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COPYRIGHT AND FREEDOM OF EXPRESSION: SAVING FREE SPEECH FROM ADVANCING LEGISLATION

Amanda Beshears Cook*

The Supreme Court has expressly recognized the possibility of a First Amendment defense to copyright infringement claims, but it has never actually found such a defense to apply to a case before it. And nearly every year, Congress enacts or attempts to enact more legislation that restricts speech under the banner of the copyright clause. The problem is that the natural right of free speech is being depleted by the legislatively granted right of intellectual property, putting both individual liberty and the public good at risk. Congress and the courts both must begin to acknowledge that in the common law country of the United States, natural rights such as free speech should take rank over congressionally granted rights. Scholars have been trying to call attention to this conflict since the Copyright Act became effective, but it is important to focus on the very basis of the conflict: the difference in theories of intellectual property law between common law and civil countries.

This article approaches this subject with a comprehensive, yet concise, method. It walks the reader through several stages of the development of current copyright law, taking a very close look at fair use doctrine, the problems of the Digital Millennium Copyright Act, and how other advancements in Congressional legislation are historically framed by our Constitution. Next, it examines the historical purposes of these two conflicting Constitutional clauses. And ultimately, the article provides recommendations for courts, developed from viewing these problems through a lens of natural law theory.

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Introduction

"Congress shall make no law...abridging the freedom of speech"[1]

"The Congress shall have Power To...promote the Progress of Science and useful Arts, by securing for limited Times to Authors...the exclusive Right to their respective Writings..."[2]

In one clause, the Constitution expressly grants Congress the right to limit speech by forbidding others to use copyrighted material. In the other, it forbids Congress from limiting speech. Scholars have insisted these clauses represent an apparent conflict for some time. Although the Supreme Court has acknowledged that a First Amendment defense to copyright infringement may exist in theory, such a defense has never been recognized by the Supreme Court.

It is possible to reconcile this conflict when these clauses are construed to work together for the same purpose. The most well documented policy behind both clauses is to encourage the dissemination of information in order to serve the public good.[3] But the Supreme Court has only acknowledged this policy in dicta without an express application, and Congress seems to have forgotten it altogether,[4] as it directly conflicts with recent changes in international intellectual property agreements.[5]

The Supreme Court has expressly recognized the possibility of a First Amendment defense to copyright infringement claims,[6] but it has never actually found such a defense to apply to a case before it. And nearly every year, Congress enacts or attempts to enact more legislation that restricts speech under the banner of the copyright clause. But every constitutional challenge to this legislation thus far has met with the same Supreme Court ruling: that the 'traditional contours' of copyright law have not been disturbed, and therefore the built-in free speech protections available in the Copyright Act are enough to accommodate the First Amendment.[7]

These 'traditional contours' that accommodate the First Amendment are usually cited as the two main exceptions to copyright infringement: 'fair use' and the 'definitional balance'. 'Fair use' defenses to copyright infringement claims allow defendants to assert that their repetition of another's copyrighted work was done in parody, for a non-commercial or educational use, or for another exception permitted by the court.[8] Courts rely on 'fair use' doctrine to determine, on a case-by-case basis, whether an accused infringer should be liable for damages. The 'definitional balance' exception prevents the copyright of ideas and facts. In traditional forms of intellectual

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[1] U.S. CONST. amend. I.
[2] U.S. CONST. art. I § 8 cl. 8.
[3] *See* Craig W. Dallon, *The Problem With Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*. 44 SANTA CLARA L. REV. 365, 368-369 (2004).
[4] *Id*.
[5] David L. Lange, Risa J. Weaver & Shiveh Roxana Reed, *Golan v. Holder: Copyright in the Image of the First Amendment*, 11 J. MARSHALL REV. INTELL. PROP. L. 83, 86-87 (2011).
[6] Eldred v. Ashcroft, 537 U.S. 186 (2003).
[7] *See* Harper & Row Publishers v. The Nation Enterprises, Inc., 471 U.S. 539, 558 (1985), Edlred 537 U.S. at 186, 222 (2003), *and* Golan v. Holder, 132 S. Ct. 873 (2012).
[8] 17 U.S.C.A. §§107-115 (2010).

property, such as film, television, and print, these built-in protections of the Copyright Act of 1976, however muddy their application, generally protect speech from the abuse of private monopolies (with some exceptions).

But the landscape of intellectual property has rapidly changed over the past two decades. With the advent of the Internet people have changed the way they share information and consume intellectual property. With these new developments, it has become easier for people around the world to misappropriate protected material.[9] The sheer volume of piracy of intellectual property has become difficult to regulate. And Congress, goaded by new developments in foreign intellectual property agreements, is scrambling to enact legislation that would secure the millions (and some cite billions) of dollars in revenue that is lost every year due to Internet piracy of copyrighted material.[10]

Increasingly, this expansive protection of private property rights has come at the expense of free expression, through modern interpretation of copyright doctrine and recent legislative implementation of certain international agreements. Conflict exists between theories of intellectual property law in common law and civil law countries, which is problematic when the U.S. is required to comply with international agreements.[11] Civil law countries view intellectual property rights as natural rights, and even grant 'moral' rights to copyright holders. By contrast, common law countries, such as the United States, view intellectual property rights as only means to serve the natural right of free expression, and in turn, the public good.[12]

The purposeful disregard of this inherent conflict is beginning to erode the right of public dissemination of information, in favor of private property rights.[13] The danger caused by this erosion is that it creates private monopolies over information and unconstitutionally 'chills' expression. This frustrates the democratic, public benefit purposes of the original constitutional clauses.

It is important to recognize that the Internet and social media have recently fueled revolutions both in the music industry[14] and in the Middle East.[15] And neither recent legislation nor current interpretive doctrine of the Copyright Act provides adequate protection of First Amendment principles on the web.[16] The Internet is "one of the greatest tools of freedom in the

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[9] Internet Commerce Promotion and Protection: Hearing before the Subcomm. on Intellectual Property, Competition and the Internet of the H. Comm. on the Judiciary, 112th Cong. 4-5 (April 7, 2011) (statement of Floyd Abrams, senior partner at Cahill Gordon & Reindel, LLP).
[10] *Id*.
[11] *See* David L. Lange et al. *supra* note 5, at 86-87.
[12] *See* Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813) *in* THE WRITINGS OF THOMAS JEFFERSON, (Andrew A. Lipscomb & Albert Ellery Bergh 1905), *available at* http://press-pubs.uchicago.edu/founders/documents/a1_8_8s12.html
[13] Craig W. Dallon, *The Problem With Congress and Copyright law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365,425 (2004).
[14] Interview by Claire Suddath with Greg Kot, author and music critic: *How the Internet Changed Music* (May 21, 2009), available at: http://www.time.com/time/arts/article/0,8599,1900054,00.html
[15]Kody Gerkin, *World of Click: Social Networking and the Arab Spring Revolutions* (2011), *available at* http://bad.eserver.org/issues/2011/Word-of-Click.html
[16] Dallon *supra* note 12, at 454.

history of the world",[17] and freedom of expression must be better protected on the Internet to further the role of democracy both internationally and in the United States.

This article is designed to provide an overview of how the legislature and the courts have historically managed the conflict between the Copyright Clause and the First Amendment. It will also show how the goal of serving the public good through dissemination of information is slowly eroding in favor of protecting private property rights. And finally, it will critique new legislation and recent court decisions for not sufficiently protecting the First Amendment right to free speech against copyright law.

Part I examines the doctrines of 'fair use' and 'definitional balance'. Part II explores the evolution of Supreme Court holdings that consider these somewhat flawed doctrines as sufficient protection for free speech against copyright law. Part III reviews enacted and proposed copyright legislation since the rise of the digital age, discussing the manner in which Congress advances private rights at the expense of free speech and why this advancement is incongruent with the common law purposes of copyright law and freedom of expression. Part IV will critique the constitutionality of some of this recent federal legislation. And finally, Part V will recommend new judicial standards based on proper constitutional policy.

I. Understanding the Context of the Constitutional Conflict: The 'Traditional Contours' of First Amendment Problems in Copyright Law

In keeping with its goal of serving the public good, built into the Copyright Act of 1976 are two major exceptions intended to accommodate the First Amendment, 'definitional balance' (also referred to as the idea/expression dichotomy), and 'fair use' doctrine. The Supreme Court has used both of these protections to avoid a more difficult inquiry into whether the unauthorized use of a work should be protected by the First Amendment.[18] Both of these doctrines have their problems, and may not be as protective of First Amendment principles as some suggest.[19] Nevertheless, these doctrines are what the Court refers to when it speaks of 'traditional contours' of Copyright law. And they have thus far been held sufficient protections of expression when free speech is asserted as a defense to infringement, or when new copyright legislation is attacked on First Amendment grounds.[20]

A. Tipping the Scales with the Definitional Balance

The idea/expression (or fact/expression) dichotomy is codified in 17 U.S.C. § 102(b), which states: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such

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[17] *See* Floyd Abrams *supra* at note 9, *and see* Marvin Ammori, *First Amendment Architecture*, 2012 WIS. L. REV. 1, 44 (2012).
[18] *See* Eldred v. Ashcroft 537 U.S. 186, 222 (2003), *and* Golan v. Holder, 132 S. Ct. 873 (2012).
[19] Travis J. Denneson, *The Definitional Imbalance Between Copyright and the First Amendment*, 30 W. MITCH. L. REV. 895 (2004).
[20] *See Golan,* 132 S. Ct. at 890-891.

work."[21] This is meant to encourage the dissemination of ideas, allowing an idea or factual information to flow freely from one author to another, and from authors to consumers of works.[22] By preserving ideas and facts for the public domain, copyright law seeks to avoid conflict with the First Amendment and serve the public good.

The Supreme Court has used the idea/expression dichotomy to avoid determinations of whether certain First Amendment rights to free speech should outweigh the property interests of copyright holders. In the first case where the Supreme Court addressed this conflict, it quoted the Second Circuit, saying: "copyright's idea/expression dichotomy 'strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.'"[23] This is what has since become known as the 'definitional balance' approach to deciding matters of copyright infringement, 'punting' the speech/property conflict in favor of reaching a determination based solely upon the built-in protections of the Copyright Act.[24]

There is one very fundamental reason that the idea/expression dichotomy does not sufficiently protect First Amendment rights. Sometimes an idea can be so intertwined with the expression of that idea that the two become inseparable.[25] The particular work in such an instance should not be protectable.[26] This phenomenon has been referred to as 'merger'.[27] In this case, the work is not capable of attaining copyright protection.[28] "The merger doctrine reflects the principle that where the expression is essential to the statement of the idea, or where there is only one way or very few ways of expressing the idea, the idea and the expression 'merge' into an unprotectable whole."[29]

Classifying a work as either 'merged' or subject to the 'definitional balance' is not an easy decision. The difficulty of distinguishing an idea from its expressive form can be made with certain visual images.[30] The distinction between idea and expression is more difficult to make in

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[21] Copyright Act of 1976, 17 U.S.C.A. § 102(b) (2012), *accord* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 350 (1991).
[22] Janice E. Oaks, *Copyright and the First Amendment: Where Lies the Public Interest?,* 59 TUL. L. REV. 135, 137 (1984).
[23] Harper & Row Publishers v. The Nation Enterprises, Inc.(quoting XXXX), 471 U.S. 539, 556.
[24] Travis J. Denneson, *The Definitional Imbalance Between Copyright and the First Amendment*, 30 W. MITCH. L. REV. 895 (2004).
[25] *Id.*
[26] *Id, and accord* Rodney A. Smolla, SMOLLA & NIMMER ON FREEDOM OF SPEECH, A TREATISE ON THE FIRST AMENDMENT § 21:8, (2008).
[27] Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463, 481 (March 2010).
[28] Morrissey v. Procter & Gamble Co., 379 F.2d 675, 678-79 (1st Cir.1967), *accord* Melville B. Nimmer and David Nimmer, NIMMER ON COPYRIGHT § 13.03[B][3] (2007).
[29] Woods v. Resnick, 725 F. Supp. 2d 809, 821 (W.D. Wis. 2010).
[30] *Id, and accord* Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683 (Jan. 2012).

this context,[31] because the image may express the idea in ways that words cannot.[32] Whether a particular visual image is protectable under the merger doctrine is not easily determined.[33]

For example, in *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, the Ninth Circuit held that a jewelry company could not enjoin the manufacture of all jewel-encrusted pins that are shaped like bees.[34] This holding seems obvious at first glance, but the reasoning behind it can prove problematic when applied in different scenarios, such as when it would be more appropriate to apply for a patent than rely on copyright protection. "When the idea and its expression are thus inseparable, copying the expression will not be barred, since protecting the expression in such circumstances would confer a monopoly of the idea upon the copyright owner free of the conditions and limitations imposed by the patent law."[35] This holding exposes the heart of the constitutional conflict. Applying the same reasoning, Professor Nimmer once referred to photographs of the My Lai massacre, arguing that they should not be protectable, because "It would be intolerable if the public's comprehension of the full meaning of My Lai could be censored by the copyright owner of the photographs. In this case, the speech interest outweighs the copyright interest."[36]

Yet another problem with the 'definitional balance' test is that the First Amendment protects non-verbal expression as well as ideas.[37] For example, there are certain categories of protected speech that can be offensive to some members of society, yet the Supreme Court has upheld them as constitutionally protected free speech, such as certain music,[38] flag burning,[39] or non-obscene pornography.[40] Non-verbal expression is, therefore, protectable under the First Amendment. Because a non-verbal expression may or may not be protected speech, yet another layer of difficulty is added to questions of copyright infringement, especially when the line between idea and expression is unclear.[41]

When these lines are blurred, as they often are in copyright litigation, a court will often favor economic considerations over concerns for freedom of expression.[42] This apparent bias and the difficulties in applying the definitional balance defense both result in the defense rarely being used, and even more rarely used successfully.[43] It has been applied successfully only to works in certain specific, and very pragmatic, forms of expression, such as building codes and accountancy forms.[44] The defense is usually unsuccessful when applied to artistic or cultural

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[31] Mannion v. Coors Brewing Co., 377 F.Supp.2d 444 (S.D.N.Y. 2005).
[32] *See* Smolla *supra* note 28 at § 21:8, Denneson *supra* note 26 at 904, *and* Tushnet *supra* note 32 at 692.
[33] Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).
[34] 446 F.2d 738 at 742 (9th Cir. 1971).
[35] *Id*.
[36] NIMMER ON COPYRIGHT § 19E.03 (1997).
[37] *See* Denneson *supra* note 26 at 916, citing to Texas v. Johnson, 491 U.S. 397, 418 (1989), *and* United States v. Eichman, 496 U.S. 310, 317-19 (1990).
[38] Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989).
[39] Texas v. Johnson, 491 U.S. 397, (1989).
[40] Miller v. California, 413 U.S. 15, 24 (1973).
[41] Smolla *supra* note 28 at § 21:8.
[42] *Id.*
[43] Andrew B. Hebl, *A Heavy Burden: Proper Application of Copyright's Merger and Scenes a Faire Doctrines*, 8 WAKE FOREST INTELL. PROP. L.J. 128 (Winter 2007).
[44] *See* Baker v. Selden, 101 U.S. 99 (1879).

works, which arguably contribute more to social discourse than accountancy forms.[45] Because of these unclear distinctions and limited applications, the 'definitional balance' doctrine is insufficient to defend First Amendment rights against claims of copyright infringement.

B. The Muddy Waters of Fair Use

The ‘fair use’ doctrine also insufficiently protects multitudes of creators. For example, visual artists cannot copy another's work, even if using a different medium or if visual elements are changed, and sometimes even if no commercial value has been misappropriated from the original work.[46] The reasoning behind this is that allowing even a near-exact copy would discourage artists from creating new works and publishing those works for public view. Some direct copies of visual works were once held to be non-infringing 'fair use', due to their importance to the public interest, but these holdings have been overruled.[47] Like the 'definitional balance' between an idea and its expression, 'fair use' plays a large role in protecting First Amendment interests against private copyright monopolies, even if somewhat ineffectively.[48]

17 U.S.C. § 107 codifies four different 'fair use' factors to use to determine whether an author has infringed upon another's copyright, or whether the use is allowable.[49] These factors are:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[50]

These factors attempt to accommodate the First Amendment by allowing use of another creator's work through quotations, for educational purposes, for parody, and generally for non-commercial use. But the statute is held to call for a case-by-case analysis, which means ad hoc decisions are made for each case on what is or is not exactly 'fair use'.[51] Both the courts and Congress have deliberately kept the test for 'fair use' vague. The Committee on the Judiciary notes to the 1976 Act state: "... no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts."[52] This case-by-case approach to determining copyright infringement invites much litigation over what is or is not fair use.

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[45] *See Id* at 142.
[46] *See* Rogers v. Koons, 960 F.2d 301 (N.Y.C.A. 1992) (holding that when the infringing image is in almost all elements exactly the same as the original work, intentionally appropriated the commercial value of the original work, and cannot be considered parody, the infringing author is still subject to liability).
[47] Time, Inc. v. Bernard Geis Associates 293 F.Supp. 130, 141 (D.C.N.Y. 1968), *accord* Harper & Row Publishers v. The Nation Enterprises, Inc., 471 U.S. 539, 558 (1985).
[48] *See* Eldred v. Ashcroft 537 U.S. 186, 222 (2003), Golan v. Holder, 132 S. Ct. 873 (2012), *and accord Harper & Row Publishers* at 558.
[49] Copyright Act of 1976, 17 U.S.C.A. § 107 (2010).
[50] *Id.*
[51] Campbell v. Acuff-Rose Music, 510 U.S. 569, 581 (1994).
[52] H.R. Rep. No. 1476, 94th Cong., 2d Sess. (Sept. 3, 1976).

One of the best illustrations of the uncertainty that surrounds the fair use doctrine is the application of the 'parody' defense.[53] In *Rogers v. Koons*, the Court famously held that while parody is a 'fair use' defense, satire is not.[54] And therefore, in order to claim 'fair use', an artist who uses another's work must comment directly on that work, as opposed to commenting on some social phenomenon through use of the work. [55]

In deciding this seminal case, the court also focused on the commercial nature of the appropriation, and the intention of the infringing artist.[56] The artist, Jeff Koons, copied the image of a postcard photograph into a sculpture. He incorporated some surreal elements into his three dimensional interpretation, by turning a litter of puppies bright blue and giving them cartoon noses, and caricaturing the human subjects' faces.[57] The Court did not, however, focus at all on how much the artist had changed (or, to use the legal term of art, 'transformed') the original image, but instead focused on the extent of his intentional use of the copyrighted image, for which evidence existed to support.[58]

In another well-known parody case, *Campbell v. Acuff-Rose Music,*[59] the Court wrestled with whether 2LiveCrew had misappropriated Roy Orbison's "Pretty Woman", or whether the group's use of Mr. Orbison's famous bass line and lyric constituted fair use.[60] The court held that not all commercial appropriation can be considered infringement, and that the test was how 'transformative' the parody is of the original work, as well as how much market value the parody directly took from the original.[61] The court then remanded for determination on these two elements.[62]

Parody doctrine illustrates the difficulty of most 'fair use' defenses. The application of § 107 factors is usually very unpredictable, as demonstrated by these two cases. Courts look at factors such as how much of the work was appropriated, if the copying supplanted the commercial value of the work, or whether the new work is 'transformative'.[63] Sometimes courts use the fair use factors to manufacture their own exceptions. As one legal commentator quipped: "Unfortunately, the only way to get a definitive answer on whether a particular use is a 'fair use' is to have it resolved in federal court."[64]

There are also problems inherent in the parody/satire distinction. The Court reasons that the distinction is based on the premise that satire 'stands on its own two feet', and it is therefore

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[53] *See* Michael A. Einhorn, *Miss Scarlett's License Done Gone! Parody, Satire and Markets,* 20 CARDOZO ARTS & ENT. L.J. 589 (2002).
[54] Rogers v. Koons, 960 F.2d 301, 310 (N.Y.C.A. 1992).
[55] *Id*.
[56] *Id* at 309.
[57] See the comparative images at http://www.law.harvard.edu/faculty/martin/art_law/image_rights.htm
[58] *Rogers* at 309. (There was evidence that he had deliberately removed a copyright symbol from the photograph before sending it for a cast mold to be made from the image.)
[59] Campbell v. Acuff-Rose Music, 510 U.S. 569, 581 (1994).
[60] *Id*.
[61] *Id* at 590, 592.
[62] *Id* at 594.
[63] 18 AM. JUR. 2d *Copyright and Literary Property* §§ 78-85 (2010).
[64] RICHARD STIM, GETTING PERMISSION: HOW TO LICENSE AND CLEAR COPYRIGHTED MATERIALS ONLINE AND OFF, (Oct. 2010) reprinted in part at: http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-b.html

unnecessary to appropriate someone else's material to satirize a general social concern.[65] But satire has just as much social value, if not more, than parody.[66] Also, there is no difference in the economic difficulty of obtaining a license for either type of commentary.[67] And arguably, if there were no distinction recognized by the Court between parody and satire, the sculpture at issue in *Rogers v. Koons* could very well have withstood the test of *Acuff-Rose*. The sculpture did not supplant the market value of the postcard, and it was 'transformative' of the postcard in style and meaning, as well as medium.

C. The Dangerous Chill of Subjective Safe Harbors

Both the fair use doctrine and the test for definitional balance are murky and subjective. Because these are difficult tests to apply, and because each allegation must be decided on a case-by-case basis, the legal framework creates much uncertainty over the outcome of litigation for social satirists, and creators of all mediums of expression. Moreover, when these doctrines are imported to the online world, compilation artists, DJs, fan club presidents, social satirists and other comedians, meme creators, remix artists, collage artists, amateur musicians, politicians, political pundits and commentators, journalists, clip show hosts, bloggers, proud mothers of dancing toddlers, and just about any other citizen who uses the Internet for business, pleasure, or social communication experience a chilling of their natural, Constitutional rights by intellectual property monopolies.

This murkiness also prevents the dissemination of information for educational as well as social purposes. The Visual Resources Association went so far as to publish a best practice manual to instruct educators and librarians on the most common instances of fair use issues.[68] In it, the association succinctly describes the issues:

> "Uncertainty surrounding the ability to rely on fair use had a tangible negative impact on teaching, research, and study: for example, some faculty and students do not have access to the images they need for pedagogical purpose because the images cannot be licensed and because these individuals are unsure of the boundaries of fair use. In other instances, individual institutions are uncertain about their ability legally to preserve image collections and to migrate them to new formats. In still other cases, some graduate students are tailoring their doctoral dissertation and thesis choices based on perceived licensing barriers."[69]

The confusion created by unclear legal standards causes a 'chilling effect' on expression, due to the costs and uncertainty of litigation.[70] And the 'chill' restricts expression just as much as a content-based prior restraint.[71] The 'chill' of copyright has been thus far tolerated because it has

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[65] Rogers v. Koons, 960 F.2d at 309.
[66] Michael A. Einhorn, *Miss Scarlett's License Done Gone! Parody, Satire and Markets*, 20 CARDOZO ARTS & ENT. L.J. 589, 603 (2002).
[67] *Id*.
[68] VISUAL RESOURCES ASSOCIATION: STATEMENT ON THE FAIR USE OF IMAGES FOR TEACHING, RESEARCH, AND STUDY, (2011) available at http://www.vraweb.org/organization/pdf/VRAFairUseGuidelinesFinal.pdf
[69] *Id* at 2.
[70] *See* Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the Chilling Effect*, 58 BOSTON U. L. REV. 685 (1978).
[71] *See id*.

been seen as justifiable, necessary to advance dissemination of works by encouraging their creation. But when the costs of creation and dissemination are low, such as with new digital media, the rationale behind these traditional rules becomes less and less sound.

Therefore, the problems with 'definitional balance' and 'fair use' grow even more poignant when transferred to a digital forum. And when viewed in the context of the legal theory behind the Copyright Clause, namely protecting the natural right of free expression and the public right to dissemination, versus the Congressionally granted right of intellectual property ownership, the favor shown to economic interests in the application of these doctrines is unacceptable. This theme is repeated throughout legislative and doctrinal copyright law.

II. Supreme Court Interpretation of the Adequacy of Built-In First Amendment Protections: Applying the "Traditional Contours" of Copyright law

The Supreme Court decisions in copyright cases continue to use these two built-in statutory protections as the only free speech accommodations to copyright law, despite their inadequacies.[72] This results in an erosion of free expression in favor of private property rights, especially when coupled with the enactment of progressively aggressive copyright legislation. In litigation over 'fair use' issues, the Supreme Court still regularly mentions the purpose of promoting the public good, or serving the 'public interest' by incentivizing the dissemination of information.[73] But with each advancing issue, the Court has yet to find the public good of free speech to outweigh private rights in intellectual property.[74] Certainly, many decisions on the validity of a copyright have been informed by First Amendment values.[75] However, no copyright infringement has ever been expressly held defensible by the Court on First Amendment grounds. And no copyright legislation has ever been held unconstitutional under the First Amendment. Even the decisions that have expressly applied a ‘public interest’ analysis under ‘fair use’ doctrine have been overruled by the Supreme Court.[76]

One famous case, Rosemont Enterprises, Inc. v. Random House, Inc., initiated a line of cases in the Second Circuit that cited the 'public good' or 'public benefit' as playing a role in determining the purpose and character of use under the first § 107 factor. [77] The court held that information appropriated by an unauthorized biographer, from magazine articles written about Howard Hughes, was not subject to a preliminary injunction. The court considered the 'public interest' in the life of a 'public figure' to be of too high of importance to enjoin publication.

Soon thereafter, in a case where an artist copied film stills of the Kennedy assassination into sketches, the court held that the event was of such great 'public interest' that the artist had the

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[72] *See* Edlred v. Ashcroft, 537 U.S. 186, 222 (2003), *accord* Golan v. Holder, 132 S. Ct. 873 (2012).
[73] *Id*, *see also* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975), Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984), *and* Golan at 888-890 (holding that both dissemination and creation are permissible Congressional objectives under the copyright clause).
[74] *Id.*
[75] Michael D. Birnhack, "Freedom of Speech" *from* NIMMER ON COPYRIGHT. §19E.
[76] Harper & Row v. Nation Enterprises, 471 U.S. 539, 559 (1985).
[77] 366 F.2d 303 (2 Cir. 1966).

right to use the images. It also considered that he needed the images to explain his theories on how the assassination was carried out, as there was no other way to do so.[78]
The court found that in such a case the public good would be greater served by allowing dissemination of the stills.[79] It weighed the 'public interest' against the minimal commercial value of the appropriated video.[80] Finding in favor of the defendant, it decided there was greater need for First Amendment protection of the allegedly infringing work.[81]

Up until the mid-1980's, the Second Circuit continued to use this 'public interest' balancing test under the 'purpose and character' factor of §107 for certain infringement decisions.[82] The courts weighed the 'public interest' of an infringing work against the lost commercial value of the appropriated material, in order to discern which one was in greater need of protection.[83] In other words, the courts began inquiring , under the first factor of § 107, whether the 'purpose and character' of an infringing work was to serve the 'public interest'.[84] And if the 'purpose and character' met a high threshold of 'public interest', the court found 'fair use'.[85]

In time, however, the Supreme Court put an end to such an inquiry. In the landmark case *Harper & Row, Publishers, Inc. v. Nation Enterprises*, the Second Circuit held that the 'public interest' was so important in this particular case that no infringement could be found.[86] The case involved a copy of the unpublished autobiography of President Gerald Ford, which was somehow misappropriated by a journalist, whose employer published verbatim quotes from the manuscript, thereby destroying its commercial value.[87] On appeal, however, the Supreme Court disagreed with the Second Circuit about the importance of the 'public interest' in 'fair use' doctrine, or more specifically, of the importance of works regarding a 'public figure'.[88] In an opinion delivered by Justice O'Connor, the Court reversed the judgment of the Second Circuit Court of Appeals by a 5-3 decision.[89]

The Court used examples of other 'fair use' exemptions to copyright, holding these exemptions sufficient to protect the 'public interest' without a special exception.[90] The court specifically noted the idea/expression dichotomy, as well as the express statutory exemption for

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[78] Time, Inc. v. Bernard Geis Associates, 293 F.Supp. 130, 141 (D.C.N.Y. 1968).
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] Janice E. Oaks. *Copyright and the First Amendment: Where Lies the Public Interest?*, 59 TUL. L. REV. 135, 147-154 (1984) (see for an aggregation of several 'public interest' under 'fair use' cases in 1960s to early 1980s Second Circuit. Ms. Oaks' article was published just before *Harper & Row* was granted certiorari, and suggested a 'necessity' factor as implied in Bernard Geis, but no reported decision of the 2d Circuit has expressly used this as a factor).
[83] *Id.*
[84] Rosemont Enterprises, Inc. v. Random House, Inc., 385 U.S. 1009 (1967).
[85] *Id.*
[86] 723 F.2d 195 (2d Cir. 1983).
[87] Harper & Row Publishers, 471 U.S. 539 at 562 (1985).
[88] *Id.*
[89] *Id.*
[90] *Id* at 557-558.

government works.[91] It also noted that the issue at hand was related to a government worker no longer in office, which was clearly outside of the bounds set by Congress.[92]

Also, the Court specifically rejected the idea of a 'public interest' factor under 'fair use', stating, "It is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public. Such a notion ignores the major premise of copyright and injures author and public alike."[93] Thus, the Court rationalized away First Amendment concerns, based on the fear that overprotecting First Amendment rights against copyright law would paradoxically lead to the production of less speech of 'public interest'.[94]

In the next section of the opinion, Justice O'Connor applied the 'fair use' defense to the printing of substantial verbatim quotations from President Ford's book.[95] The court noted that not only was the publisher's use of the copyrighted material commercial, but that the use had the intended purpose of supplanting the commercial use of the copyright holder.[96] Finding no other support for a 'fair use' defense, the Court reversed the decision of the Second Circuit.[97]

In his dissenting opinion, Justice Brennan, joined by Justices White and Marshall, quoted the report made by the 60th Congress when it enacted the Copyright Act of 1909, which echoed the words of Thomas Jefferson: "The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings ... but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted..."[98] Notably, these dissenters recognized free speech as a natural right, and in contrast, intellectual property as one Congressionally granted, only to serve that natural right. [99]

Therefore, the Supreme Court, in 1985, still sought to serve the public good through copyright, even if it declined to recognize an explicit 'public interest' exception. But many lower courts subsequently misread the *Harper* opinion to extend a broad ban on First Amendment objections to copyright infringement claims.[100] The Court ended this trend in *Eldred v. Ashcroft*.

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[91] *Id*.
[92] *Id, and see* 17 U.S.C.A. § 111.
[93] *Id* at 559.
[94] Stephen Fraser, *The Conflict Between the First Amendment and Copyright Law and its Impact on the Internet*, 16 CARDOZO ARTS & ENT. L.J. 1, 18 (1998).
[95] *Id*.
[96] *Harper & Row Publishers*, 471 U.S. at 562.
[97] *Id* at 569.
[98] Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813) *in* THE WRITINGS OF THOMAS JEFFERSON, (Andrew A. Lipscomb & Albert Ellery Bergh 1905), *available at* http://press-pubs.uchicago.edu/founders/documents/a1_8_8s12.html
[99] *Harper & Row Publishers* at 562.
[100] New Era Publications Intern. v. Henry Holt and Co., Inc., 873 F.2d 576 (1989) (holding that fair use accommodates all First Amendment claims to copyright infringement), Twin Peaks Productions, Inc. v. Publications Intern., 778 F.Supp. 1247 (S.D.N.Y. 1991) (holding that 'fair use' analyses incorporates First Amendment defense), Hustler Magazine, Inc. v. Moral Majority, Inc., 606 F.Supp. 1526, (C.D.Cal. 1985) (holding that the First Amendment is not a defense to copyright infringement), and Quinto v. Legal Times of Washington, Inc., 506 F.Supp. 554, (D.C.D.C. 1981) (holding the 'definitional balance' to accommodate First Amendment concerns).

In the late 1990's, group of artists and educators questioned the constitutionality of the Sony Bono Copyright Term Extension Act (CTEA) as a restriction on First Amendment rights.[101] This legislation extended the terms of both new and existing copyrights by twenty years.[102] The petitioners argued that extending the copyright terms for works already scheduled to enter the public domain violated their constitutional right to use those already existing works.[103] They asked the Court to apply the intermediate scrutiny of content-neutral prior restraints to the new legislation, which they argued would render it unconstitutional.[104]

The United States District Court for the District of Columbia had earlier rejected the petitioners' First Amendment claims, and held that the First Amendment was categorically never a defense to copyright infringement.[105] The lower court stated "plaintiffs lack any cognizable First Amendment right to exploit the copyrighted works of others." This followed precedent from *United Video v. F.C.C.*,[106] in which the district court held, "Although there is some tension between the Constitution's copyright clause and the First Amendment, the familiar idea/expression dichotomy of copyright law, under which ideas are free but their particular expression can be copyrighted, has always been held to give adequate protection to free expression."[107]

Although the Supreme Court in *Eldred* agreed with the D.C. Circuit in result,[108] it also explicitly overruled the lower court's holding that the First Amendment could never be a defense to a copyright infringement claim.[109] Justice Ginsberg, writing for seven of the nine Justices, explained at the very end of the majority opinion: "We recognize that the D.C. Circuit spoke too broadly when it declared copyrights “categorically immune from challenges under the First Amendment.” [citation omitted]. But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."[110]

Therefore, in 2003, although the Supreme Court held that 'definitional balance' and 'fair use' were thus far adequate accommodations of First Amendment speech, it left the door open for further constitutional challenges to forthcoming copyright legislation in cases where Congress might overstep the bounds of the 'traditional contours'.[111] The Court continues to hold that there is no per se ban on First Amendment challenges to copyright, but still has never decided a case in which the First Amendment prevailed. And no act of Congress has yet been held to unconstitutionally alter the 'traditional contours' of copyright.

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[101] Pub. L. No. 105-298, Title I, §102(b), (d), 112 Stat. 2827 (1998) (amending 17 U.S.C. §§ 302, 304 (1976).
[102] Eldred v. Reno, 74 F. Supp.2d 1 (D.C. Cir. 1999), *and see* 17 U.S.C.A. §§ 302(a, c), 304.
[103] Eldred v. Reno, 239 F.3d. 372, 375 (D.C. Cir. 2001).
[104] *Id*.
[105] *Id*.
[106] 890 F.2d 1173, 1191 (D.C. Cir. 1989).
[107] *Id*.
[108] Eldred v. Ashcroft, 537 U.S. 186, 222 (2003).
[109] *Id*.
[110] *Id* at 221.
[111] *Id*.

The Court heard the next Constitutional challenge to a subsequent copyright extension in 2011, under a similar pattern as *Edlred*, in *Golan v. Holder*.[112] The petitioners were again scholars and artists, who this time protested the removal of certain works from the public domain.[113] A new extension enacted by Congress in order to bring United States' copyright law into compliance with the Berne Convention of 1886, as required by the 1994 Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), re-instated copyright protection for certain works that had previously been available in the United States' public domain.[114]

The Supreme Court found this extension, known as the Uruguay Round Agreements Act § 514 (URAA), constitutional in a January 18, 2012 decision.[115] The Court hardly seemed to consider the First Amendment issue, stating once again that the 'definitional balance' and 'fair use' analyses were sufficient protection for any work that had gained or re-gained copyright protection from the new legislation.[116] The court also held that bringing copyright law into compliance with international agreements was rationally related to the dissemination of information, which is a permissible government interest under the copyright clause.[117]

Thus, although the Supreme Court vaguely acknowledges that there may be some First Amendment limitations on copyright, it has yet to find those limitations. Once again, the Court left the door open for more copyright litigation, but declined to indicate when it might be shut. And again, content users from all walks of life are left twisting in the winds of uncertainty due to a lack of focus on the underlying natural rights of free expression and public dissemination.

III. The Foreign Policy-Driven Congressional Progression of the Private Property Regime

The last two cases discussed, Eldred and Golan, resulted from new copyright legislation passed to implement foreign treaties with the goal of conforming copyright legislation at the international level.118 The problems inherent in this implementation stem from different conceptions of what copyright laws are meant to accomplish. In civil law countries, copyright laws were enacted to protect what are viewed as natural property rights, inherent to the creator of the property.119 But in common law countries such as the United States, copyright laws were originally meant to serve the public by disseminating information.120 So it is no wonder that forcing conformity between these disparate systems has brought some turmoil.

A. Foreign Policy and Intellectual Property Protection Treaties

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[112] Golan v. Holder, 132 S. Ct. 873, 874 (2012).
[113] *Id*.
[114] *Id*.
[115] *Id* at 873.
[116] *Id* at 892-894.
[117] *Id* at 888-891.
[118] *See* David L. Lange, Risa J. Weaver & Shiveh Roxana Reed, *Golan v. Holder: Copyright in the Image of the First Amendment*, 11 J. MARSHALL REV. INTELL. PROP. L. 83, 86-87 (2011).
[119] *Id and see Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813) in THE WRITINGS OF THOMAS JEFFERSON, (Andrew A. Lipscomb & Albert Ellery Bergh 1905), available at http://press-pubs.uchicago.edu/founders/documents/a1_8_8s12.html*
[120] *Id*.

The CTEA and the URAA are not the only recent Congressional acts that advance private property rights at the expense of free speech. The Berne Convention of 1886 was the first international agreement to regulate trade in intellectual property between member countries.[121] The United States did not join the Berne Convention initially because the treaty was so much more protective of private property rights than of free expression.[122]

For example, the Berne Convention protected 'moral rights', or rights of an artist to control the 'integrity' of her work.[123] Also, works in the United States once required registration to gain protection, as works under the Berne Convention did not. And in the United States authors once had to actively renew their copyright, while under European law, copyright owners did not.[124] But in 1988, Congress passed the Berne Convention Implementation Act, and began enacting legislation to bring the United States into compliance with the international treaty.[125]

The next international agreement resulted in formation of the World Trade Organization, and incorporated Articles 1 through 21 of the Berne Convention as the Agreement on Trade Related Aspects of Intellectual Property (TRIPS).[126] This was the international agreement under which the CTEA was passed, the statute at issue in Golan.[127] But this was not the last advancement of intellectual property rights in the United States in the past fifteen or twenty years.

Next came an international agreement reached by the World Intellectual Property Organization.[128] Two treaties were signed by the organization in 1996, the Copyright Treaty and the Performances and Phonograms Treaty.[129] And perhaps most notoriously, one of the most troubling Congressional copyright advancements to date, the Digital Millennium Copyright Act (DMCA), was enacted because of these treaties.[130] This act has been in place long enough for the problems inherent in its procedural implementations to come to light, and these problems are discussed in more detail below.

The latest international agreement, the Anti-Counterfeiting Trade Agreement,[131] was signed by the United States in October of 2011.[132] ACTA requires member countries to impose both fines and imprisonment for not only copying a work, but also "aiding and abetting" a

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[121] Deborah Ross, *The United States Joins the Berne Convention: New Obligations for Authors' Moral Rights*? 68 N.C. L. REV. 363, 364-365 (1990).
[122] David L. Lange, Risa J. Weaver & Shiveh Roxana Reed, *Golan v. Holder: Copyright in the Image of the First Amendment*, 11 J. MARSHALL REV. INTELL. PROP. L. 83 (2011).
[123] *Id*.
[124] *Id* at 85.
[125] *Id*.
[126] *Id*.
[127] *Id*.
[128] http://www.wipo.int/about-wipo/en/
[129] WIPO Copyright Treaty, June 3, 2002, 112 Stat. 2860, 2186 U.N.T.S. 1-38542, *and* WIPO Performances and Phonograms Treaty, June 3, 2002, 112 Stat. 2860, 2186 U.N.T.S. 1-38543.
[130] 17 U.S.C.A. § 512, Pub.L. 105–304, 112 Stat. 2860 (Oct. 28, 1998).
[131] (Oct. 1, 2011) *available at* http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf
[132] Joint Press Statement of the Anti-Counterfeiting Trade Agreement Negotiating Parties, *available at* http://www.ustr.gov/about-us/press-office/press-releases/2011/october/joint-press-statement-anti-counterfeiting-trade-ag

'criminal' infringer.[133] What kind of legislation Congress will attempt to pass to comply with this international agreement is yet to be seen. But many critics agree that the ACTA provisions "are both vague and frightening to a free society."[134]

Criminalization of what has thus far been civil infringement is one concern of free speech proponents.[135] Another feared result is the implementation of 'graduated response', or 'three strikes' rules.[136] These provisions in the treaty encouraged Internet service providers (ISPs) to eliminate Internet access to the websites of 'repeat infringers' altogether, which would permanently silence voices on the web without any adjudication.[137] The express provisions of these politically dangerous laws have been removed from the final version of the treaty, but the policy encouraging member states to implement such measures still remains.[138]

By studying the chronology of these international agreements, one can see the progression of the protection of private intellectual property rights, and in contrast, the erosion of free speech. Since the United States became a member of the Berne Convention in 1988, each new treaty has brought with it more international obligations to prevent infringement at the expense of free expression. Like the use of the 'traditional contours' in the Supreme Court, this development illustrates the erosion of the natural right of free speech and the progression of the private property regime at the expense of public dissemination. The following section looks at some provisions adopted to comply with these international agreements in the United States, and how they directly erode public rights to information and free speech.

B. The Digital Millennium Copyright Act

The DMCA, approved by Congress in 1998, is as yet the boldest attempt of the United States Congress to curtail Internet piracy of intellectual property.[139] The stated purpose of the act was to... "provide certainty for copyright owners and Internet service providers with respect to copyright infringement liability online."[140] The DMCA implemented a new, self-help procedure for copyright owners to exercise control over their intellectual property. And this procedure creates problems when it is abused by copyright holders who, for political purposes or purposes of corporate espionage, wish to limit the speech of others.[141]

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[133] Anti-Counterfeiting Trade Agreement Art. 23 & 24, available at: http://keionline.org/sites/default/files/acta1105_en.pdf.

[134] Kenneth L. Port, *A Case Against the ACTA*, 33 CARDOZO L. REV. 1131, 1165 (Feb. 2012), *but see* Khaliunaa Garamgaibaatar, *Anti-Counterfeiting Trade Agreement: Copyrights, Intermediaries, and Digital Pirates*, 20 COMM. LAW CONSPECTUS 199, 201 (2011).

[135] Jennifer L. Hanley, *ISP Liability and Safe Harbor Provisions: Implications of Evolving International Law for the Approach Set Out in Viacom v. YouTube*, 11 J. INT'L BUS. & L. 183, 199 (2012).

[136] Annemarie Bridy, *ACTA and the Specter of the Graduated Response*, 26 AM. U. INT'L L. REV. 559, 560 (2011).

[137] *Id*.

[138] *Id* at 571.

[139] Wendy Seltzer, *Free Speech Unmoored in Copyrights' Safe Harbor: Chilling Effects of the DMCA on the First Amendment*. 24 Harv. J.L. & Tech. 171, 175 (2010).

[140] S. Rep. No. 190, 105th Cong., 2d Sess. 1998, 1998 (WL 239623), *and see* Daniel J. Gervais, Cloud *Control: Copyright, Global Memes, and Privacy*, 10 J. TELECOMM. & HIGH TECH. L. 53 (Winter 2012) (discussing on how it is questionable that the DMCA even serves the goal of protecting intellectual property revenue).

[141] Seltzer at 210-213, *see also* Thomas A. Mitchell, *Copyright, Congress, and Constitutionality, How the Digital Millennium Copyright Act Goes Too Far*, 79 NOTRE DAME L. REV. 2115 (Oct. 2004).

The DMCA takedown procedure is somewhat simple, and at first glance this can be appealing. A copyright owner, having found an unlicensed bit of her intellectual property posted on a host website (or linked by a search engine), needs only to contact the intermediary site or engine and request the material be removed.[142] An intermediary is any site that provides data hosting, webhosting, serves as an interface between third parties for the exchange of goods, or serves in any way to facilitate the sharing of information between users.[143] Once the intermediary receives the notification through its 'designated DMCA agent', it can escape liability for any contributory infringement if it expediently removes the offending material.[144] Unfortunately, the lack of any judicial supervision leaves this process open to certain abuse.[145]

In her article on the 'chilling effects' of the DMCA, Wendy Seltzer recounts an event that directly illuminates the effect of the DMCA takedown procedure on the purposes of the First Amendment.[146] During the 2008 presidential election, Senator John McCain's campaign posted several videos to YouTube. These campaign videos used clips from particular television shows to illustrate certain political issues.[147] Television networks that owned the rights to these clips filed DMCA takedown notices with YouTube, resulting in the prompt removal of Senator McCain's videos.[148]

The allegedly offending material was down for several weeks just prior to Election Day.[149] "If there was ever a clear case of non-infringing fair use -- speech protected by the First Amendment -- this should have been it: a political candidate, seeking to engage in public multimedia debate...".[150] These abusers of the DMCA process were capable of successfully silencing campaign speech right at its most critical moment. Though this particular medium of communication might not have been envisioned by our forefathers, this was exactly the type of communication they sought to protect with the United States Constitution.

This abuse was a problem that Congress anticipated and attempted to prevent, however with very limited success. Another provision in the DMCA provides for counter-notices, by which an accused user whose use is not infringing can notify the intermediary and have his content re-posted.[151] It also provides that the victim of a notice that has been filed by misrepresentation may bring an action against the entity or individual who filed the misrepresentation.[152]

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[142] 17 U.S.C.A. § 512(b), (c)&(d), *and* Lydia Pallas Loren, *Deterring Abuse of the Copyright Takedown Regime by Taking Misrepresentation Claims Seriously*, 46 WAKE FOREST L. REV. 745 (Fall 2011).
[143] See Edwards, Lilian; Waelde, Charlotte (2005*). Online Intermediaries and Liability for Copyright Infringement*. Keynote paper at WIPO Workshop on Online Intermediaries and Liability for Copyright, Geneva. World Intellectual Property Organization (WIPO). pp. 5–6
[144] *See* Loren at 745-746.
[145] Seltzer *supra* note 138 at 197-198.
[146] *Id*.
[147] *Id*.
[148] *Id*.
[149] *Id*.
[150] *Id* at 173.
[151] 17 U.S.C.A. § 512(f)
[152] *Id*.

But an action for misrepresentation can only be successful if it meets an incredibly high burden of proof. The accused infringer must prove that the copyright owner made a 'knowing material misrepresentation' as to whether s/he owned the copyright or actually knew that the plaintiff's posted material was not infringing.[153] This means that for a finding of 'bad faith' misrepresentation, a plaintiff (the accused infringer) must show that the defendant (the copyright holder) knew or should have known that the plaintiff's use of the defendant's intellectual property was 'fair'.[154] In other words, the plaintiff (accused infringer) must divine the application of the law as well as the defendant's (copyright holder's) intentions. And as discussed in Part I(B), actually knowing this before a federal court renders a decision is nearly impossible.

This is a high hurdle of proof, and many cases have held that the plaintiff (alleged infringer) must prove lack of a good faith belief on the part of the DMCA claimant.[155] One of the only successful claims involved a mother who posted a video of her toddler dancing to Prince's "Let's Go Crazy."[156] Prince is notoriously outspoken against anyone using his material without permission, even if a court would find it fair use.[157] The woman won her claim against Prince's label, Universal Music, on proof that the company was sophisticated enough to have known the material would have been held fair use under the Copyright Act.[158]

But this one example of victory over a "knowing material misrepresentation" in a DMCA takedown notice is a very rare exception to the usual speech-chilling rule.[159] The financial incentives created by the DMCA distort the procedure of copyright litigation at the expense of free expression. The financial reward for winning these cases is very small compared to the costs of litigation, which is a huge disincentive for a poster (or her attorney) to stand up for her right to free speech.[160]

Additionally, the abnormal incentives created by the DMCA flip the responsibilities of copyright holder and infringer.[161] Instead of the copyright holder having to sue the re-posting user, the user will have to sue the copyright holder in order to speak freely.[162] Thus, state-granted intellectual property rights have perversely become a bulwark against the natural rights of free expression and public dissemination. Surely this was not the intention of the framers of the Constitution.

Further, an intermediary who does not expediently remove infringing material can be liable for contributory infringement under the Copyright Act, and has very little incentive to

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[153] *Id*.
[154] *See* Lenz v. Universal Music Studios, 572 F. Supp. 2d 1150 (N.D. Cal. 2008).
[155] 17 USCA § 512(b)(3)(a)(v), *and see* Third Educ. Group, Inc. v. Phelps, 675 F.Supp.2d 916 (E.D.Wis.,2009) (plaintiff could not prove lack of good faith due to complex legal questions involved in ownership rights), and Dudnikov v. MGA Entertainment, Inc., 410 F.Supp.2d 1010, (D.Colo.2005) (holding that plaintiff did not prove lack of good faith on behalf of corporate copyright holder, even though copyright holder was advised by IP counsel).
[156] *See* Lenz, 572 F.Supp.2d at 1150.
[157] *Id*.
[158] *Id*.
[159] *See* Seltzer *supra* note 142 at 210-217 (citing a lengthy list of incidents of DMCA abuses, from the truly frightening to the somewhat amusing).
[160] *Id* at 178.
[161] *Id* at 210-217.
[162] *Id* at 178.

defend the poster, who is also unlikely to succeed in any subsequent litigation against the copyright holder for unwarranted removal.[163] The result is essentially that the government turns intermediaries and search engines into de facto federal judges, with a self-serving financial bias in favor of findings of infringement. On one side the intermediaries are threatened with contributory liability, and on the other side with nothing, so there is no incentive to be fair. This skews take-down results in a way that creates a 'chilling effect' on free expression, discouraging speech before it is communicated to its intended audience.[164]

One First Amendment challenge to the DMCA has been adjudicated,[165] but only in regard to the speech and non-speech nature of computer code. In Universal City Studios v. Reimerdes, [166] the Southern District of New York held that the DMCA did not violate the First Amendment rights of those who posted decoding programs that would allow other Internet users to decrypt and manipulate encrypted content.[167] Addressing the anti-trafficking and anti-circumvention provisions of the DMCA, the Second Circuit Court of Appeals affirmed the decision, specifically analyzing computer code as speech, computer programs as speech, and addressing the question whether computer code, and specifically the decryption code, was protected by the First Amendment.[168]

The Second Circuit held that the computer code and computer programs, as well as the decryption code at issue, all constitute speech, and are therefore entitled to some First Amendment protection.[169] However, the court also found that the decryption code contained both speech and non-speech components, and held that this mixture entitled the code only to intermediate scrutiny protection against the DMCA.[170] The court also found that both provisions in question held up under a content-neutral analysis, because they both "serve[d] a substantial governmental interest, the interest [was] unrelated to the suppression of free expression, and the incidental restriction on speech [did] not burden substantially more speech than is necessary to further that interest".[171]

This was a narrow holding related only to the decoding software and the anti-circumvention and anti-trafficking provisions of the DMCA. The Second Circuit was very cautious of giving any further indication of whether it would uphold or strike down any other provisions of the DMCA in relation to other types of speech.[172] Therefore, a lower court would be free to examine the constitutionality of the take-down notice procedure, regardless of this holding. And given the conflict between the DMCA and proper constitutional policy, courts should take a very close look at this legislation every time they are afforded the opportunity.

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[163] *Id* at 180.
[164] Frederick Schauer*, Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, (1978).
[165] Universal City Studios v. Reimerdes, 111 F.Supp.2d 294, (S.D.N.Y. 2000).
[166] *Id*.
[167] 273 F.3d 429, 432. (2d Cir. 2001).
[168] 17 U.S.C.A. § 1201 (2010), *and see Universal City Studios*, 273 F.3d at 445-458.
[169] *See Universal City Studios*, 273 F.3d at 453.
[170] *Id* at 454.
[171] *Id*.
[172] *Id*.

C. The Avalanche of Legislation

Lawmakers and entertainment industry professionals are adamant about the need for even more protection for copyright holders from pirates and Internet users.[173] There is constantly more Congressional legislation proposed over digital copyright infringement issues, most recently the Stop Online Piracy Act (SOPA) and the Protect Intellectual Property Act (PIPA).[174] SOPA and PIPA were basically long-arm statutes that allowed the Attorney General to file complaints against unknown owners of foreign websites who host or sell infringing material.[175] Under these bills, after obtaining summary judgment against a defendant who was unlikely to appear, the attorney general could then file for an injunction against any website or search engine that so much as linked to the offending site.[176]

Any site failing to comply with the court order would be vulnerable to court sanctions.[177] This would most certainly cause user-generated content sites to "err on the side of censorship", just as they do under the DMCA.[178] Like the DMCA, this could have caused considerable problems for procedural protection of expression, and 'chilled' the speech of a user by any site who simply did not want to be part of any litigation.[179]

Another concern was that these statutes would have created 'blacklists' of foreign websites that would never be available in the United States. They also allegedly created security threats by encouraging domain name system blocking schemes.[180] If free expression is going to be sufficiently protected in the digital age, Congress is needs to remember the purpose of United States' copyright law and the First Amendment.[181]

But instead, Congress has quickly continued passing more and more restrictive legislation on speech under the banner of copyright and the pressure of international agreements. There are many other examples. The 1990 Visual Rights Act gave artists 'moral rights' over their visual works, which before were only available under copyright laws of civil law countries.[182] The Criminal Penalties for Copyright Infringement Act of 1992 could send an infringer to prison for up to five years for copying material worth more than $2,500.[183] The No Electronic Theft Act criminalized 'willful' infringement, even if not for commercial purposes, in direct opposition to

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[173] U.S. Intellectual Property Enforcement Coordinator Annual Report on Intellectual Property Enforcement (March 2012), *available at* http://www.whitehouse.gov/sites/default/files/omb/IPEC/ipec_annual_report_mar2012.pdf.
[174] Stop Online Piracy Act, 112th Cong. (2011-2012) H.R.3261.IH, *and* PROTECT Intellectual Property Act, 112th Cong., 1st Sess. H. R. 3261 (2012).
[175] *Id*.
[176] *Id*.
[177] 158 Cong. Rec. H33, Stop SOPA and PIPA, (Jan. 18, 2012) (Testimony of Congressman Peter DeFazio, Oregon), *available at* http://www.gpo.gov/fdsys/pkg/CREC-2012-01-18/pdf/CREC-2012-01-18-pt1-PgH33-2.pdf
[178] *See* Seltzer *supra* note 142 at 189.
[179] *Id*.
[180] Jack Schecter, *Online Piracy Legislation: Is the Cure Worse than the Disease?*, 59 APR FED. LAW. 20 (April 2012).
[181] Craig W. Dallon, *The Problem With Congress and Copyright law: Forgetting the Past and Ignoring the 'Public Interest'*. 44 SANTA CLARA L. REV. 365 (2004).
[182] Visual Rights Act, 17 U.S.C.A. § 106A (1990).
[183] P.L. 102-561. H.R. Rep. 102-997, 2d Sess. (1992).

the 'traditional contours' of 'fair use' and the 'definitional balance'.[184] In 1996, RICO[185] liability was added to certain copyright infringement claims by passing the Anti-counterfeiting Consumer Protection Act.[186] And criminal sanctions were again increased for different kinds of infringement with the Anti-counterfeiting Amendments Act of 2004, the Artists Rights and Theft Prevention Act of 2005, and the Enforcement of Intellectual Property Rights (PRO-IP) Act of 2008.[187]

The PRO-IP Act,[188] which again increased criminal and monetary sanctions, also created the Office of the U.S. Intellectual Property Enforcement Coordinator.[189] It also authorizes a court to destroy or impound any material if a plaintiff has a reasonable chance of success on a claim.[190] All of this legislation, like the DMCA, compounded by the uncertainty of copyright litigation, once again significantly limits the expressive rights and incentives of creators of all kinds of work, from music, to software, to visual art.[191] And like the courts, Congress is beginning to hold government-granted intellectual property rights in higher regard than the natural right of free speech.

Each new piece of legislation is a turn on a ratchet that tightens the lid of copyright down on top of free expression.[192] And any post-hoc attention paid to free speech by a court is usually too late, as accused material would already be removed or destroyed, a business or home will have already been raided, business assets seized and destroyed, an accused infringer charged and possibly held in custody, and therefore the damage to an innocent 'fair-user' irrevocably done.[193] The uncertainty of litigation, in combination with possible destruction of the work and criminal sanctions, provides little incentive for a creator to take any risk in creating a new work with even the slightest reference to his inspiration. Chill winds indeed are blowing from the realm of copyright.

IV. The Shared Purpose of Copyright and the First Amendment

The reason for the dissonance in traditional U.S. copyright law and the recent legislation being passed under international agreements is more fundamental than many lawmakers seem to

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[184] No Electronic Theft Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997).
[185] Federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (Westlaw 2012), *and see* Julie L. Ross, *A Generation of Racketeers? Eliminating RICO Liability for Civil Copyright Infringement Claims*, 13 VAND. J. ENT. & TECH. L. 55, 79 (Fall 2010) (explaining how "racketeering activity" under this statute includes any act indictable under 18 U.S.C. § 2319, which in turn controls the punishment for criminal copyright infringement under 17 U.S.C. § 506(a)).
[186] Pub. L. No. 104-153, 110 Stat. 1386 (1996), *and see* Ross *supra* note 187 at 79-80, (explaining how RICO claims can even be imputed to a user who did not distribute electronic copies for profit, and is not a member of a crime organization, as long as the distributed work was "known to be intended for commercial distribution" and "distributed over a computer network").
[187] Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J.L. & TECH. 469, 485 (2011).
[188] *See* 15 U.S.C.A. § 8111, 17 U.S.C.A. § 503, and 18 U.S.C.S.A. §2323 (2010).
[189] *Id*.
[190] *See* Michael Katz, *Surviving Copyright: Survival & Growth in the Remix Age*, 13 INTELL. PROP. L. BULL. 21 (2008).
[191] *See Id*.
[192] Joshua N. Mitchell, *Promoting Progress with Fair Use*, 60 DUKE L.J. 1639, 1642-1656 (April 2011).
[193] *See* Katz at 23-24.

recognize. The very basis of the conflict is the differing theories of law between civil law and common law countries. Civil law countries view copyright as a 'natural' right of authorship, whereas common law countries view copyright as a means to incentivize works of authorship to promote the dissemination of information.[194] In common law counties, free speech and public dissemination of ideas are 'natural rights' more fundamental than the legislatively-granted right of intellectual property ownership.

Therefore, while in civil law countries the bounty of intellectual toil is considered an aspect of the natural right of property, in the United States, the ability to own and therefore sell a work is meant to be a temporary carrot for the creative voice.[195] Allowing authors to capitalize on their works for a limited period of time is meant to encourage them to disseminate their ideas.[196] In this way Article I, section 8, clause 8 of the United States Constitution, granting Congress the power to establish intellectual property rights that do not already exist in a natural state, serves the public good, which is one of the shared goals of the Copyright Clause and the First Amendment.[197] The dissemination of information ultimately serves the public, as opposed to an individual squirreling information and ideas away for herself, or hoarding them for her own economic gain.

Sometimes it is argued that self-actualization is the goal of the copyright clause, and it is therefore more aligned with the purposes of intellectual property laws in civil law countries.[198] But self-actualization can also be seen as a means to serve the public good. Some scholars argue that this is the best and the highest rationale for freedom of expression.[199] There seems to be a fear that admitting the public goal in both copyright law and First Amendment doctrine would somehow endanger all speech that was not political,[200] but this is surely not the case. Though some commentators argue that political speech is the only speech that should be protected, an inquiry into what constitutes political speech would be almost impossible. Take for example, the breakthrough film, "Guess Who's Coming to Dinner?," an expose of racial stereotypes and attitudes in 1960's America.[201] Art imitates life, which imitates art, and one cannot be said to be separate from the other.[202]

If these purposes are an "interlocking web" of values, with none being derivative of the other,[203] certainly there is a central thread to this web, and that is the public good. There is no other rationale cited so frequently by our founding fathers. Thomas Jefferson wrote a letter to Isaac McPherson in which he pondered the Copyright Clause in relation to Freedom of Expression.[204] In this letter, he explained that it is unnatural for an idea to be considered the

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[194] David L. Lange, Risa J. Weaver & Shiveh Roxana Reed, *Golan v. Holder: Copyright in the Image of the First Amendment*, 11 J. MARSHALL REV. INTELL. PROP. L. 83, 86-87 (2011).
[195] *Id*.
[196] 471 U.S. at 558.
[197] Michael D. Birnhack, NIMMER ON COPYRIGHT § 19E.03 (2011).
[198] Justin Hughes. *The Philosophy of Intellectual Property*, 77 Geo. L.J. 287, 315-318 (Dec. 1988).
[199] *See* Martin H. Redish. *The Value of Free Speech*, 130 U. PA. L. REV. 591 (Jan. 1982).
[200] *Id*.
[201] "GUESS WHO'S COMING TO DINNER?" (Columbia Pictures 1967).
[202] OSCAR WILDE, THE DECAY OF LYING (1891).
[203] *See* Redish *supra* note 201 at 603.
[204] Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813) *in* THE WRITINGS OF THOMAS JEFFERSON, *supra* note 12.

property of any one person, because "ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition..."[205]

In this letter, Jefferson expressed doubt that a system granting monopolies over intangible property could encourage public discourse any better than one that does not. However, he chose to sit on the patent board in order to develop the law of intellectual property, property which he wrote was "given not of natural right, but for the benefit of society..."[206] So, although Jefferson was sometimes doubtful of the usefulness of the Copyright Clause in accomplishing its goal of serving the public good, he acquiesced in its use for this purpose. By comparison, in his first inaugural address, he praised the American guarantee of free speech, which he viewed as a natural right, saying, "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."[207]

James Madison also viewed expression as a natural right, and intended copyright to serve the public good, as evidenced in The Federalist no. 43.[208] There, he stated that, "The copy right of authors has been solemnly adjudged in Great Britain to be a right at common law. The right to useful inventions, seems with equal reason to belong to the inventors. The public good fully coincides in both cases..."[209] As a president who had been a drafter of the First Amendment, he also wrote in his eighth annual message to Congress that the United States government was one "pursuing the public good as its sole object, and regulating its means by the great principles consecrated in its charter, ...a government which watches over...freedom of speech..."[210] He also wrote in his detached memoranda that he believed the monopolies granted by copyright ought to be temporary, because doing so was sufficient to encourage authors to serve the public good.[211]

Admittedly, the argument can become circular. The First Amendment and the Copyright Clause serve the individual who serves the public interest, which serves the individual. James Kent wrote of the balance between freedom of the press and the law of libel and slander: "But though the law be solicitous to protect every man in his fair fame and character, it is equally careful that the liberty of speech, and of the press, should be duly preserved . . . [this] is deemed essential to the judicious exercise of the right of suffrage, and of that control over their rulers, which resides in the free people of these United States."[212]

But perhaps Justice Brandeis bolstered the intent of our founders best in his moving concurrence in Whitney v. California:

> They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech

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[205] *Id*.
[206] *Id*.
[207] *Id*.
[208] Available at: http://www.constitution.org/fed/federa43.htm
[209] ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST, (Jacob E. Cooke. 1961).
[210] JAMES MADISON, THE WRITINGS OF JAMES MADISON, 384 (1808-1819).
[211] Craig W. Dallon, *The Problem With Congress and Copyright law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 425 (2004) (quoting James Madison's detached memoranda).
[212] JAMES KENT, COMMENTARIES ON AMERICAN LAW, (1826 - 1830).

> and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law-the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed. [213]

As Justice Brandeis recognized, our forefathers valued freedom of expression as both an end and a means. The goal of serving the public good is inextricably tied to the intention of our founding fathers when recognizing and protecting intellectual property rights, as is the natural right of free speech and dissemination of information. It seems lately that Congress has forgotten this goal. But the public good, hand in hand with these natural rights, should be given full due, especially when considering copyright or anti-piracy legislation that might endanger freedom of speech.

V. Better Serving the Original Goals of Copyright and the First Amendment

Since the United Stated joined the Berne Convention in 1988, Congress has ignored the natural right of free speech when enacting copyright legislation. The Supreme Court should use standards of review more appropriate for the protection of freedom of expression against this advancement in the legislature. The crux of the conflict is the dissonance between the 'natural' right theory of intellectual property that is becoming more popular due to compliance with international agreements, and our framers' original conception of the public good purpose of copyright grants. These two theories of intellectual property can usually be reconciled, but when they do come into conflict, courts should construe them to protect the framers' original intent.

The courts should start by addressing the take-down notice provisions of the DMCA. These have not been addressed as content-based prior restraints, even though "they are imposed to limit speech before any adjudication on the merits of the copyright claims,"[214] and do so arguably based on the content of the posted speech. Prior restraint on speech is a limitation on speech before it is published.[215] Though the DMCA removes the material from publication before it has reached its intended audience, the material has already been posted, therefore the DMCA take-down notice procedure cannot be technically considered a prior restraint.

However, the DMCA creates "excessive promotion of self-censorship".[216] This leads to a 'chilling effect', which like a prior restraint, stops expression before it is made. Also, like a prior

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[213] 274 U.S. 357, 375 (1927).
[214] *See* Seltzer *supra* note 142 at 190.
[215] Near v. Minnesota, 283 U.S. 697 (1931).
[216] *See* Seltzer at 194.

restraint, the DMCA restrictions are content-based.[217] The alternative argument is that the government is not restraining a message that an Internet user conveys, only encouraging a private actor to censor on private property. But a Congressional act requires these private actors to restrain speech based on its content, and courts should realize that this government action creates the same type of constitutional problem as overt government censorship.

By requiring intermediaries to act as judges, juries, and executioners over such vague doctrines as 'fair use' and 'definitional balance', especially under the threat of contributory infringement, Congress has granted a 'standardless delegation' to these intermediaries, one it would not even be allowed to grant to a government agency.[218] Also, Congress has given these intermediaries every incentive to restrict speech as opposed to protecting it because of the monetary penalties they face as possible contributory infringers.[219]

These intermediaries are made government proxies, who will restrict speech based on whatever standard they wish, which is exactly what happened in the case of Senator McCain's YouTube videos.[220] This is also akin to what happened in the first days of the English printing press, when the Stationers' Company controlled the dissemination of information through the Licensing Act.[221] This nominally private censorship was a direct trigger for the enactment of the Statute of Anne, the predecessor of the U.S. Copyright Act, which was intended to end this censorship by opening copyright protection to those who were not members of The Company.[222]

In *Southeastern Promotions, Ltd. v. Conrad*, the Supreme Court laid down very explicit factors in determining whether a government restriction on speech is a prior restraint.[223] The Court held that a provision must be struck down when "the exercise of authority was not bounded by precise and clear standards,"[224] which is exactly what happens under the DMCA. It required that the restriction be imbedded in a licensing scheme, which copyright is.[225] And it also required that the governing body make some determination on whether to grant a license based on "'appraisal of facts, the exercise of judgment, and the formation of an opinion.'"[226] Under the DMCA, the intermediary is required to do just this, as it decides whether or not to remove a poster's content. So again, the DMCA functions effectively as a prior restraint.

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[217] *See* Thomas v. Chicago Park District 534 U.S. 316, 321-322 (2002) *and also see* Andrew Beckerman-Rodau *Prior Restraints and Intellectual Property, The Clash between Intellectual Property and the First Amendment from an Economic Perspective*, 13 YALE J.L. & TECH 2, (2011).

[218] *See* SMOLLA § 6:16, (Even more so, it is questionable whether Congress even has the power to delegate these duties to private actors as opposed to a government agency, or whether Due Process should allow the takedown of user content before proper adjudication. To explore these ideas further would require sojourns into both administrative law and Due Process, which are beyond the scope of this article, *see* Benjamin Wilson: *Notice, Takedown and the Good Faith Standard*: *How to Protect Internet Users from Bad-Faith Removal of Content*, 29 ST. LOUIS U. PUB. L. REV. 613 (2010) (discussing the Due Process argument), *and see* Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11 (2006)).

[219] *See* Seltzer *supra* note 142 at 182.

[220] *See id* at 197.

[221] *See* Dallon *supra* note 3 at 399-400.

[222] *Id* at 408.

[223] 420 U.S. 546, (1975).

[224] *Id* at 553.

[225] *Id*.

[226] *Id* at 554, (quoting Cantwell v. Connecticut, 310 U.S. 296, 305 (1940)).

The danger of a prior restraint on free speech is much greater when the restriction would result in a high cost to First Amendment rights (especially when relative to a low cost to a copyright owner), when there is too much discretion afforded to the party determining the necessity of the restraint, and when possible delay in the dissemination of information could result in harm to the public good.[227] In the case of DMCA takedown notices, all of these elements are met. And like a prior restraint, "[t]he DMCA deprives the public of both access to speech that would ultimately be ruled lawful and the judicial certainty that would come from earlier adjudication of many of these disputes."[228]

The DMCA takedown notice procedure has as much 'chilling effect' on free speech as a prior restraint, and should be struck down as unconstitutionally restrictive. It incentivizes creators to self-censor based on fear of litigation and a sense of uselessness. The courts should hold statutes that cause these 'chilling effects' to a higher standard of scrutiny. Our courts should also treat as suspect any new legislation enacted under the international copyright agreements, which regard intellectual property as a 'natural' right, equivalent to freedom of speech. This would better serve the original intent of the framers of our Constitution, by encouraging the dissemination of information for the public good.

Conclusion

The Supreme Court is the guardian of our constitutional right to free speech, and this role should not, as Congress sometimes may, bow to pressures from entertainment industry professionals who seek to limit speech for private economic gain. The underlying problem with the recent progression of copyright law is that neither Congress nor the courts have focused on the natural, public right to dissemination or the natural right of free speech when considering copyright legislation, and instead have focused on the private property concerns and state-granted rights of copyright holders.

The DMCA takedown procedure, though technically not a prior restraint, causes such a chilling effect on expression that it is arguably unconstitutional under the Free Speech Clause. Many similar problems exist with other copyright legislation as the DMCA, though it is beyond the scope of this article to explore those problems. But when a court encounters conflict embodied in such legislation, raised by problems in reconciling international law, it should construe the statute to favor the natural right of dissemination of information or the natural right to free speech, as would be most harmonious with our framers' original intent.

There are specific, suspect qualities a court should look for in such legislation. The 'traditional contours' of copyright are complicated doctrines with difficult, ad-hoc applications, especially when imported into the digital age, and should not be used as catch-all saviors to defeat infringement claims. A court should be wary if Congress delegates the duty of determining the application of these complicated judicial doctrines to private parties. A court should also be suspicious should a law criminalize individual copyright infringement, criminalize

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[227] Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L. J. (No. 2 Nov. 1998).
[228] *See* Seltzer *supra* note 142 at 193.

infringement for non-commercial purposes, levy heavy sanctions for minimal economic loss, or shift the burden of proof of innocence significantly onto an alleged infringer. When enacting copyright legislation, Congress should consider better protecting First Amendment speech with devices such as forced licenses and proper due process, and a court should seriously examine whether such legislation is congruent with our framers' original intent.

The Supreme Court has expressly reserved the right to find an overreaching piece of copyright legislation unconstitutionally restrictive. It is time for the Court to begin flexing its First Amendment muscles when analyzing these statutes. Perhaps this will encourage Congress to remember the purpose of copyright in the United States, which is to encourage free speech and the dissemination of ideas in furtherance of individual liberty and public good.