THE CASE FOR FIRST AMENDMENT LIMITS ON COPYRIGHT LAW

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I. INTRODUCTION

Scholars have felled many trees arguing for First Amendment limits on copyright rights. Seminal articles by Melville B. Nimmer, Paul Goldstein, Lionel S. Sobel and Robert C. Denicola first wrestled with the tension between free speech and copyright in the 1970s.[1] Interest then waned until the early 1990s when a trickle of new articles quickly grew into a torrent of scholarship.[2]

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1. *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); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970); Lionel S. Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. (ASCAP) 43 (1971).

2. For a sampling of this voluminous literature, *see generally* LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004); C. Edwin Baker, Essay, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002); Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173 (2003); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999) [hereinafter Benkler, *Free as the Air*]; Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act Is Unconstitutional*, 36 LOY. L.A. L. REV. 83 (2002); Daniel A. Farber, *Conflicting Visions and Contested Baselines: Intellectual Property and Free Speech in the "Digital Millennium"*, 89 MINN. L. REV. 1318 (2005); Alan E. Garfield, *The First Amendment as a Check on Copyright Rights*, 23 HASTINGS COMM. & ENT. L.J. 587 (2001); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998); Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. Rev. 1057 (2001); David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281 (2004); Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272 (2004); Neil Weinstock

Underlying this surge in interest is a sense that the political process has become heavily slanted in favor of maximizing copyright rights at the public's expense.[3] Recent amendments to the 1976 Copyright Act have extended copyright duration to almost a century,[4] have bolstered the ability of copyright owners to use encryption technologies to block access to works (even when the access might be for a fair use),[5] and have made the civil and criminal penalties for copyright infringement increasingly more onerous.[6] Copyright owners have also begun using

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Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001) [hereinafter Netanel, *Locating Copyright*]; Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879 (2000); Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217 (1998); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1 (1987); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1 (2002); Rebecca Tushnet, Essay, *Copy this Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004); William W. Van Alstyne, *Reconciling What the First Amendment Forbids with What the Copyright Clause Permits: A Summary Explanation and Review*, 66 LAW & CONTEMP. PROBS. 225 (2003); Eugene Volokh, Essay, *Freedom of Speech and Intellectual Property: Some Thoughts After* Eldred, 44 Liquormart, *and* Bartnicki, 40 HOUS. L. REV. 697 (2003); Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278 (2004); Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833 (2000); Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665 (1992).

3. Marci A. Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L.J. 655, 655 (1996) (noting that "[a]gain and again, Congress has been willingly captured by the publishing and motion picture industries"); Niva Elkin-Korren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375, 375 (2005) (stating that the "legislative process is captured by the content industries"). *See generally* WILLIAM M. LANDES & RICHARD A. POSNER, THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY LAW 25 (2004) (stating that the increase in the legal protection of intellectual property since 1976 may be explained by political forces and ideological currents "abetted by interest-group pressures that favor originators of intellectual property over copiers"); JESSICA LITMAN, DIGITAL COPYRIGHT 14 (2001) (noting that "[c]opyright is now seen as a tool for copyright owners to use to extract all the potential commercial value from works of authorship").

4. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827, 2827-29 (1998) (codified as amended at 17 U.S.C. §§ 109, 203, 301-304 (2000)) (adding twenty years to the duration of existing and new copyrights). The duration of works for hire is now ninety-five years from the year of first publication or 120 years from the year of creation, whichever expires first. The duration of other types of works is the author's life plus seventy years, which potentially could be considerably longer than a century. *Id.*

5. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2860-72 (1998) (codified as amended in scattered sections of 17 U.S.C.) (providing protection for technological protection measures employed by copyright owners).

6. Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, 113 Stat. 1774, 1774 (codified as amended at 17 U.S.C. § 504(c) (2000)) (increasing maximum statutory damages by fifty percent); No Electronic Theft (NET) Act, Pub. L. No. 105-

new digital technologies as a self-help means of expanding their rights through both technological protections and electronic contracting.[7]

Scholars hoping to counter this trend have understandably looked to the First Amendment for help.[8] The appeal of a constitutional check, of course, is that it allows judges to trump the political process. Using the power of judicial review, judges can undo the expansion of copyright rights even if grassroots lobbying could not.

Yet this outpouring of scholarship has been notably unsuccessful in winning judicial converts. While there have been occasional lower court decisions which have invoked First Amendment limits on copyright rights,[9] for the most part, courts have been unreceptive to the idea.[10] Leading the way has been the Supreme Court, which barely gave lip service to First Amendment claims in two high profile cases.[11] Even

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147, 111 Stat. 2678, 2678-80 (1997) (codified as amended in scattered sections of 17 U.S.C. and 18 U.S.C.) (increasing criminal penalties for willful copyright infringement).

7. Julie E. Cohen, Lochner *in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462, 470 (1998) (stating that "the growing use of 'click- through' contracts for the online delivery of digital works" and new "'rights management'" technologies "will allow copyright owners to set unilaterally and enforce automatically the terms and conditions of access to digital content"); Kathleen K. Olson, *Preserving the Copyright Balance: Statutory and Constitutional Preemption of Contract-Based Claims*, 11 COMM. L. & POL'Y 83, 83 (2006) (stating that "[s]ome copyright owners in the digital age have turned from copyright to contract law to protect their intellectual property, employing licensing agreements that override fair use and other public interest safeguards"); Maureen A. O'Rourke, *Copyright Preemption After the ProCD Case: A Market-Based Approach*, 12 BERKELEY TECH. L.J. 53, 53 (1997) (noting that "[e]lectronic information providers . . . have continually turned to the private law of contract both to supplement and modify the public law of copyright").

8. *See supra* note 2 (listing articles discussing the application of the First Amendment to Copyright Law).

9. *See, e.g.*, Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1277 (11th Cir. 2001) (finding a preliminary injunction in a copyright case to be an unlawful prior restraint that was "at odds with the shared principles of the First Amendment and the copyright law"); *see also* Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 801 (9th Cir. 2003) (finding parody photographs of Mattel's Barbie doll to be a fair use and acknowledging that parody is "'a form of social and literary criticism'" that "has 'socially significant value as free speech under the First Amendment,'" (quoting Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1400 (9th Cir. 1997))).

10. *See, e.g.*, Chicago Bd. of Educ. v. Substance, Inc., 354 F.3d 624, 631 (7th Cir. 2003) (rejecting First Amendment argument); Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1115 (9th Cir. 2000) (rejecting First Amendment argument); Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor Ltd., 55 U.S.P.Q.2d 1680, 1696 (S.D.N.Y. 2000) (rejecting First Amendment argument); L.A. Times v. Free Republic, 54 U.S.P.Q.2d 1453, 1472 (C.D. Cal. 2000) (rejecting First Amendment argument); Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290, 1295 (C.D. Utah 1999) (rejecting First Amendment argument). *See generally Rubenfeld*, *supra* note 2, at 7 (stating that "[c]opyright proceeds as if possessed of a magic free speech immunity, with most courts, including the Supreme Court, explicitly declining to subject copyright to any independent First Amendment review").

11. Eldred v. Ashcroft, 537 U.S. 186, 221 (2003) ("The First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers

Paul Goldstein, one of the early advocates of First Amendment limits on copyright, has now labeled the debate a "tempest in a very small teapot."[12]

So what's gone wrong? Why have scholars barely been able to make a dent with the one group that might have translated their ideas into binding law?

Of course, judicial obliviousness to legal scholarship is hardly surprising; it is more likely the norm than the exception. Yet scholars may also have undermined their own cause by exaggerating the threat of overbearing copyright owners and by casting their arguments in theoretical terms that have left judges with little practical guidance.[13]

In this short Article, I hope to build upon the foundation laid by other scholars. My goal is to present as clearly as possible the case for First Amendment limits on copyright. I will also provide some practical guidelines for how judges can determine when copyright laws should be declared unconstitutional.

II. WHY JUDGES SHOULD IMPOSE FIRST AMENDMENT LIMITS ON COPYRIGHT RIGHTS

The argument for First Amendment limits on copyright is actually quite straightforward. The more troublesome issue is discerning what those limits should be. Still, the enforcement of copyright rights by private parties is sufficiently different from the paradigmatic First Amendment violation of government imposed censorship that it is worth considering why First Amendment limits should apply.

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assert the right to make other people's speeches. To the extent such assertions raise First Amendment concerns, copyright's built-in free speech safeguards are generally adequate to address them."); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985) (concluding that, "[i]n view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright").

12. 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 10.3 (1989).

13. Jessica Litman, *War and Peace: The 34th Annual Donald C. Brace Lecture*, 53 J. COPYRIGHT SOC'Y U.S.A. 1, 3-11 (2006) (talking about the strident positions taken by both sides in the ongoing "copyright war[s]"); *see also* Julia D. Mahoney, Book Review, *Lawrence Lessig's Dystopian Vision*, 90 VA. L. REV. 2305, 2305 (2004) (reviewing LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004), and concluding that the author's description of a world in which "innovation and creativity are under ferocious assault from powerful corporate and political interests" is at odds with the very vibrant and creative world he describes in his own book).

In this section, I first make the case for imposing First Amendment limits on copyright rights. I then respond to common arguments for not doing so.

A. Why the First Amendment Needs to Impose Limits on Copyright Law

One can appreciate the importance of a First Amendment check on copyright law by imagining a world without one. If there were no First Amendment check, nothing would stop Congress from expanding copyright rights to include rights in facts or ideas. Nothing would bar Congress from eliminating the fair use defense or the first sale doctrine.[14] Nothing would bar Congress from extending copyright duration to a thousand years. Put simply, Congress could give private parties property rights that they could use to shut down the free exchange of ideas and information.

Of course, courts could also use the Constitution's Copyright and Patent Clause to prevent this abuse.[15] They could say that Congress can only protect "Authors" and that no one is the author of facts. They could say that eliminating fair use will not "promote the Progress of Science and useful Arts," and that a 1,000 year duration is not for "limited Times."[16] The point, however, is that whichever provision judges rely on, they must use their power of judicial review to place limits on copyright rights. Copyright cannot just be left to an unregulated political process that is free from a judicial countermajoritarian check. The issue is only what the limits of that check should be.

It probably makes sense for courts to use both the Copyright and Patent Clause and the First Amendment to place limits on copyright law. If the issue is whether the duration of copyright is constitutional, the "limited Times" provision in the Copyright Clause is a logical textual basis for judicial intervention.[17] But if the primary concern is with copyright's impact on speech, the First Amendment is a better source for judicial intervention. First Amendment jurisprudence has volumes of

14. 17 U.S.C. § 109(a) (2000) (codifying the first sale doctrine).

15. U.S. CONST. art. I, § 8, cl. 8 (noting that "Congress shall have 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").

16. *Id.*

17. Of course, the Supreme Court has not been receptive to this argument. *See* Eldred v. Ashcroft, 537 U.S. 186, 209 (2003) (rejecting the argument that the twenty year extension created by the Sonny Bono Term Extension Act violated the "limited Times" provision in the Copyright and Patent Clause).

decisions to guide courts as to when something should be considered an unlawful abridgement of speech.

The Supreme Court itself has readily acknowledged that the First Amendment places limits on copyright law. Rather than saying that copyright law is immune from First Amendment scrutiny, the Court has merely said that such scrutiny is usually unnecessary because copyright law already has its own built-in free speech safeguards.[18] By not protecting facts and ideas, and by giving breathing room for the fair use of expression, copyright ordinarily does not trench upon free speech interests.[19] Yet the Court has also acknowledged that First Amendment concerns would arise if Congress ever altered these traditional contours of copyright law.[20]

Given these strong arguments for First Amendment checks on copyright, one might wonder why courts often seem reluctant to impose them. Following are reasons why courts might choose to withhold First Amendment limits on copyright, together with explanations as to why these rationales are flawed.

B. Should Copyright be Immune from First Amendment Scrutiny Because the Constitution Authorizes Congress to Enact Copyright Laws?

It is true that Article I, Section 8 of the Constitution explicitly authorizes Congress to enact copyright laws.[21] But there is little reason to think that laws enacted pursuant to this power are immune from First Amendment scrutiny. Indeed, courts routinely invalidate federal legislation for violating constitutional rights even though Congress had the underlying power to enact the laws. Congress, for example, has the power under the Commerce Clause to regulate newspapers distributed in

18. *Eldred*, 537 U.S. at 221 (stating that to the extent uses of copyrighted expression "raise First Amendment concerns, copyright's built-in free speech safeguards are generally adequate to address them").

19. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985) ("In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and copyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright.").

20. *Eldred*, 537 U.S. at 221 (stating that the D.C. Circuit "spoke too broadly when it declared copyrights 'categorically immune from challenges under the First Amendment,'" but stating that "when, as in this case, *Congress has not altered the traditional contours of copyright protection*, further First Amendment scrutiny is unnecessary") (emphasis added).

21. U.S. CONST., art. I, § 8, cl. 8.

interstate commerce,[22] but no one would argue that Congress could use this power to prohibit the newspapers from criticizing the war in Iraq.[23] The fact that the law was within Congress's Commerce power has no bearing on whether the law violates the First Amendment or any other constitutional right.

In the same vein, Congress may have the power to enact copyright laws under the Copyright and Patent Clause but this provides no immunity for copyright laws if they violate freedom of speech (e.g., Congress provides that copyright protects facts and ideas), freedom of religion (e.g., Congress provides that Episcopalians may not hold copyrights), or equal protection of the law (e.g., Congress provides that works created by Hispanic-American authors will have a shorter duration).[24]

C. Should the Fact that Copyright Rights Are Enforced by Private Parties Immunize Them from First Amendment Scrutiny?

The First Amendment, like other constitutional rights, is a limit on government action. So why should the enforcement of copyright rights by private parties trigger the First Amendment? This issue, which closely relates to the "state action" question in Constitutional Law, is trickier than it seems.[25]

On the one hand, we know from case law that the fact that a private party is enforcing rights does not immunize the claim from First Amendment scrutiny. The Supreme Court laid that argument to rest in *New York Times v. Sullivan* when it held that the private enforcement of

22. United States v. Lopez, 514 U.S. 549, 558-59 (1995) (acknowledging that Congress's commerce power "includes the power to regulate those activities having a substantial relation to interstate commerce").

23. *Cf.* Reno v. ACLU, 521 U.S. 844, 877-79 (1997) (without questioning Congress's power to regulate the Internet under the Commerce Clause, the Supreme Court still found a part of the Communications Decency Act of 1996 unconstitutional under the First Amendment).

24. *See, e.g.*, Rubenfeld, *supra* note 2, at 13 ("Against a claim that a federal statute violates the Bill of Rights, it is never an answer that the statute falls within the terms of an Article I power."); Netanel, *Locating Copyright*, *supra* note 2, at 38 (stating that "[t]he fact that the Constitution explicitly empowers Congress to enact a copyright statute cannot immunize from First Amendment scrutiny whatever provisions Congress might now include in such a statute").

25. It seems clear that the enforcement of copyright rights constitutes "state action" and at least triggers the First Amendment. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 555-60 (1985) (analyzing the constitutionality of a copyright enforcement action under the First Amendment). Comparison to "state action" jurisprudence is only helpful because it wrestles with the question of when constitutional restraints should be imposed on private parties. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 507 (3d ed. 2006).

a defamation tort triggers "state action."[26] The Court has subsequently recognized that the private enforcement of a wide variety of tort and property claims triggers First Amendment scrutiny.[27]

On the other hand, it is equally true that some private actions affecting speech do not implicate the First Amendment. When a mall owner uses trespass law to evict protesters because he disapproves of their speech, the First Amendment is not implicated.[28] Similarly, the private enforcement of a contractual promise to suppress speech will usually be given little or no scrutiny.[29]

The question, then, is whether private enforcement of copyright rights is more like the enforcement of defamation and privacy torts or the enforcement of trespass and contract rights? This question is particularly troublesome when one recognizes that copyright owners sometimes use contractual provisions to achieve the same type of protection they receive from copyright law.[30] If the impact on speech interests from these two actions is the same, is there any reason courts should treat them differently under the First Amendment?

A variety of arguments could be made as to whether courts should impose First Amendment limits on the private enforcement of copyright rights, but ultimately these arguments all point in the same direction: that such limits are appropriate.

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26. New York Times v. Sullivan, 376 U.S. 254, 264-65 (1964).

27. Bartnicki v. Vopper, 532 U.S. 514, 517-18 (2001) (damage claim brought by private parties for broadcast of illegally intercepted cell phone conversation triggered First Amendment scrutiny); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988) (intentional infliction of emotional distress claim by private party triggers First Amendment scrutiny); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 565-66 (1977) (right of publicity claim by private party triggered First Amendment scrutiny); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496-97 (1975) (privacy claim brought by private party triggers First Amendment scrutiny); Time, Inc. v. Hill, 385 U.S. 374, 387-88 (1967) (false light privacy claim by private party triggers First Amendment scrutiny).

28. Hudgens v. NLRB, 424 U.S. 507, 520-21 (1976) (finding no First Amendment right to enter a private shopping center for speech purposes).

29. Cohen v. Cowles Media Co., 501 U.S. 663, 670-71 (1991) (finding that the enforcement of a promissory estoppel claim constitutes "state action" triggering the First Amendment but then finding no First Amendment violation because the restrictions on speech were "self-imposed"). *See generally* Volokh, *supra* note 2, at 1057 (stating that the "Supreme Court explicitly held in *Cohen v. Cowles Media* that contracts not to speak are enforceable with no First Amendment problems"). *But see* Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 268-72 (1998) (arguing for First Amendment limits on contractual suppression of speech).

30. For a discussion as to whether such contracts would be preempted by the Copyright Act, *see infra* note 57.

1. Copyright Law Requires Judicial Scrutiny Because the Government Defines the Speech Being Abridged

The primary purpose of First Amendment scrutiny is to ensure that the government does not act in ways that undermine freedom of speech. Of course, government abuse is most apparent when the government censors speech because of its message.[31] This is the quintessential First Amendment violation. But the government can also abuse its power through content-neutral laws that have a severe impact on speech interests.[32] One need only imagine a law that forbids anyone from saying anything to recognize the truth of this assertion.[33] The question in both instances is whether there exists a potential for government abuse.

This focus explains why courts scrutinize defamation and privacy torts more carefully than contract and trespass laws. In the former instance, the risk of government abuse is great because the government defines the speech being punished (whether it be speech injuring a person's reputation or speech disclosing intimate private facts).[34] Courts need to scrutinize these laws to ensure that the government does not define the punishable speech in ways that would harm the marketplace of ideas. By contrast, in the case of contract and trespass laws, the decision as to which speech to suppress is made by private parties. It is the landowner who decides which speech warrants a speaker's eviction or the parties to a contract who decide which speech a party promises to suppress.[35] Because private parties and not the government decide which

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31. Texas v. Johnson, 491 U.S. 397, 414 (1989) (stating that a "bedrock principle underlying the First Amendment" is that "the [g]overnment may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) (stating that "above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content").

32. *See generally* Geoffrey Stone, *Content Neutral Restrictions*, 54 U. CHI. L. REV. 46, 58 (1987) (stating, with regard to content-neutral speech restrictions, that "[t]here is a strong correlation in practice . . . between the extent to which a challenged law actually interferes with the opportunities for free expression and the Court's use of the strict, intermediate and deferential standards of review," with strict scrutiny being used for regulation with a "severe effect" on expression).

33. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 313-14 (1984) (Marshall, J., dissenting) (noting that "[t]he consistent imposition of silence upon all may fulfill the dictates of an even-handed content-neutrality" but it still "offends our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'").

34. *See* Andrew B. Sims, *Food for the Lions: Excessive Damages for Newsgathering Torts and the Limitations of Current First Amendment Doctrines*, 78 B.U. L. REV. 507, 558 (1998) (noting how the Supreme Court has distinguished between promises to keep silent, which do not raise serious First Amendment concerns because the obligations are "self-imposed," and a state privacy statute protecting the anonymity of rape victims, which does raise First Amendment concerns because "the state itself defined and imposed liability on the basis of the content of speech").

35. Cohen v. Cowles Media Co., 501 U.S. 663, 670-71 (1991). The Court states:

speech to suppress, the danger of government abuse is considerably reduced.[36]

Copyright law fits comfortably into the first category. As with defamation and privacy torts, the government defines the speech being suppressed. Congress may not legislate with regard to the specific content of any given work (just as legislatures do not specify the precise defamatory remarks that trigger liability), but it does define what types of speech constitute copyrightable subject matter and thus become someone's private property.[37] The danger of government abuse exists because the government could potentially define copyright so broadly as to give parties rights in facts or ideas.[38]

The fact that the abuse of these rights will only occur if private parties enforce them does not eliminate First Amendment concerns. If it

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> In [the privacy] cases, the State itself defined the content of publications that would trigger liability. Here, by contrast, Minnesota law simply requires those making promises to keep them. *The parties themselves, as in this case, determine the scope of their legal obligations*, and any restrictions that may be placed on the publication of truthful information are self-imposed.

Id. (emphasis added).

36. Volokh makes this point in connection with contractual promises not to talk about someone:

> The great free speech advantage of the contract model is that it does *not* endorse any right to "stop people from speaking about me." Rather, it endorses a right to "stop people from violating their promises to me." One such promise may be a promise not to say things, and perhaps there may even be special defaults related to such promises or special remedies for breaches of such promises. But in any event, the government is simply enforcing obligations that the would-be speaker has himself assumed.

Volokh, *supra* note 2, at 1061. *Compare* Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 737-40 (1970) (a law requiring the Post Office to stop delivering offensive mail to a particular individual is not unconstitutional when the decision to terminate the mail delivery is made by the individual recipient) *with* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 75 (1983) (a government ban on the mailing of unsolicited contraceptive advertisements is unconstitutional).

37. Courts have similarly recognized that the private enforcement of other types of property rights in expression also trigger First Amendment scrutiny. *See, e.g.*, Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 565-66 (1977) (acknowledging that the First Amendment could limit right of publicity rights even though it did not do so on the facts of that case); Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 807 (9th Cir. 2003) (imposing First Amendment restrictions on trademark rights).

38. The fact that copyright law creates a potential for government abuse because the government defines the speech being regulated does not mean that copyright law is content-based regulation of speech. Indeed, although commentators have fought over whether copyright law is content-based or content-neutral regulation of speech, the better argument is that it is content-neutral regulation. *See, e.g.*, Netanel, *Locating Copyright*, *supra* note 2, at 47-48 (acknowledging the claims of some commentators that copyright law is content-based but arguing that "logical and doctrinal consistency strongly favors classifying copyright law as content-neutral, not content-based, regulation"). Nonetheless, as noted above, even content-neutral regulations of speech can violate the First Amendment. *See infra* notes 102-11 and accompanying text (discussing how courts should analyze the constitutionality of copyright laws).

did, the government could hand out rights to facts and ideas with immunity and private parties could wreak havoc on the marketplace of ideas with no judicial monitoring.[39] But this should no more be allowed than for the government to authorize private parties to bring defamation actions with no First Amendment restraints.

2. First Amendment Immunity for Copyright Rights Is Not Necessary to Protect Individuals' Autonomy Rights

One of the primary justifications for the "state action" doctrine—the doctrine that provides that constitutional restraints apply only to government action and not private action—is that it "preserves a zone of private autonomy."[40] By saying that the Constitution is not implicated when private landowners use trespass law to evict persons because of the color of their skin or their speech, the "state action" doctrine bolsters the landowners' autonomy to decide whom they want to associate with.[41] These private landowners need not guess who's coming to dinner because the Constitution will not force them to associate with parties they prefer to exclude.

One could argue that copyright law similarly enhances private autonomy by allowing copyright owners to decide when their expression can be used by others. This could be another reason for refusing to impose First Amendment limits on copyright rights.

There is some jurisprudential support for this proposition. In *Harper & Row Publishers, Inc. v. Nation Enterprises*, the Supreme Court's most thorough exploration of copyright's relationship to freedom of speech, the Court spoke directly about copyright's role in

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39. *See, e.g.*, Rubenfeld, *supra* note 2, at 29 (stating that "[i]f Congress could act with First Amendment impunity whenever it turned speech into property, the freedom of speech would turn out to mean a freedom to speak only at the sufferance of federally designated individuals or corporations").

40. CHEMERINSKY, *supra* note 25, at 512.

41. Although the Constitution does not prohibit discrimination by private landowners (because their actions do not amount to "state action"), the Constitution may still permit the government to prohibit this discrimination by statute. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1588-89 (5th ed. 2005). The government's powerful interest in preventing discrimination in public accommodations, for instance, can trump a private landowner's autonomy interest in associating with whom he pleases. At the same time, however, there are instances in which an individual or group's autonomy interests can prevent the government from forcing them to associate with others against their will. *See, e.g.*, *id.* at 1588 (suggesting that without the "state action" doctrine, "private autonomy would be subject to the same limitations as government autonomy" so that "[p]rivate homeowners might be precluded from choosing their guests on racial or political grounds"); *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 643-44 (2000) (Boy Scouts could not be compelled by New Jersey anti-discrimination law to accept a gay scoutmaster when it would interfere with the group's expressive activities).

facilitating an individual's right not to speak.[42] Freedom of thought and expression, the Court noted, "'includes both the right to speak freely and the right to refrain from speaking at all.'"[43] Copyright law furthers the latter interest in personal autonomy by allowing copyright owners to decide when their expression can be used.[44]

While there is undoubtedly some truth to the Court's observation, it is a gross exaggeration to say that copyright's autonomy-enhancing quality is present in all copyright enforcement actions. This quality is most evident when the facts resemble those in the *Harper & Row* case itself. In that instance, the copyright infringer peremptorily published the plaintiff's work in advance of the plaintiff's own publication.[45] Thus, the defendant stole from the plaintiff the right to decide when and how his words would be communicated to the public.[46]

But copyright's autonomy-enhancing qualities are less evident in other contexts. Once a work is published, for instance, the author's interest in keeping her expression private would seem to disappear altogether. Of course, it could be argued that an author's autonomy interest also encompasses the right to decide when others can use her published expression. In other words, a copyright owner would have a right to declare: "I don't want so-and-so using my expression."

This autonomy right might make sense in those instances in which the use of a work implies that the author has consented to the use and thereby implicitly endorsed it. In those instances, the ability of an author to stop the use could bolster the author's autonomy right not to be associated with a particular use or user.[47] To that extent, copyright rights could support an autonomy right embedded in the First Amendment's right not to speak.

But there would necessarily have to be limitations on this principle. For one, it would be irrelevant in those instances in which it was clear that the use of a work was not authorized by an author. Works commenting, criticizing or reporting about an author's work, for

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42. Harper & Row v. Nation Enters., 471 U.S. 539, 559-60 (1985).

43. *Id.* at 559; *see also* Eldred v. Ashcroft, 537 U.S. 186, 221 (2003) (stating that the "First Amendment securely protects the freedom to make—or decline to make—one's own speech").

44. *Harper & Row*, 471 U.S. at 560 (stating that "[c]ourts and commentators have recognized that copyright, and the right of first publication in particular, serve this countervailing First Amendment value" of protecting a person's right not to speak).

45. *Id.* at 557.

46. *Id.* at 564, 567.

47. The Copyright Act, for instance, permits owners of non-dramatic literary works and musical works to object to what would otherwise be exempt non-profit performances of their work. 17 U.S.C. § 110(4) (2000).

instance, should not implicate an author's right to disassociate from another since the public would not perceive the use as implying any endorsement or association by the author. It would be similar to the *PruneYard Shopping Center v. Robins* case in which the Supreme Court said that a mall owner's right not to speak was not infringed by a California law that compelled him to permit protesters onto his property.[48] The Court explained that no one would associate the protesters' speech with that of the mall owner's so that the mall owner was not being forced to say something against his will.[49]

Moreover, it is not clear what an autonomous "right not to speak" means in the context of a property right that an author can freely assign to others. Is there any autonomy right left once an author has parted with copyright ownership? Absent contractual restrictions, authors cannot usually stop a copyright owner from licensing an author's work in ways of which he would disapprove.[50] And the assignee could hardly claim any autonomy right in someone else's expression.

Even for unpublished works, there would seem to be instances in which First Amendment rights should trump an author's autonomy right. Indeed, as commentators have noted, one person's autonomy right can often be another's person deprivation of rights.[51] If I do not want you on my land because of the color of your skin, then kicking you off furthers my autonomy interest but violates your right to equal treatment. Similarly, one person's autonomy right to control the use of his expression is another person's deprivation of the right to speak, even if the speech was initially someone else's expression. The balance might usually tip in favor of an author's right to control his speech, but it can sometimes tip the other way. For instance, if a candidate for public office claimed that he never used illegal drugs, but he had written unpublished letters discussing such use, then a speaker's right to quote from these letters would undoubtedly outweigh any countervailing right not to speak. This is similar to the balance struck in the recent *Bartnicki v. Vopper* case, in which the court found that any legitimate privacy interest on the part of the plaintiff was outweighed by the public's right to access speech on a matter of public concern.[52]

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48. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980).

49. *Id.* at 87 (stating that "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the owner").

50. There are some limited exceptions for works of visual art. 17 U.S.C. § 106A (2000).

51. *See* CHEMERINSKY, *supra* note 25, at 512.

52. Bartnicki v. Vopper, 532 U.S. 514, 532-35 (2001).

In sum, even if copyright rights might bolster an individual's First Amendment right not to speak, there are many instances in which this interest is irrelevant. Certainly, this interest by itself cannot justify complete immunization of copyright law from First Amendment scrutiny, particularly in those instances in which there is no credible autonomy right and there is a strong First Amendment interest on the part of the person who wants to use the expression.

3. Even Contract and Trespass Laws Should Not Be Immune from First Amendment Scrutiny

Thus far, I have argued that copyright laws, like defamation and privacy laws, pose a risk of government abuse and therefore merit judicial monitoring even though copyright rights are enforced by private parties. Likewise, the need to protect an individual's autonomy interests is less pronounced in the copyright context than in the context of other laws such as contract or trespass.

While these arguments might explain why courts should monitor copyright's impact on speech more carefully than the impact of contract and trespass laws, it should be noted that even these latter laws should not be absolutely immune from First Amendment scrutiny. The reason is that both of them, under certain circumstances, could have a severe negative impact on speech interests.

Trespass laws, for instance, in ordinary circumstances do not pose a serious threat to free speech interests. As noted above, the danger of government abuse is not present because it is private parties and not the government who decide what speech to discriminate against.[53] By immunizing trespass laws from First Amendment scrutiny, courts bolster the autonomy right of private citizens to choose which speakers to associate with on their own property. Moreover, the impact on free speech interests of immunizing trespass actions from judicial scrutiny is arguably minimal. As long as speakers have access to government forums for communicating their ideas—classically, the streets, sidewalks, and parks—the marketplace of ideas will remain healthy notwithstanding the speech biases of private landowners.

Yet things would not be so tidy if government forums disappeared or were no longer public gathering places. If that were to occur, then First Amendment interests would be seriously jeopardized if courts did not impose First Amendment restraints on private landowners. Otherwise, citizens would lack access to forums where face-to-face

53. *See supra* Part II.C.1.

grassroots communications could occur. Powerful arguments could then be made for expanding the rules regarding public forums to private property that is used like traditional public forums (malls, gated communities, etc.).[54]

Contracts suppressing speech can be even more threatening to free speech interests. This is particularly evident when one considers the relationship between contract law and copyright law.

Imagine, for instance, a copyright owner of software selling his software online. Customers who purchase the software must accept an electronic license agreement that accompanies the software download. Until a customer clicks "I Accept," the transaction is not completed and the customer will not gain access to the software.

Not surprisingly, most customers click "I Accept" without ever reading the license agreement. Nevertheless, some of the many terms they "accept" are ones that prohibit the software's reproduction or the creation of derivative works without permission. These restrictions, of course, are redundant in the sense that they mirror protections that the copyright owner already has under copyright law.[55]

Now pretend that the customer starts unlawfully making copies. If the software owner sues for both copyright infringement and breach of contract, should only the former action raise First Amendment concerns? One could certainly argue for that result because only the copyright claim involves government created rights in speech. By contrast, any restraint on speech in the contract context occurs solely because the customer agreed to restrain his or her speech. The specter of government censorship, in other words, is absent because the speech suppression occurred only because of the voluntary consent of a private party.

This argument certainly has merit. But it can become remarkably artificial in a world in which copyrightable works are routinely distributed with accompanying electronic license agreements.[56] The impact of enforcing these agreements might be as great or greater than

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54. *See, e.g.*, Hudgens v. NLRB, 424 U.S. 507, 539-40 (1976) (Marshall, J., dissenting) ("[T]he owner of the modern shopping center complex, by dedicating his property to public use as a business district, to some extent displaces the 'State' from control of historical First Amendment forums, and may acquire a virtual monopoly of places suitable for effective communication. The roadways, parking lots, and walkways of the modern shopping center may be as essential for effective speech as the streets and sidewalks in the municipal or company-owned town.").

55. Courts are split as to whether such contracts are preempted by the Copyright Act. *See, e.g.*, Kabehie v. Zoland, 125 Cal. Rptr. 2d 721, 731-34 (Cal. Ct. App. 2002) (summarizing the decisions on both sides of the debate).

56. Julie Cohen has noted that copyright management systems might prevent anyone but a licensee from accessing a copyrighted work. Cohen, *supra* note 7, at 487.

copyright law since the contracts might place limits on the use of a work that go beyond copyright law (prohibiting fair use, for instance, or the use of facts or ideas).[57] Should the fact that customers have objectively "assented" to the terms be the deciding factor in whether the First Amendment applies?

None of this, of course, should detract from the primary observation that the First Amendment needs to set limits on copyright law. For the moment, it is enough to recognize that First Amendment interests might be poorly served if limits are not also placed on contracts with copyright-like restraints.

D. Should Copyright Law Be Immune from First Amendment Scrutiny Because It Incorporates Free Speech Safeguards?

Courts frequently say that there is no need to impose First Amendment restraints on copyright law because copyright law already incorporates speech protections.[58] Copyright's idea/expression dichotomy ensures that copyright law does not protect either facts or

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57. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1455 (7th Cir. 1996) ("[W]hether a particular license is generous or restrictive, a simple two-party contract is not 'equivalent to any of the exclusive rights within the general scope of copyright' and therefore may be enforced."); *see also* Olson, *supra* note 7, at 88 (stating that "the model for online publishing is shifting from a property-based system of transactions governed by copyright law to a contract-based system of transactions governed by whatever terms the market will bear, even if such terms do not further the pro-dissemination values inherent in the Copyright Clause and in copyright law"); Cohen, *supra* note 7, at 472-73 (stating that "copyright owners will be able to implement contractual restrictions prohibiting reuse of the ideas, facts, or functional principles contained in a work"). Of course, Congress is always free to legislatively restrict the ability of copyright owners to use contracts to complement or supplement their copyright rights. In the copyright law context, this is most likely to occur through statutory preemption of state contract claims. Courts have generally found that contract claims are not preempted by section 301 of the Copyright Act, although some courts find preemption when the rights protected by a contract are equivalent to copyright rights. *See, e.g.*, *Kabehie*, 125 Cal. Rptr. 2d at 731-34 (summarizing the case law on the preemption of contract claims); *see generally* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01[B][1][a][i] (2006) (discussing copyright preemption of contract claims).

58. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985) ("In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright."); Religious Tech. Ctr. v. Henson, 182 F.3d 927, 927 (9th Cir. 1999) (stating that the defendant's First Amendment "argument fails in light of [the Supreme Court's decision in] *Harper & Row* . . . in which the Court stated that the laws of the Copyright Act already embrace First Amendment concerns"); A&M Records, Inc. v. Napster, 114 F. Supp. 2d 896, 922 (N.D. Cal. 2000) (quoting Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc., 166 F.3d 65, 74 (2d Cir. 1999)) (stating that free speech concerns "are protected by and coextensive with the fair use doctrine"); L.A. Times v. Free Republic, 54 U.S.P.Q. 2d 1453, 1472 (C.D. Cal. 2000) (stating that free speech concerns "are subsumed within the fair use Analysis").

ideas but only the expression of ideas.[59] Likewise, the fair use doctrine allows for the use of expression if there is an overriding public interest to justify the use (parodies, news reporting, commentary, scholarship).[60]

This is a perfectly legitimate argument. Indeed, courts should not reach constitutional claims if they can resolve cases through copyright doctrine alone. Yet it is important to remember that just because copyright provides some free speech protection does not mean that copyright is not subject to First Amendment limits. To the contrary, it merely means that courts can frequently avoid addressing those limits because they can resolve copyright/free speech conflicts through copyright law. But if copyright law ever failed to adequately protect speech interests, courts would have to intervene under the First Amendment to ensure that freedom of speech was not jeopardized.

In the same vein, the common law of defamation could easily include all of the safeguards mandated by *New York Times v. Sullivan* and its progeny.[61] If it did, then courts would rarely need to address First Amendment issues because the rules regarding actual malice, burdens of proof, and limits on presumed and punitive damages would be built into the state tort law. Nevertheless, it is clear that, if a state ever modified its defamation law so that it varied from First Amendment dictates, courts would have to intervene to ensure that free speech interests were fully protected.

The same is true with copyright law. While it is true that the idea/expression dichotomy and the fair use doctrine are capable of resolving most conflicts between freedom of speech and copyright rights, it is equally true that the First Amendment prevents Congress from altering these doctrines in any way that would unduly interfere with speech interests.

Even if Congress keeps the idea/expression dichotomy and the fair use doctrine intact, courts still may interpret these doctrines in ways that

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59. 17 U.S.C. § 102(b) (2000) (codifying rule that copyright law does not protect ideas).

60. 17 U.S.C. § 107 (2000) (codifying the fair use doctrine); *see also* Sega Enters. v. Accolade, Inc., 977 F.2d 1510, 1523 (9th Cir. 1993) ("Public benefit need not be direct or tangible, but may arise because the challenged use serves a public interest. . . . Accolade's identification of the functional requirements for Genesis compatibility has led to an increase in the number of independently designed video game programs offered for use with the Genesis console. It is precisely this growth in creative expression, based on the dissemination of other creative works and the unprotected ideas contained in those works, that the Copyright Act was intended to promote.") (citation omitted).

61. The common law of defamation did contain certain defenses that were intended to protect free speech interests. *See generally* HARVEY L. ZUCKMAN ET AL., MODERN COMMUNICATIONS LAW 416-17, 422-24 (1999) (discussing the common law defenses of truth and fair comment).

are inadequately sensitive to free speech interests.[62] In those instances, a First Amendment corrective would also be in order. Likewise, the very vagueness of these doctrines can raise First Amendment concerns, particularly since First Amendment jurisprudence is acutely sensitive to the chilling effects of vague speech regulations.[63]

III. WHEN JUDGES SHOULD FIND COPYRIGHT LAW IN VIOLATION OF THE FIRST AMENDMENT

While it may be clear that courts should impose some First Amendment limits on copyright law, it is far from clear what those limits should be. Copyright, after all, is in most instances "an engine of free expression."[64] By giving authors incentives to create works and publishers incentives to distribute them, copyright furthers free speech interests. How, then, can courts know when copyright crosses the line from supporting the First Amendment to opposing it?

Needless to say, there is no bright line for making this distinction. Ultimately, the answer lies in a careful balancing of interests. Nevertheless, First Amendment jurisprudence is sufficiently rich that one can distill fairly clear principles for when a judge should find copyright law in violation of the First Amendment.

This section will review First Amendment jurisprudence to extrapolate general principles for when an abridgement of speech should be found unconstitutional. It will then show how these principles can guide judges in determining when copyright law unduly impinges on speech interests.

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62. For instance, one strand of scholarship suggests that the fair use privilege should only be available when the transaction costs of negotiating permission are prohibitive. These transaction costs, however, are likely to shrink as more and more works are distributed electronically, thus resulting in a concomitant shrinkage in the range of uses that would be considered fair use. Cohen, *supra* note 7, at 471-72.

63. Lawrence Lessig has noted that the "fuzzy lines" of the fair use doctrine combined with the potentially "extraordinary liability" if a use is not fair means that the value of the doctrine "for many types of creators is slight." LESSIG, *supra* note 2, at 99; *see generally* MARJORIE HEINS & TRICIA BECKLES, WILL FAIR USE SURVIVE? FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL 54 (2005) (documenting how confusion about the proper scope of fair use often suppresses speech).

64. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

A. Extrapolating General Principles for What Constitutes an Unlawful Abridgement of Speech

One can extrapolate from First Amendment jurisprudence two primary scenarios in which government actions unlawfully abridge speech. The first occurs when the government's purpose for regulating speech is illegitimate. The classic example, of course, is when the government regulates speech because it does not like the message or because it finds an idea offensive.[65] This type of regulation is at loggerheads with the First Amendment's core "neutrality principle"—that the government should not decide which ideas are worthy of public discourse—and is almost always found unconstitutional.[66]

This specter of government censorship is what prompts courts to strictly scrutinize content-based regulations (because there is always a danger that government censorship is afoot), and to treat viewpoint discrimination as virtually per se unconstitutional.[67] Of course, there are occasionally situations in which the government is legitimately regulating speech based on its content (for example, to protect children or privacy interests).[68] In those instances, judges have no choice but to wrestle with difficult balancing issues. But, for the most part, government regulation of content outside of special contexts (e.g., education, funding, non-public forums) is largely inappropriate.[69]

The second scenario occurs when the government's purpose for regulating speech is legitimate but the regulation's impact on speech interests is intolerable. A classic example is a content-neutral time, place and manner law done for a legitimate purpose but with an unacceptable impact on speech. In *Schneider v. New Jersey*, for instance, the Supreme Court found that a law banning leafleting, while enacted for the

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65. Texas v. Johnson, 491 U.S. 397, 414 (1989).

66. RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 4:8 (2007) (stating that "[m]odern First Amendment cases establish a *per se* rule making the punishment of speech flatly unconstitutional if the penalty is based on the offensiveness or the undesirability of the viewpoint expressed").

67. Hill v. Colorado, 530 U.S. 703, 743 (2000) (Scalia, J., dissenting) ("The vice of content-based legislation—what renders it deserving of the high standard of strict scrutiny—is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes."); R.A.V. v. City of St. Paul, 505 U.S. 377, 395-96 (1992) (finding unconstitutional an ordinance embodying viewpoint discrimination by the government).

68. Bartnicki v. Vopper, 532 U.S. 514, 532-35 (2001) (balancing privacy interests and speech interests); *see also* Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 566 (2005) (discussing balancing issues that arise with laws designed to protect minors from harmful speech).

69. *See generally* SMOLLA, *supra* note 66, at § 4:4 (discussing how strict scrutiny analysis of content-based regulations can be lessened "in situations involving certain special settings").

legitimate purpose of controlling littering, was nevertheless unconstitutional because it banned a vital method of grassroots communication.[70]

Intellectual property laws, as well as contract law, typically fall into this latter category. No one questions that the government has a legitimate reason for creating and enforcing these laws. Problems arise only because the laws are occasionally used in ways that have a severe impact on speech.[71]

In this latter scenario, judges cannot boldly pronounce the laws unconstitutional as illegitimate. Instead, judges must wade into the murky waters of balancing the government's legitimate interest in speech regulation against the impact of the regulation on speech interests.[72] Empirical data might help elucidate how this balance should come out but it is unlikely to be decisive. Ultimately, judges have to make their best guess as to whether a law's impact on public discourse can be tolerated.

Judges reviewing the constitutionality of copyright laws and the private enforcement of copyright rights should keep these two scenarios in mind. Both scenarios can arise in the copyright context. There are some instances in which private parties use copyright rights for the illegitimate purpose of censorship. Courts should readily find such actions unconstitutional. More commonly, copyright rights are used for legitimate purposes. In those instances, courts must consider whether the impact of these rights on speech interests is tolerable. In the garden variety copyright infringement case, this is usually not a problem. But

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70. 308 U.S. 147, 164-65 (1939); *see also* Watchtower Bible & Tract Soc'y v. Stratton, 536 U.S. 150, 180 (2002) (invalidating municipal ordinance that required door-to-door solicitors to first receive a permit from the city); City of Ladue v. Gilleo, 512 U.S. 43, 57 (1994) (invalidating ban on residential signs for aesthetic purposes because it cut off "an usually cheap and convenient form of communication"); Martin v. City of Struthers, 319 U.S. 141, 145-46 (1943) (while invalidating a ban on door-to-door solicitations, the Court noted that door-to-door solicitors may be either "a nuisance or a blind for criminal activities" but that the door-to-door distribution of literature is also "essential to the poorly financed causes of little people").

71. *See* Farber, *supra* note 2, at 1353 (in discussing how courts should analyze copyright laws under the First Amendment, the author notes that "[p]arsing terms like 'content neutrality' is unlikely to definitively establish the level of scrutiny" and that "the determining factor is likely to be the statute's potential impact on speech values").

72. *See supra* note 70 for cases where, after balancing the interests, the Court found the government regulations had an intolerable impact on speech. For cases in which the Court upheld government regulations notwithstanding their impact on speech, see Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789 (1984) (upholding a ban on the posting of signs on public property); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984) (upholding Park Service regulation notwithstanding its incidental impact on demonstrators' symbolic speech).

there are occasional situations in which free speech interests should trump copyright.

B. When Copyright Rights Are Used Illegitimately to Suppress Speech

In one sense, all of copyright law is censorial. Copyright creates property rights in expression and punishes those who use the expression without permission.[73] But the restraints copyright places on speech are in most instances a necessary price for encouraging authors to create speech. By giving authors property rights in their expression, copyright law makes the marketplace of ideas richer, not poorer.[74]

Copyright law also protects free speech by withholding protection for facts and ideas.[75] Thus, copyright ensures that the property rights it creates do not unduly interfere with the free exchange of information and ideas. The fair use defense provides further free speech protection by allowing an author's expression to be used in instances in which there is an overriding public interest.[76]

All of this suggests that copyright law ordinarily poses little danger as a vehicle for censorship. Still, there remain instances in which copyright owners use their property rights not to protect their economic interests but to suppress speech they want kept out of the marketplace of ideas.

One common scenario for this "censorship" occurs when a copyright owner does not want the public to have access to what an author has said.[77] Typically, the owner is concerned that the author's words will provide support for critics who claim that the author or the copyright owner has said or done something wrongful or embarrassing.

A recent example is the effort by the Diebold Company to take down copies of employee emails that two Swarthmore students posted on the Internet.[78] To be sure, one could argue that these emails qualified

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73. *See, e.g.*, 17 U.S.C. § 501 (2000) (authorizing copyright infringement actions).

74. *See, e.g.*, Chemerinsky, *supra* note 2, at 83 (explaining that copyright protection encourages authors and artists to engage in speech, and that absent such protection, "less speech would occur").

75. 17 U.S.C. § 102(b) (2000) (providing that copyright protection does not extend to "any idea" or "discovery").

76. 17 U.S.C. § 107 (2000) (codification of fair use doctrine).

77. *See* HEINS & BECKLES, *supra* note 63, at 36 (noting that a percentage of DMCA take-down letters in a survey were aimed at websites with criticism or commentary, suggesting "that they may have been targeted at least in part because the IP owner did not like the message that they were expressing").

78. Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1197 (N.D. Cal. 2004). Other recent examples include NXIVM Corp. v. Ross Inst., 364 F.3d 471, 475 (2d Cir. 2004) (producers

as copyrightable literary works and that Diebold, as the employer of the authors, was the copyright owner under the work-for-hire doctrine.[79] But the case had nothing to do with Diebold's rights to economically exploit these copyrightable works. Indeed, as the district judge pointed out, "Diebold clearly . . . indicated that it never intended to publish the emails."[80] To the contrary, Diebold wanted the emails taken off the Net because they were embarrassing. The emails openly acknowledged problems with Diebold's voting machines and the potential risk that the machines might incorrectly tabulate the results of an election.[81]

What should a court do when a party uses copyright law for such a censorial purpose? Just as courts are unwilling to tolerate government regulations that illegitimately censor speech, so should courts readily strike down this illegitimate use of copyright rights by private parties.

Of course, one might argue that censorship of speech by private parties should not raise any First Amendment concerns. But, as argued in Part I, it is highly questionable whether the government should be able to delegate the right to illegitimately censor speech to private parties. This is not the intended purpose of copyright law, regardless of whether the speech itself might technically be copyrightable.

Copyright owners could rightfully claim that the Supreme Court has also recognized a copyright owner's right not to speak—particularly when the work at issue is unpublished.[82] But this kind of "autonomy" interest rings hollow in a case like Diebold's. To begin with, this is not a classic example of the government forcing a person to say something he or she does not believe (children being forced to recite the Pledge of Allegiance or Jehovah's Witnesses being forced to use a license plate with an offensive slogan).[83] To the contrary, the words at issue are the voluntary expression of Diebold employees. Nor is this a case, like *Harper & Row*, where an author intends to eventually publish his work but thinks his words are not yet ready for distribution.[84] Diebold was not

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of business training seminars trying to stop a "cult de-programmer" from posting on the Internet reports criticizing the plaintiff's programs and quoting from the plaintiff's course manual); Ty, Inc. v. Publ'n Int'l Ltd., 292 F.3d 512, 515, 520 (7th Cir. 2002) (the maker of "beanie babies" trying to suppress criticism of its products in the defendant's collectors' guides).

79. 17 U.S.C. § 201(b) (2000).

80. *Diebold, Inc.*, 337 F. Supp. 2d at 1203 n.13.

81. *Id.* at 1203.

82. *See supra* notes 46, 59 and accompanying text.

83. Wooley v. Maynard, 430 U.S. 705, 707, 717 (1977) (requiring Jehovah's Witnesses to display state license plate with motto "Live Free or Die" violated their right not to speak); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (compelling public school student to recite Pledge of Allegiance violated student's right not to speak).

84. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 557, 564 (1985).

concerned that the emails were not ready for publication. It simply found them embarrassing and did not want them disclosed.

Finally, it is doubtful that a company like Diebold could claim that copyright law is supporting any legitimate privacy claim. While an individual like J. D. Salinger might have a legitimate privacy interest in keeping his unpublished letters from being disclosed, business entities do not have a comparable personal privacy interest.[85] Indeed, comments in the Restatement of Torts specifically note that a "corporation, partnership or unincorporated association has no personal right of privacy."[86] Even if Diebold claims, as it did, that the emails contain trade secrets, courts are unlikely to sustain its claim because wrongful or embarrassing information is not a trade secret "used in the operation of a business."[87]

Even when an individual wants to use copyright rights to prevent disclosure of his embarrassing expression, it is doubtful that the privacy interest should trump free speech interests in those instances in which there is an overriding public interest in the speech. A candidate for public office, for instance, should not be able to stop publication of unpublished letters that contain information reflecting upon his or her qualifications for office. Likewise, one could argue that a public figure like L. Ron Hubbard should not be able to stop critics from publishing

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85. Salinger v. Random House, Inc., 811 F.2d 90, 99 (2d Cir. 1987).

86. RESTATEMENT (SECOND) OF TORTS § 652I cmt. c. (1977); *see also* Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., 931 F. Supp. 1487, 1493 (D. Ariz. 1996) (concluding that a corporation has no privacy rights).

87. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1995) (defining a trade secret as "any information that can be used in the operation of a business" and that affords to its owner "an actual or potential economic advantage over others"). The Supreme Court captured this notion in Ruckelshaus v. Monsanto Co.:

> We emphasize that the value of a trade secret lies in the competitive advantage it gives its owner over competitors. . . . If . . . a public disclosure of data reveals, for example, the harmful side effects of the submitter's product and causes the submitter to suffer a decline in the potential profits from sales of the product, that decline in profits stems from a decrease in the value of the pesticide to consumers, rather than from the destruction of an edge the submitter had over its competitors, and cannot constitute the taking of a trade secret.

467 U.S. 986, 1011 n.15 (1984).

By contrast, a copyright owner has a legitimate reason for keeping a work from being disclosed when the value of the work is dependent upon the public being denied general access. This is the case, for example, with a standardized test that is administered from year to year. *See, e.g.*, Chicago Bd. of Educ. v. Substance, Inc., 354 F.3d 624, 631-32 (7th Cir. 2003) (finding that the defendant's publication of six of the plaintiff's standardized tests was not a fair use). Even here, the court acknowledged that the defendant, in order to be able to effectively criticize the plaintiff's tests, might be permitted to disclose some of the test questions. *Id.* at 629. But the defendant failed to justify his wholesale publication of six entire tests. *Id.* at 629-31.

passages of Hubbard's unpublished writings to demonstrate the hypocrisy of his public statements.[88]

There are a couple of important qualifications to these observations. First, if critics can adequately substantiate their arguments by simply using "facts" or "ideas" from a copyrighted work, then there is a good argument for denying them the right to reproduce the copyrighted expression. Professor Nimmer, for instance, argued that the Second Circuit incorrectly decided the *Rosemont Enterprises v. Random House* case when it held that the unauthorized biographer of Howard Hughes had a fair use privilege to use copyrighted articles about Hughes.[89] Nimmer claimed that the biographer was fully capable of writing his biography by using the unprotected facts from the articles, and that there was no need to use the exact expression from the underlying articles.[90]

Still, it is equally clear that in some instances a critic's complaints will only have credibility if the critic can impeach the target with his own words. In such instances—and the Diebold and L. Ron Hubbard cases are good examples—only using the target's expression will suffice to make the indictment stick. Indeed, the Supreme Court has long recognized that sometimes specific expression is necessary to capture an idea. As the Court explained in *Cohen v. California*, "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."[91]

None of this means that the First Amendment creates an open hunting season on the expression of public figures. The Supreme Court was absolutely right in *Harper & Row* to say that public figures will have little incentive to write memoirs if the First Amendment permits

88. Hubbard's Church of Scientology has frequently tried to use copyright law to stop dissenters from reproducing Scientology works, but has usually not met with success. *See, e.g.*, New Era Publ'ns Int'l v. Carol Publ'g Group, 904 F.2d 152, 157 (2d Cir. 2000) (discussing the applicability of the fair use doctrine to a biography of L. Ron Hubbard); New Era Publ'ns Int'l v. Henry Holt & Co., 873 F.2d 576, 577 (2d Cir. 1989) (upholding denial to issue an injunction against the publication of a biography of L. Ron Hubbard); Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 923 F. Supp. 1231, 1246 (N.D. Cal. 1995) (discussing the classification of various works by Hubbard for determination of fair use); Religious Tech. Ctr. v. F.A.C.T.NET, Inc., 901 F. Supp. 1519, 1521, 1527 (D. Colo. 1995) (denying request for a preliminary injunction against F.A.C.T.NET for displaying works associated with Scientology on an Internet bulletin board service); Religious Tech. Ctr. v. Lerma, 908 F. Supp. 1362, 1364 (E.D. Va. 1995) (granting summary judgment to a former scientologist who published a court document containing "Advanced Technology" works on the Internet).

89. Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 311 (2d Cir. 1966).

90. NIMMER & NIMMER, *supra* note 57, at § 1.10[D] (concluding that the "copying of the expression in *Rosemont* was merely labor saving, and not essential, to the expression of the idea").

91. Cohen v. California, 403 U.S. 15, 26 (1971).

the widespread pillaging of their expression.[92] But those are instances in which authors want the public to have access to their works. It is simply a question of who does the publishing.[93] The First Amendment concerns are much more salient when copyright owners are trying to deny the public access to expression as a way of keeping people in the dark.[94]

The other common scenario of copyright owners using their rights to censor speech is when they fear that their expression will be used to ridicule their own work. This is the case when third parties want to use an author's expression to parody the author's work or to criticize it. There are many examples of this: the owners of *Pretty Woman* trying to stop the 2 Live Crew parody; the *Gone with the Wind* owners trying to stop the publication of *The Wind Done Gone*; Disney trying to stop the publication of the Air Pirates parody; and Mattel trying to stop the distribution of photographs skewering (or more accurately blending) Barbie.[95]

Once again, the common theme in these cases is that the copyright owners are not concerned that the users are exploiting a market the owners desire to exploit—copyright owners do not usually exploit the market for ridiculing their works. Rather, the owners want to prevent users from criticizing their works. To be sure, harsh criticism of the copyright owners' works might make the works less valuable, but the copyright owners have no right to maintain the value of their works by denying the public access to criticism.[96] If Jerry Falwell cannot use tort

92. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 557-59 (1985).

93. *Id.* at 564.

94. Even if the copyright owner is trying to keep the public in the dark, that does not mean that other parties should have a wholesale right to reproduce as much of the copyright owner's work as they would wish. While limited excerpts might be necessary to substantiate a party's criticism, wholesale reproduction of a copyright owner's work could not only damage a copyright work's economic value, but also, if the work is a type that loses its value if made public (for example, a standardized test), the publication of the entire document could destroy its value. In Chicago Bd. of Educ., 354 F.3d 624, 631 (7th Cir. 2003), for instance, the court held the defendant's publication of six entire standardized tests actionable even though the defendant alleged that publication was necessary to demonstrate the illegitimacy of the tests. As the court noted, he had a right "to quote some of the test questions in order to substantiate his criticisms . . . [b]ut he does not have the right, as he believes he does . . . to destroy the tests by publishing them indiscriminately"). *Id.* at 629-30.

95. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572-74 (1994) (*Pretty Woman* case); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1259 (11th Cir. 2001) ("Wind Done Gone" case); Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 753 (9th Cir. 1978) ("Air Pirates" case); Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 796 (9th Cir. 2003) ("Barbie" case).

96. *Campbell*, 510 U.S. at 592 (noting that "'parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically,'" and that "the role of courts is to distinguish between '[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it.'"); *see also Mattel*, 353 F.3d at 801 (noting that "because parody is

law to stop the media from viciously mocking his reputation, then surely Disney has no greater right to use copyright law to stop the parodying of Mickey Mouse.[97] Subjection to criticism is "the price that, under the First Amendment, must be paid in the open marketplace of ideas."[98]

Regardless of whether copyright owners are trying to prevent the public from accessing an author's expression, or are trying to prevent others from using the expression to ridicule it, there are common characteristics in both instances. First, in neither instance are copyright owners asserting their rights to protect their economic interests. In the first instance, the owners have no intention of ever exploiting the work because it is a source of embarrassment. In the second instance, the owners have no intention of exploiting the market for criticism and parody of their works.[99] Second, the intent of the copyright owners in asserting their rights is to deny the public access to information that the owners find offensive or embarrassing. Private parties should no more be able to use copyright law for this purpose than private parties can use defamation law, privacy law, or the tort of intentional infliction of emotional distress to deny the public access to truthful information on a matter of public concern.

Of course, in virtually all of these instances, courts could properly resolve these disputes without resorting to the First Amendment. The

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'a form of social and literary criticism,' it has 'socially significant value as free speech under the First Amendment'").

97. Hustler Magazine, Inc. v. Falwell, 486 U.S. 46, 50 (1988); *accord* L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 31 (1st Cir. 1987) (holding a pornographic magazine's parody of an L.L. Bean catalog was not actionable under trademark law because "[n]either the strictures of the First Amendment nor the history and theory of anti-dilution law permit a finding of tarnishment based solely on the presence of an unwholesome or negative context in which a trademark is used without authorization").

98. NXIVM Corp. v. Ross Inst., 364 F.3d 471, 482 (2d Cir. 2004) (holding that quoting a plaintiff's course manual for purposes of criticizing the plaintiff's services was likely to be a fair use); *see also* Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191, 205-06 (3d Cir. 2003) (stating that "[a] copyright holder's attempt to restrict expression that is critical of it (or of its copyrighted good, or the industry in which it operates, *etc.*) may, in context, subvert . . . copyright's policy goal to encourage the creation and dissemination to the public of creative activity").

99. Of course, the right to criticize or parody does not include a right to usurp copyright owners' legitimate market for their works. Their works should only be used in ways that will not supersede the demand for the original or for derivative works based on the original. Ty, Inc. v. Publ'ns Int'l Ltd., 292 F.3d 512, 517 (7th Cir. 2002) (noting that if a book reviewer were "to quote the entire book in his review, or so much of the book as to make the review a substitute for the book itself, he would be cutting into the publisher's market, and the defense of fair use would fail"). The market for derivative criticism or parody of a work, however, is not a market that copyright owners would ordinarily be expected to exploit. *Campbell*, 510 U.S. at 592 (noting that "the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market").

fair use doctrine, an elastic "rule of reason," can easily serve as the rationale for allowing the use of a copyright owner's expression.[100] Indeed, most of the cases mentioned above were properly resolved using the fair use doctrine.[101]

Using fair use to resolve copyright/free speech conflicts is not only acceptable but desirable. To the extent that courts can incorporate free speech interests into their fair use analysis, they can avoid invoking the Constitution and adding another layer to their legal analysis. But the First Amendment must continue to loom in the background of these cases to ensure that free speech interests are adequately protected.[102] Congress cannot legislatively eliminate these First Amendment protections if it amends or even eliminates the statutory fair use defense. And if fair use jurisprudence evolves in a manner that is inadequately sensitive to free speech interests, then defendants should always be able to assert a First Amendment defense.[103]

Finally, it is important to consider issues relating to procedure and remedies. After all, even if parties have a strong claim that the First Amendment protects their use of a copyrighted work, the prospect of having to litigate even a successful First Amendment defense might cause them to shy away from the use. This may be an unavoidable chilling effect of an overly expensive and cumbersome litigation system. But there are ways in which courts could help reduce the chilling effect of frivolous, albeit expensive, copyright claims.

First, lower courts should be encouraged to grant summary judgment in cases in which a copyright owner's assertion of rights seems

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100. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 (1984).

101. Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 812 (9th Cir. 2003) (holding that parody photographs of Barbie Doll were a fair use); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1276-77 (11th Cir. 2001) (concluding that the defendant's fair use defense is likely to prevail at trial).

102. *See Suntrust Bank*, 268 F.3d at 1265 (stating that "courts often need not entertain related First Amendment arguments in a copyright case," but "must remain cognizant of the First Amendment protections interwoven into copyright law"); Nat'l Rifle Ass'n of Am. v. Handgun Control Fed'n of Ohio, 15 F.3d 559, 562 (6th Cir. 1994) (noting that "[t]he scope of the fair use doctrine is wider when the use relates to issues of public concern").

103. *See generally* Rubenfeld, *supra* note 2, at 20 (stating that the "economically oriented fair use doctrine cannot remotely be viewed as 'coextensive' with First Amendment analysis"); Garfield, *supra* note 2, at 604 (stating that "[c]ourts performing a fair use analysis . . . may focus so intently on the property implications of a defendant's actions that they may fail to appreciate the speech implications"); Robert C. Denicola, *Freedom to Copy*, 108 YALE L.J. 1661, 1678 (1999) (noting that the fair use doctrine is "constrained by economic considerations foreign to the First Amendment").

to be clearly illegitimate.[104] The hallmarks of such a claim—that they are based not on economic interests but on an interest in suppressing speech—have already been discussed above. Second, courts should strongly favor the award of attorney fees to successful defendants in cases in which plaintiff copyright owners are wrongfully using copyright to suppress speech. The Copyright Act already permits courts in their discretion to award attorney fees to a prevailing party and the Supreme Court has made it clear that courts should consider whether an action was frivolous or objectively unreasonable.[105] Cases in which copyright is used for the illegitimate purpose of censoring speech should be considered per se objectively unreasonable.

C. When Copyright Rights Are Used for a Legitimate Purpose But the Impact on Speech is Intolerable

Even when copyright owners have a legitimate reason for asserting their rights, there may still be instances in which the impact of these rights on speech interests is more than the First Amendment can tolerate. This is comparable to the decisions courts make when they find a legitimately enacted content-neutral time, place, and manner regulation unconstitutional because of its impact on freedom of expression.[106]

Judges are understandably reluctant to invalidate laws in this context. They cannot boldly pronounce actions unconstitutional as they can with wholly illegitimate regulations of speech. Instead, they must wade into the murky waters of balancing society's legitimate interest in regulating speech against society's competing interest in a robust marketplace of ideas.[107]

Making matters worse, this balancing process is highly subjective. Parties may trot out empirical evidence but the evidence is likely to be biased, ambiguous, or inconclusive. Nor do judges have any special training in evaluating social science data (as Justice Powell once

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104. This would be the judicial equivalent of what some states have done with "SLAPP" statutes, statutes intended to curb "Strategic Lawsuits Against Public Participation." These statutes allows defendants to bring a special motion to strike a complaint unless a plaintiff can establish by pleading and affidavit a probability that he or she will prevail on the merits. *See, e.g.*, Gilbert v. Sykes, 53 Cal. Rptr. 3d 752, 770 (Cal. Dist. Ct. App. 2007) (striking plaintiff's defamation complaint using the California anti-SLAPP legislation).

105. Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 n.19 (1994) (stating that judges, in deciding whether to award attorney's fees, can consider factors such as whether an action was frivolous, brought in bad faith, or objectively unreasonable); *see also* 17 U.S.C. § 505 (2000) (providing that a court may award reasonable attorney's fees to a prevailing party).

106. *See supra* note 72 and accompanying text.

107. *See supra* notes 72-74 and accompanying text.

confessed, "[m]y understanding of statistical analysis . . . ranges from limited to zero").[108]

Perhaps because of the difficulty of this endeavor, judges often create artificial excuses for avoiding this balancing process. They might, for instance, declare a law to be a "neutral law of general applicability" and therefore, for some inexplicable reason, immune from First Amendment scrutiny.[109] That is in effect what the Supreme Court did with contractual suppression of speech in *Cohen v. Cowles Media Co.*[110] Judges have often done the same with copyright law by saying that it incorporates free speech interests so that any First Amendment analysis is superfluous.[111]

But judges are shirking their responsibilities under the First Amendment when they use these artificial means to avoid serious review of legitimate but speech-impacting regulations. To fulfill their responsibility, they must wrestle with the difficult task of balancing the interest in favor of regulating speech against the impact of the regulation on speech.

Fortunately, judges needing to assess the speech impact of legitimate assertions of copyright rights are not without guidance. To the contrary, one can extrapolate from First Amendment jurisprudence a number of key factors for determining when legitimate regulations of speech have an intolerable impact. It is helpful to consider these factors in the contexts in which copyright laws are most likely to negatively impact on speech.

1. When Congressional Acts Have an Intolerable Impact on Speech

There is little reason to suspect that Congress uses its power to enact copyright laws to censor unpopular ideas. Thus, copyright laws are not an illegitimate form of censorship that can be summarily found unconstitutional. Instead, copyright laws are legitimate regulations enacted for the desirable and constitutional goal of promoting the creation and distribution of works of authorship.

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108. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. (1994), *reprinted in* JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW 315 (5th ed. 2002).

109. *See* Alan E. Garfield, *The Mischief of* Cohen v. Cowles Media Co., 35 GA. L. REV. 1087, 1092-1104 (2001) (discussing how the Supreme Court uses the fact that a law is a "neutral law of general applicability" as a reason for not giving the law serious judicial scrutiny).

110. *See id.* (discussing how the Supreme Court used the doctrine of neutral law of general applicability to avoid giving serious scrutiny to the promissory estoppel claim at issue in *Cohen*).

111. *See supra* note 58 and accompanying text.

Yet even legitimate content-neutral laws can have an intolerable impact on speech. The Supreme Court, for instance, has invalidated a ban on leafleting even though it acknowledged that the government has a legitimate interest in preventing littering.[112] Likewise, the Court has recognized that the government has legitimate interests in promoting privacy and safety, but still cannot ban all door-to-door solicitations.[113] And a legitimate government interest in promoting aesthetics could not justify a ban on residential lawn signs.[114]

The point in each of these cases is not that the government's interest was illegitimate. Instead, the point is that a speech regulation can be unconstitutional even when enacted for a legitimate purpose.[115]

Copyright laws, like other laws, can sometimes impose too high a price on speech interests. Indeed, there is good reason for fearing that the political process in Washington will produce copyright laws that are inadequately sensitive to speech interests. After all, and as commentators have noted, the political process is heavily slanted in favor of the copyright industries whose lobbying power and financial resources easily overwhelm the diffuse public interest in access to copyrighted materials.[116] If judicial review is particularly appropriate when the political process is unlikely to protect civil liberties, then copyright laws are a prime candidate for judicial monitoring.[117]

But how will courts know whether any given copyright provision violates the First Amendment? Who, after all, can say whether any given duration for copyrightable works is "too much" or whether efforts to stop piracy fail to strike the "right" balance between the interests of copyright owners and the interests of the public?

Whether they like it or not, judges must make these calls. For as Justice Marshall said, it is the judiciary that has the power "to say what

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112. *See* Schneider v. New Jersey, 308 U.S. 147, 160-62 (1939).

113. *See* Martin v. City of Struthers, 319 U.S. 141, 143, 149 (1943).

114. *See* City of Ladue v. Gilleo, 512 U.S. 43, 48-49, 58-59 (1994).

115. This seems to be particularly true when laws negatively impact on traditionally cheap and easy methods of grassroots communication. *See, e.g.*, *City of Ladue*, 512 U.S. at 57 (stating that "[r]esidential signs are an unusually cheap and convenient form of communication" and that "persons of modest means . . . may have no practical substitute"); *cf.* Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 819 (1984) (Brennan, J., dissenting) (in arguing that a complete ban on signs on public property should be unconstitutional, Brennan urged the majority not to discount the fact that this "medium of communication is particularly valuable because it entails a relatively small expense in reaching a wide audience").

116. *See* Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. INTELL. PROP. L. 319, 326 (2003) (noting that the "success of U.S. copyright industries has made Congress quite receptive to arguments for stronger and longer legal protection").

117. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

the law is."[118] Fortunately, First Amendment jurisprudence is rich with instances in which judges have carefully balanced the government's interest in regulation against free speech interests.[119] Courts can extract from this jurisprudence lessons as to when Congressionally-enacted copyright laws have gone too far.

One of the primary factors courts consider when evaluating a content-neutral regulation of speech is whether the regulation leaves open "ample alternative channels for communication."[120] In other words, will messages still make it to the marketplace of ideas even if a court upholds the regulation?

Copyright law does not ordinarily create the risk that ideas will be kept from the marketplace of ideas because copyright rights do not protect either ideas or facts. This "definitional balance" helps ensure that copyright does not unduly trench upon speech interests.[121] Yet this also implies that courts monitoring copyright legislation should be on the alert for any legislation that threatens to alter this balance.[122] Laws that raise the prospect of protecting facts or ideas (as some commentators have suggested about proposed database bills) threaten to cut off all channels of communication for certain facts and ideas and therefore must be carefully scrutinized.[123]

Similarly, laws that prevent the public from accessing works to extract unprotected facts and ideas are also problematic. This is the concern that scholars have raised with the Digital Millennium Copyright

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118. Marbury v. Madison, 5 U.S. 137, 177 (1803). In his dissent in *Eldred v. Ashcroft*, the Supreme Court decision upholding the Copyright Term Extension Act, Justice Stevens chided the majority for "quitclaim[ing] to Congress its principal responsibility in this area of the law." Eldred v. Ashcroft, 537 U.S. 186, 242 (2003) (Stevens, J., dissenting). He recalled Chief Justice John Marshall's "trenchant words" from *Marbury v. Madison* that "'[i]t is emphatically the province and duty of the judicial department to say what the law is'" and urged the court to discharge that responsibility. *Id.* (citation omitted).

119. *See supra* note 72 and accompanying text.

120. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (stating that time, place, and manner restrictions in a public forum will be upheld only if they are "justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information").

121. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985).

122. *See Eldred*, 537 U.S. at 221 (suggesting that First Amendment scrutiny of copyright law is unnecessary as long as "Congress has not altered the traditional contours of copyright protection").

123. *See, e.g.*, J.H. Reichman & Paul F. Uhlir, *Database Protection at the Crossroads: Recent Developments and Their Impact on Science and Technology*, 14 BERKELEY TECH. L.J. 793, 833-36 (1999) (discussing, *inter alia*, First Amendment concerns raised by Congressional efforts to protect factual databases).

Act's access provisions.[124] Courts might reasonably conclude that these access protections are a necessary evil to ensure that piracy does not altogether eliminate the incentives for creating and distributing works, but it is the responsibility of courts to at least consider whether there are alternative methods for protecting works that will take less of a toll on the marketplace of ideas.[125]

Even when copyright law leaves the idea/expression dichotomy intact, there can still be instances in which the government's interest in regulating does not justify the cost to speech interests. Copyright duration that lasts for nearly a century, for instance, delays the ability of other authors who cannot afford a license or are denied one from making adaptations of a work. The public at large is then denied access to these derivative works, not to mention cheaper access to the original work.[126] Is this cost to speech interests justified by the remote benefits to authors and their families from a longer duration or by the trade benefits of coordinating our term limits with those of Europe? Maybe, but courts should not breezily dismiss a First Amendment challenge because it only affects someone's right to use another's expression.[127]

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124. *See* Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000*, 88 CAL. L. REV. 2187, 2237-38 (2000); David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 702-34 (2000); Benkler, *Free as the Air*, *supra* note 2, at 419. Scholars have also expressed concerns that technological controls on access could prevent the public from accessing a work for purposes of using it for a fair use and could even prevent the public from accessing works that are in the public domain. *See* Samuelson, *supra* note 116, at 330 (noting that "[t]echnical measures will not cease limiting access and use when the copyright expires").

125. *See, e.g.*, Universal City Studios, Inc. v. Corley, 273 F.3d 429, 453-58 (2d Cir. 2001) (upholding against First Amendment challenge an injunction issued pursuant to the DMCA). Alfred Yen has argued that the DMCA safe harbor provisions are also inadequately sensitive to First Amendment interests because they create an incentive for ISPs to be overly aggressive in removing material from the Internet, even when it is unclear whether the material is infringing. *See* Yen, *supra* note 2, at 1888.

126. *See Eldred*, 537 U.S. at 249 (Breyer, J., dissenting) (noting that the "extra royalty payments" owed because of the increased duration of works "will not come from thin air" but "ultimately come from those who wish to read or see or hear those classic books or films or recordings that have survived").

127. In *Eldred v. Aschroft*, the Supreme Court decision upholding the Copyright Term Extension Act, Justice Breyer explained in his dissent why he "would look harder than does the majority at the statute's rationality":

> [I]t is necessary only to recognize that this statute involves not pure economic regulation, but regulation of expression, and what may count as rational where economic regulation is at issue is not necessarily rational where we focus on expression—in a Nation constitutionally dedicated to the free dissemination of speech, information, learning, and culture.

Eldred, 537 U.S. at 244-45 (Breyer, J., dissenting); *see also* Samuelson, *supra* note 116, at 328 (stating that "the utilitarian rationale for granting authors limited rights in their works has given way

2. When a Private Party's Assertion of Copyright Rights Has an Intolerable Impact on Speech

Copyright owners do not typically use their rights to wrongfully censor speech. To the contrary, the owners usually want their works to be publicly distributed and performed, and merely want to be compensated for these uses. This is a perfectly legitimate use of copyright rights. Indeed, the *raison d'etre* of copyright is to create this right of compensation so that authors and distributors will have an incentive to create and publish works.[128]

Yet there can still be rare instances in which even a copyright owner's demand for compensation might exact too high a toll on speech interests. This is likely to occur only when the public's interest in accessing speech is particularly strong, and the copyright owner is seeking to exact too high a price for this access.

Imagine, for instance, that a law professor writes a letter with a detailed legal argument justifying government torture of terrorist suspects. The professor then, unsolicited, sends the letter to the Attorney General's office. As things turn out, the Attorney General is favorably impressed by the professor's argument and the letter ends up providing the legal foundation for the administration's policy favoring the use of torture.

A major policy debate erupts over the legality of torturing terrorist suspects, and it comes to light that the professor's letter laid the foundation for the administration's hard-line position. The nation's leading newspaper then obtains a copy of the letter from people in the administration and wants to publish it in its entirety. The paper contacts the professor, who is happy to oblige, but only for $150,000.

If the editors find the license fee prohibitively expensive, they might nevertheless publish the letter without permission. Of course, a court might find the publication a fair use since it was done for news reporting. On the other hand, the fact that the paper reproduced the entire work, and thereby may have destroyed the author's ability to sell copies of the work, might argue against fair use. If a court finds that the use was not fair, it could award statutory damages at the professor's option. If the

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to pure rent-seeking behavior by dominant industry players" which is "plainly illustrated by the Congressional decision in 1998 to extend the copyright term of existing works for another twenty years").

128. *See* Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.").

use is found to be "willful," the paper could potentially be liable for up to $150,000.[129]

This hypothetical raises a dilemma. On the one hand, it could be argued that an important public interest would be served by giving the public access to the professor's work. While the paper would be free to reproduce facts and ideas in the letter, and short excerpts would undoubtedly be a fair use, it may be that the only effective way for the public to fully understand and critique the administration's argument is to read the letter in its entirety.

On the other hand, even if the professor did not initially write the letter with any expectation of compensation (and, indeed, he has never done his scholarly writings for direct compensation), he is still the author of the work and is arguably entitled to compensation if the work is going to be publicly distributed. He does not desire to suppress the speech—he is willing to license its publication—he just insists on an exorbitant fee. Copyright licensing fees are ordinarily left to freedom of contract, so if the owner wants to be hardnosed about the fee, it is his prerogative.

What might the First Amendment say about this? The professor's desire to receive some compensation for the use of his work is perfectly legitimate, but there is also a powerful speech interest in having this work available for the public to read. The fee the professor seeks, however, might preclude the work from being published. Of course, in most instances, reasonable parties would negotiate until they found a price they could agree upon. But this professor refuses to negotiate.

While not exactly comparable, this situation resembles in some respects one in which a city charges a flat fee for anyone wanting to use a public park for a rally. The fee is intended to cover the costs of cleaning up the park and possible police protection. The Supreme Court has held that such fees are unconstitutional if the amount of the fee is left to the unbridled discretion of a government official or if it varies upward based upon the likelihood of a hostile public reaction (thus, in effect, giving the public a heckler's veto).[130] The Court has not, however, indicated that flat fees are necessarily impermissible.[131]

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129. 17 U.S.C. § 504(c)(2) (2000).

130. *See, e.g.*, Kunz v. New York, 340 U.S. 290, 293-95 (1951) (invalidating permit requirement where public official had unbridled discretion in deciding whether to issue permit); Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 133-36 (1992) (invalidating permit requirement where fee for permit varied based upon the likely expense of maintaining order).

131. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1230-31 n.1 (15th ed. 2004) (noting that the Supreme Court "has never invalidated a content-neutral user fee").

But what if the city charges a flat fee of $50,000? While there is no danger that Communists will have to pay a higher fee than the Daughters of the American Revolution, and thus no danger that viewpoint discrimination is at work, the high fee might prevent most groups from being able to use the park for a rally. The fee may be administered in a content-neutral fashion, but it still might be more than the First Amendment could tolerate. Moreover, it is also more than the city undoubtedly needs to adequately cover its expenses associated with most rallies.

This might be a situation where a judge would uphold a flat fee but not uphold this particularly exorbitant one.[132] The judge might permit a fee more closely correlated to the city's actual expenses, while at the same time considering whether any revised fee would have an unacceptable impact on the ability of groups to hold rallies in the city's parks.

Perhaps the First Amendment should require a judge to make the same type of corrective calculation in the case of the professor's letter. The professor should be awarded a fair compensation for his actual damages (which might be substantial if there is truly a market for copies of his work). At the same time, if there is evidence that the paper acted in good faith, that there were strong arguments for giving the public access to the letter, and that the likely damages from the newspaper's publication are considerably less than the requested license fee, then perhaps the First Amendment should limit any damages to a reasonable licensing fee for the work.

Once again, there is no reason why a judge could not accomplish all of the above through copyright law. Under copyright law, a judge could potentially find that the paper's use was a fair use so that the paper bore no liability. Or, in the alternative, the judge could find the use infringing,

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132. In invalidating a license fee applied to public distribution of religious literature, the Supreme Court has said that "[f]reedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943). Professor Van Houweling has said that the reach of this language is unclear, but notes that some lower courts have read the case as insisting that speech permit fees be no more than nominal to preserve speech opportunities of poorly financed speakers. Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1552-53 (2005); *see also, e.g.*, Stonewall Union v. City of Columbus, 931 F.2d 1130, 1136-37 (6th Cir. 1991); Cent. Fla. Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515, 1522 (11th Cir. 1985); *see also* Kevin Francis O'Neill, *Disentangling the Law of Public Protest*, 45 LOY. L. REV. 411, 473 (1999) (stating that, "[t]aken together, *Cox, Schneider, Murdock and Follet* stand for a basic principle: 'The state may recoup the actual costs of governmental services that are generated by the use of public property for speech activities, so long as the charge is not so great as to appear to the judiciary to be oppressive or completely preclusive of speech.'") (citation omitted).

but then use his or her discretion to limit the statutory damages to a small amount.[133]

The importance of recognizing the First Amendment interests, however, is not that a judge must resort to the First Amendment, but that a judge must be attentive to First Amendment values however he or she chooses to decide the case.

The First Amendment is perhaps most likely to be relevant in cases in which there is an overriding interest in giving the public access to an author's specific expression and not just facts or ideas derived from the expression. Professor Nimmer's example of the My Lai Massacre photograph is perhaps one such work, as might be the Zapruder photographs or the video of the Rodney King beating.[134] In each instance, the copyright owner is entitled to compensation. We do not want to eliminate the incentive to create these works. But at some point the First Amendment may have to strike a balance between the copyright owner's expectations of compensation and the public's need for access to a work of major historic or political significance.[135]

While First Amendment jurisprudence does not ordinarily focus on limiting damages, there are some examples. Perhaps most noteworthy are the Supreme Court's limitations on punitive and presumed damages in the defamation context, unless the plaintiff can show actual malice.[136]

The First Amendment might also be implicated by more garden variety transaction costs that copyright creates for many small time authors and artists. Documentary filmmakers, artists and other authors, for instance, often find themselves barred from creating valuable derivative works because of the difficulty and cost of identifying copyright owners and obtaining permission to use the underlying works.[137]

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133. This would be harder to do in a jury trial. *See, e.g.*, Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 342 (1998) (finding a constitutional right to a jury trial when a copyright owner elects to recover statutory damages). In that instance, the First Amendment might have to place limits on the amount of damages that a jury can award.

134. *See* NIMMER & NIMMER, *supra* note 57, at § 1.10[C][2]. *Compare* L.A. News Serv. v. Reuters Television Int'l, Ltd., 149 F.3d 987, 994-95 (9th Cir. 1998) (holding that the broadcasting without permission of copyrighted footage of the Rodney King beating was not a fair use), *with* L.A. News Serv. v. Columbia Broad. Sys., Inc., 305 F.3d 924, 942 (9th Cir. 2002) (holding that the broadcasting of the same work without permission was a fair use).

135. *See* Samuelson, *supra* note 116, at 329 (noting that "[o]ne way to respond to problems posed by excessive pricing and other market failures is compulsory licensing").

136. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).

137. *See, e.g.*, HEINS & BECKLES, *supra* note 63, at 5; *see also* Center for Social Media, Stories Untold, http://www.centerforsocialmedia.org/videos/stories_untold/ (last visited July 4, 2007).

Here, too, the toll exacted by copyright might be more than the First Amendment should tolerate. The First Amendment might dictate, for instance, that courts can award statutory damages in such instances but must limit the award to a reasonable licensing fee, as long as the author tried in good faith to obtain permission to use a work for a reasonable fee or believed in good faith that his use was a fair use.[138] And in some instances, where a derivative author uses small parts of many works, so that it is impractical to obtain a license for each work, courts should place the burden on copyright holders to sue and make it clear that damages will be limited to reasonable licensing fees, thus helping to prompt settlements. This is especially appropriate when the users are non-profit groups pursuing educational, scholarship, teaching, or reporting purposes.

An analogy can be made to damage limitations in the common law of Contracts. Under contract law, damage awards do not ordinarily punish breaching parties, but only seek to protect the expectations of the non-breaching parties.[139] Thus, punitive damages are not generally permitted and instead plaintiffs are typically limited to expectation damages—damages intended to place them in the position they would have been in had the contract been performed.[140]

A consequence of this rule is that contract law sometimes encourages parties to breach.[141] For instance, if Farmer A contracted to deliver 1,000 bushels of corn to B at the end of the growing season, but was subsequently offered $1 million by a movie producer to use the Farmer's land for the summer (to put in a baseball field, perhaps), then contract law would enable A to breach. A will not be subject to punitive damages even though he knowingly and willingly breaches the contract. At the same time, contract law will protect B by making A pay him damages for any increase in the price of corn that B pays to obtain the

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138. *See* Denicola, *supra* note 103, at 1678 (suggesting the propriety of issuing reasonable license agreements); *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 n.10 (1994) (suggesting that granting injunctive relief is not always appropriate when a party has created a new transformative work and that a reasonable license fee might be appropriate); New York Times Co., v. Tasini, 533 U.S. 483, 505 (2001) (implying that it may be appropriate in some instances for courts to allow the use of a work for a reasonable fee); *cf.* Orphan Works Act of 2006, H.R. 5439, 109th Cong. § 514(b)(1)(A) (2006) (limiting damages to "reasonable compensation for the use of the infringed work"), *reprinted in* ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT 498-500 (7th ed. 2006).

139. *See* E. ALLAN FARNSWORTH, CONTRACTS 756 (3d ed. 1999) (noting that "[o]ur system of contract remedies is not directed at *compulsion of promisors* to *prevent* breach; it is aimed, instead, at *relief* to *promises* to *redress* breach").

140. *See id.*

141. *Id.* at 763.

corn elsewhere. Contract law enables A's "efficient breach" because it is better for society if A uses his resources in the most efficient manner, even if this means breaching a contract.[142]

These contract rules are intended to help ensure the most efficient use of resources in economic markets.[143] My argument here is that we should have similar rules to protect the marketplace of ideas. If copyright damages raise the specter of plaintiffs receiving punitive-like damages—because of the risk of high statutory damages awards, particularly if an infringement is found to be willful—then many parties will avoid using copyrighted works even if they believe that their use is a fair use or will only result in minimal harm to a copyright owner.

In these instances, the First Amendment should place limits on statutory damages so that parties making limited use of copyrighted works will not be deterred by the threat of these damages. Just as in contract law, courts can still protect copyright plaintiffs by awarding them "actual damages" for any infringement—perhaps, for instance, a reasonable licensing fee for the use. But the threat of potentially punitive-like statutory awards should be limited so that parties wanting to make derivative works will not have their creative speech chilled.

3. When Contractual Suppression of Speech Has an Intolerable Impact

What if copyright owners use contracts to complement or supplement their copyright rights? Should the First Amendment place limits on this suppression of speech or should it be irrelevant because the suppression is "self-imposed?"

Of course, good arguments can be made for withholding First Amendment scrutiny in this context. It is private parties, not the government, who are deciding which speech to suppress. Withholding judicial scrutiny also supports the individuals' autonomy rights to sell their right to speak.

Yet the impact of these contracts on speech interests can be as great or greater than copyright rights. Copyright law, after all, is the product of a legislative process that at least in theory considers the public's best interests. By contrast, there is no reason to expect that private parties, given freedom of contract, will be equally solicitous of the public's interest.

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142. *See id.*

143. *Id.* (stating that to discourage efficient breaches "by compelling performance would result in an undesirable wealth distribution, since the party in breach would lose more than the injured party would gain").

Contractual suppression of speech is also more threatening to speech interests than other areas of law, like trespass, that do not trigger heightened scrutiny. A landowner who refuses to tolerate certain speech on his property, for instance, only succeeds in suppressing the speech in a particular location. By contrast, if a copyright owner distributes his work with a concomitant license that forbids the use of any facts or ideas, he can potentially block the free flow of ideas and information.[144]

Any concern about the autonomy interests of private parties to buy and sell their silence may also be overstated. To what extent, for instance, are consumers truly exercising their right to sell their silence when they agree to a standardized electronic contract? It is likely that they never read the contract terms, so if they are bound, it is only because the law imposes an obligation when parties appear—to a reasonable person—to have assented. But once the law imposes obligations without actual consent, the line between contract and tort becomes considerably blurred. The logic of treating contract law differently from defamation and privacy torts because of the qualitatively different autonomy interests at stake seems highly dubious.

More importantly, any autonomy interest assumes that it is the right of a private party to sell his silence. But what if the right is not his to sell? Justice Souter made just such a suggestion in *Cohen v. Cowles Media Co.* when he considered whether a source could buy a newspaper's promise to keep quiet about his identity:

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144. In explaining why the property law of trespass is less threatening to First Amendment interests than the intellectual property rights created by copyright law, Jed Rubenfeld notes that there is "an important inherent restriction" on the ability of a landowner to suppress speech: "It is limited to speech that takes place on or with the use of the owner's property." Rubenfeld, *supra* note 2, at 28. By contrast, he notes that "[a] copyright owner's power over speech applies to the public at large, anywhere and everywhere." *Id.* at 29. Contractual suppression of speech would fit somewhere between these two models. On the one hand, it can only suppress the speech of parties who have promised to suppress their speech. On the other hand, if copyrightable works are routinely sold with standardized licenses that are held to be enforceable, then as a practical matter the copyright owner can control the use of the speech "anywhere and everywhere." While it may be true, as Easterbrook hypothesized in the *ProCD* case, that anyone who finds a copyrightable work lying on the street would not be bound by the licensing agreement (even though their actions would still be regulated by copyright law), ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1454 (7th Cir. 1996), technological advances might for all practical purposes make it increasingly rare for people to access a work without having to consent to a license. Moreover, even if a small percentage of people can access a work without being subject to a license agreement, the impact of the contractual restrictions on all the other licensees would still be significant. Why should the fact that there may be limited exceptions immunize the contracts from First Amendment scrutiny? Indeed, even copyright law does not create an absolute prohibition on the actions of third parties. Anyone who independently creates a work that resembles a prior copyrighted work will not incur liability. MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 59 (4th ed. 2005). But this exception does not immunize copyright from First Amendment scrutiny.

> Nor can I accept the majority's position that we may dispense with balancing because the burden on publication is in a sense "self-imposed" by the newspaper's voluntary promise of confidentiality. This suggests both the possibility of waiver, the requirements for which have not been met here, *as well as a conception of First Amendment rights as those of the speaker alone, with a value that may be measured without reference to the importance of the information to public discourse.* But freedom of the press is ultimately founded on the value of enhancing such discourse for the sake of a citizenry better informed and thus more prudently self-governed. "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *In this context, "'[i]t is the right of the [public], not the right of the [media], which is paramount.'"*[145]

Of course, Congress is always free to statutorily preempt state enforcement of contracts that interfere with free speech interests. Congress could expressly provide in the Copyright Act that all contracts which duplicate or interfere with the policies embodied in copyright law are preempted. As things currently stand, courts interpreting the existing preemption provision—section 301—generally do not find contracts preempted by the Copyright Act.[146] A number of courts, however, have held that the enforcement of contracts is preempted when the contracts try to protect rights that are equivalent to those in the Copyright Act.[147]

But even if Congress does not intervene, there are good reasons for courts to consider whether the impact of a contract on speech interests is more than the First Amendment should tolerate. Once again, this is not likely to be the case in the garden variety use of contracts to protect copyrightable works. But if parties use contracts to illegitimately keep information from the public, to deny the public access to ideas and information, or in ways that impose too high a price on speech interests, then courts should be prepared to intervene.

IV. CONCLUSION

Public discourse about copyright rights has become increasingly strident in recent years. Jessica Litman has called this harsh exchange

145. Cohen v. Cowles Media Co., 501 U.S. 663, 677-78 (1991) (Souter, J., dissenting) (emphasis added) (internal citations omitted).

146. *See supra* note 57.

147. *See id.*

the "copyright war."[148] Those who object to the expansion of copyright rights paint a picture of the copyright industries as faceless conglomerates determined to "propertize" and "commoditize" all sources of information. They tend to forget the fact that this "all-powerful" copyright industry is itself terrified that piracy facilitated by new digital technologies is going to render its property rights meaningless.

At the same time, representatives of the copyright industries tend to describe their opponents as "anarchists" who encourage the rampant theft of their intellectual property. They tend to ignore the fact that copyright rights are not inherent natural rights, but are artificial rights created by the government to benefit the public. They refuse to acknowledge that the proper scope of these rights is a legitimate subject for public debate.[149]

In an ideal world this battle would be fought out through the political process with little need for judicial intervention. But when the political process is incapable of adequately protecting constitutional rights, including First Amendment rights, then courts must be prepared to intervene. This is not inappropriate judicial intermeddling. It is judges ensuring that freedom of speech—"the indispensable condition, of nearly every other form of freedom"—is safely secured.[150]

148. Litman, *supra* note 13, at 1.

149. *See id.* at 3 (noting that the "enemies" in the copyright wars, depending upon one's viewpoint, "are either apologists for piracy who insist that information and entertainment want to be free or they're corrupt fat cats who are misusing copyright to shield their antiquated business models from competition").

150. Palko v. Connecticut, 302 U.S. 319, 327 (1937).