expression is near the core of the First Amendment."¹⁵⁷ The court considered the situation of Plaintiff John Blackburn, a high school band director who, relying on the principle work passing into the public domain, arranged a derivative work based on Dmitri Shostakovich's *Symphony No. 5* to be played at an event commemorating September 11. Because the Shostakovich work had passed into the public domain, the court found that Mr. Blackburn had the right to create his derivative piece and that Section 514 of the URAA interfered with his right to use his own legally created work by making the cost of performing such work prohibitive due to licensing.¹⁵⁸ Therefore, regarding the nature of the speech at issue, the court found that the plaintiffs' First Amendment interests in public domain works were stronger than that of the *Eldred* plaintiffs who did not, nor had they ever, possessed unrestricted access to any works at issue.¹⁵⁹ While the *Eldred* plaintiffs' First Amendment interests were in "making other people's speeches," for example in distributing books from the public domain,¹⁶⁰ the plaintiffs in *Golan* used "publically available works to create their own artistic productions," thus the speech at issue in *Golan* belonged to the plaintiffs themselves.¹⁶¹

b. Copyright's Built-in Free Speech Protections

The Tenth Circuit determined that, unlike in *Eldred*, copyright's built-in free speech safeguards – the idea/expression dichotomy and the fair use doctrine – are not adequate to address the threat to First Amendment interests posed by URAA's removal of works from the public domain.¹⁶² The court reached this conclusion on the grounds that the danger addressed by the idea/expression dichotomy, monopolies over ideas, is not the danger threatened by the URAA, the removal of works from the public domain.¹⁶³

The Tenth Circuit also found that the fair use doctrine was not adequate to address the First Amendment interests threatened by Section 514.¹⁶⁴ The plaintiffs had a right to unrestricted use of the works at issue before the URAA removed those works from the public domain.¹⁶⁵ Where applicable, the fair use doctrine provides limited use for limited purposes in situations where no use would otherwise be allowed. Applying the fair use doctrine to the present case would allow only limited use where unrestricted use had previously been allowed, thereby infringing on the plaintiffs' First Amendment rights.¹⁶⁶ Thus, the Tenth Circuit held that limited use in limited circumstances does not serve as "an adequate substitute for the unlimited access enjoyed before the URAA was enacted."¹⁶⁷

In broadly discussing the finding that copyright's built-in safeguards are not sufficient in the present case, the court explained that such safeguards are "designed to govern the distribution of rights between authors and the public from the moment a work is created and copyrighted until the copyright expires."¹⁶⁸ Accordingly, the court recognized that once a work reaches the public domain no such need for distribution of rights is necessary as all enjoy unrestricted access.¹⁶⁹

c. Additional Protections in the Legislation at Issue

The URAA includes none of the supplemental First Amendment protections found in the CTEA. In *Eldred*, the Supreme Court found that First Amendment review of the CTEA was not necessary, in part, because the CTEA provides additional protections beyond those built in to copyright, including exceptions for libraries and exemptions from licensing-fees for small businesses.¹⁷⁰ The URAA, on the other hand, provides only a safe harbor provision that allows a party receiving notice of the restoration of the copyright to continue use of the work for a limited time.¹⁷¹

The Tenth Circuit thus held that Section 514 of the URAA alters the "traditional contours" of copyright law by removing works from the public domain.¹⁷² Further, the factors that led the Supreme Court in *Eldred* to determine that the CTEA did not infringe upon the First Amendment were not present with the URAA and the *Golan* plaintiffs.¹⁷³ The Tenth Circuit remanded for First Amendment scrutiny of Section 514 by the district court.¹⁷⁴ The Tenth Circuit summarily rejected the Government's petition for rehearing en banc on January 4, 2008.¹⁷⁵

IV. Discussion

A. The Circuit Split

Since the Supreme Court's decision in *Eldred*, courts have widely accepted that new copyright legislation and changes to existing copyright legislation are subject to First Amendment scrutiny where they fall within copyright's "traditional contours."¹⁷⁶ Nonetheless, two conflicting readings of the *Eldred* "traditional contours" standard have arisen among the circuit courts. In cases involving First Amendment challenges to copyright laws based on *Eldred*, those challenging the law have consistently asserted that "traditional contours" means just that – the longstanding, established form of copyright law.¹⁷⁷ In opposition, the government consistently argues that "traditional contours" includes only copyright's two built-in First Amendment safeguards, and thus, *Eldred* requires First Amendment review of copyright legislation if *and only if it* alters either the idea/expression dichotomy or the fair use doctrine.¹⁷⁸

The Tenth Circuit in *Golan* agreed with the interpretation of the challengers, finding that "the term [traditional contours] seems to refer to something broader than copyright's built-in free speech accommodations."¹⁷⁹ The Tenth Circuit defined the term to include the "bedrock principle[s]" founded upon the general form or structure of copyright protection from both a functional and historical perspective.¹⁸⁰

In contrast, the Ninth Circuit accepted the government's position in *Kahle v. Gonzales*.¹⁸¹ The *Kahle* plaintiffs challenged the Copyright Renewal Act of 1992 (CRA),¹⁸² which eliminated the renewal requirement for the extended protection afforded to works created between 1964 and 1977.¹⁸³ The plaintiffs asserted that the change from discretionary to automatic renewal of copyrights – from an opt-in to an opt-out system – altered the "traditional contours of copyright [protection]" and thus requires First Amendment review.¹⁸⁴ The *Kahle* court, however, rejected the characterization of the CRA as a change from an opt-in to an opt-out system.¹⁸⁵ Instead, taking a more liberal approach, the Ninth Circuit characterized the CRA as merely a tool for bringing the protection afforded to older works into parity with the protection afforded to newer works under the CTEA.¹⁸⁶ In doing so, the court was able to frame the challenge in *Kahle* to bring it under the purview of its own interpretation of *Eldred*, and it held that copyright

laws intending to bring older works into parity with newer works are permissible without First Amendment review. In so holding, the Ninth Circuit accepted the government's position that *Eldred* requires First Amendment scrutiny only where the traditional First Amendment safeguards are altered. The Tenth Circuit's holding in *Golan* came in direct contrast to this decision.

B. The Route to Resolution

On January 4, 2008, two separate decisions of importance were handed down. Most directly, the Tenth Circuit in *Golan v. Mukasey* denied the Government's motion for rehearing en banc.¹⁸⁷ In the motion, the Government relied on its position that *Eldred* calls for First Amendment review only where Congress alters either the idea/expression dichotomy or the fair use doctrine, and asserted that the panel decision was in error in finding otherwise.¹⁸⁸ This motion is the most thorough exposition of the government's interpretation of the *Eldred* standard to date.

On the same day, in *Kahle v. Mukasey*, the United States Supreme Court denied the plaintiffs' petition for writ of certiorari.¹⁸⁹ The petitioners framed the appeal around the circuit split created by *Golan* on the issue of whether *Eldred*'s "traditional contours" include more than just copyright's built-in First Amendment safeguards.¹⁹⁰ The Government offered two arguments in response.¹⁹¹ First, it argued that although *Golan* created a "tension" among the circuits, the panel misinterpreted *Eldred* and the split would be resolved upon rehearing en banc.¹⁹² Second, the Government argued that "[w]hile the results and reasoning of the two decisions are in tension, there is no actual conflict" because the courts were reviewing two separate laws, the URAA and the CRA.¹⁹³ Thus, in essence, the Government argued that although the circuits provided conflicting and incompatible definitions of "traditional contours," there was no conflict, and it is acceptable to apply *Eldred* in a new way in every situation. The latter argument is unconvincing, and would likely carry little weight with the Supreme Court, as it is beyond question that the *Eldred* standard, like any judicial standard, should be applied consistently. In response, the *Kahle* petitioners asked the Court, at a minimum, to hold the petition for certiorari until the Tenth Circuit resolved whether to grant a petition for rehearing.¹⁹⁴ Somewhat ironically, the Supreme Court denied certiorari on the same day the Tenth Circuit denied rehearing.

These decisions set the stage for Supreme Court review of the decision in *Golan*. Although the challenge in *Kahle* examining the change from an opt-in to an opt-out system certainly provided a clearer framing of the issue, the Tenth Circuit's refusal of rehearing en banc entrenches the issue and removes the obstacle argued by the Government in opposition to certiorari in *Kahle*.

Two potential paths exist for the split to reach the Supreme Court. First, the Tenth Circuit's remand could proceed from a decision by the district court to an inevitable appeal to the Tenth Circuit and finally to the Supreme Court to resolve the issue. Alternatively, the Government could directly appeal the decision of the Tenth Circuit by arguing that removal of works from the public domain is an alteration of the "traditional contours" of copyright protection.

For the plaintiffs, the most desirable outcome would naturally be for the decision in their favor at the Tenth Circuit to stand and for the case to proceed to the district court for First Amendment review. Nonetheless, the alternative result of a direct appeal to the Supreme Court of the Tenth Circuit's interpretation of the *Eldred* "traditional contours" standard has its own advantages. Although Supreme Court review would be somewhat undesirable to the plaintiffs themselves because in the short run it places the ground gained in jeopardy, direct review would have advantages for the proponents of copyright reform whom the plaintiffs represent. A decision by the Supreme Court affirming the *Golan* challengers' interpretation of *Eldred* would pave the way for further challenges to existing copyright laws and place a real limitation on Congress's future legislation.

For the Government, the manner in which the case proceeds is significantly more critical. Although the Government would hope to successfully defend the constitutionality of the URAA in its present form, its arguably more pressing concern lies in the precedent established by *Golan*. The definition of "traditional contours" provided by *Golan* calls into question the constitutionality of other copyright legislation and thus encourages further challenges. For example, the unsuccessful challenge to the Copyright Renewal Act of 1992 made in *Kahle* would be given a new life in the Tenth Circuit,¹⁹⁵ as the opt-in nature of the system was a defining characteristic of the United States copyright regime for 186 years, from the first Copyright Act of 1790 through the Copyright Act of

1976. The opt-in system would almost certainly be deemed a "traditional contour." This is especially likely in light of the same finding in *Golan* with regard to the relatively less central principle that works in the public domain cannot be copyrighted.¹⁹⁶ Thus, the goal of the Government must be not just to win the case, but to win the case in a way that overturns the precedent of the Tenth Circuit's opinion in *Golan*.

The Government's delicate objective makes it a dangerous proposition for the case to reach the district court. If the Government were to win at the district court level – that is if the URAA were to survive First Amendment scrutiny – then the Government would lack standing to appeal, and although the URAA survives, so does the precedent of the Tenth Circuit's opinion.¹⁹⁷ If the Government was to lose at the district court, it would have the opportunity to argue on appeal that the Tenth Circuit interpreted the *Eldred* standard incorrectly and that First Amendment review was unnecessary. Yet, in such circumstances, the issue they would seek to appeal, whether First Amendment review was even necessary, would be seriously muddled. The Tenth Circuit would be asked to find that First Amendment scrutiny was not proper for a piece of legislation that had already been found to unconstitutionally infringe on the First Amendment.

Instead, the Government will likely, and most prudently, appeal the decision of the Tenth Circuit directly. Such action preserves the issue for the Government as a pure de novo review of an isolated legal issue – whether the "traditional contours of copyright protection" include more than the built-in First Amendment safeguards. Although the Government will certainly argue in the alternative that even under the *Golan* court's definition of "traditional contours" First Amendment review is unnecessary, this argument is likely to fail and the Government's case hinges victory on the former issue.

A Government petition for certiorari to the Tenth Circuit's decision would likely be successful. The arguments made in support of the grant of certiorari by the petitioners in *Kahle*¹⁹⁸ remain equally applicable to *Golan*.¹⁹⁹ As Congress repeatedly acts to rebalance the interests at play in copyright law in order to facilitate the rapid changes of a digital world, proper application of the *Eldred* rule is vital to ensure that Congress can effectively operate within the boundaries of the Constitution.²⁰⁰ Further, what the Government characterizes as merely

"tension" among the circuits at the time of the *Kahle* petition has matured in to a complete circuit split. Thus, as similar copyright challenges will continue to be made to different statutes, further guidance from the Supreme Court is needed.

V. A Suggestion on the Proper Resolution of the Circuit Split

The "traditional contours of copyright protection" include not only the idea/expression dichotomy and the fair use doctrine, but also all other "contours" within the historical structure of copyright law. This conclusion becomes clear for four reasons: (1) the interpretation is clearly supported by the language of *Eldred*; (2) the alternative interpretation is incompatible with the plain language of *Eldred*; (3) adoption of the alternative position advanced by the Government would produce absurd results; and (4) the Supreme Court explicitly rejected the alternative interpretation as adopted by the D.C. Circuit Court in *Eldred* below.

A. The Plain Language of *Eldred* Supports the Tenth Circuit's Interpretation

The language of the *Eldred* decision is the most apparent support for the view that the "traditional contours" include more than just copyright's two built-in First Amendment safeguards. A clear reading of the standard provided in *Eldred* can be accomplished by breaking it down into its components. First, the purpose of *Eldred* is to ensure an effective balance between protection of the First Amendment from copyright and appropriate deference to Congress in exercising its copyright power. *Eldred* achieves this by identifying the dangers faced by the First Amendment and addressing them with an appropriate level of protection in proportion to the level of risk involved.²⁰¹

Eldred recognizes two levels of danger that the First Amendment may face from copyright – a relatively high level of danger and a relatively low level of danger. To determine what level of danger is faced from a particular copyright law, the Supreme Court provided that where Congress alters the "traditional contours of copyright protection" the First Amendment faces a relatively high level of danger; otherwise, copyright's built-in safeguards are "generally adequate," and the First Amendment faces a relatively low level of danger.²⁰² In providing that copyright's built-in First Amendment safeguards are "generally adequate" to address the concerns faced, the *Eldred* Court creates the clear inference that

normally the First Amendment will face a relatively low level of danger.²⁰³ Yet, "generally adequate" also implies that in certain situations the built-in safeguards will not be sufficient on their own to protect the First Amendment. In these situations, the First Amendment faces a relatively high level of danger from copyright. This division makes sense; in light of the longstanding historical balance between First Amendment and copyright interests, congressional action within that traditional balance raises no real alarms, but once Congress transgresses that balance, the assurances of tradition are no longer present.

In order to ensure both proper deference to Congress and sufficient protection of the First Amendment, *Eldred* provides for two separate levels of protection corresponding to the two levels of danger potentially faced.²⁰⁴ The first level of protection is copyright's historical structural balance, including the built-in First Amendment safeguards.²⁰⁵ The Court recognized this safeguard as generally adequate to address the relatively low level of danger when Congress works within the bounds of tradition.²⁰⁶ The second level of protection comes in the form of First Amendment judicial scrutiny. The court finds this safeguard necessary to address the relatively high level of danger when Congress disrupts copyright's historical balance – that is, alters the "traditional contours of copyright protection."²⁰⁷

This explanation illustrates the system set forth by the *Eldred* court; however, neither the Government, nor the collective plaintiffs dispute that First Amendment review is necessary where Congress alters the "traditional contours" of copyright protection. The conflict arising initially between the Government and the plaintiffs, and now between United States circuit courts, is over what the definition of "traditional contours" includes. Nevertheless, an understanding of the system remains valuable because a proper understanding of the details of the *Eldred* process leaves only one coherent definition of "traditional contours."

The confusion in interpreting the standard set forth in *Eldred* seems to stem from the Government's ignorance of – and the collective plaintiffs' failure to emphasize – the fact that the built-in First Amendment safeguards serve two independent roles. The built-in First Amendment safeguards serve as "traditional contours of copyright protection," as they are certainly a part of the structure of copyright law; however, in the *Eldred* standard, the role of the safeguards as a

part of the "traditional contours" is only secondary. First and foremost, the idea/expression dichotomy and the fair use doctrine serve within the *Eldred* system as the First Amendment's front-line, and where the dangers are low, the only line of protection. This recognition – that the built-in First Amendment safeguards' primary role is as a protective measure – is vital to a proper interpretation of the language of *Eldred*. Recognizing that the Government fails to see both facets reveals how it came to the erroneous determination that the safeguards alone constitute the "traditional contours." That is, the Government seems to read the issue in *Eldred* as whether the protection of First Amendment review of the CTEA is necessary. Recognition of the real question answered by the *Eldred* Court – not whether, but how much protection is necessary to guard First Amendment interests – reveals the error of the Government's interpretation. That the latter is the proper characterization of the issue is clear from the language of the *Eldred* Court itself. In fact, the Court based its conclusion that First Amendment review is unnecessary on its finding that copyright's built-in First Amendment safeguards, functioning in their role as a protective measure, provided adequate protection with regard to the CTEA, thus making the further protection of judicial scrutiny unnecessary.²⁰⁸

The Government's interpretation of "traditional contours" is based on an improper assumption. The Government erroneously contends that the Supreme Court's thorough discussion of copyright's built-in safeguards in the three pages prior to setting forth the "traditional contours" standard suggests that the "traditional contours" include only these safeguards. The assumption that the Court's discussion is an exposition of the "traditional contours" standard, however, is improper. In light of the real question faced by the Court – how much protection is necessary – the Court's thorough discussion of the built-in safeguards becomes visible for what it is: a discussion of why the built-in safeguards offer sufficient protection in the case of the CTEA such that First Amendment judicial review is unnecessary. The "traditional contours" language that follows the Court's discussion of the safeguards is in fact used to express a different proposition all together. That is, the discussion of copyright's built-in safeguards is offered to show that those safeguards are sufficient in the present case. In contrast, the "traditional contours" language is used not to resolve the *Eldred* case itself, but instead to recognize that although not necessary in the present case, First Amendment review could be necessary in other cases.

B. The Ninth Circuit's Interpretation Would Frustrate the Purpose behind *Eldred*

The purpose of the *Eldred* Court, in establishing the "traditional contours" standard, would be frustrated under the Government's interpretation of "traditional contours." The Court's purpose was to ensure that Congress is accorded the appropriate level of deference with regard to copyright law while still providing the First Amendment sufficient protection against infringement.

The *Eldred* Court achieves this purpose by recognizing that the traditional structure of copyright law creates a balance between the interests of copyright and the interests of the First Amendment, and that this balance generally provides an adequate level of protection to the First Amendment such that intrusive judicial review can often be avoided. This balance operates in the *Eldred* Court's standard to justify not requiring First Amendment scrutiny. If the balance was disrupted, one would expect that First Amendment scrutiny would then be required. This is precisely what the *Eldred* Court provides by holding that the balance is disrupted and thus First Amendment scrutiny is required whenever Congress alters the "traditional contours of copyright protection."²⁰⁹ Because the Court's intention for the "traditional contours" standard is to define when the balance between copyright and the First Amendment is disrupted, it follows that any definition of "traditional contours" would have to be broad enough to effectuate this purpose. That is, any change in copyright law that displaces the balance must necessarily be one that alters the "traditional contours of copyright protection." If this was not the case, situations would exist where Congress could change copyright in a way that disrupted the balance of interests, thereby eliminating the Court's original justification for not requiring First Amendment review, yet still not be subject to First Amendment review. Such an interpretation could not be the intention of the *Eldred* Court, yet this is precisely what the Government argues and the Ninth Circuit has accepted.

For example, prior to the Copyright Act of 1976, a work had to be published to be eligible for copyright protection. This requirement certainly played a role in ensuring the balance between copyright and the First Amendment. The requirement of publication functioned to "guarantee that new ideas, or new expressions of old ideas, would be accessible to the public" and thus free

expression would be encouraged with more content to express.²¹⁰ The Copyright Act of 1976 eliminated this requirement.²¹¹ Because the balance of interests was disrupted, the guarantees of tradition are no longer present and the logic of *Eldred* requires First Amendment review. Therefore, in order to fulfill the purpose of *Eldred*, the definition given to "traditional contours" should produce this result. This is precisely the result produced by the interpretation of *Eldred* by the Tenth Circuit, as the publication requirement would certainly be found to be a "traditional contour." In contrast, the interpretation accepted by the Ninth Circuit would frustrate the purpose of *Eldred* as the publication requirement, although a vital part of the definitional balance, would not be found to be a "traditional contour" as it is not one of the two built-in First Amendment safeguards. Despite upsetting the First Amendment copyright balance, the law would not be subject to First Amendment review under the Government's interpretation of *Eldred*.

C. The Eldred Court Expressly Rejected the Government's Position as Held by the D. C. Circuit Court below

Not only does the plain language and purpose of *Eldred* reveal that the Government's interpretation is incorrect, but the Supreme Court has also expressly rejected the same proposition made by the D.C. Circuit in deciding *Eldred* below. The D.C. Circuit found that "copyrights are categorically immune from challenges under the First Amendment."²¹² Although this language suggests the D.C. Circuit thought copyright completely immune, the court went on to clarify that this immunity protects Congress in those instances where the copyright legislation regulates "works on the latter half of the 'idea/expression dichotomy' [i.e., expressions] and makes them subject to fair use . . . [as] [t]his obviates further inquiry under the First Amendment."²¹³ In other words, the D.C. Circuit found that copyright legislation must not undergo First Amendment review so long as the traditional built-in safeguards are not changed. The Supreme Court expressly rejected this position on review, writing: "We recognize that the D.C. Circuit spoke too broadly when it declared copyrights 'categorically immune from challenges under the First Amendment.' But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."²¹⁴ Thus, the D.C. Circuit held that First Amendment review is only necessary when copyright's built-in safeguards are

changed, and the Supreme Court rejected that holding as limiting First Amendment review to too narrow of circumstances. Not only does the Government in *Golan* now argue a position firmly rejected by the *Eldred* Court – that First Amendment review is only necessary for changes to copyright's built-in safeguards – but it also asserts that argument in reliance on the precise language that the Supreme Court previously used to reject it in *Eldred* – "the traditional contours of copyright protection." In essence, the Government's argument is that, although the Supreme Court previously rejected this position, the proposition they replace it with means the same thing.

D. The Interpretation of *Eldred* Accepted by the Ninth Circuit Produces Absurd Results

Under the Government's interpretation of *Eldred*, where the only grounds giving rise to First Amendment scrutiny are alterations to the idea/expression dichotomy or the fair use doctrine, copyright law would be immunized from First Amendment review in many irrational situations. The Government's interpretation of *Eldred* would effectively permit Congress to censor at will by couching its action as copyright law. For example, suppose Congress passed a law removing from copyright protection all works expressing partisan political ideas. Congress could provide the rationale that partisan ideas create conflict and that discouraging such works would lead to a more peaceful society. Under the *Golan* court's interpretation of *Eldred*, such a law would certainly alter the "traditional contours of copyright protection." Yet, despite the law's blatant chilling of political speech, the law would not be subject to First Amendment review under the Government's interpretation of *Eldred*, as it alters neither the idea/expression dichotomy nor the fair use doctrine. The *Golan* plaintiffs themselves made similar arguments in opposition to rehearing en banc, providing the example of Congress passing a law prohibiting copyright protection for hate speech or removing copyright protection from works by convicted criminals.²¹⁵ No court would exempt such a law from First Amendment review,²¹⁶ yet such a law would not be subject to scrutiny under the Government's interpretation of *Eldred* because neither alters the built-in safeguards. Clearly, such outrageous results could not be the intention of the Supreme Court.

VI. Conclusion

Two-hundred and twenty years ago, the Framers feared copyright as a dangerous monopoly, accepted only as necessary for the development of a rich public domain. Today, not fear, but fondness motivates Congress in the area of copyright. Little pretense remains that copyright is but a means to the enrichment of the public domain; instead, copyright appears to exist as an end in itself. It is thus appropriate that free expression, the right with the most to lose, stands as the greatest defense against neglect of the public domain. Where copyright is "the engine of free expression,"²¹⁷ the public domain is its fuel. As Congress's copyright policy continues to press at the public domain, *Golan v. Gonzales* is a signal that the First Amendment has begun to press back.

Endnotes

- 1 US CONST. amend. I.
- 2 Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831).
- 3 Malla Pollack, *What Is Congress Supposed to Promote ? Defining "Progress " in Article I, Section 8, Clause 8 of the US Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754, 755 n.1 (2001) (providing that "[e]arlier academics call this the 'Copyright and Patent Clause.' Since neither 'copyright' nor 'patent' appears in the text . . . the best name would be the 'Progress Clause.'").
- 4 US CONST. art. 1, § 8, cl. 8.
- 5 *Id.* amend. I.
- 6 *Id.* art. 1, § 8, cl. 8.
- 7 2 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 21:3 (2007).
- 8 *Triangle Publ'ns v. Knight-Ridder Newspapers*, 626 F.2d 1171 (5th Cir. 1980); *Sid & Mart Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977); *Wainright Sec., v. Wall St. Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977).
- 9 471 US 539, 556-60 (1985).
- 10 537 US 186, 221 (2003).
- 11 *Id.*
- 12 501 F.3d 1179 (10th Cir. 2007).
- 13 See *supra* text accompanying note 11.

- 14 US CONST. art. I, § 8, cl. 8.
- 15 Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1831) (quoting the Act's preamble).
- 16 Edward C. Walterscheid, *Understanding the Copyright Act of 1790: The Issue of Common Law Copyright in America and the Modern Interpretation of the Copyright Power*, 53 J. COPYRIGHT SOC'Y USA 313, 338-39 (2006). Congress relied specifically on the Statute of Anne for the principle that copyright protection should be provided only for limited times with the purpose of incentivizing the creation of works of art and science. Copyright Act of 1709, 1710, 8 Ann., c. 19 (Eng.) (providing for copyright protection for "the Encouragement of Learning").
- 17 Act of May 31, 1790, ch. 15, § 1, 1 Stat. at 124.
- 18 *Id.* §§ 1, 3.
- 19 Act of Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 436, 439.
- 20 Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080.
- 21 *Id.*; Act of Feb. 3, 1831, §§ 1, 16, 4 Stat. at 436, 439.
- 22 Act of Mar. 4, 1909, 35 Stat. 1075.
- 23 SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1261 (2001).
- 24 17 U.S.C. §§ 101-810 (2000).
- 25 *Id.* § 302.
- 26 Berne Convention for the Protection of Literary and Artistic Works art. 5(3), Sept. 9, 1886, S. TREATY DOC. NO. 99-27 (1971), 828 U.N.T.S. 221 [hereinafter Berne Convention]; see *infra* notes 79-98 and accompanying text.
- 27 17 U.S.C. § 408.
- 28 *Id.* § 102.
- 29 Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.).
- 30 17 U.S.C. § 302.
- 31 *Id.* § 304.
- 32 E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE 57 (5th ed. 2003).
- 33 US CONST. art. I., § 8, cl. 8 ("to Promote the Progress of Science and useful Arts").
- 34 *E.g.*, Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1831) ("for the encouragement of learning"); L. Ray Patterson & Craig Joyce, *Copyright in 1791: An*

Essay, 52 EMORY L.J. 909, 947 (2003) (quoting George Washington's January 8, 1790 address to Congress, "Knowledge is, in every country, the surest basis of public happiness.").

- 35 1 WILLIAM PATRY, *PATRY ON COPYRIGHT* § 1:1 (2007) (recognizing copyright in the United States as a "positive law for utilitarian purposes" and "not a property right, much less a natural right").
- 36 US CONST. art. I., § 8, cl. 8 ("to Promote the Progress of Science and useful Arts"); Act of May 31, 1790, 1 Stat. at 124 ("for the encouragement of learning"); Patterson & Joyce, *supra* note 34, at 947 (quoting President George Washington, Address to Congress (Jan. 8, 1790)).
- 37 Andrew M. Hetherington, *Purpose and Inter-Clause Conflict: The Constraints Imposed on Congress by the Copyright Clause*, 9 MICH. TELECOMM. & TECH. L. REV. 457, 468 (2003) (citing Letter from James Madison to Thomas Jefferson (Oct. 17, 1788)).
- 38 *Id.*
- 39 *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co.*, 499 US 340, 349 (1991).
- 40 *Fox Film Corp., v. Doyal*, 286 US 123, 127 (1932); accord *Twentieth Century Music Corp., v. Aiken*, 422 US 151, 156 (1975).
- 41 Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180, 1186 (1970).
- 42 274 US 357, 375 (1927) (Brandeis, J., concurring).
- 43 *Id.*
- 44 Nimmer, *supra* note 41, at 1187-88 (citing Alexander Meiklejohn, *Free Speech AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948)).
- 45 *Id.* at 1188.
- 46 *Whitney*, 274 US at 375 (Brandeis, J., concurring).
- 47 *Id.*
- 48 Nimmer, *supra* note 41, at 1188.
- 49 US CONST. amend. I.
- 50 *Id.* art. I, § 8, cl. 8.
- 51 2 SMOLLA, *supra* note 7, § 21:2.
- 52 *Harper & Row Publishers, Inc., v. Nation Enters.*, 471 US 539, 558 (1985) (emphasis added).
- 53 *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263 (2001).

- 54 *Eldred v. Ashcroft*, 537 US 186, 219 (2003).
- 55 *Harper & Row*, 471 US at 558; see SMOLLA, *supra* note 7, § 21:3.
- 56 See 17 U.S.C. § 102(b) (2000).
- 57 *Golan v. Gonzales*, 501 F.3d 1179, 1194 (10th Cir. 2007).
- 58 *Harper & Row*, 471 US at 547 (citation omitted).
- 59 *Id.* at 556 (citing *Harper & Row Publishers, Inc., v. Nation Enters.*, 723 F.2d 195, 203 (2d Cir. 1983)).
- 60 537 US 186, 219 (2003).
- 61 *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co.*, 499 US 340, 349-50 (1991).
- 62 See *supra* text accompanying notes 41-48.
- 63 17 U.S.C. § 107 (2000).
- 64 *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264 (11th Cir. 2001).
- 65 537 US 186.
- 66 Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.); see *supra* text accompanying notes 29-31.
- 67 *Eldred*, 537 US at 193-94.
- 68 *Id.* at 218, 221.
- 69 *Id.* at 199.
- 70 *Id.*
- 71 *Id.*
- 72 *Id.* at 218.
- 73 *Id.* at 219.
- 74 *Id.*
- 75 *Id.* at 221.
- 76 See *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007); *Kahle v. Gonzales*, 487 F.3d 697 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 958 (2008); *Luck's Music Library, Inc., v. Ashcroft*, 321 F. Supp. 2d 107 (D.D.C. 2004), *aff'd on other grounds*, 407 F.3d 1262 (D.C. Cir. 2005); *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085 (N.D. Cal. 2004).
- 77 See *infra* notes 176-97 and accompanying text.

- 78 Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified as 17 U.S.C. §§ 104A, 109).
- 79 Berne Convention, *supra* note 26.
- 80 US COPYRIGHT OFFICE, INTERNATIONAL COPYRIGHT RELATIONS OF THE UNITED STATES, CIRCULAR 38A (2007), available at <http://www.copyright.gov/circs/circ38a.pdf>.
- 81 Berne Convention, *supra* note 26, art. 5(3).
- 82 *Id.* art. 5(2).
- 83 *Id.* art. 6(1), (6).
- 84 *Id.* art. 1.
- 85 See *supra* notes 32-40 and accompanying text.
- 86 See 17 U.S.C. § 101 (2000); see also Berne Convention, *supra* note 26.
- 87 Berne Convention, *supra* note 26, art. 18.
- 88 Olivia Regnier, *Who Framed Article 18? The Protection of Pre-1989 Works in the USA Under the Berne Convention*, 15 EUR. INTEL. PROP. REV. 400, 400 (1993).
- 89 See, e.g., *id.*
- 90 Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified as 17 U.S.C. §§ 104A, 109).
- 91 General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.
- 92 See S. REP. No. 103-412, at 225 (1994).
- 93 Berne Convention, *supra* note 26, art. 18.
- 94 *Id.*
- 95 *Id.*
- 96 *Id.* art. 5(2). Many of these foreign works had already fallen into the public domain for failure to meet the formal requirements of United States copyright law, such as to register the work, to renew protection, or to include satisfactory copyright notice. Article 5(2) of the Berne Convention prohibits protection being subject to formalities. *Id.* Thus, for these works protection would have had to be restored not only under Article 18, but also under Article 5(2). *Id.*
- 97 Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified as 17 U.S.C. §§ 104A, 109).
- 98 *Golan v. Gonzales*, 501 F.3d 1179, 1182-83 (10th Cir. 2007).
- 99 *Id.* at 1182.
- 100 *Id.*

- 101 Appellants' Opening Brief at 13, *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007) (No. 05-1259), 2005 WL 2673976.
- 102 *Id.* at 14.
- 103 *Id.*
- 104 *Id.*
- 105 *Id.*
- 106 *Id.*
- 107 *Id.*
- 108 *Id.*
- 109 *Id.*
- 110 Complaint at 1, *Golan v. Ashcroft*, 310 F. Supp. 2d 1215 (D. Colo. 2004) (No. 01B-1854), available at <http://cyber.law.harvard.edu/openlaw/golanvashcroft/complaint.pdf>.
- 111 *Eldred v. Ashcroft*, 537 US 186 (2003).
- 112 *Id.*
- 113 *First Amended Complaint*, *Golan v. Ashcroft*, 310 F. Supp. 2d 1215 (D. Colo. 2004) (No. 01B-1854), available at <http://cyberlaw.stanford.edu/attachments/Amended%20Complaint.pdf>.
- 114 Memorandum in Support of Defendant's Renewed Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted at 3, *Golan v. Ashcroft*, 310 F. Supp. 2d 1215 (D. Colo. 2004) (No. 01B-1854), available at <http://cyberlaw.stanford.edu/attachments/Renewed%20Motion%20to%20dismiss-4-30-03.pdf>.
- 115 *Golan v. Ashcroft*, 310 F. Supp. 2d 1215 (D. Colo. 2004).
- 116 *Golan v. Gonzales*, No. 01B-1854, 2005 WL 914754, at *1 (D. Colo. Apr. 20, 2005). *Golan v. Gonzales*, No. 01B-1854, 2005 WL 914754, at *1 (D. Colo. Apr. 20, 2005).
- 117 Memorandum in Support of Defendant's Motion for Summary Judgment, *Golan v. Ashcroft*, 310 F. Supp. 2d 1215 (No. 01B-1854 (D. Colo. 2004), available at <http://cyberlaw.stanford.edu/attachments/MSJ6-23-04.pdf>.
- 118 321 F. Supp. 2d 107 (D.D.C. 2004), *aff'd* 407 F.3d 1262 (D.C. Cir. 2005) (holding that § 514 of the URAA does not exceed Congress's power under the Progress Clause, nor does it violate the First Amendment).

- 119 Plaintiffs Opposition to Defendant John Ashcroft's Motion for Summary Judgment at 4, *Golan v. Ashcroft*, 310 F. Supp. 2d 1215 (No. 01B-1854) (D. Colo. 2004), available at <http://cyberlaw.stanford.edu/attachments/PlaintiffsSJOppBrief.pdf>.
- 120 *Golan*, 2005 WL 914754.
- 121 Appellants' Opening Brief, *supra* note 101, at 20.
- 122 *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007).
- 123 *Eldred v. Ashcroft*, 537 US 186 (2003).
- 124 *Id.* at 221.
- 125 *Golan*, 501 F.3d at 1185-86.
- 126 *Id.* at 1189-92.
- 127 Brief for the Appellees at 23, *Golan v. Gonzales*, 501 F.3d 1179 (No. 05-1259) (10th Cir. 2005), available at http://cyberlaw.stanford.edu/system/files/govt_response.pdf.
- 128 *Golan*, 501 F.3d at 1189-92.
- 129 *Id.*
- 130 *Kahle v. Gonzales*, 487 F.3d 697 (9th Cir. 2007), cert. denied, 128 S. Ct. 958 (2008).
- 131 *Luck's Music Library, Inc., v. Ashcroft*, 321 F. Supp. 2d 107 (D.D.C. 2007), *aff'd on other grounds*, 407 F.3d 1262 (D.C. Cir. 2005).
- 132 *Golan*, 501 F.3d at 1189.
- 133 *Id.* (emphasis added).
- 134 *Id.*
- 135 *Id.*
- 136 *Id.*
- 137 *Id.*
- 138 *Id.*
- 139 *Id.*
- 140 *Id.* at 1189-90.
- 141 *Id.*
- 142 *Id.* at 1192.
- 143 *Id.* at 1190.

- 144 *Id.* at 1191 (citing Walterscheid, *supra* note 16, at 332).
- 145 *Id.* at 1190 (quoting 1 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 477 (1953)).
- 146 *Id.*
- 147 *Id.*
- 148 *Id.* at 1192 (citing 3 NIMMER ON COPYRIGHT § 9A.07[A], 9A-79 to -80 (2007) and arguing that with regard to the wartime acts Congress was "simply [] sweep[ing] the constitutional issues under the rug").
- 149 *Id.*
- 150 *Id.* at 1189 (citing *Eldred v. Ashcroft*, 537 US 186, 220-21 (2003)).
- 151 *Id.*
- 152 *Id.* at 1184 (citing *Eldred*, 537 US at 219-20).
- 153 *Id.* (citing *Eldred*, 537 US at 220).
- 154 *Id.* at 1193.
- 155 *Id.*
- 156 *Id.*
- 157 *Id.* (citing *Ward v. Rock Against Racism*, 491 US 781, 790 (1989)).
- 158 *Id.*
- 159 *Id.* at 1194.
- 160 *Id.* at 1193 (citing *Eldred v. Ashcroft*, 537 US 186, 221 (2003)).
- 161 *Id.*
- 162 *Id.* at 1193-94.
- 163 *Id.*
- 164 *Id.* at 1195
- 165 *Id.*
- 166 *Id.*
- 167 *Id.*
- 168 *Id.*
- 169 *Id.*

- 170 *Eldred v. Ashcroft*, 537 US 186, 220-21 (2003).
- 171 17 U.S.C. § 104A(d)(2) (2000).
- 172 *Golan*, 501 F.3d at 1187-88.
- 173 *Id.* at 1188.
- 174 *Id.* at 1196.
- 175 *Golan v. Mukasey*, No. 05-1259 (10th Cir. Jan. 4, 2008), available at <http://lessig.org/blog/Rehearing-denied.pdf>.
- 176 See *Golan*, 501 F.3d at 1184; *Kahle v. Gonzales*, 487 F.3d 697, 700 (9th Cir. 2007), cert. denied, 128 S. Ct. 958 (2008); *Luck's Music Library, Inc., v. Ashcroft*, 321 F. Supp. 2d 107, 119 (D.D.C. 2004), aff'd on other grounds, 407 F.3d 1262 (D.C. Cir. 2005); 321 *Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085 (N.D. Cal. 2004).
- 177 See Reply to Brief in Opposition at 4, *Kahle v. Mukasey*, 128 S. Ct. 958 (No. 07-189), 2007 WL 4340897.
- 178 E.g., Brief for the Appellees, *supra* note 127, at 23-27.
- 179 *Golan*, 501 F.3d at 1189.
- 180 *Id.* at 1187, 1189.
- 181 487 F.3d 697; see also *Luck's Music Library*, 321 F. Supp. 2d at 119 (accepting the Government's position that *Eldred's* "traditional contours" include only the idea/expression dichotomy and the fair use doctrine).
- 182 Pub. L. No. 102-307, 1992 U.S.C.C.A.N. (106 Stat. 264) 756 (altering the copyright system to eliminate the renewal requirement for works created between 1964 and 1977).
- 183 *Kahle*, 487 F.3d at 699.
- 184 *Id.*
- 185 *Id.* at 700.
- 186 *Id.*
- 187 No. 05-1259 (10th Cir. Jan. 4, 2008), available at <http://lessig.org/blog/Rehearing-denied.pdf>.
- 188 Appellees' Petition for Rehearing and Rehearing En Banc, *Golan v. Mukasey*, No. 05-1259 (10th Cir. 2007), available at <http://cyberlaw.stanford.edu/system/files/Golan+Response+to+Govt+Petition+for+Rehearing.pdf>.
- 189 128 S. Ct. 958 (2008).

- 190 Reply to Brief in Opposition, *supra* note 177, at 1.
- 191 Brief for the Respondent in Opposition, *Kahle v. Mukasey*, 128 S. Ct. 958 (No. 07-189), 2007 WL 4218439.
- 192 *Id.* at 12-13.
- 193 *Id.* at 13.
- 194 Reply to Brief in Opposition, *supra* note 177, at 8-9.
- 195 *Kahle v. Gonzales*, 487 F.3d 697 (9th Cir. 2007).
- 196 *Golan v. Gonzales*, 501 F.3d 1179, 1192.
- 197 In this scenario, the possibility exists that the plaintiffs could appeal a loss at the district court level through to the Supreme Court, where the Government would have the opportunity to argue in the alternative that, even if the Court finds the URAA does not withstand First Amendment scrutiny, under the *Eldred* standard First Amendment review was nonetheless not appropriate. This argument however is both awkward and unlikely to be successful.
- 198 *Petition for Writ of Certiorari, Kahle v. Gonzales*, 487 F.3d 697 (9th Cir. 2007) (No. 07-189), 2007 WL 2323450.
- 199 *Golan*, 501 F.3d 1179.
- 200 *Petition for Writ of Certiorari, supra* note 198.
- 201 *Eldred v. Ashcroft*, 537 US 186 (2003).
- 202 *Id.* at 221.
- 203 *Id.* (emphasis added).
- 204 *Eldred*, 537 US 186.
- 205 *Id.* at 219-20.
- 206 *Id.* at 221.
- 207 *Id.*
- 208 *Id.*
- 209 *Id.*
- 210 *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264 (11th Cir. 2001).
- 211 Copyright Act of 1976, 17 U.S.C. § 104 (2000).
- 212 *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001).
- 213 *Id.* at 376.

- 214 *Eldred*, 537 US at 221 (quoting *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001)).
- 215 Appellants' Response to Appellees' Petition for Rehearing and Rehearing En Banc at 7-8, *Golan v. Mukasey*, No. 05-1259 (10th Cir. 2007), available at <http://cyberlaw.stanford.edu/system/files/Golan+Response+to+Govt+Petition+for+Rehearing.pdf>.
- 216 Cf. *R.A.V. v. St. Paul, Minn.*, 505 US 377 (1992) (striking hate speech statute); *Simon & Schuster, Inc., v. Members of N.Y. State Crime Victims Bd.*, 502 US 105 (1991) (invalidating law that regulated an accused or convicted criminal's income from works describing the crime).
- 217 *Harper & Rowe Publishers, Inc., v. Nation Enters.*, 471 US 539, 558 (1985).

Global Copyright, Local Speech

*Michael D. Birnhack**

The globalization of copyright law destabilized previous equilibrium. The shift to a trade environment required a re-evaluation of the previous position. The concern explored in this article is that the old foundations would collapse under the heavy weight of global forces. The concern is that local culture, access to information, research and free speech in general, will be left unattended, in the face of expanding the scope of copyright. In this scenario this article examines the intersection of copyright law and free speech. A normative evaluation of G Copyright law is conducted by detaching from its previously underlying philosophies and is now void of a coherent theory, other than that of a trade ideology. The framework of G Copyright is then applied to examine the conflict between copyright law and freedom of speech in a context where copyright has become global and free speech jurisprudence remained local. The result is that the answers given to the alleged copyright/speech conflict in some developed countries do not necessarily fit in other places.

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I. Introduction

Copyright law has been part of international law since the end of the nineteenth century, when the Berne Convention, one of the first precursors of globalization, came into force in 1886. But copyright law has specifically undergone a dramatic change in the past decade; it no longer strives toward the “encouragement of learning”, in the words of the English Statute of Anne (1709), or toward “promoting the progress of science”, in the words of the United States Constitution. Now, more than ever before, copyright serves the purpose of trade.

A decade ago, the Uruguay Round of Trade Negotiations created the World Trade Organization (WTO) and, within the framework of the WTO, the Trade Related Agreement on Intellectual Property Rights (TRIPS) was devised.¹ Copyright scholar David Nimmer wrote thereafter that, “[c]opyright has now entered the world of international trade”, and declared the “end of copyright law”.²

Copyright, of course, did not disappear with the advent of the WTO and TRIPS, but it did change dramatically. The new copyright regime is no longer a law of the public and for the public, but rather, a law of business, for businessmen and investors. We now have a Global Copyright (G©) regime. This is a shift in the essence of copyright law, which goes hand in hand with the ongoing commodification of information and the dramatic expansion of copyright law that has taken place in developed countries over the past decade.³ These two processes, the commodification of information and the expansion of copyright, work to reinforce each other.

Old copyright law was a delicate and complex balance of the interests and rights of authors (past, current and future), and the interests and rights of users and the public in general. The globalization of copyright law and its shift from “the field of cultural production”⁴ to that of trade has reshuffled the cards (including the trumps, i.e., the legal rights)⁵ and destabilized previous balances. In light of concerns that the old foundations of copyright law will collapse under the heavy weight of global forces, this shift to a trade-focused understanding of copyright law requires a reevaluation of at least some of those foundations. This article addresses the concern that due to the globalization of copyright, local culture, access to information, access to knowledge, freedom of research, and free speech in general will not be accorded appropriate importance in the face of expanding copyright.

This article attempts to trace the impact globalization has had on copyright law as it has shifted toward becoming a matter of trade. This article examines the intersection of copyright law and free speech. The intersection of copyright law and free speech is important in itself, but it also provides a jumping-off point for an exploration of copyright in general.⁶

The thesis of this article is composed of two sub-arguments and a third that ties the two sub-arguments together. The first argument is a normative evaluation of G© law. Several scholars documented and critically evaluated the process by which copyright became global over the past decade.⁷ They described in great detail how a few mega-corporations captured international organizations and managed to channel their business models through international treaties, provisions of which would later be incorporated into national legal systems.⁸ This article focuses not on the process of G© but on evaluating the outcome thereof, *i.e.*, the *nature* of G©. This examination of G© reveals that currently copyright reflects an ideology of trade, and that copyright law has been detached from its previously underlying philosophies. “Ideology of trade” refers to a capitalistic view that elevates the free market and its efficient functioning to the top priority, making it the single most important social norm that trumps all other interests and recruits them to serve its end.

The second argument applies the framework of G© to a specific but fundamental area of copyright law: the conflict that exists (or does not, depending upon whom you ask) between copyright law and free speech. The argument notes a peculiar discrepancy: while copyright has become global, free speech jurisprudence has remained local, and hence, different from place to place.⁹ The result is that the answers given to the alleged copyright-speech conflict in one place (that copyright is the engine of free speech, for example) do not necessarily fit in other places.¹⁰ Accordingly, Part II of this article offers a glance into the political and social phenomena of globalization in general, and then focuses on intellectual property law and copyright law in particular. Part II also introduces the concept of GloCalization, *i.e.*, the fusion of the global and the local.

Part III is devoted to surveying the status of speech – and the status of freedom of speech – around the globe. Despite attempts to create an

international principle of free speech, there is no such unified principle. Free speech remains a local matter, with free speech jurisprudence and the “tradition” of free speech varying from one jurisdiction to another. Furthermore, free speech jurisprudence is contingent upon a country’s history, culture, legal system, and current national agenda. A comparison of the level of free speech and the economic status of WTO members reveals that there is a direct correlation between the level of economic development (free trade) and that of free speech. Part III further concludes that freedom of speech is unlikely to be subject to a global regime in the near future.

Part IV addresses the alleged conflict between copyright law and free speech and the various responses offered by courts in developed countries that attempt to explain why the conflict is unproblematic. The judicial responses usually state either that there is no such conflict, or that the conflict has been satisfactorily addressed. Equipped with the conclusions from the previous Parts about the nature of G© and the local nature of free speech, this Part will take the copyright law/free speech conflict to the global level. It concludes that in a world of G© and local speech, the conflict between property limitations on the use of creative works on the one hand and the freedom to use these works to enhance creativity, culture, and democratic participation on the other hand, is better understood as a case of GloCalization. The copyright/speech conflict is both legal and political, and it enables the global norms of trade to collide with local culture. When copyright law is imposed upon countries without a strong tradition of free speech, access to information is limited, as is the use of such information, and the as the formation of new speech. In other words, the trade benefits to the North come at the expense of freedom in the South.¹¹ The lessons derived from the comparison of free trade and free speech emphasize the inappropriateness of the North’s treatment of the South.

It is important to realize that one size (copyright) does not fit all (countries). Despite the undisputed need for harmonization of copyright law on a global scale, the expansion of copyright law should be softened, and copyright should be redirected to its original productive and benevolent goal: the promotion of culture. Global institutions, such as the World Intellectual Property Organization (WIPO) and the WTO, should also recognize the impact that G© has had on opportunities for speech, and act accordingly. The *Development Agenda* currently on WIPO’s table is a good step in this direction.¹²

II. The New World IP Order

A. Globalization

Globalization has become a buzzword in recent years, especially since the Battle of Seattle in 1999,¹³ though this economic, political, and cultural phenomenon started long before. A lot of water has passed under the bridge since Marshall McLuhan wrote about the global village in 1964.¹⁴ Much was written about the pros and cons of globalization in various disciplines. The criticisms of globalization stem from social and economic concerns and political views, and is driven by fear of environmental effects, violations of human rights, and other concerns. Support for globalization is based on liberal ideologies, some theories of macro-economics, and a belief that capitalism and globalization can lead to freedom and liberty. This Part begins by presenting several definitions of globalization. It then provides an overview of the arguments for and against globalization and attempts to identify the role of the law in the process.

1. Defining Globalization

Globalization has acquired many definitions over a short period, and there is no single agreed-upon definition.¹⁵ There are several perspectives through which globalization can be addressed, and the corresponding definitions vary accordingly. The discussion that follows distinguishes the definitions for the sake of clarity,¹⁶ although all the definitions are interrelated.

One view of globalization is descriptive. This descriptive view refers to the connectedness of people around the world. The means of communication and transportation available to humanity are continually improving. It is now easier, faster, cheaper, and safer (at least from a technological perspective) to travel from one place to another, and more people travel now than ever before. People also communicate more easily, using technologies such as electronic mail, satellite telephony, cellular phones and Internet telephony (VoIP). While the end of the Cold War and other political and economic changes have accompanied technological progress, the descriptive view of globalization focuses on human interaction. In this McLuhanian sense, the world has become, at least relatively speaking, a global village.

A second meaning of globalization is cultural homogenization. More people now share similar cultural backgrounds, or at least similar cultural experiences, with respect to fashion, food, art, and even music and movies. Harry Potter, Madonna, Disney, Hollywood movies, Nike, MTV, Microsoft products, Peer to Peer (P2P) file sharing technologies, and McDonalds are all examples of this shared culture. Young people today have much more in common with their peers around the world than their parents' generation did. The "global village" means that the world is becoming closer, more uniform, and culturally standardized. Cultural homogenization means that local, distinctive values and traditions change, and some may even disappear. Of course, there are still many cultural differences between peer groups around the world. Language, tradition, religion, financial divides and other factors prevent many from being part of the emerging global culture, and even those who are caught up in the global culture experience it differently. Much of this global culture is ideological: the emerging global culture carries and conveys (and reinforces) a message of consumerism, dividing the world into producers and consumers; sellers and buyers.¹⁷ Money is the key to participation in the consumerist culture, and capital is the vision. In such a global village, producers of cultural products target a global audience of potential buyers, often turning to the least common denominator, which easily crosses borders.

A third meaning of globalization is economic. Under this view, globalization envisions worldwide growth within one united market rather than in separate geographic and political economies. The means to achieve economic globalization is through free trade, especially the free flow of capital and direct foreign investments, accompanied by technological diffusion. Economic growth is the ultimate goal, and efficiency, competition, and specialization are cast as the chief tools of integrating economies. In this context, "free trade" means uninhibited flow of capital, goods and labor, and, in the context of G©, it means the free flow of commodified information. This creates an interesting juxtaposition, where commodified information is superimposed upon "free" information – free from regulation and private control.¹⁸ This form of economic globalization requires the removal of so-called trade barriers, such as tariffs, import quotas, and various labor-related regulations.¹⁹ Economic globalization requires foreign investments not to be burdened. It also means that the flow of human capital is easier, such that employees can migrate from one place to

another. Economic globalization is thus an enhanced version of capitalism: the idea of a free market is transposed onto the global market. Whereas free market ideology insists on a *laissez-faire* approach and limits governmental intervention with the market, the ideology of the global economy limits governmental intervention in general, in an attempt to bypass local governments.²⁰

Who gains from globalization? Why is it such a contested process? The debate regarding globalization is political, and, in order to better understand its intellectual property context, a brief survey of this debate is due.

2. Globalization-by-Law

The law is an important tool by which power is exercised. The law imposes the command of the sovereign with more subtlety than does sheer force. But the law is no less powerful than brute force. The law is a civilized, amorphous, and intangible mechanism, and it is within this gentle facade that the power of the rule of law lies. The law is inaccessible and incomprehensible to most citizens. An employee who is fired because her workplace has been relocated to another country overnight cannot be expected to intuitively identify "the law" as the cause of her misery, let alone the laws of globalization.²¹

The laws of globalization employ sophisticated means to execute the global agenda. The laws that enable globalization usually have a local incarnation. The political structure is simple but crude: a country joins an international legal instrument and is required to adapt its laws so as to meet its new international commitments. Thus, the last chain of globalization is always a local law, which is enforced through local mechanisms. Citizens are likely to place the blame first on their own governments (at least in democracies), and not on international bodies, other countries, or some obscure international treaty. It is only at a later stage, when greater understanding of the political process is gained, that the blame of ordinary citizens is directed elsewhere.

Proponents of the idea of *globalization-by-law* call on another idea for support: harmonization. The diversity of laws among nations is blamed as an impediment to trade and progress, and harmonization is called on as the solution.²² Critics of harmonization, however, are skeptical, since harmonization

means giving up the unique attributes of the local polity. These critics argue that harmonization is just a disguise, and that there is no harmony in a world where the powerful impose their will upon the weak.

However, globalization is a complex economic, political, social, and cultural process and need not necessarily be all-or-nothing. An awareness of this concept leads to an examination of the intermediate points on the local-global axis: GloCalization.

B. GloCalization

Sociologists who document processes of globalization report that it has a complex effect on society, involving the interaction of global forces, ideologies and economic powers local players. The result of this complex interaction is called GloCalization.²³ GloCalization is where global norms meet local norms. The meeting point can be cultural, economic, or political. One sociologist defines GloCalization as "the interpenetration of the global and the local resulting in unique outcomes in different geographic areas".²⁴ Examples range from the impact that globalized fast food restaurants have over local dishes,²⁵ to business strategies applied by multinational firms to blend themselves into local markets,²⁶ or to the rise of a localized nationalist movement in a single country.²⁷ Accordingly, the concept of GloCalization can assist in describing social phenomena, explaining them, and providing a measure against which one can evaluate globalization. Further, it can be a political strategy or a political goal. In recent years, legal analyses have begun to use this concept.²⁸

GloCalization can also serve as a deliberate strategy undertaken to empower local communities. GloCalization can assist in creating a civil society that can cope with, and accommodate, the new foreign powers of globalization.²⁹ In this sense, GloCalization can ease the shock of globalization. Accordingly, GloCalization can be viewed as a social space where an unstable, often unpredictable, dialectic relationship takes place between the global and the local. Once the two forces reach some sort of equilibrium, GloCalization can be said to be the result of the global meeting the local. A successful outcome of GloCalization might be one that allows a local community to enjoy the best of all worlds: the community can enjoy the benefits of globalization without losing the benefits of the local culture, economy, and social fabric. However, the result

might also be negative: where the disadvantages of each of the two interacting forces, the global and local cultures, combine to leave the local community with only the detrimental effects of globalization.

GloCalization offers local culture a chance of surviving in the face of the mighty global forces. It offers an opportunity to smooth the process of globalization and to enable the local community to participate in shaping its own future. For a traditional community or conservative society striving to preserve its social norms and old social order, this is likely to lead to a compromise of some sort. But a compromise is better than an unconditional surrender to globalization. GloCalization thus has empowering potential:³⁰ the old community, its political habits, and the pre-globalization social norms are not completely eliminated, but rather, are adapted to the new situation. GloCalization is a compromise between old and new.

This article now returns to an examination of the ways in which intellectual property is global. Copyright law is becoming a global matter, and when G© is applied in a jurisdiction, the result is one of GloCalization: there is a meeting of G© and of local culture, norms, and traditions. One meeting point in particular, that of G© and freedom of speech, will be examined in Part IV, *infra*.

C. Intellectual Property Globalization

A series of treaties – most notably the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Artistic and Literary Works (1886), brought intellectual property into the field of international law in the late nineteenth century. These conventions established common minimum standards and provided benefits to the countries (and their authors and inventors) that joined.³¹ Many countries did not join, however.

The United States, for example, joined Berne only in 1989; up until then, it had only been a member of the Universal Copyright Convention (UCC).³² The Berne Convention is now incorporated by reference into the TRIPS Agreement.³³ The combined result of Berne and TRIPS, as well as other measures, which will be discussed shortly, combine to form a G© regime.³⁴ Because of the array of international agreements on the subject, copyright laws around the globe resemble each other more than most laws in other fields.

Intellectual property globalization has taken three basic and interrelated forms over the last two decades: multilateral treaties, bilateral agreements, and unilateral measures. The Uruguay Round of Trade Negotiations, which started in the mid-1980s and resulted in the mid-1990s with the replacement of the General Agreement on Tariffs and Trade (GATT) with the WTO, reflects the shift from an *international* IP order to a *global* IP regime. On top of this global infrastructure came bilateral agreements, followed by unilateral measures. Now, all three layers are tied together in an expanding spiral form.

1. Multilateral Treaties

a. WIPO

The Berne Convention has been administered by WIPO since the 1970s. However, WIPO's "one nation, one vote" system gave developing countries the power to block the initiatives of industrialized nations.³⁵ Those nations and industries that wanted a wider scope of protection, greater compliance with the treaty, and more tools of local enforcement, had to turn to other forums.³⁶ The Uruguay Round of Trade Negotiations provided such a forum.³⁷

b. The Uruguay Negotiations

The initiative to include intellectual property issues within the framework of trade came from a group of industry leaders: the Advisory Committee on Trade Negotiation (ACTN), which persuaded the United States Trade Representatives (USTR) to do so.³⁸ Accordingly, IP was placed on the negotiation table under the pressure of a few developed countries. One of these industry leaders, the United States, even went so far as to apply political pressure against objecting developing countries in a process described by one scholar as no less than "bully[ing]".³⁹

In the negotiations of TRIPS, developed countries applied a strategy of "linkage bargain diplomacy", in which the developed countries tied unrelated issues together and refused to break the package: a developing country had the choice of joining and accepting all treaties as presented, or declining any part of the treaties and being left out.⁴⁰ It was an all-or-nothing choice. In the case of TRIPS, the linkage was between IP and trade of goods, such as agricultural

products and textiles. The negotiations took the form of “circles of consensus”, in which a circle of countries in agreement was continuously expanded, thereby avoiding a confrontational situation.⁴¹ This “negotiation” strategy led to the inclusion of TRIPS in the framework of the WTO.

One might object to the notion that developing countries were coerced into consenting during the TRIPS negotiations, as no country was forced to join the WTO.⁴² However, whereas joining the Berne Convention was optional for a country, joining TRIPS was not: given the linkage of IP and trade, it would have been unrealistic to expect a country to opt out of the WTO. One commentator described the pressure to opt into the WTO as being made up of a combination of the following: a bargain of European Union concessions on agricultural exports, promises by the United States not to pursue unilateral measures, and threats that the Uruguay Round of negotiations would fail.⁴³ Another commentator described it as “old fashioned, Western-style imperialism”.⁴⁴ One view from the South described the negotiations as “essentially an asymmetric, non-transparent and autocratic process”.⁴⁵ Even Bhagwati, an enthusiastic pro-globalization scholar, harshly criticized the inclusion of intellectual property within the framework of the WTO, concluding that, “the damage inflicted on the WTO system and on the poor nations has been substantial”, and that “TRIPS . . . [was] like the introduction of cancer cells into a healthy body”.⁴⁶ Bhagwati appears to be most disturbed by the effects that global patent laws have had on the access of poor people and nations to medicine, but he has also critiqued the very inclusion of TRIPS within a trade agreement and the politics that led to its inclusion.

c. TRIPS

TRIPS now binds the 149 members of the WTO.⁴⁷ TRIPS includes several layers: basic principles, expansion of the bundle of rights, enforcement, and a dispute settlement system.

The first layer of TRIPS is the requirement of minimum standards of protection by the incorporation of the Berne Convention, as amended in 1971,⁴⁸ which ensures some commonality among member states. Under Berne, copyright law remained territorial, but each country had to adapt its laws to meet the minimum standards of the Convention. These minimum standards were coupled

with the “national treatment principle”, which required member countries to apply their copyright laws equally to citizens of other member countries.⁴⁹ Berne left the members with leeway regarding the application of the minimum standards and did not require complete equality in how members treated foreign nationals as compared with how members treated one another.⁵⁰ One of TRIPS’ novelties was the introduction of the “Most Favored Nation” (MFN) treatment in the context of IP.⁵¹ This principle requires that *all* nationals of all WTO members should enjoy the same legal treatment.⁵² Thus far, the MFN principle is broader than the national treatment principle of Berne. The MFN rule has some exceptions, of which Free Trade Agreements (FTAs) are the most important, since FTAs are the avenue through which copyright is expanded beyond that which is required by TRIPS.⁵³

The second layer of TRIPS adds new kinds of works to be protected, and expands the bundle of rights beyond those guaranteed by the Berne Convention. For example, TRIPS requires protection for computer programs and grants the right of commercial rental,⁵⁴ while the Berne Convention did neither. While this change did not represent an expansion of the scope of protection afforded to copyright owners in the developed countries,⁵⁵ it greatly expanded the copyright laws of the developing countries.

In the long term, it might be beneficial for developing countries to have strong copyright laws, to protect their own authors and facilitate the emergence of local content industries (assuming that there is a causal connection between more copyright protection and innovation). Presently, however, the beneficiaries of a strong copyright regime are foreign copyright owners. These foreign copyright owners, not surprisingly, are almost all citizens (and corporations) of the North.⁵⁶

The third layer of TRIPS is that of enforcement.⁵⁷ TRIPS requires member countries to provide copyright owners with civil and administrative procedures to enforce their rights, as well as criminal penalties for violations of those rights. This might sound obvious, as it does not make much sense to have new laws without the means to enforce them. However, this requirement means that countries need to allocate resources and to change their spending priorities according to external interests. Indeed, IP police units have been established

worldwide.⁵⁸ Article 41(5) of TRIPS purports not to require this, as it states that, "[n]othing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general". However, the bilateral commitments and unilateral measures under TRIPS render this article ineffective, as they require enforcement beyond TRIPS.⁵⁹ A Brazilian commentator reported that, "[s]pecial courts and special forces were created to pursue [IP enforcement], even though the increase of budgetary and personal resources was not proportionately extended to other pressing needs, like fighting drug-related crime".⁶⁰

Local enforcement might run into various problems, especially when subject to a country's international obligations, and even more so when the line between public interests and the private commercial interests of copyright owners is blurred. Thus, for example, once an IP police unit is established, it might lack the power to determine its own priorities, as those priorities are dictated by external forces. Thus, an IP police unit might, on its own volition, be interested in dealing with counterfeit alcoholic products or medicines, as these tend to be of low quality and dangerous. Instead, the local IP unit may be recruited to assist private copyright owners in enforcing their rights in software or sound recordings.⁶¹ This is even more frustrating, as copyright owners sometimes use criminal procedures to place pressure on alleged infringers and to strengthen their bargaining positions in discussing the possible settlement of a civil dispute. Once a settlement is achieved, the complaint submitted to the police is withdrawn. Even if the police are interested in further investigating the matter, they may find that those who complained in the first place will no longer cooperate with them.⁶²

A fourth layer of TMPS is specific to the international level and applies to the members of the WTO. The WTO framework includes a dispute settlement system, which it considers to be a central pillar of its multilateral trade system.⁶³ The dispute settlement system creates one mechanism of resolutions of violations of any of several agreements under the WTO, including TRIPS.⁶⁴ The settlement process is intended to encourage negotiations of disputes among countries,⁶⁵ but it also provides for some remedies. The authority to decide trade disputes lies with the WTO Dispute Settlement Body (DSB), which is the WTO's General Council. In practice, the disputes are decided by special panels, which make

recommendations to the DSB.⁶⁶ A panel's recommendation is accepted, *unless* there is a consensus *against* it. Thus, the panels enjoy tremendous power.⁶⁷ This rule is the opposite of the previous dispute settlement system under GATT.⁶⁸

A country that loses a dispute is required to amend its violating policy in order to bring it into conformity with the WTO agreement.⁶⁹ If this option is impractical, or if the losing country does not comply, the losing country should enter into negotiations with the complaining country in order to seek a resolution.⁷⁰ Such resolution is not generally in the form of direct monetary compensation; rather, it takes the form of some comparable measure, such as a trade retaliation, by which tariffs imposed on goods imported from the complaining country would be reduced. Failure of such negotiations might result in trade sanctions imposed on the losing country. The sanctions are structured in a hierarchical manner, so that the first priority is to impose sanctions in the same sector as the one in dispute. If this is impractical or ineffective, sanctions will be imposed under another WTO agreement.⁷¹ This is how a dispute between Ecuador and the European Union over quotas of bananas resulted in a remedy in the copyright sector.⁷² Intellectual property is thus treated as just another kind of goods.

d. WIPO Copyright Treaty – The WCT

TRIPS is not the only mechanism to globalize IP rights. WIPO, perhaps fearing that TRIPS would render it irrelevant, and perhaps driven by powerful industries, initiated amendments to the Berne Convention, which culminated in the 1996 WIPO Copyright Treaty (WCT).⁷³ Like TRIPS, the WCT incorporates the Berne Convention and further expands both the subject matter of copyright law and the accompanying bundle of rights. But the WCT expansions go beyond TRIPS. Most notably, article 11 of the WCT requires contracting countries to provide "adequate legal protection . . . against the circumvention of effective technological measures", or, in other words, to provide a protection for Digital Rights Managements (DRMs).⁷⁴

Currently, as of September, 2006, the WCT is less popular than TRIPS and includes sixty contracting parties,⁷⁵ in contrast to the WTO's one hundred and forty-nine members. The reason for its lack of popularity is probably because the

sole subject of the WCT is copyright law. The WCT does not link trade benefits, or any other benefits, to the copyright deal. Although many countries have joined the WCT, there might be another explanation for the WTC's lack of popularity: bilateralism.

2. Bilateral Agreements

The multilateral trade treaties of TRIPS and the WCT were justified in their goal of harmonizing copyright laws around the world, especially in a world where creative works easily cross borders.⁷⁶ From these multilateral agreements, however, a web of IP-related bilateral agreements has emerged. In these agreements, such as the Free Trade Agreements discussed above, TRIPS generally serves as a baseline, and the owners of IP rights are granted more rights and fewer exceptions or limitations than they would have under TRIPS.⁷⁷ Thus, through a process of global "ratcheting up",⁷⁸ a new layer of IP law has been constructed. These bilateral agreements result in a "TRIPS-Plus" regime.⁷⁹ This mechanism of bilateralism is especially troubling when the parties have unequal power, as in the case of the United States⁸⁰ and the European Union,⁸¹ and their less powerful trade partners.

For example, in all of its recent FTAs, the United States includes similar language, addressing the exclusive reproduction rights granted to authors in literary and artistic works. The United States-Chile FTA states, in part, that "[e]ach party shall provide that authors of literary and artistic works have the right to authorize or prohibit all reproductions of their works, in any manner or form, permanent or temporary (*including temporary storage in electronic form*)".⁸²

The requirement to include temporary storage is not addressed in TRIPS and is a controversial addition thereto. Courts in the United States have found that the temporary copying that occurs in the context of transmitting information over the Internet is sufficiently "fixed" to be considered "copying" for the purposes of copyright law.⁸³ The European Union, however, reached the opposite conclusion, allowing member states to exempt temporary acts of reproduction which are transient or incidental or which are an integral and essential part of a technological process, as long as certain conditions are met.⁸⁴ The United States-Chile FTA includes a similar exemption,⁸⁵ but other recent FTAs, such as that between the United States and Australia, do not.⁸⁶

Other examples of TRIPS-plus obligations are that parties to the FTA must not only provide authors the exclusive right to make their works available to the public,⁸⁷ but also, the parties to the FTA are obligated to create anti-circumvention rules.⁸⁸ These two obligations are required by the WCT, but not by TRIPS.⁸⁹ Australia and Morocco, for example, committed in their FTAs with the United States to enact DMCA-like statutes, even though they have not ratified the WCT.⁹⁰ This is a clear example of a bilateral mechanism which expands copyright protection beyond TRIPS. While some FTAs faced local opposition, they were signed in the end.⁹¹

Bilateral agreements should be assessed within their political and global contexts. Each bilateral agreement has its own unique character, which reflects the political, cultural, or other relationship between the contracting countries. The United States-Israel bilateral agreements, for example, reflect the close political and financial ties between those two countries.⁹² IP bilateral agreements are better understood as part of the globalization of IP. Bilateral agreements both rely on the current global level and serve as the basis for the next wave of global IP law. They are part of the process of the ratcheting-up of IP law.

3. Unilateral Measures

Unilateral measures provide a powerful means to expand IP rights. One such measure is found in section 301 of the United States Trade Act of 1974, as amended in 1984. A procedure known as "special 301 review"⁹³ empowers United States Trade Representatives (USTR) to examine the level of protection accorded to American-owned intellectual property in countries with which the United States has trade relations. The USTR publishes its report once a year, an act which worries quite a few trade ministries around the world.⁹⁴ Countries are categorized in the USTR publication by placement on one of several lists: Priority Foreign Country, Priority Watch List, and Watch List. Classification as a Priority Foreign Country, considered to be the worst category, might result in trade sanctions, and classification in any list is likely to result in heavy political pressure. The Trade Act was amended to enable the USTR to reach a finding that a country's IP protection is inadequate, even if the country is TRIPS compliant.⁹⁵ This is a powerful TRIPS-plus mechanism: even if a country is TRIPS compliant, the USTR may require it to do more.⁹⁶

The 301 review process requires extensive resources, which the United States government lacks. But there are those who are happy to offer assistance – the content industries. The International Intellectual Property Alliance (IIPA), a powerful coalition of United States copyright-based industries, is actively involved in this process, as it collects and analyzes the data that forms the basis of the annual 301 Report.⁹⁷ In fact, in the political sense, the American copyright industry has captured the USTR.⁹⁸

4. A Web of Global Copyright

TRIPS transcended the Berne Convention's international foundations and created a global copyright regime, but the WCT and the accompanying web of bilateral agreements and unilateral measures have further raised the standard of copyright protection. In light of the dynamic nature of G©, it is not unreasonable to assume that there will soon be a new call to harmonize copyright law around the world, and the new global standard will be akin to that of the bilateral agreements and unilateral measures. Professor Daniel Gervais, a leading scholar of global IP, estimates that the current state of reviews, negotiations, and politics might lead to a "TRIPS II" Agreement.⁹⁹ Alternatively, as the South now has a better understanding of the dynamics of G© law (and of global IP law in general), one commentator has observed an attempt by developing countries to halt the expansion of IP rights and restore balance by shifting the international IP regimes out of the WTO and into other international organizations.¹⁰⁰ The *Development Agenda*, mentioned in Part I of this article, is a promising step in this direction, in that it offers an alternative to the expansionist agenda of IP law and emphasizes the public interest in access to knowledge.¹⁰¹ For now, the new G© is the regime in place, and an exploration of the nature and essence of this form of copyright law is due.

III. Traditions of Free Speech

It is a well-known fact that different countries provide different levels of protection to speech. A country's free speech jurisprudence is the result of several factors, such as the country's history, culture, and political and legal systems. In addition to observing the diversity of speech regimes by exploring certain examples thereof, this article argues that the speech regime is local in nature, rather than global, and that the "free speech regime" has remained local, despite attempts

to establish a global principle of freedom of expression. Because of the culturally and politically contingent nature of free speech jurisprudence, such efforts at globalization are unlikely to succeed, although trade-related speech may represent an exception to the localization of freedom of speech laws.¹⁰²

A. Global Speech ?

There have been many efforts to globalize freedom of expression through the use of international legal instruments. Chief among them is the *Universal Declaration of Human Rights*, adopted by the General Assembly of the United Nations in 1948. Article 19 thereof states, “[e]veryone has the right to freedom of opinion and expression: this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.¹⁰³

Members of the United Nations are not bound by the Declaration, but it has nonetheless had a tremendous and worldwide impact. In 1948, forty-eight of the fifty-eight United Nations member states adopted the *Universal Declaration of Human Rights*, and many additional countries have since announced their commitment thereto.¹⁰⁴ The *Universal Declaration* has been expressly referred to in many constitutions, and it has inspired many more.¹⁰⁵ It has had a far-reaching effect on the legal construction and interpretation of the concept of human rights. One commentator noted that it “exerts a moral, political, and legal influence far beyond the hopes of many of its drafters”.¹⁰⁶ It is considered today to be “the primary source of global human rights standards”,¹⁰⁷ and it is an important source of customary international law.¹⁰⁸

Although article 19 is stated as if the enumerated rights are absolute rights, no country applies them as absolute commands. Even the First Amendment to the United States Constitution, despite its strong language, was not interpreted as an absolute.¹⁰⁹ Furthermore, article 29 of the *Universal Declaration* allows limitations of the right, “[f]or the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”.¹¹⁰ The 1996 Constitution of the Republic of South Africa, which is considered to be one of the most progressive constitutions in the world today, provides a clear illustration of this non-absolute nature of the right to free speech.¹¹¹ The South

African Constitution first announces the right to freedom of expression in a broad manner ("everyone has the right to freedom of expression"), then enumerates some concrete derivatives of this right, such as the freedom of the press or the freedom to receive information. The Constitution then goes on to limit and exclude some forms of expression, such as propaganda for war, incitement of immediate violence, and advocacy of hatred. However, the South African Constitution limits the right not only in this category-based manner, but in another way, that of balancing, which reflects article 29 of the *Universal Declaration*. Section 36 of the South African Constitution states that –

The rights in the Bill of Rights [including the freedom of expression] may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.¹¹²

The section then lists five such factors with regard to the limitation of certain rights: the nature of the right, the importance of the limitation, the extent of the limitation, the relation between the limitation and its purpose, and the least restrictive means to achieve the purpose.¹¹³

Other major international covenants convey a similar message, that free speech can be balanced against conflicting interests. The *International Covenant on Civil and Political Rights* of 1966 states:

19.2 Everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

19.3 The exercise of the right provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

1. For respect of the rights or reputations of others;
2. For the protection of national security or of public order (ordre public), or of public health or morals.¹¹⁴

Unlike the *Universal Declaration*, this definition of the right to free speech acknowledges that speech is not an absolute right. The *International Covenant* allows for the limitation of freedom of speech in two situations. The first situation exists at the “horizontal” level, or the private sphere, where the conflict is between two private parties. If one person’s speech might harm another’s reputation, privacy or other interests (such as copyright), then that speech may be restricted.

The second situation in which free speech can be limited under the *International Covenant* is at the “vertical” level, where the conflict is between the state and a citizen due to a state-imposed limitation on the speech of an individual. A restriction on speech in the interest of national security is the chief example of such a limitation, but the Covenant also lists other situations in which restrictions on free speech are permitted – the protection of public order, public health, or public morals. Limitations on speech are thus permitted only if two conditions are met: (1) that the restriction is by law, and (2) that it is necessary. For those states that wish to limit free speech, these vague conditions can be easily satisfied. The result is that the *International Covenant* provides a statement that is important for its political, educational, and moral power, but that is practically weak and can be easily bypassed.

Other global or international initiatives are more specific. The *Treaty Establishing A Constitution for Europe*, for example, declares that, “[e]veryone has the right to freedom of expression” and enumerates the elements of this right (freedom to hold opinions, and to receive and impart information without governmental interference and across borders), but also subjects the right to limitations if some strict conditions are met.¹¹⁵

The focus of the *European Charter for Regional or Minority Languages* (1992) of the Council of Europe is even more specific. The Charter strives to guarantee the freedom of direct reception of broadcast across political borders, and to ensure that “no restrictions [are] placed on freedom of expression and free circulation of information in the written press in a language used in identical or similar form to a regional or minority language”.¹¹⁶

A more recent legal instrument touching on speech rights is the Civil Society Declaration on *Shaping Information Societies for Human Needs*.¹¹⁷ This Declaration was adopted in December, 2003, by the World Summit on the

Information Society (WSIS), which convened under the auspices of the International Telecommunication Union (ITU), and focused on the digital environment. The Civil Society Declaration is fascinating in that it is, in many respects, far removed from the agenda of the North, or more precisely, from the interests of many global mega-corporations.¹¹⁸ In the context of copyright, for example, the Declaration states that “[e]xisting international copyright regulation instruments including TRIPS and WIPO should be reviewed to ensure that they promote cultural, linguistic and media diversity and contribute to the development of human knowledge”.¹¹⁹ The Declaration also explicitly refers to article 19 of the *Universal Declaration on Human Rights* and enumerates the rights to media, access, and speech that derive therefrom, especially in the context of the Internet.¹²⁰ These commitments were reaffirmed in the second WSIS summit in Tunis, in November, 2005.¹²¹

B. Balancing Speech with Local Interests

The international attempts at the pronouncement of a global free speech principle are composed of two elements: a (global) rule and (local) exceptions. This “rule and exception” structure provides for the balancing of conflicting rights and interests. While balancing was rejected by United States constitutional law as an invalid methodology,¹²² it is very much alive elsewhere.¹²³

Balancing free speech with conflicting rights and interests requires recognizing that the right to free speech is not absolute. Importantly, the fact that speech is balanced against other rights and interests does not, in itself, dictate the outcome of the balancing test. The result of the constitutional methodology of balancing depends on the weight accorded to each of the conflicting interests or rights and the way the balance is structured to begin with and then upon the way it is applied.

How should the balancing formula be constructed? Which interests are worthy of being balanced against the right to free speech? There are various examples around the globe, including the South African constitution, discussed above. Likewise, the *Canadian Charter* instructs that the rights and freedoms set therein can be subject “only to such reasonable limits prescribed by law as can

be demonstrably justified in a free and democratic society".¹²⁴ The European Convention on Human Rights (ECHR) states in article 10(2) that freedom of expression can be,

subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.¹²⁵

The ECHR thus lists both the interests that may supersede freedom of expression and the general formula for balancing them against one another. European Courts added that the restriction on speech should be proportional to the legitimate aim pursued.¹²⁶

Other jurisdictions have adopted their own balancing formulas, and it is these formulas that create a space for local considerations. A country must decide for itself how to serve its national security interests, how to ensure the public order, and how to define its morals. And a country must determine the weight it accords to these conflicting interests. These decisions are political in nature and may be fiercely disputed within a country. Chief Justice Shimon Agranat stated in one of Israel's most important constitutional free speech opinions that "[i]t is a well known axiom that the law of a people must be studied in the light of its national way of life".¹²⁷ A critical example of the need for balancing is demonstrated in the case of changing national security interests: indeed, when new threats materialize and threaten the security of a country, the law must respond to such changing needs.¹²⁸

If free speech jurisprudence revolves around national interests and local political decisions, the reason for its focus on the governmental paradigm becomes clear. Because governmental interests are accorded more weight than private interests, a country's free speech jurisprudence will be shaped first and foremost by the threats to free speech that come from governmental, rather than market forces. The horizontal level of the private sphere remains secondary, but this does not mean that the horizontal level lacks value judgments. On the

contrary, formulating a definitional balance between free speech and other human rights, such as the right to privacy, reputation, or property, does indeed reflect the values of the community. What comprises a person's reputation? What is the scope of privacy? Is property more important than free speech? These are deeply political decisions, contingent upon elusive factors such as society, culture, and a people's "national way of life".¹²⁹

The annual report on freedom of the press by Freedom House confirms these intuitions about the status of free speech around the world.¹³⁰ While a free press is only one aspect of free speech, the Freedom House reports provide the most comprehensive survey on the status of speech. Given the focus on the press, the reports examine restrictions on speech at primarily the vertical level. The reports rate the degree of freedom based on the legal environment in which the media operates and the amount of political influence over reporting and access to information. The reports also examine restrictions at the horizontal level by taking into account economic pressures on content.¹³¹ The most recent report concluded that in 2004, "out of 194 countries and territories surveyed, 75 countries (39%) were rated Free, 26 (50%) were rated Partly Free, and 69 (35%) were rated Not Free".¹³² This report will be referred to further in the following Part.

Free speech jurisprudence thus remains local in nature and reflects the different ideologies, politics, and cultural choices of each jurisdiction. The processes of globalization, however powerful, are unlikely to render these differences obsolete.

C. Free Speech and Free Trade

What then, is the relationship between free speech and free trade? If a country adopts a free trade policy, will it become (more) democratic? A comparison of WTO members at varying stages of development with the list generated by the Freedom House report confirms the intuition that there is a strong correlation between free speech and free trade. First, the list of WTO members (as of July, 2006) was divided into three categories, applying the "globalization" terminology of developed-developing-least developed countries. Second, this list

was compared with the list generated by Freedom House.¹³³ The results are as follows:

Of the fifty LDCs, thirty-two are WTO members. Only three are classified by Freedom House as "Free",¹³⁴ eleven are classified as "Partly Free",¹³⁵ and eighteen are classified as "Not Free".¹³⁶

Of the developing countries,¹³⁷ the division is as follows: thirty-one countries are "Free",¹³⁸ twenty-eight countries are "Partly Free",¹³⁹ and twenty-seven are "Not Free".¹⁴⁰

Of the twenty-four developed countries, all but two (Norway and Italy, which were classified as Partly Free) are classified by Freedom House as "Free countries". Of the additional six OECD members that are not considered High Income countries, four were classified as "Free", and two (Mexico and Turkey) as "Partly Free". None of the developed countries was classified as "Not Free".

The correlation between free trade and free speech does not necessarily mean that there is a causal link between the two. However, for the purpose of the argument that follows, causation does not matter. If, on the one hand, as many in the North believe, free trade promotes, in the long term, a more democratic form of government, which includes free speech,¹⁴¹ then one should not ignore any impediment to the goal of achieving free-speech. To the extent that copyright law is such an impediment, the conflict between free speech and copyright law should be addressed. If, on the other hand, there is no causal link between free trade and freedom in general, then imposing a trade-oriented copyright law onto countries that lack free speech will only serve to reduce freedom of speech without bringing the long-term benefits of democracy. In other words, free trade might mean freedom of some to conduct business, but it does not necessarily mean freedom of speech.¹⁴²

Equipped with the understanding that speech and its legal protection are local in nature, combined with previous conclusions about the nature of G©, the copyright law/free speech conflict comes into focus. The comparison of free trade and free speech will demonstrate that G© serves the free trade interests of the North, and disserves the free speech interests of the South.

IV. Copyright and Speech

Is there a conflict between copyright law and free speech? The conflict is readily apparent to some, but to others, especially courts, the conflict does not exist.¹⁴³ The existence of a conflict between copyright law and free speech does not run through every element of copyright law, nor does it mean that copyright law is inherently unconstitutional. Acknowledging the conflict, however, does require an awareness of the ways in which the exceptions to copyright protection resolve the free speech considerations, and it also requires an interpretation of copyright law that does not run afoul of free speech principles.

This Part will first survey the conflict argument and the various judicial responses thereto. It will also point to the weaknesses of these responses. The discussion focuses on single jurisdictions before returning to the global arena. The second section will “go global” by examining the conflict between G© and the local traditions of free speech.

A. Is There a Conflict?

The response to the conflict argument, first raised thirty-six years ago in the United States, has developed and changed over the years. The initial response was simply that there is no conflict,¹⁴⁴ suggesting that speech and copyright are completely separate and unrelated legal concepts. Later, the refusal to recognize a conflict between free speech and copyright was based on historical and constitutional reasoning: the framers saw no conflict, as the IP clause and the First Amendment live side by side.¹⁴⁵

These reasons, however, failed to convince scholars and lawyers, who continued to argue that there is a conflict between free speech and copyright law, and consequently, another more substantial response emerged from the American judiciary. Courts reasoned that both copyright law and free speech principles share the same goal, that of promoting speech. Each legal field simply applies different means toward the same end. Copyright law aims at the market by providing incentives to authors to make works and acts as a substitute for governmental intervention in the creative process. Conversely, the First Amendment aims at the government and prevents it from limiting speech. Hence, there is no conflict, but rather, a beneficial cooperation between the two areas of

law. This has been called the shared goal argument,¹⁴⁶ and is best encapsulated in Justice O'Connor's 1985 judicial sound bite: "In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression".¹⁴⁷ Since then, both legal fields have expanded to such an extent that, even if there were no conflict between free speech and copyright at the time, there is one now.¹⁴⁸

The shared goal argument tells a story in which there is a division of labor between copyright and freedom of speech. The shared goal argument thus assumes that copyright and freedom of speech occupy entirely separate realms of influence. The shared goal argument further refuses to accept the fact that copyright law itself is a governmental act and should be subject to judicial scrutiny.

The principal response to the shared goal argument was that Congress had already taken into consideration free speech concerns in copyright law, and had built into the copyright laws certain mechanisms to resolve any potential problems.¹⁴⁹ The main "free speech ambassadors" within copyright law are the idea/expression dichotomy and the fair use defense.¹⁵⁰ According to this response to the shared goal argument, the idea/expression dichotomy excludes ideas from copyright law, and hence enables the marketplace of ideas to operate without interference, and the fair use defense allows a breathing space for speech, in that it exempts criticism and other expressive activities.

The study of the conflict argument and the judicial response thereto reveals that there are, in fact, two conflicts at stake, and they are often confused.¹⁵¹ One conflict exists at the constitutional level, where one clause of the Constitution (the "promote the progress" clause)¹⁵² empowers Congress to enact copyright laws, and another (the First Amendment) prohibits the limitation of speech. This conflict is called the external conflict.¹⁵³ The other conflict is the internal conflict, which exists within copyright law and represents the fundamental tension upon which copyright law is built. Copyright law must address the conflicting interests of the author and of the public; it must serve the goal of encouraging creativity and the dissemination of creative works, but it must do so by placing control over those creative works in the hands of property owners, who may then prevent those works from being used as building blocks for new creativity. It is also a conflict between the long term goal of promoting creativity by providing incentives to make works of authorship and the short term means to achieve such incentives

by limiting the access to, and the use of those works.¹⁵⁴ The observation that there are in fact two conflicts, as opposed to just one, leads to a further observation. While users of copyrighted works advancing a conflict argument often pointed to the external conflict, the judicial response, which was to deny the conflict, did so by referring to the internal conflict, stating that the conflict had been solved at the internal level. This kind of response, addressing the external conflict in terms of the internal conflict, may be called the internalization of the conflict argument.

There are two ways in which the response to the conflict argument is internalized.¹⁵⁵ The first is substantive internalization, whereby the conflict argument is rejected on a philosophical (and historical) level. This type of internalization must, therefore, assume a specific justification of copyright law, as only under the instrumental view, where copyright is understood to have a goal, can one say that the goal of copyright law is shared by free speech jurisprudence. This response also assumes a particular kind of free speech philosophy, one that has a goal (and is not an end in itself), and this goal needs to be one that fits the goal of copyright law.¹⁵⁶

The other form of internalization of the conflict argument is the mechanical internalization, where some copyright law mechanisms are designated to play a role in mitigating the conflict.¹⁵⁷ This form of internalization, in turn, assumes a division of labor between Congress and the judiciary, a division that, in light of judicial review, might be fallacious. The mechanical internalization should furthermore force courts to interpret copyright law in such a way that enables the internal copyright mechanisms to truly fulfill their constitutional tasks. This is especially so with regard to the fair use defense: it should be interpreted broadly and vigorously as to reflect its task of representing the First Amendment within copyright law.

In *Eldred*, the United States Supreme Court affirmed the constitutionality of the Copyright Term Extension Act of 1998 (CTEA).¹⁵⁸ The Court rejected the arguments against the Act, including a First Amendment challenge. Justice Ginsburg first discussed the idea/expression dichotomy and the fair use defense, both referred to as “built-in First Amendment accommodations”,¹⁵⁹ and then concluded that “[t]o the extent such assertions raise First Amendment concerns, copyright’s built-in free speech safeguards are generally adequate to address

them".¹⁶⁰ The Court thus injected fresh constitutional rationale into the fair use doctrine, which previously had been justified solely on bases internal to copyright law.¹⁶¹ This means that even if the conflict between them is denied, free speech principles do have an effect on the way copyright law is constructed and interpreted in the United States. Thus, copyright law and free speech have reached an uneasy sort of co-existence in the United States. The equilibrium might change over the course of the years, as copyright law and First Amendment jurisprudence evolve, but nevertheless, the tension is present.

This discussion of the internal and external conflicts and substantive versus mechanical internalization aids in the understanding of the different responses to the conflict argument in the United States judiciary and that of other jurisdictions, especially the European Union and the United Kingdom.¹⁶² The constitutional backdrop of the latter jurisdictions explicitly permits the balancing of free speech considerations with other rights and interests, and thus, the harm caused to freedom of expression by copyright law is understood there differently than it is in the United States. The prevalent understanding of copyright, which focuses on the individual author as opposed to the public, renders the shared goal argument irrelevant on the Continent. The result is that the conflict argument remains on the external, constitutional level, and the response is in the form of mechanical, not substantive internalization.¹⁶³

In short, the theory behind copyright law matters. It matters not only in terms of the interpretation and application of copyright law, but also for other reasons, namely the protection of free speech. Copyright law grants owners control over their works. The creative process requires building on previous works, which requires access to such works and the ability to borrow ideas and facts (which, of course, are not protected by copyright law), as well as the freedom to use the expressive parts of the existing works to create new works. The freedom to use and reuse works is necessary to the creative process, but it also has a constitutional relevance, in that it enables the exercise of free speech. When speakers are limited in the way they can express themselves – even if the limitation stems from market, not governmental forces, and even if the limitation is justified – their speech rights are limited. Such limitation requires an explanation. Accordingly, the various judicial responses to the conflict argument

might be accepted if they also serve to inform the interpretation and application of exceptions and defenses to copyright. However, in order for the effects on speech to be taken seriously within copyright law, the conflict must first be acknowledged.

B. Global Conflict

This article has shown that copyright law has become global and that the only ideology behind G© is that of trade. How does the conflict argument play out under such circumstances? Is there an external conflict between copyright law and free speech, an internal conflict within copyright law, or perhaps both? Can a meaningful internalization of the conflict take place in countries which lack a strong tradition of free speech or which have been affected by G©?

The external conflict, as defined earlier, is one between two separate fields of law: copyright law on the one hand, and free speech jurisprudence on the other. Once an external conflict is identified, one may resolve the conflict through substantive internalization or mechanical internalization; but each method of resolution has consequences. Copyright law and free speech have reached a balance on the local level in some jurisdictions. To the extent that there is a clash between the two legal fields in the United States, for example, the response that copyright enables freedom of expression is partially convincing. Now copyright law is exported from the North to the South, without the parallel export of free speech jurisprudence. Since it takes two for a conflict, one cannot frame the problem as a conflict, let alone devise means to solve it. The balance of the North is inapplicable in the South.

Some of the developing and less developed countries do have some local free speech law, and they might have already reached equilibrium in the copyright/speech conflict. However, now one side of the balance (copyright law) has changed, and the other (local free speech law) has remained unchanged. While countries with a solid free speech principle may be able to reach a balance with copyright law, most of those countries already have a strong copyright law, which is compatible with G© and its free trade ideology. For those countries that lack any meaningful tradition of free speech, however, the lack of a viable counter-measure to copyright law is the least of their democratic deficiencies. Local law is thus not likely to have an impact on the copyright-speech conflict at the global level.

For the fifty-five countries classified as “developing countries” and rated either as “Not Free” or as “Partially Free” by Freedom House, the price of G© matters the most. These countries do not have the local strength to ease the pressure of copyright law, and the imposition of G© void of philosophical justification might well result in a clash between the global and the local. This is the clash between copyright law and freedom of speech, between a consequentialist trade ideology and deontological human rights theory.¹⁶⁴

It is in these “Not Free” or “Partially Free” developing countries that GloCalization is likely to emerge. Courts faced with a free speech/copyright conflict can either imitate the United States response, which would mean ignoring the local nature of free speech jurisprudence, or they can turn to local free speech law for a solution, to the extent that it is available. The local laws may not manage to overcome the conflict, but they can serve to mitigate the effects of G©. This reliance on the local free speech jurisprudence may result in a more reasonable application of copyright law, and a less proprietary, more civilized regime. It can protect genuine national interests, like education, access to knowledge, and the preservation of language, culture and other social norms. Reliance on the local jurisprudence can thus serve to soften the aggressive nature of the global.

In order for this to happen, however, a developing country must acknowledge the anti-speech potential of copyright law, understand that it requires a response, and be able to withstand the political pressure flowing from the North, which demands adherence to G©. Copyright law might inspire a country’s creativity and foster the growth of knowledge and science, and globalization might ultimately promote local industries and encourage foreign investors. But until the positive benefits can be felt, a country must make the transition from local to global, and its citizens must have access to information, to knowledge and to global culture.

Furthermore, the goal of copyright law must be recognized even in those countries which do have viable local free speech jurisprudence, in order for the shared goal argument to make any sense. It might be that the “Framers [of the US Constitution] intended copyright itself to be the engine of free expression”,¹⁶⁵ but the framers of G© had no such intentions. G© is void of any ideology other

than that of trade; G© has no embedded values that converge or overlap with those of free speech; and absent any common ground, the shared goal argument and the substantive internalization both collapse.

For many jurisdictions, therefore, it does not make sense to speak of an external conflict, and, even if there is such a conflict, it cannot be internalized on any philosophical level. Accordingly, one turns to the internal level. Perhaps G© can carry with it some internal mechanisms to ease the tension. Can internal mechanisms “take care” of free speech concerns when copyright law is dictated to and imposed upon countries without consideration for their history and culture?

The primary internal mechanisms within copyright law that can act as ambassadors of free speech are the idea/expression dichotomy and exceptions to copyright protection, such as the United States’ fair use doctrine. However, these mechanisms are absent from the global instruments, or worse, they are relegated to a secondary position.¹⁶⁶ The bilateral agreements likewise do not carve out exceptions, and it remains to be seen whether the unilateral measures will include them or not (however, the USTR’s annual 301 Report has yet to require a country to create broader exceptions to copyright).¹⁶⁷ Countries new to copyright law, or those that adjust their copyright law to fit G©, are not equipped with sufficient internal mechanisms to accommodate free speech concerns. Hence, when G© is imposed on these countries, it is not a balanced copyright law. The price of G© will be paid, *inter alia*, in the currency of free speech.

Global copyright does not, and can not, take care of the conflict between copyright and free speech in any meaningful manner.

V. Conclusion

This article began by observing globalization and the social/political phenomenon of GloCalization, the social space in which the global meets the local. GloCalization can either be viewed as a battlefield in which cultures are pitted against political power, or it can be a space of productive interaction. Turning to intellectual property and copyright law, and placing it within the general framework of globalization, global copyright was found to be detached from its philosophical justifications and understood, unfortunately, solely in the

context of one ideology: free trade. While copyright has become global, free speech jurisprudence has remained local in nature. The “law of expressions” around the world varies and depends on the history of the nation, its general culture and its legal culture.

Examining the alleged conflict between copyright and free speech, this article revealed that there are actually two conflicts at stake: one at the constitutional level, external to copyright law; and the other within copyright law itself. The common responses to the conflict (substantive internalization, or the “shared goal argument”, and mechanical internalization, or the reliance on free-speech safeguards built in to copyright law) suggest a new level of understanding the copyright-free speech conflict as a GloCalization problem: global copyright law conflicts with local free speech traditions.

There are several (political) lessons to be taken from this endeavor. One is addressed to the North: exporting G© and imposing it onto unwilling recipient countries has a price in terms of free speech. Indeed, as shown, many of the countries whose copyright law is based on the G© regime lack satisfactory freedom of speech. Almost ironically, however, a balanced form of copyright law can assist in spreading not only trade but freedom as well. Acknowledging the free speech implications of copyright law is a first step in resolving the problem. Being tolerant to processes of GloCalization is a second important step. When the North suggests that the new copyright regimes will serve the countries upon which it is imposed, it is important to remember the conflict and to insist that copyright be accompanied with viable free speech laws. Imagine the North bundling copyright with speech and tying the level of copyright protection accorded to a country to the strength of its free speech jurisprudence. In this way, G© would truly achieve the promises of globalization. It is important to understand that the global cannot replace the local overnight; a dialectic process of reconciliation between the two spheres should be expected.

As for the lesson to be learned by global institutions, this article has shown that focusing on trade alone may have grave unintended consequences. A truly free (global) trade will benefit not only from unified trade laws, but from stronger democracies and better protection of human rights. If access to knowledge is assured in a free environment, in which one can reuse creative works to create new knowledge, then copyright law can indeed serve as an engine of global progress, of science and of free speech.

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Endnotes

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- 2 See David Nimmer, *The End of Copyright Law*, 48 VAND. L. REV. 1385, 1386 (1995) (discussing the impact of the TRIPS agreement on US copyright law). See also *id.* at 1412 (explaining that “copyright now serves as an adjunct of trade”).
- 3 See EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION FOR THE KNOWLEDGE SOCIETY (Rochelle Cooper Dreyfuss et. al., eds., 2001); THE COMMODIFICATION OF INFORMATION (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002).
- 4 PIERRE BOURDIEU, *THE FIELD OF CULTURAL PRODUCTION* (1993).
- 5 Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153 (Jeremy Waldron ed., 1984). The term “trump” is taken from Dworkin. *Id.*
- 6 Much of the critical discourse on copyright and free speech in recent years, in academia and elsewhere, has retained its focus and remained within the contours of copyright law – only occasionally turning to other legal branches, such as antitrust law. The critical view on the commodification of information, or the “public domain” project, for example, remains a useful lens through which the concerns that arise in the face of the expansion of copyright law can be conceptualized. See, e.g., Conference, *Commodification of Information*.
- 7 See, e.g., Peter Drahos, *Negotiating Intellectual Property Rights: Between Coercion and Dialogue*, in GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT 161 (Peter Drahos and Ruth Mayne, eds., 2002).
- 8 See HERTZ, *supra* note 7.
- 9 Free speech is not only a matter of law. Rather, it is a matter of political and cultural tradition. A country’s free speech principle is usually the result of an ongoing

dialectical process where the local culture and the law influence and shape each other. This issue is further elaborated in Part III, *infra*.

- 10 Rochelle Cooper Dreyfuss observed,

this asymmetry on a wider scale, stating that core protections for users are, on the whole, not found in intellectual property laws themselves, but rather in other law or, more obscurely, embedded in the structure of the legal regime as a whole. Indeed, for developing countries, this is an important part of the problem. Because these states lack the background rules that developed countries take for granted, the bases for limiting the scope of rights, or for implying user protections into law, are largely absent.

Rochelle Cooper Dreyfuss, *TRIPS-Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21, 30 (2004) [hereinafter *TRIPS-Round II*].
- 11 The terms North and South have come to refer to the industrialized, developed countries, and low-income, developing and less developed countries, respectively. The vertical description based on an economic criterion has replaced the horizontal West-East division, based on political and ideological criteria, which dominated political discourse during the Cold War. See Fernando Henrique Cardoso, *North-South Relations in the Present Context: A New Dependency ?*, in *THE NEW GLOBAL ECONOMY IN THE INFORMATION AGE: REFLECTIONS ON OUR CHANGING WORLD* 149, 156 (Martin Carnoy, Stephen S. Cohen & Fernando Henrique Cardoso eds., 1993).
- 12 See World Intellectual Property Organization (WIPO), Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO (Aug. 27, 2004), http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/wo_ga_31_11.pdf.
- 13 This term refers to the demonstrations that took place in Seattle in late November and early December, 1999, during the World Trade Organization (WTO) Ministerial Conference. The demonstrators represented myriad interests and ideologies, though they shared the general view of what is now known as anti-globalization. There are numerous documentations of the events, and many cultural and political interpretations thereof. One of the more interesting interpretations is that of Naomi Klein, whose writing seems to have inspired many of the demonstrators and provided them with eloquent, although controversial, arguments. See NAOMI KLEIN, *NO LOGO* (2001); NAOMI KLEIN, *FENCES AND WINDOWS – DISPATCHES FROM THE FRONT LINE OF THE GLOBALIZATION DEBATE* (2002).
- 14 MARSHAL McLUHAN, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 34 (1964).
- 15 For a sociological account of globalization, see ROLAND ROBERTSON, *GLOBALIZATION – SOCIAL THEORY AND GLOBAL CULTURE* (1992).
- 16 See Jan Nederveen Pieterse, *Globalization as Hybridization*, in *GLOBAL MODERNITIES* 45 (Mike Featherstone, Scott Lash & Roland Robertson eds., 1997).

- 17 For a discussion of globalization along the lines of the cultural ideology of consumerism, see LESLIE SKLAIR, *SOCIOLOGY OF THE GLOBAL SYSTEM* (1995).
- 18 Thanks to Peter Drahos for suggesting this juxtaposition.
- 19 The International Monetary Fund (IMF) defines globalization as "the increasingly close integration of markets for commodities, labor, and capital". IMF, Seminar, *Globalization in Historical Perspective* (Aug. 12, 2002), <http://www.imf.org/external/pubs/ft/seminar/2002/global/eng/index.htm>. See IMF, *Globalization: Threat or Opportunity*? (Apr. 12, 2000) (corrected Jan. 2002), <http://www.imf.org/external/np/exr/ib/2000/041200.htm>!!.
- 20 Both the free market and the free trade ideologies resent external intervention in the markets and prefer deregulation to regulation. However, once a market failure is identified, regulation is justified. The production of creative works and research and development might not take place when the products can be copied; hence, under the economic analysis of intellectual property, regulation of creative production in the form of copyright law is not only justified, but required to enable the functioning of the market.
- 21 There are a few exceptions. A demonstration by half a million Indian farmers in 1993 in Bangalore against the General Agreement on Tariffs and Trade (GATT), the precursor to the WTO, was an outstanding preview of the demonstrations that would occur in Seattle in 1999. See *supra* note 13. See Vandana Shiva & Radha Holla-Bhar, *Piracy by Patent: The Case of the Neem Tree*, in *THE CASE AGAINST THE GLOBAL ECONOMY*, *supra* note 30 at 146, 148.
- 22 The European Union often describes its measures as those of harmonization, although, unlike the more globally applicable mechanisms described in the text, the inequality of power among the twenty-five member states is less dramatic than global gaps. See e.g., the first recital of the Copyright Directive, stating: "The Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives". Council Directive 2001/29, art. 5, 2001 O.J. (L 274) 33 (EC) (regarding the harmonization of certain aspects of copyright and related rights in the information society).
- 23 Wikipedia offers two definitions of GloCalization, neither of which reflects the argument in the text. The first is the creation of products intended for the global market, but customized to suit local culture. The second refers to the use of such global technologies as the Internet to offer local services. Definition of Glocalisation, <http://en.wikipedia.org/wiki/Glocalization> (last visited Sept. 21, 2006). See Craig Stroupe, *GloCalization*, IDEAS, <http://www.d.umn.edu/~cstroupe/ideas/glocalization.html> (last visited Sept. 21, 2006) (in which University of Minnesota professor Craig Stroupe defines GloCalization as the existence of direct relationships between communities and the global system that bypass national governments and markets).

- 24 See GEORGE RITZER, *THE GLOBALIZATION OF NOTHING* 73 (2004).
- 25 See Uri Ram, *Glocommodification: How the Global Consumes the Local – McDonald's in Israel*, 52 *CURRENT SOCIOLOGY* 11 (2004).
- 26 See, e.g., Lan Cao, *Corporate and Product Identity in a Postnational Economy: Rethinking US Trade Laws*, 90 *CAL. L. REV.* 401, 430 (2002).
- 27 See generally BARBER, *supra* note 28.
- 28 A WestLaw search (July, 2006) yielded thirty citations of the term “glocalization” in United States law review articles (including two with the spelling “glocalisation”). Most articles mentioned it as a term of political science and international relations, and only some utilized the concept to argue for actual conclusions. For uses in the intellectual property field, see Graeme B. Dinwoodie, *Trademarks and Territory: Detaching Trademark Law from the Nation-State*, 41 *HOUS. L. REV.* 885, 959 (2004).
- 29 See, e.g., *Glocalization*, DEVELOPMENT GATEWAY <http://topics.developmentgateway.org/glocalization> (last visited Aug. 23, 2006).
- 30 GloCal Forum, *GloCalization Manifesto* (Sept. 7, 2004), <http://topics.developmentgateway.org/glocalization> (under “Key Issues” on the left sidebar click on “The GloCalization Manifesto”).
- 31 See Paris Convention for the Protection of Industrial Property, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention]; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised Sept. 28, 1979, 828 U.N.T.S. 221 [hereinafter Berne Convention]. The national treatment principle, for example, ensures that works are protected in nations other than just that of the origin. See *id.* at art. 5.
- 32 Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731 [hereinafter UCC], revised July 24, 1971, 25.2 U.S.T. 1341 [hereinafter Paris Amendment]. The leading United Kingdom copyright treatise declares that the UCC “has lost part of its *raison d’être* and importance”. K. GARNETT, J. RAYNER & JAMES G. DAVIES, *COPINGER AND SKONEJAMES ON COPYRIGHT* 1174 (14th ed. Sweet & Maxwell 1999).
- 33 See TRIPS, *supra* note 1, at art. 9(1). Note that the Berne Convention’s moral rights are exempted from the TRIPS Agreement. *Id.*
- 34 Okediji suggests that we understand TRIPS as a “regime”. Okediji’s analysis is based on a “regime theory”, derived from international relations theory and international law. Okediji, *supra* note 7, at 597.
- 35 See RYAN, *supra* note 7, at 104-13; see also *Negotiating*, *supra* note 7, at 166.
- 36 See Laurence R. Heifer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 *YALE. J. INT’L L.* 1, 20-21 (2004).

- 37 See generally RYAN, *supra* note 7, at 104-13. For a documentation of the shift from GATT to TRIPS, see DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 10-26 (2ded. 2003).
- 38 See RYAN, *supra* note 7, at 105; PETER DRAHOS & JOHN BRAITHWAITE, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?* 114-120 (2002). (Drahos & Braithwaite refer to the Committee as the "ACTN", the Advisory Committee on Trade Negotiation).
- 39 See Ryan, *supra* note 7, at 108. Drahos also documents the use by the United States of bilateral means to convince objecting countries to accept TRIPS, especially in the case of Brazil. *Negotiating*, *supra* note 7, at 170-71.
- 40 RYAN, *supra* note 7, at 92.
- 41 Drahos describes this as a means to exclude opposition. *Negotiating*, *supra* note 7, at 167-69. Gervais, on the contrary, describes the process in a more favorable manner, of formal and informal meetings, with full transparency. GERVAIS, *supra* note 54, at 20. For a critical analysis of the political strategies that led to TRIPS, see Susan K. Sell, *Trips and the Access to Medicines Campaign*, 20 WIS. INT'L L.J. 481 (2002).
- 42 Peter Yu observes that the story of TRIPS is usually told in one of four narratives: a bargain narrative, a coercion narrative, an ignorance narrative, and a self-interest narrative. Yu argues that none of these narratives is complete, but each provides valuable insights into TRIPS. Peter K. Yu, *The First Ten Years of the TRIPS Agreement: TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369 (2006).
- 43 Frederick M. Abbott, *The International Intellectual Property Order Enters the 21st Century*, 29 VAND.J. TRANSNAT'L L. 471, 472-73 (1996).
- 44 Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated and Overprotective*, 29 VAND.J. TRANSNAT'L L. 613, 615 (1996).
- 45 See South Centre, *The TRIPS Agreement – A Guide for the South* 8 (1997), <http://www.southcentre.org/publications/trips/tripsagreement.pdf>.
- 46 BHAGWATI, *supra* note 21, at 182-83.
- 47 See WTO, *Understanding the WTO: The Organization, Members and Observers*, (Dec. 11, 2005), http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm, for a current list of WTO members.
- 48 TRIPS, *supra* note 1, at art. 9.
- 49 Berne Convention, *supra* note 48, at art. 5(1).
- 50 For a clear summary of these principles of Berne, see Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733, 736-42 (2001).

- 51 TRIPS, *supra* note 1, at art. 4. See also 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 18.06[A] [1] [b] (1963).
- 52 See GERVAIS, *supra* note 54, at 104-10.
- 53 See Part II.B.2, *infra*.
- 54 TRIPS, *supra* note 1, at arts. 10 (computer programs), 11 (rental rights).
- 55 In the United States, for example, computer programs are protected as of 1980. See Computer Software Copyright Act 1980 § 10(b), Pub. L. No. 96-517, 94 Stat. 3015, 3024 (Dec. 12, 1980) (amending 17 U.S.C. § 117). The 1980 Act stated that it was meant to preserve the status quo, which was rather unsettled at the time. The commercial rental rights are part of the right of distribution. See 17 U.S.C. § 101 (1976) ("publication"); 17 U.S.C. § 106(3). The rental right is subject to the first sale doctrine. 17 U.S.C. § 109.
- 56 For the various narratives of the power relationship between the North and the South in this context, see Yu, *The First Ten Years*, *supra* note 59.
- 57 TRIPS, *supra* note 1, at pt. III. Gervais reports that the enforcement provisions of TRIPS were "drafted on the basis of concerns expressed by industry experts and other interested parties". GERVAIS, *supra* note 54, at 69.
- 58 See, e.g., Global Congress/Interpol Latin America Regional Forum on Combating Counterfeiting and Piracy, The Rio Declaration §§ 3-4, 6-7 (June 14, 2005), available at <http://www.wcoomd.org/ie/En/Press/Rio%20Declaration%20Final%20Draft.pdf>; Interpol, Intellectual Property (IP) Crime, <http://www.interpol.int/Public/FinancialCrime/IntellectualProperty/Default.asp>.
- 59 See, e.g., Office of the USTR, Final Text of the Morocco Free Trade Agreement, art. 15.11(3), June 15, 2004, KAV 7206.
- 60 Denis Borges Barbosa, Abstract, *Counting Ten for TRIPs: Author Rights and Access to Information – A Cockroach's View of Encroachment* (SOCIAL SCIENCE RESEARCH NETWORK, 2005), available at <http://ssrn.com/abstract=842564>.
- 61 See, e.g., DVIR OREN ET. AL., NEW COPYRIGHT LEGISLATION FOR ISRAEL 17 (Niva Elkin-Koren and Michael Birnhack eds., 2004) (Hebrew), available at http://techlaw.haifa.ac.il/papers/copyright_seminar.pdf.
- 62 *Id.* at 180. Thus, for example, in its response to the 2006 USTR Report, the Israeli government complained that "[l]ack of cooperation from rights holders continues to prevent the successful prosecution of some criminal matters". Submission of the Government of Israel to the USTR with Respect to the 2006 Special 301 Review, at 3 (on file with author).
- 63 WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, at art. 3(2) (Apr. 15, 1994), available at <http://www.wto.int/english/>

docs_e/legal_e/28-dsu_e.htm; WTO, Marrakesh Declaration of 15 April 1994, 1869 U.N.T.S. 401, 33 I.L.M. 1125 (1994), available at http://www.wto.int/english/docs_e/legal_e/marrakesh_decl_e.htm [hereinafter DSU]. Article 64 of TRIPS subjects it to the DSU.

- 64 Other WTO agreements refer to goods and services.
- 65 DSU, *supra* note 80, at art. 4.
- 66 *Id.* at arts. 6-15 (establishing the panels and determining their procedures); art. 17 (regarding appellate review).
- 67 *Id.* at arts. 16, 17(14).
- 68 See WTO, Understanding the WTO: Settling Disputes, A Unique Contribution, http://www.wto.int/english/thewto_e/whatis_e/tif_e/displ_e.htm (last visited Aug. 25, 2006).
- 69 DSU, *supra* note 80, at art. 19.
- 70 Okediji argues that this system allows stronger countries to bypass the rule-based system of global copyright and replace the judicial-like processes of the DSU with diplomacy. Thus, stronger countries are able to “bargain down” their TRIPS obligations. See Okediji, *supra* note 7, at 634.
- 71 DSU, *supra* note 80, at art. 22(3).
- 72 See Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by Ecuador*, WT/DS27/RWECU (Apr. 12, 1999). The report found that the European Community violated its commitments under the WTO. See World Trade Organization, Overview of the State-of-Play of WTO Disputes (July 13, 2001), http://www.wto.int/english/tratop_e/dispu_e/stplay_e.doc. Eventually, Ecuador did not pursue this remedy. For a discussion of the case, see Marco Bronckers & Naboth van den Broek, *Financial Compensation in the WTO*, 8 J. INT’L ECON. L. 101, 105 (2005).
- 73 World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 (1997), at art. 1(1), available at http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html [hereinafter WCT]. More precisely, the WCT is a “special agreement” within the meaning of article 20 of the Berne Convention. See *id.* at art. 1(1).
- 74 DRM is a generic term, referring to various technological measures which are designed to control access to a digital work and/or the uses thereof. The access control measures can range from simple passwords to complex identification procedures. Usage- control measures can be designed to limit, for example, the number of times a text document can be printed, saved, or whether it is possible to copy portions thereof. DRM is thus a self-help measure. The WCT provides owners of creative works with legal protection of these self-help measures.

- 75 See WIPO, Contracting Parties: WCT, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16 (last visited Sep. 22, 2006).
- 76 See *id.*
- 77 *Negotiating*, *supra* note 7, at 172-74.
- 78 See Peter Drahos, *Securing The Future of Intellectual Property: Intellectual Property Owners And Their Nodally Coordinated Enforcement Pyramid*, 36 CASE W. RES. J. INT'L L. 53, 55 (2004) (describing the process in which bilateral agreements ratchet up the level of intellectual property protection).
- 79 Peter Yu suggests that we distinguish between various kinds of provisions, such as TRIPS-plus and TRIPS-extra. This is a useful distinction, though for rhetorical purposes I will not apply it here. Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. (forthcoming 2007).
- 80 For a critical discussion in the context of data exclusivity in the pharmaceutical industry, see Carlos M. Correa, *Bilateralism In Intellectual Property: Defeating The WTO System For Access To Medicines*, 36 CASE W. RES. J. INT'L L. 79 (2004).
- 81 For a discussion of the European Union and the TRIPS plus strategy, which is applied mostly in the fields of trademark and geographical indications, see Willem Pretorius, *TRIPS and Developing Countries: How Level is the Playing Field"?*, in GLOBAL INTELLECTUAL RIGHTS, 183, 194 (Peter Drahos & Ruth Mayne eds., 2002).
- 82 See US-Chile FTA, *supra* note 76.
- 83 The origin of this view is in a non-network setting. See *MAI Systems Corp., v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) (holding that loading of software from the Read Only Memory of a computer to its Random Access Memory is a "copy" under the Copyright Act). The specific ruling in *MAI* regarding machine maintenance was overruled by Congress in 17 U.S.C. § 117(c). The general rule that temporary copying amounts to "copying" under the Copyright Act remains, however, and was applied in the context of the Internet. See also *Intellectual Reserve, Inc., v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290 (D. Utah 1999).
- 84 See Council Directive 2001/29, art. 5, 2001 O.J. (L 274) 33 (EC) (regarding the harmonization of certain aspects of copyright and related rights in the information society).
- 85 See US-Chile FTA, *supra* note 76, at art. 17.7(3) n.17.
- 86 See US-Australia FTA, *supra* note 99.
- 87 See US-Chile FTA, *supra* note 76, at art. 17.5(3); US-Australia FTA, *supra* note 99, at art. 17.4(2); US-Bahrain FTA, *supra* note 99, at art. 14.4(2); US-Morocco FTA, *supra* note 99, at art. 15.5(3).

- 88 See US-Chile FTA, *supra* note 76, at art. 17.7(5); US-Australia FTA, *supra* note 99, at art. 17.4(7); US-Bahrain FTA, *supra* note 99, at art. 14.4(7); US-Morocco FTA, *supra* note 99, at art. 15.5(8).
- 89 See WCT, *supra* note 90, at art. 6 (regarding making works available), art. 11 (regarding anti-circumvention rules).
- 90 See US-Australia FTA, *supra* note 99, at art. 17.4(7); US-Morocco FTA, *supra* note 99, at art. 15.5(8). Morocco is required, under the FTA, to ratify the WCT. See WCT, *supra* note 90, at art. 15.1 (2) (g).
- 91 See, e.g., Peter Martin, *The FTAs Clause that Stifles Creativity*, SYDNEY MORNING HERALD, Apr. 14, 2004 (regarding the opposition in Australia to copyright aspects of the US-Australia FTA), available at <http://www.smh.com.au/articles/2004/04/13/1081838720006.html>.
- 92 See United States-Israel Free Trade Agreement, Apr. 22, 1985, 25 I.L.M. 653, available at http://www.mac.doc.gov/tec/data/commerce_html/TCC_Documents/IsraelFreeTrade.html.
- 93 Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978, 2041 (1975).
- 94 See, e.g., USTR 2006 SPECIAL 301 REPORT (Apr. 2006), available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_Special_301_Review/asset_upload_file473_9336.pdf [hereinafter 2006 REPORT].
- 95 Trade Act § 301 (b) (codified as amended at 19 U.S.C. § 241 I(d) (3) (A)). See generally 4 NIMMER, *supra* note 68, § 18.04[A].
- 96 The “301 process” was challenged by the European Commission under the WTO’s DSU. See Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999).
- 97 IIPA, <http://www.iipa.com/> (last visited Sept. 21, 2006).
- 98 See Drahos, *supra* note 7, at 173; Drahos & Braithwaite, *supra* note 55, at 90-99. It should be noted that the content industries are not alone in capturing the regulators. Pharmaceutical companies have tremendous power over these governmental agencies.
- 99 See GERVAIS, *supra* note 54, at 48.
- 100 See Heifer, *supra* note 53.
- 101 See *supra* note 11. See Pedro de Paranagua Moniz, Abstract, *The Development Agenda for WIPO: Another Stillbirth ? A Battle Between Access to Knowledge and Enclosure* (Getulio Vargas Foundation 2005), «?wzz’fa&fe1:£http://ssrn.com/abstract=844366.

- 102 Trademark law, for example, is part of globalization. Another exception is hate speech: as more countries find themselves under terrorist threats, they join hands in fighting terrorism. Hate speech is sometimes affiliated with terrorism. See, e.g., Council of Europe, Additional Protocol to the Convention On Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems, Jan. 28, 2003, E.T.S. no. 189, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/189.htm>.
- 103 Universal Declaration of Human Rights, G.A. Res. 217A, art. 19, UN GAOR, 3d Sess., 1st plen. mtg., UN Doc A/810 (Dec. 12, 1948).
- 104 Due to its non-binding nature, the Declaration does not have a signatory system and hence there is no authoritative list of countries which adhere thereto.
- 105 See Hurst Hannum, *The Status and Future of the Customary International Law of Human Rights: The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 289 (1996).
- 106 *Id.*
- 107 *Id.* at 291.
- 108 *Id. passim.*
- 109 US CONST, amend. I. For an absolutist interpretation thereof, see Justice Black's dissenting opinion in *Beauharnais v. Illinois*, 343 US 250, 275 (1952). See also Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 559 (1962).
- 110 The Universal Declaration of Human Rights, *supra* note 183, at art. 29. See Torkel Opsahl & Vojin Dimitrijevic, *Article 29 and 30, in A COMMON STANDARD OF ACHIEVEMENT*, *supra* note 183, at 633.
- 111 S. AFR. CONST. 1996.
- 112 *Id.* § 36.
- 113 *Id.*
- 114 International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), at 55, UN GAOR, 21st Sess., 1496 plen. mtg., UN Doc. A/2200(XXI) (Dec. 16, 1966).
- 115 See Treaty Establishing A Constitution for Europe, Oct. 29, 2004, 2004 O.J. (C 310) at arts. 11-72, 11-112, available at http://www.europa.eu.int/constitution/en/1stocl_en.htm.
- 116 See European Charter for Regional or Minority Languages, June 5, 1992, 2044 U.N.T.S. 577, at art. 11.2, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/148.htm>.

- 117 World Summit on the Information Society (WSIS), Shaping Information Societies for Human Needs: Civil Society Declaration to the World Summit on the Information Society, Dec. 8, 2003, <http://www.itu.int/wsis/docs/geneva/civil-society-declaration.pdf>.
- 118 The divergence of the WSIS from the politics of the North and the agenda of the mega-corporations is apparent throughout the Declaration, for example, in its call to promote free software. *Id.* § 2.3.3.3 ¶ 2.
- 119 *Id.* § 2.3.1.3.
- 120 *Id.* §§ 2.1.5, 2.2.1, 2.3.2, 2.3.3.
- 121 See WSIS, Tunis Commitment, WSIS Doc. No. WSIS-05/TUNIS/DOC/7-E (Nov. 18, 2005), available at <http://www.itu.int/wsis/docs2/tunis/off/7.html>.
- 122 For a discussion of balancing in the United States, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943 (1986). Perhaps “balancing” acquired a negative reputation in the United States due to “ad hoc balancing”. A less objectionable type of balancing is what Melville Nimmer called “definitional balancing”. Melville Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1192-93 (1970).
- 123 For a comprehensive statement on balancing, see Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 93-97 (2002) (outlining the constitutional methodology of balancing).
- 124 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (UK), available at <http://lois.justice.gc.ca/en/charter/index.html>. See also *R. v. Oakes*, [1986] 1 S.C.R. 103 (Can.) (containing a discussion on the subject).
- 125 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. No. 5, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.
- 126 See, e.g., Jason Coppel & Michael Supperstone, *Judicial Review after the Human Rights Act*, 3 E.H.R.L. REV. 301, 312 (1999).
- 127 HCJ 73/53 Kol Ha’am Co., v. Minister of the Interior [1953] IsrSC 7(2) 871, 884, translated in 1 Selected Judgments of the Supreme Court of Israel 90, 105 (E. David Goitein ed., 1953).
- 128 This is true of the United States as well. See, e.g., the post-World War I speech cases, such as *Abrams v. United States*, 250 US 616 (1919), and the congressional response to 9/11, in the form of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, §§ 105, 201-02, 204, 212, 214, 115 Stat. 272 (2001).

- 129 Kol Ha'am, 7(2) P.D. at 884. See Michel Rosenfeld, *Constitutional Migration and the Bounds of Comparative Analysis*, 58 NYU ANN. SURV. AM. L. 67, 77 (2001).
- 130 Freedom House is a non-governmental organization. Freedom House, <http://www.freedomhouse.org> (last visited Sept. 21, 2006).
- 131 See Karin Deutsch Karlekar, *Press Freedom in 2004*, <http://www.freedomhouse.org/template.cfm?page=131&year=2005> (last visited Aug. 22, 2006).
- 132 Id.
- 133 A few short methodological notes are in order. As mentioned *supra* note 34, the United Nations publishes a list of LDCs, but not of developed or developing countries. The WTO relies on the UN's LDC list, but enables each remaining country to choose for itself its status as a developed or developing country. See Who Are the Developing Countries in the WTO?, http://www.wto.org/english/tratop_e/devel_e/dlwho_e.htm (last visited Sept. 21, 2006).
- 134 Benin, Mali and Solomon Islands.
- 135 Burkina Faso, Guinea Bissau, Lesotho, Madagascar, Malawi, Mozambique, Niger, Senegal, Sierra Leone, Tanzania and Uganda.
- 136 Angola, Bangladesh, Burundi, Cambodia, Central African Republic, Chad, Democratic Republic of Congo, Djibouti, Gambia, Guinea, Haiti, Maldives, Mauritania, Myanmar (Burma), Nepal, Rwanda, Togo, Zambia.
- 137 Macao is listed as an independent member of the WTO, but is not independently classified by Freedom House. Rather, it is listed as Macao (China). For this reason, it is left out of the analysis here.
- 138 Estonia, Barbados, Belize, Botswana, Chile, Costa Rica, Cyprus, Dominica, Fiji, Ghana, Grenada, Guyana, Hong Kong, Israel, Jamaica, Lichtenstein, Lithuania, Latvia, Malta, Mauritius, Namibia, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Slovenia, South Africa, Suriname, Taiwan (Chinese Taipei), Trinidad and Tobago, Uruguay.
- 139 Albania, Antigua, Argentina, Bolivia, Brazil, Bulgaria, Congo, Croatia, Dominican Republic, Ecuador, El Salvador, Georgia, Guatemala, Honduras, India, Indonesia, Kuwait, Former Yugoslav Republic of Macedonia, Mongolia, Nicaragua, Nigeria, Panama, Paraguay, Peru, Philippines, Romania, Sri Lanka, Thailand.
- 140 Armenia, Bahrain, Brunei Darussalam, Cameron, China, Columbia, Cote d'Ivoire, Cuba, Egypt, Gabon, Jordan, Kenya, Kyrgyzstan, Malaysia, Moldova, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Singapore, Swaziland, Tunisia, United Arab Emirates, Venezuela, Zimbabwe.
- 141 The classic arguments remain those of FRIEDRICH A. VON HAYEK, *THE ROAD TO SERFDOM* (1944) and MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

142 Fredrich Jameson writes that:

It is in particular important ironically to distance the rhetoric of freedom – not merely free trade, but free speech, the free passage of ideas and intellectual “properties” – which accompany this [US GATT cultural] policy The freedom of those corporations (and their dominant nation-state) is scarcely the same thing as our individual freedom as citizens.

Fredrich Jameson, *Notes on Globalization as a Philosophical Issue*, in *THE CULTURE OF GLOBALIZATION* 54, 60 (Fredrich Jameson & Masao Miyoshi eds., 1998).

- 143 In a previous work I argued that there is such a conflict, and that the judicial refusal to acknowledge it amounts to a denial thereof. See Michael D. Birnhack, *The Copyright Law and Free Speech Affair: Making-Up and Breaking-Up*, 43 *IDEA: J. OF L. & TECH.* 233 (2003).
- 144 *Id.* at 248-53.
- 145 *Id.* at 254-60.
- 146 *Id.* at 266.
- 147 *Harper & Row, Publishers, Inc., v. Nation Enters.*, 471 US 539, 558 (1985).
- 148 Neil W. Netanel, *Locating Copyright within the First Amendment Skein*, 54 *STAN. L. REV.* 1, 12-30, 30-36 (2001) (surveying copyright law and First Amendment developments, respectively, since 1970).
- 149 See, e.g., *Eldred v. Ashcroft*, 537 US 186, 219 (2003) (stating that the built-in safeguards within copyright law are generally adequate to address free speech concerns).
- 150 Birnhack, *supra* note 223, at 278-82.
- 151 Michael D. Birnhack, *Copyright Law and Free Speech after Eldred v. Ashcroft*, 76 *S. CAL. L. REV.* 1275 (2003).
- 152 US CONST, art. I, § 8. cl. 8.
- 153 Birnhack, *supra* note 231, at 1304-05.
- 154 Yochai Benkler describes this temporal tension in economic terms, as one between static and dynamic efficiency. Yochai Benkler, *THE WEALTH OF NETWORKS – HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 36-37 (2006).
- 155 Birnhack, *supra* note 231, at 1305-09.
- 156 For a detailed account of this argument, see Michael D. Birnhack, *More or Better”? Shaping the Public Domain*, in *THE FUTURE OF THE PUBLIC DOMAIN* 59 (P. Bernt Hugenholtz & Lucie Guibault eds., 2005) (discussing the compatibility of copyright law justifications and free speech justifications).

- 157 Birnhack, *supra* note 231, at 1306.
- 158 Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified in scattered sections of 17 U.S.C.).
- 159 *Eldred v. Ashcroft*, 537 US 186, 190 (2003).
- 160 See *id.* at 219. See also Birnhack, *supra* note 231, at 1292, 1308.
- 161 See the ground-breaking work of Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982).
- 162 For a discussion of the conflict argument in the United Kingdom, see Michael D. Birnhack, *Acknowledging the Conflict Between Copyright Law and Freedom of Expression Under the Human Rights Act*, 23 ENT. L. REV. 24 (2003).
- 163 See Birnhack, *Copyrighting Speech*, *supra* note 139.
- 164 For a conceptualization of the trade/human rights conflict in general, along the lines of consequentialist and deontological theories, see Frank J. Garcia, *Trading Away the Human Rights Principle*, 25 BROOK. J. INT'L L. 51 (1999).
- 165 *Harper & Row, Publishers, Inc., v. Nation Enters.*, 471 US 539, 558 (1985).
- 166 See *supra* Part III.A.
- 167 See 2006 REPORT, *supra* note 111.

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Free Speech and Copyright Law

It appears conceptually difficult to square the free speech with copyright. Probably the inconsistencies in application of principles have made the subject controversial as many researchers feel that meaningful free speech limits on copyrights do not in anyway violate the constitutional balance of rights to citizens and users of content. Copyright doctrine in fact accommodates the free speech right through the idea-expression dichotomy and respects the constitutional rights of all citizens to free speech. Additionally, fair use umbrella provides the much needed protection for accessing the copyrighted knowledge content. As such judicial scrutiny is warranted only in case where the balance between free speech and property rights of copyright holders is disturbed. In tune with this approach free speech advocates must acknowledge that copyright law limits are also free speech limits.

In the above backdrop the edited book presents some research perspectives on the subject. It is hoped that research scholars, legal practitioners and rights activists find this book useful.