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Freedom of the Press 2.0

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Abstract

In today's digital age, copyright law is changing. It now attempts to regulate machines. Over the past twenty years, and particularly with the advent of the Internet, copyright holders have increasingly invoked copyright law to regulate directly—indeed, even to prohibit—the manufacture and sale of technology that facilitates the mass dissemination of expressive works. Although the concerns of copyright holders about the ease of digital copying are understandable, the expansion of copyright law to regulate—and, in some cases, to prohibit—technologies raises a troubling question. Can the government regulate under copyright law technologies that facilitate the dissemination of speech, consistent with the First Amendment? If so, are there any limits to what the government can do? Or does copyright law have constitutional carte blanche to regulate technologies, without any First Amendment scrutiny? Because copyright law, dating back to the first Copyright Act of 1790, traditionally refrained from regulating technologies directly, these questions were scarcely considered before. But, today, these questions have vital importance as copyright law and other laws proposed in service of copyright holders contemplate even greater regulation of emerging technologies that are revolutionizing the ability of individuals to create expressive content on the Internet, in the “Web 2.0” culture of user-created content. However, despite their importance, these questions have escaped attention in legal scholarship. This Article attempts to answer these questions by tracing the historical development of the “freedom of the press” that led to the Framers’ inclusion of the concept in the First Amendment. My core thesis is twofold: (i) the Framers understood the freedom of the press as the freedom of the printing press—a speech technology—to be free of intrusive governmental regulation, including restrictions on technology imposed under copyright law; and (ii) today, the *Sony* safe harbor operates as a “First Amendment safeguard” within copyright law that is designed to protect the freedom of the press and the development of speech technologies. All future attempts by Congress to regulate speech technologies under copyright law must answer to the Free Press Clause or the *Sony* safe harbor.

Freedom of the Press 2.0

Edward S. Lee*

Ever since the days of the printing press, copyright law has affected the regulation of technology that mass produces books and other works for dissemination to the public. But, historically, copyright did so only indirectly. Instead of regulating the technology of the printing press itself, the first copyright act in England, known as the Statute of Anne,¹ only regulated the products of printing, i.e., who owned the exclusive rights to print and publish works of authorship. The printing press itself was left off-limits from monopoly and government control, marking a profound change from the prior regime of the British Crown under which the printing presses were regulated in virtually all respects, including a strict limit on the total number of presses allowed in England. That limitation on the number of printing presses, along with the requirement of licensing and registration before any work could be published, effectively served the dual ends of censorship and monopoly. Limiting the number of presses was intended to limit the number of publications deemed to be heretical or piratical. Control over the technology, in other words, effectuated control over content. The Statute of Anne replaced this repressive regime of press regulation with a system of author's rights. And it did so while staying clear of regulating any aspect of the printing press, or the machines of mass publication. Copyright law was thus borne with a freedom of the press—an aversion to government control over the technology that enables the mass publication of speech. This basic corollary of copyright—a freedom of the press—lasted for well over two hundred years.

Today, however, copyright has begun to change. It now attempts to regulate machines. Over the past twenty years, and particularly with the advent of the Internet, copyright holders have increasingly invoked copyright law to regulate directly—indeed, even to prohibit—the manufacture and sale of technology that facilitates the mass dissemination of expressive works. In 1984, Universal City Studios and Disney asserted, unsuccessfully, a claim of secondary liability under copyright law to stop Sony's manufacture of video recorders.² The Supreme Court rejected what it characterized as an “unprecedented” attempt by copyright holders to stop a technology from production.³ The Court held that Sony could not be held secondarily liable for the copyright infringement of users of its devices: liability does not attach to the mere distribution of a technology that is

* Associate Professor, Michael E. Moritz College of Law, The Ohio State University. I thank David Goldberger, David McGowan, Mark Rose, Chris Sprigman, and Peter Shane for their insightful comments on earlier drafts.

¹ 8 Anne, c. 19 (1710) (Eng.).

² Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 421 (1984).

³ *Id.*

“capable of substantial noninfringing uses.”⁴ In 2005, the Court revisited the *Sony* doctrine in a case involving two distributors of p2p software used by some individuals for illegal music file-sharing. In *Grokster*, the Court clarified that the *Sony* decision established a “safe harbor” for the design and distribution of technologies that are capable of substantial noninfringing uses.⁵ But the *Sony* safe harbor does not shield defendants who attempt to “actively induce” others to use their products for copyright infringement.⁶ As explained in *Grokster*, although the *Sony* safe harbor offers some immunity to technology developers, it is not blanket immunity.

Parallel to these developments in copyright law has been the enactment of the Digital Millennium Copyright Act of 1998 (DMCA),⁷ which even more directly regulates, by prohibiting, the manufacture and sale of technologies that can be used to circumvent encryption of copyrighted works. Although these “circumventing” technologies may be different in kind from technologies (such as the printing press or copier) that themselves mass produce copies, the anti-circumvention law shares a similar aim with the aforementioned claims of secondary liability to regulate technologies directly, instead of the mere acts of copying. This major shift in copyright law to encompass the direct regulation of technology can no doubt be attributed to the advances in digital technology, especially related to the Internet and forms of digital copying. Digital technology makes it easier for everyone to make near perfect copies, instantaneously, often in ways that constitute copyright infringement. In the future, we can only expect more claims by copyright holders to regulate technology that enables the mass production, copying, and dissemination of works. The music and movie industries have already attempted to regulate digital video recorders (DVRs) such as TiVo through copyright litigation,⁸ and all digital receivers for radio and television under the controversial “broadcast flag” proposal in Congress.⁹

⁴ *Id.* at 442.

⁵ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2778-80 (2005).

⁶ *Id.* at 2779-80.

⁷ 17 U.S.C. § 1201.

⁸ *See* MPAA v. Replay TV, Civ. No. 01-09801 (C.D. Cal. filed Nov. 14, 2001); *Metro-Goldwyn-Mayer v. RecordTV*, No. 00-06443 (C.D. Cal. filed June 15, 2000); *Twentieth Century Fox Film, Inc. v. Scour, Inc.*, No. 00 Civ. (S.D.N.Y. filed July 20, 2000); Maribel Rose Hilo, *Tivo and the Incentive/Dissemination Conflict: The Economics of Extending Betamax to Personal Video Recorders*, 81 WASH. U. L.Q. 1043 (2003).

⁹ *See* Molly Shaffer Van Houweling, *Communications' Copyright Policy*, 4 J. TELECOMM. & HIGH TECH. L. 97 (2005). The FCC promulgated a broadcast flag rule, but the D.C. Circuit held that the rule fell outside the FCC's authority. *American Library Ass'n v. FCC*, 406 F.3d 689, 703 (D.C. Cir. 2005).

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

Because copyright law traditionally refrained from regulating technologies directly, these questions were scarcely considered before.¹⁰ But, today, these questions have vital importance as copyright law and other laws proposed in service of copyright holders contemplate even greater regulation of emerging technologies that are revolutionizing the ability of individuals to create expressive content on the Internet, in the “Web 2.0” culture of user-created content. However, despite their importance, these questions have escaped attention in legal scholarship. This Article attempts to answer these questions by tracing the historical development of the “freedom of the press” that led to the Framers’ inclusion of the concept in the First Amendment. My core thesis is twofold: (i) the Framers understood the freedom of the press as the freedom of the printing press—a speech technology—to be free of intrusive governmental regulation, including restrictions on technology imposed under copyright law; and (ii) today, the *Sony* safe harbor operates as a “First Amendment safeguard” within copyright law that is designed to protect the freedom of the press and the development of speech technologies.

Part I discusses the history of the freedom of the press, and its connection to the origin of copyright law. The historical materials before

¹⁰ The literature on the First Amendment and government regulation of speech-facilitating technologies outside of copyright law, such as under telecommunications law, has been extensive. See, e.g., C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57; Jim Chen, *Conduit-Based Regulation of Speech*, 54 DUKE L.J. 1359 (2005); Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899 (1998); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245 (2003). The literature analyzing the same issue within copyright law is sparse. While some attention has been given to First Amendment concerns about the Digital Millennium Copyright Act (DMCA) or potential liability of Internet service providers, see, e.g., 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, 414-29 (1999); Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833 (2000), no sustained attention has been devoted to the First Amendment or Free Press implications of copyright law’s attempted regulation of speech-facilitating technologies under secondary liability. Ernest Miller provides a helpful start to the discussion in a recent essay. Ernest Miller, *First Amendment Scrutiny of Expanded Secondary Liability in Copyright*, 32 N. KY. L. REV. 507 (2005).

and during the ratification of the Bill of Rights indicate that the Framers understood “the press” in “the freedom of the press” to refer primarily to the machine of the *printing press*, and not to any notion of an institutional “press” (of journalists) as we more commonly understand it today. While the concept also stood more broadly for the freedom of individuals to print and publish materials, such as pamphlets and local newspapers, one of the most important animating principles of the freedom of the press was a technological one. The freedom of press encapsulated the basic ability of individuals to use the printing press—the only technological means of mass publication then in existence—free from excessive governmental intrusion, such as prohibitions on the technology itself imposed by the British Crown. Indeed, the historical materials related to the framing of the Free Press Clause indicate that the Clause was understood as a limitation on the Copyright Clause and Congress’s power to grant copyrights.

Part II draws the doctrinal connection between the freedom of the press and the *Sony* safe harbor in copyright law. Although the Supreme Court has yet to fully tease out this doctrinal connection—and no copyright scholarship before has even suggested it, I demonstrate how, under the Court’s own precedents, the *Sony* safe harbor operates as a First Amendment safeguard within copyright law, just like the fair use and idea-expression doctrines. Although the Court has yet to formally recognize the *Sony* safe harbor as such, the *Sony* decision itself supports this conclusion. Even more, First Amendment principles and the Free Press Clause compel it. The *Sony* safe harbor operates as a First Amendment safeguard under copyright law to protect speech-facilitating technologies from excessive governmental intrusion, consistent with the freedom of the press.

Part III explores the significance of understanding the *Sony* safe harbor as a First Amendment safeguard. The distinction is more than a doctrinal nicety. It has important ramifications for copyright law, particularly in today’s digital age. First, to the extent that Congress enacts any copyright law that attempts to restrict speech technologies outside of the *Sony/Grokster* framework, First Amendment scrutiny is required. Based on the free press concerns about such restrictions dating back to the Framers, controls on technology, even under copyright law, raise serious constitutional concerns. Second, courts must apply the *Sony* safe harbor as a First Amendment safeguard within copyright law to protect free press interests. Four free press principles are recommended.

This Article fills a serious gap in the literature by tracing the historical connection between the freedom of the press and the origin of copyright law, and between the Copyright and the Free Press Clauses. Most scholars tracing the Copyright Clause or the history of copyright have simply ignored the important role the freedom of the press played in the

genesis of copyright law as we understand it today.¹¹ It is perhaps even more of a mystery that the Supreme Court has overlooked this important history, too. By tracing the history of the freedom of the press in England and in early America and by examining the drafting history and debate of the Free Press Clause, this Article seeks to put copyright in its *full* historical perspective. From the beginning of copyright, there was a deep skepticism of allowing government to control or prohibit a technology that facilitated the mass publication of speech. The freedom of the press encapsulated that skepticism, and the Free Press Clause codified it into law. All future attempts by Congress to regulate technologies through copyright law must answer to this history.

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

After nearly 300 years of existence, dating back to the Statute of Anne in England, one would think that the history of copyright law would be well understood by now. It is not. Courts, historians, and commentators have hardly considered, much less understood, the important relationship between the historical development of the freedom of the press and the origin of copyright law. That relationship was fundamental to copyright law's original design. Copyright law first began in England as a less restrictive alternative to the Crown's restrictions on the printing press, including severe limits on the total number of presses that were allowed. The origin of copyright law was one in which the notion of the freedom of the press operated as an important limit on government control over technology—attempts by government to dictate or limit the extent to which the public could use technologies of mass publication were viewed as suspect. The Framers in the United States and the ratifying states embraced

¹¹ Legal scholarship examining the connection between copyright and the freedom of the press, or the connection between the Copyright and Free Press Clauses, has been scant. Even Melville Nimmer, who wrote a seminal article about the connection between copyright and the First Amendment and an article specifically on the Free Press Clause, did not draw the connection. See Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1186-1204 (1970) [hereinafter *Copyright*]; Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975).

The most extensive discussion is provided in a short essay by L. Ray Patterson and Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909 (2003). In other scholarship, only passing reference is made. See BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 6 (1967) (referring to freedom of the press in recounting the demise of the Stationers' Company); LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 20-27 (1968) (describing press control in England); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 17-18 (1987) [hereinafter *Free Speech*]; Lior Zemer, *The Making of a New Lockean Copyright*, 29 HARV. J.L. & PUB. POL'Y 891, 898-905 (2006) (describing connection between Locke's understanding of freedom of the press and his view of copyright as a right for authors).

this tradition even more strongly, recognizing this important limit in the Free Press Clause. Below I sketch out this history.

A. The Freedom of the Press and Copyright in England

The origin of copyright law cannot be understood without understanding the larger, historical context in which it arose. Indeed, no history of copyright law can be considered accurate without an account of the freedom of the press. One of the central points of my historical account is that the birth of copyright in England coincided with and reinforced the emerging concept of the freedom of the press.¹² The Statute of Anne, the first copyright act in England, enacted in 1710, was a part of the eventual dismantling of the old regime of press regulation under the Crown, in which it regulated virtually all aspects of the printing press. This dismantling of the old system was brought about by a growing recognition of the concept of the freedom of the press. Copyright law reflected this new freedom by offering no authority for the government, publishers, or authors to limit the technology of the printing press. Thus, instead of allowing government to control or limit the printing press to fight “piracy” of published works, as had been effectuated under the prior regime, copyright law originated as a direct, less restrictive alternative to government control of the presses.

1. The old system of press regulation

The protection for an individual’s use of the printing press—free of intrusive governmental regulation—was a response to the repressive regime of strict regulation of the press that enabled the Crown and later Parliament to control the production of all printed materials in England from the 1500s until the early 1700s.¹³

Indeed, the Crown controlled the printing presses in virtually all aspects. The Crown instituted (1) a system of monopolies over printing under which the Crown limited the number of printing presses and master printers and gave authority to print materials only to a select few, notably, the Stationers’ Company, and (2) a system of licensing under which all

¹² The Crown’s power to control the press was, from its inception, unlimited. FREDERICK SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND 1476-1776*, at 28 (1952). During the 16th and 17th centuries, the Crown controlled the entire printing industry by allowing printing only through (i) special grants of printing patents or royal prerogatives to individuals who were favorites of the Crown and (ii) the Stationers’ Company, a chartered guild of printers/publishers. MARK ROSE, *AUTHORS AND OWNERS* 12 (1993).

¹³ I discuss the English history of copyright, given its clear influence on the Framers and the early American development of copyright law. Copyright can be traced back even earlier to patent privileges in Venice and Rome. See CHRISTOPHER L.C.E. WITCOMBE, *COPYRIGHT IN THE RENAISSANCE* 21-52 (2004).

materials had to be approved for publication.¹⁴ The two systems were, in fact, both parts of the same system of regulation of printing in England that was established under the Tudor reign.

Spurred by the religious schism from the Catholic Church, Henry VIII imposed the first pre-publication licensing requirement under the Proclamation of 1538.¹⁵ In 1557, Philip and Mary (a devout Catholic) granted the royal charter of incorporation to the Stationers' Company, a guild of printers/publishers, who became the only authorized group allowed to print books (other than those individuals who were granted printing patents from the Crown).¹⁶ Although Henry and Mary were on opposite sides of the religious schism, both saw the importance of controlling the presses as a way to control the content of publications, particularly, religious views.

Building on these restrictions, Elizabeth I issued the Star Chamber Decree of 1586, which was “the most comprehensive regulation of the press of the entire Tudor period.”¹⁷ The Decree required that all printers register their presses with the Stationers' Company, and that no presses could be set up outside of the London area (except for one press at Cambridge University, and the other at Oxford University).¹⁸ All presses were subject to warrantless search by the wardens of the Stationers' Company; any violations of the Decree resulted in the destruction of the nonconforming printing press.¹⁹ The Decree went even further: it banned the use of any printing press established within the past six months (of the Decree's enactment), in order to reduce the number of printing presses to “so small a number” that the Archbishop of Canterbury and Bishop of London deemed proper.²⁰ The Decree also imposed a licensing system on the publication of works under which all works were required to be approved by ecclesiastical authorities before publication,²¹ a requirement mirrored in the Stationers' Company's own ordinance that required its member printers to obtain a pre-publication license from its officers.²²

This strict regulation of the printing press ruled England for well over a century, extending through the Stuart reign under James I and

¹⁴ See SIEBERT, *supra* note 12, at 47-63.

¹⁵ *Id.* at 49.

¹⁶ *Id.* at 65. Initially, the printers who owned the printing presses also served as the publishers of the works. Over time, printers and the publishers (or “booksellers”) came to be separate entities. See PATTERSON, *supra* note 11, at 45-46.

¹⁷ SIEBERT, *supra* note 12, at 61.

¹⁸ Star Chamber Ordinance of 1586, at §§ 1-2; see SIEBERT, *supra* note 12, at 69.

¹⁹ Star Chamber Ordinance of 1586, at § 2.

²⁰ *Id.* § 3.

²¹ *Id.* § 4; see SIEBERT, *supra* note 12, at 69.

²² *Id.* at 71.

Charles I into the governance under Parliament, albeit with a gradual decrease in effectiveness.²³ What is important to recognize is that the regulation of the press instituted by the Crown included not only a regime of licensing and monopoly grants for printing—two facets that are more commonly discussed in legal scholarship,²⁴ but also the direct regulation of the technology of the printing press itself. Starting with Elizabeth, the Crown limited the total number of printing presses in England and who could operate them.²⁵ Indeed, the express goal of the Decree was to *reduce* the total number of printing presses in England from the status quo. If used without authorization from the Crown, the printing press effectively became contraband. Throughout this period, “unauthorized” presses arose.²⁶ Such presses were illegal and, if found, were subject to seizure and destruction by the Stationers.²⁷ The Stationers had the power to conduct (effectively warrantless) searches of other people’s houses, to confiscate illegal presses and materials.²⁸ Backed by royal charter and the Printing Acts, the Stationers exercised a sweeping power over the press, in order to protect their copyrights and combat “piracy.” In Patterson’s apt phrase, the Stationers were the “policemen of the press.”²⁹

This strict regulation of the press instituted by the Crown was replicated—and even further tightened—under Parliament’s rule starting in the mid-1600s following the execution of Charles I.³⁰ The Printing Acts of 1649, 1653, and 1662 carried forward the repressive controls on printing from the Crown, including the tight limits on the number of printing presses.³¹ Indeed, the Act of 1662 stated that there was “no surer means” of reducing the licentiousness of the press “*than by reducing and limiting the number of printing-presses, and by ordering and settling the said art or mystery of printing by act of parliament, in manner as herein after is expressed.*”³² To that end, the Printing Act of 1662 imposed strict limits on the total number of master printers (20) in all of England and the printing presses each could own (just 2).³³ The goal was to reduce, by “death or otherwise,” the number of master printers to twenty.³⁴

²³ *Id.* at 107-12.

²⁴ See, e.g., Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283, 284-85 (1979).

²⁵ SIEBERT, *supra* note 12, at 61. In 1560, there were 8 or 10 master printers; by 1600, there were 30. *Id.* at 56.

²⁶ *Id.* at 99, 136, 175.

²⁷ *Id.* at 84-85, 98, 136, 139, 175, 182, 186, 190-91.

²⁸ See Raymond Astbury, *The Renewal of the Licensing Act in 1693 and Its Lapse in 1695*, 32 THE LIBRARY 296, 296 (1978).

²⁹ PATTERSON, *supra* note 11, at 6.

³⁰ SIEBERT, *supra* note 12, at 221.

³¹ *Id.* at 221, 228, 238.

³² Printing Act of 1662, 14 Car. 2., c. 33 preamble (Eng.) (emphasis added).

³³ *Id.* § 11.

³⁴ *Id.*

From the beginning, this regime of control over the presses—not only in what content could be printed by whom, but also in the total number of printing presses—served the dual purposes of censorship and monopoly. As copyright historian Mark Rose explains, “censorship and trade regulation became inextricable, and this was a marriage that was to endure until the passage of the Statute of Anne in 1710.”³⁵ The Stationers’ Company effectively held a perpetual monopoly over all book printing in England. Backed by the Crown, the printers controlled the presses, and everything that was printed. The authors themselves generally held no rights to print their works.³⁶ The Stationers sought the maintenance of these strict limits on the number of presses as a way to increase their monopoly over the printing industry and to stop the “piracy” of works published by unlicensed printers.³⁷ The Stationers were not so much concerned about censorship (as the Crown was) as they were about controlling the entire publishing industry. Controlling the presses—the only technology of mass publication—enabled the Stationers to protect their monopoly for over a century.

2. The transition to the freedom of the press and a reformed system of copyright

During the repressive regime of press regulation in the 1600s, a counter-movement for a “freedom of the press” had begun. In 1629, Michael Sparke, who ran an unauthorized press, charged that the Star Chamber decree “directly intrench[es] on the hereditary liberty of the subject’s persons and goods.”³⁸ Without referring to “freedom of the press” explicitly, John Milton wrote “Areopagitica” in 1644,³⁹ in which he criticized the Crown’s regulation of the press: “If we think to regulate printing, thereby to rectify manners, we must regulate all recreations and pastimes, all that is delightful to man.”⁴⁰ Although Milton, an official censor himself at one time, probably condoned some forms of regulation of speech that was “utterly maleficent,”⁴¹ he advocated for unlicensed printing that left truth to be sorted out in debate.⁴² Other authors, such as Samuel

³⁵ ROSE, *supra* note 12, at 13; *id.* at 15 (“Since both copyright and censorship were understood in terms of regulation of the press, it was difficult even to think about them as separable practices.”).

³⁶ *Id.* at 22.

³⁷ *Id.* at 68.

³⁸ SIEBERT, *supra* note 12, at 140.

³⁹ The work, in fact, was published without the required license. See WILLIAM E. HOCKING, *FREEDOM OF THE PRESS: A FRAMEWORK OF PRINCIPLE 4* (1947).

⁴⁰ JOHN MILTON, *THE AREOPAGITICA* (1644).

⁴¹ HOCKING, *supra* note 39, at 5; SIEBERT, *supra* note 12, at 196.

⁴² HOCKING, *supra* note 39, at 5.

Hartlib,⁴³ William Walwyn,⁴⁴ and Henry Robinson,⁴⁵ wrote in favor of a freedom in “printing” or the “press.” John Lilburne, a key leader in the Leveller party, advocated for the freedom of the press and “that the Press might be open for us as you.”⁴⁶ In 1649, the Leveller party petitioned Parliament to recognize a freedom of the press:

As for any prejudice to Government thereby, if Government be just in its Constitution, and equal in its distributions, it will be good, if not absolutely necessary for them, to hear all voices and judgments, which they can never do, but by giving freedom to the Press, and...⁴⁷

The same banner was taken up by John Locke, one of the most influential political thinkers of his time. In “Liberty of the Press,” written in 1694 and 1695,⁴⁸ Locke argued for man’s “liberty to print whatever he would speak.”⁴⁹ One of the key insights of Locke was to recognize a connection between the freedom of the press and the need for reforming the monopoly over publishing held by the Stationers’ Company. Locke suggested moving to a system of copyright in which authors, not publishers, held the rights for a limited term.⁵⁰ Similarly, Daniel Defoe, writing in 1704 about “the Regulation of the Press,” described a “Liberty in Printing”⁵¹ and also called for the recognition of rights for authors in their works, particularly against “Press-piracy” (a precursor to what we would call copyright infringement).⁵² Importantly, both Locke and Defoe attempted to reconcile the recognition of copyrights for authors with the freedom of the press.⁵³ At bottom, the two issues were intertwined.

At the same time, there were several efforts in Parliament to reinstate a licensing system after the Printing Act was not renewed, such as the Bill for Regulating of Printing and Printing Presses in February 1695.⁵⁴ That bill contained no limit on the number of presses and the trade was to be “open to all Persons,” but the bill was amended in November of that same year to limit the presses to certain locations within England, as a measure to

⁴³ SIEBERT, *supra* note 12, at 192.

⁴⁴ *Id.* at 193 (“that the Press may be free for any man that writes nothing highly scandalous or dangerous to the state”).

⁴⁵ *Id.* at 194 (“greater liberty of speech, writing, Printing”).

⁴⁶ *Id.* at 199-201.

⁴⁷ *Id.* at 201.

⁴⁸ JOHN LOCKE, LOCKE: POLITICAL ESSAYS 329-38 (Mark Goldie ed. 1997).

⁴⁹ *Id.* at 331.

⁵⁰ *Id.* at 337.

⁵¹ DANIEL DEFOE, ESSAY ON THE REGULATION OF THE PRESS (1704).

⁵² *Id.*

⁵³ *Id.* See JOHN FEATHER, PUBLISHING, PIRACY AND POLITICS 56 (1994).

⁵⁴ RONAN DEAZLEY, ON THE ORIGINS OF THE RIGHT TO COPY 7 (2004).

protect the Stationers from greater competition.⁵⁵ The Stationers again invoked fears of “piracy” of their books, in an effort to have Parliament pass tighter regulation of the printing industry.⁵⁶ None of these bills ever passed, however.⁵⁷ The sentiment for a freedom of the press had begun to take hold. In 1695, when the Printing Act was allowed to lapse, the change was monumental:

There were no more restrictions on the number (or location) of printers, or on the numbers of journeymen or apprentices. There were no restrictions of the import of books. Above all, there was no longer any legal obligation to enter new books on the Stationers’ Register, and, ... certainly no guarantee that the courts would uphold the claims of the copy-owning booksellers.⁵⁸

As before, when the Star Chamber was abolished, the Stationers lobbied heavily for re-securing their old rights.⁵⁹ Eventually, the Stationers asked for property rights in the books they printed, instead of a reinstatement of the Printing Act, which appeared to have fallen out of disfavor.⁶⁰ But what they got was different: in 1710, Parliament enacted the Statute of Anne, the first copyright act in England. The Act established, “for the Encouragement of Learning,” a system of copyrights for authors with a limited term of fourteen years of copyright (renewable once).

Although the several ideas of freedom of the press, author’s rights, and copyrights of limited duration were not necessarily viewed as a systematic bloc, the ideas worked together to free the printing press from governmental and monopoly control. If an individual had the “liberty to print whatever he would speak,” then neither the Stationers nor the Crown should be allowed to control the number of printing presses and printers, or what could be printed. So, too, if authors held the rights to print their own works—neither the Stationers nor the Crown could have a monopoly on the entire printing industry.⁶¹ But, to avoid substituting one monopoly for another, Parliament decided that the copyrights authors received should be of limited duration.⁶² And the technology of the printing press was no longer subject to government controls.

⁵⁵ *Id.* at 13-14.

⁵⁶ *Id.* at 18; SIEBERT, *supra* note 12, at 307.

⁵⁷ DEAZLEY, *supra* note 54 at 28; SIEBERT, *supra* note 12, at 306.

⁵⁸ FEATHER, *supra* note 53, at 50.

⁵⁹ ROSE, *supra* note 12, at 36.

⁶⁰ DEAZLEY, *supra* note 54, at 1-29.

⁶¹ ROSE, *supra* note 12, at 47. Patterson views the switch from publishers to authors being entitled to copyrights as a key development for the freedom of the press because authors had less potential to control the presses (e.g., “even the most prolific author would produce a fraction of press output”). Patterson, *Free Speech*, *supra* note 11, at 18.

⁶² ROSE, *supra* note 12, at 47.

Of the innovations in the system of reformed copyright established by the Statute of Anne, the most underappreciated among legal scholars is its approach to technology. Perhaps this is understandable because commentators have more often focused on what the Statute of Anne said, instead of what it did not say. Of course, what the Statute of Anne said was that (1) copyright had a limited term and (2) the rights accrued to authors.⁶³ While significant, these two more commonly recognized innovations of the Statute of Anne probably pale in comparison to the revolutionary change in approach effectuated by the Statute of Anne's departure from the past press regulations. Notably, the Statute of Anne did *not* attempt to limit the number of printing presses or printers, or otherwise regulate the presses as was the case under the Printing Acts.⁶⁴

The significance of this sea change cannot be overstated. For over 100 years, the Printings Acts (and the earlier Star Chamber Decree of 1586) ruled the presses in England until the final Act lapsed in 1695. The Stationers tried desperately to have another Printing Act enacted; indeed, 13 bills were rejected between 1695 and 1709.⁶⁵ But, instead of a Printing Act, the Statute of Anne was enacted. When viewed in this historical context, the most important innovation of the Statute of Anne was probably contained in what it did not say: the Statute of Anne made no attempt to control the printing presses as the Printing Acts did before.⁶⁶ No longer could the Crown or Parliament control the technology of the presses, at the service of publishers to protect them from piracy. Nor could, for that matter, the newly recognized class of authors assert any statutory power over the technology. This sea change ushered in a reformed system of copyright, shaped and ultimately limited by the freedom of the press.

⁶³ *Id.* at 4.

⁶⁴ The reasons for Parliament's inability to enact continued printing controls were probably several, including division among Parliament and the ineffectiveness of the old regime. SIEBERT, *supra* note 12, at 260, 300-01, 306. Part of the demise of the Printing Acts was precipitated by antipathy for it and the growing calls for the freedom of the press. By the 1700s, it was no longer politically tenable for government to openly oppose the freedom of the press. *Id.* at 305.

⁶⁵ DEAZLEY, *supra* note 54, at 28-29.

⁶⁶ Even with the lapse of the Printing Act, the freedom of the press was not necessarily guaranteed or complete. Post-publication punishment for libel remained a huge controversy. Even those who advocated for a freedom of the press were willing to allow some limitations, such as liability for certain printed material under the common law. *Id.* at 4. Prosecutions for seditious libel continued into the 1800s in England. See WILLIAM H. WICKWAR, *THE STRUGGLE FOR THE FREEDOM OF THE PRESS, 1819-1832*, at 102-14 (1928). The same question over seditious libel and its relationship to the freedom of the press would recur in the American Republic with the Sedition Act of 1798, which expired in 1801 and was never renewed. See *New York Times v. Sullivan*, 376 U.S. 254, 276 n.16 (1964).

The connection between copyright and the freedom of the press is also evidenced in the original understanding of the freedom of the press. It is well recognized that copyright originally developed in reaction to the advent of the printing press, which multiplied exponentially the number of copies of works that could be made. But what is often overlooked today is that freedom of the press also developed in response to the printing press. Indeed, the freedom of the press historically meant the freedom of printing, or, more specifically, the freedom of *the printing press*.

In 17th and 18th century England, the “press” referred to the technology of the printing press or, more generally, the publishing of any material by the printing press.⁶⁷ The “press” only later became to be associated more narrowly with newspapers and newsreporting.⁶⁸ Samuel Johnson’s *Dictionary of the English Language*, for example, defined “press” in 1778 as “[t]he instrument by which books are printed.”⁶⁹ No definition included any reference to the modern understanding of the press as agents who report news. The freedom of the press stood broadly for the “the personal liberty of the writer to express his thoughts in the more improved way invented by human ingenuity in the form of the press.”⁷⁰ It marked a sentiment that government should not be allowed to control or interfere with the public’s ability to use *the technology* that enabled the mass production of speech.

This understanding is evident in Blackstone’s *Commentaries*. Blackstone took a more limited view of the freedom of the press in England as consisting of “no *previous* restraints upon publication, [but] not in freedom from censure from criminal matter when published.”⁷¹ Even under this more limited view, Blackstone tied the freedom of the press in England to the end of the press regulation under the Printing Acts, “which limited the number of printers, and of presses which each should employ, and prohibited new publications unless previously approved by proper licensers.”⁷² In this key passage, Blackstone specifically recognized how

⁶⁷ WICKWAR, *supra* note 66, at 13-14 (“Freedom of the press must be held to embrace the whole practice of printing, and to refer as much to the printing-press as to its products.”); *id.* at 75 (“My whole and sole object ... has been a Free Press and Free Discussion.... I had never read a page of Paine’s writings; but I had a complete conviction that there was something wrong somewhere, and that the right application of the printing-press was the remedy.”) (statement of Richard Carlile, printer convicted for publishing “blasphemous” work, Paine’s *Age of Reason*).

⁶⁸ *Id.* at 13-14. In 1695, only one newspaper existed—the official government newspaper, *London Gazette*. See DEAZLEY, *supra* note 54, at 11.

⁶⁹ SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1778).

⁷⁰ FRANCIS LUDLOW HOLT, THE LAW OF LIBEL . . . IN THE LAW OF ENGLAND (first American edition 1818) (London, J. Butterworth and Son 1816), *excerpted in* HAROLD L. NELSON, FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT 18-19 (1967).

⁷¹ 4 BLACKSTONE’S COMMENTARIES 151 (Robert Bell ed., 1771) (emphasis added).

⁷² *Id.* at 152 n.a.

the Crown’s limits on the technology—and not just the prepublication licensing system—operated as restraints on the freedom of the press. After the Printing Acts expired, “the press became properly free” and “has ever since so continued,” Blackstone concluded.⁷³

This brief history of the freedom of the press and copyright law in England illuminates several points that are important for understanding the tradition in which copyright law developed, first in England and later in the United States. First, calls for the freedom of the press were made to stop the government’s and the Stationers’ control over the printing press. Second, copyright law developed *in conjunction with* the notion of the freedom of the press, as a part of the effort to break up the monopoly control over the printing press and what could be printed by whom. Third, and finally, the copyright system replaced a regime of press regulation, in which the government could control and limit the technology of the press itself, with a reformed system of author’s rights that left the printing presses themselves free of regulation. Copyright was born with the freedom of the press, not against it.⁷⁴

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

In this section, I show that the Framers understood a connection between copyright law and the freedom of the press, and, specifically, a connection between the Copyright Clause and the Free Press Clause. The connection was one of limitation: the Free Press Clause limited the Copyright Clause.

⁷³ *Id.*

⁷⁴ Two years after the Statute of Anne was passed, Parliament enacted the Stamp Act of 1711, which imposed a duty on all paper used for printed materials. See DEAZLEY, *supra* note 54, 43-44. Although the Stamp Act may have been enacted in part to restrict the amount of material published by the press, the penalty for failure to pay the duty on paper was the loss of copyright (“all Property therein”) in the underlying work—a result that was arguably consistent with the freedom of the press in that it immediately allowed everyone to “freely print and publish” the work. *Id.* at 44 (quoting Stamp Act, 1712, 10 Anne, ch. 18 (Eng.)). The Stamp Act remained controversial in England, however, with critics attacking it as a form of censorship. See Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 GEO. L.J. 257, 263 (1985). It was finally repealed in 1861. *Id.* In 1765, Parliament enacted a similar Stamp Act for the American colonies, in order to help fund the war effort in the Seven Years War, but the Act was repealed within a year due to the vocal protests of the colonists against “taxation without representation.” *Id.* at 263-64.

1. The connection between the Copyright Clause and the Free Press Clause

Most conventional accounts of the Framers' understanding of copyright focus primarily, if not exclusively, on the Copyright Clause, which was part of the Constitution ratified in 1788.⁷⁵ This account, however, only tells half the story. As the ratifying debates show, the adoption of the Free Press Clause in the Bill of Rights was equally as important to the origin and design of copyright in the United States. At the center of both copyright and the freedom of the press in the early Republic was the technology of the printing press. It would be no exaggeration to describe the Free Press Clause as “the companion-piece of the Copyright Clause,” as Professors Patterson and Joyce suggest.⁷⁶

a. Documentary evidence related to the Framing

First, let us begin with the Copyright Clause, which states: Congress shall have the power “to promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Inventions.”⁷⁷ Similar in design to the Statue of Anne, the Copyright Clause authorizes the grant of copyright to authors, but only for limited times, in order to promote progress or learning. Although the historical record related to Framers' adoption of the Copyright Clause is rather scant (we have records of Madison's and Pinckney's several proposals, but no records of any Convention debate),⁷⁸ it is fairly well accepted that the Framers drafted the Clause in reaction to the abuses of monopoly grants under the Crown in England.⁷⁹ As the Supreme Court has recognized, the Copyright Clause “was written against the backdrop of the practices—eventually curtailed by the Statute of Monopolies—of the Crown in granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public.”⁸⁰ Accordingly, the Clause acts as both “a grant of power and a limitation.”⁸¹ Madison's journal indicates that the Framers agreed upon the Copyright

⁷⁵ See, e.g., BRUCE W. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 1-2 (1967).

⁷⁶ Patterson & Joyce, *supra* note 11, at 946.

⁷⁷ U.S. CONST. art. I, § 8, cl. 8.

⁷⁸ See Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of the Progress of Science as Limitation on Congress's Intellectual Property Power*, 94 GEORGETOWN L.J. 1771, 1775 (2006).

⁷⁹ See Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 49 J. COPYRIGHT SOC'Y U.S.A. 675, 676, 688-95 (2002).

⁸⁰ *Graham v. John Deere*, 383 U.S. 1, 5 (1966).

⁸¹ *Id.* at 5.

Clause—which had been introduced during the last weeks of the Convention⁸²—“*nem: con.*,” with no one speaking against.⁸³

But the history of the Copyright Clause did not end with the Constitution’s ratification in 1788. The other important element came in 1789 through 1791, when the Free Press Clause in the Bill of Rights was proposed, debated, and then ratified. (The Free Speech Clause was also relevant to copyright, but much less discussed compared to the Free Press Clause.) In the popular debates concerning the ratification of the Constitution, one of the main objections of the Antifederalists was the absence of any specific recognition for the freedom of the press. George Mason of Pennsylvania, one of the Framers at the Convention, wrote, “[t]here is no declaration of any kind for preserving the liberty of the press.”⁸⁴ Richard Henry Lee, a Virginian and Antifederalist who wrote as the Federal Farmer, stated: “The people’s or the printers’ claim to a free press, is founded on the fundamental laws, that is, compacts, and state constitutions, made by the people. The people, who can annihilate or alter those constitutions, can annihilate or limit this right.”⁸⁵ The Antifederalists feared that, without a Bill of Rights, Congress could “restrain the printers, and put them under regulation.”⁸⁶ Among the Antifederalists’ concerns about the lack of a Bill of Rights, the need for a Free Press Clause was paramount.⁸⁷

The Federalists recognized the strength of the Antifederalists’ objection, even after the Federalists had succeeded in avoiding the inclusion of a Bill of Rights in the drafting of the Constitution. During the Constitution’s ratification process among the states, the Federalists attempted to allay the Antifederalists’ concerns. James Wilson, a Framers at the Convention and a leading Federalist, gave an impassioned speech at the State House Yard in Philadelphia to address the Antifederalists’ objections; Wilson’s speech was widely published in 34 newspapers, across 27 cities.⁸⁸ As to the freedom of the press, Wilson contended:

⁸² 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 435-36 (1971).

⁸³ BUGBEE, *supra* note 75, at 1.

⁸⁴ George Mason, *Objections to the Proposed Federal Constitution, 1787*, reprinted in 1 SCHWARTZ, *supra* note 82, at 443.

⁸⁵ Letter from the Federal Farmer XVI (Jan. 20, 1788), reprinted in 2 *THE COMPLETE ANTI-FEDERALIST* (Herbert J. Storing ed., 1981).

⁸⁶ David A. Anderson, *The Origins of the Press Clause*, 30 *UCLA L. REV.* 455, 468-69 (1983).

⁸⁷ *Id.* at 467-68.

⁸⁸ See William T. Mayton, *From a Legacy of Suppression to the “Metaphor of the Fourth Estate,”* 39 *STAN. L. REV.* 139, 144 n.27 (1986).

[T]he liberty of the press, which has been a copious subject of declamation and opposition: what controul can proceed from the federal government, to shackle or destroy that sacred palladium for national freedom? *If, indeed, a power similar to that which has been granted for the regulation of commerce, had been granted to regulate literary publications, it would have been as necessary to stipulate that the liberty of the press should be preserved inviolate, as that impost should be general in its operation....*In truth, ... the proposed system possesses no influence whatever on the press; and it would have been merely nugatory, to have introduced a formal declaration upon the subject; nay, that very declaration might have been construed to apply that some degree of power was given, since we undertook to define its extent.⁸⁹

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

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

And attack the Antifederalists did. The Antifederalists specifically pointed to the Copyright Clause as the power by which the new Congress could control the technology of the printing press, as had been effectuated in England under the Printing Acts.⁹⁰ As Robert Whitehall of Pennsylvania explained:

⁸⁹ James Wilson, *An Address to a Meeting of the Citizens of Philadelphia*, reprinted in I SCHWARTZ, *supra* note 82, at 529 (emphasis added).

⁹⁰ The Antifederalists also pointed to Congress's powers to tax and to define offenses against the law of nations, as well as the Supremacy Clause, as potentially giving Congress the power to curb the freedom of the press. See Timoleon, Nov. 1, 1787, reprinted in THE COMPLETE BILL OF RIGHTS 104-05 (1997) (tax power and Supremacy Clause); Cincinnatus, Nov. 1, 1787, reprinted in THE COMPLETE BILL OF RIGHTS, *supra*, at 106; The Federal Farmer, Jan. 20, 1788, reprinted in THE COMPLETE BILL OF RIGHTS, *supra*, at 109 (tax power); A Plebeian, Spring 1788, reprinted in THE COMPLETE BILL OF RIGHTS, *supra*, at 111 ("indefinite powers granted to the general government").

Tho[ugh] it is not declared that Congress have a power to destroy the liberty of the press; yet in effect, they will have it *They have a power to secure to authors the right of their writings.* Under this, they may license the press, no doubt; and under licensing the press, they may suppress it.⁹¹

Federalist James Iredell offered a more lengthy response than Wilson to the Antifederalists' argument, specifically emphasizing the coexistence of a reformed copyright system and the freedom of the press in England following the enactment of the Statute of Anne. In this passage, it becomes manifest how closely the issues of copyright and the freedom of the press were associated in the minds of the Framers:

The liberty of the press is always a grand topic for declamation, but the future Congress will have no other authority over this than to secure to authors for a limited time an exclusive privilege of publishing their works. This authority has been long exercised in England, where the press is as free as among ourselves or in any country in the world; and surely such an encouragement to genius is no restraint upon others it is certainly a reasonable one, and can be attended with no danger of copies not being sufficiently multiplied, because the interest of the proprietor will always induce him to publish a quantity fully equal to the demand. Besides, that such encouragement may give birth to many excellent writings which would otherwise have never appeared. *If the Congress should exercise any other power over the press than this, they will do it without any warrant from this constitution, and must answer for it as any other act of tyranny.*⁹²

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

We have been told that the liberty of the press is not secured by the new Constitution. Be pleased to examine the Plan, and you will find that the liberty of the press and the laws of Mahomet are equally affected by it. The new government is to have the power of protecting literary property; the very power which you have by a special act delegated to the present congress. There was a time in England, when neither book, pamphlet, nor paper could be

⁹¹ 2 Robert Whitehall, *The Proceedings and Debates of the Pennsylvania Convention (1787)*, reprinted in THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 525 (Merrill Jensen ed., 1978) (emphasis added).

⁹² James Iredell, *Answers to Mr. Mason's Objections to the New Constitution*, 1788, in 1 SCHWARTZ, *supra* note 82, at 454.

published without a license from government. That restraint was finally removed in the year 1694 and, by such removal, their press became perfectly free, for it is not under the restraint of any license. Certainly the new government can have no power to impose restraints.⁹³

The debate between the Antifederalists and Federalists over the freedom of the press is quite significant in three respects. First, both sides explicitly consider the possibility that copyright could infringe the freedom of the press—if enacted with a licensing system, for example, as Whitehall points out, no doubt referring to the old British system. Iredell, a Federalist, even appears to concede that copyright can act as a “power over the press,” when he explains that Congress would be acting unconstitutionally if it exercised “any *other* power over the press”—meaning any power other than copyright. Second, both the Antifederalists and Federalists refer to the practices in England as the source for their arguments—the Antifederalists pointing to the old system of press regulation under the British Crown for their criticism of Congress’s copyright power, while the Federalists pointing to the reform system of copyright after the Printing Acts had lapsed and the Statute of Anne was enacted, as the basis for their rejoinder. These references further validate the importance of considering the English history of copyright in attempting to understand the Framers’ views of copyright and the freedom of the press.

Third, and most importantly, both the Antifederalists and Federalists share a common ground in rejecting the old regime of press regulation under the British Crown. In other words, no Framer on either side of the debate over copyright or the freedom of the press suggested that the restrictions under the Printing Acts could be adopted under the new Constitution. For example, Iredell, a leading Federalist from North Carolina (who would later become one of the original justices on the Supreme Court⁹⁴), did not dispute that a licensing system would infringe the freedom of the press, but he instead referred to the reformed copyright system under the Statute of Anne in England—“where the press is as free as among ourselves or in any country in the world”—as the model for understanding the scope of Congress’s power under the Copyright Clause.

Iredell conceded a very important point, however: “If the Congress should exercise any other power over the press than this, they will do it without any warrant from this constitution, and must answer for it as any other act of tyranny.” Iredell thus admitted that, even without a Free Press

⁹³ Hugh Williamson, *Remarks on the New Plan of Government, 1788*, reprinted in 1 SCHWARTZ, *supra* note 82, at 551.

⁹⁴ See 2 *id.* at 932.

Clause, Congress would be without constitutional authority to “exercise any other power over the press” through copyright law other than the basic kind of system of author’s rights modeled after the Statute of Anne—i.e., “no other authority over this than to secure to authors for a limited time an exclusive privilege of publishing their works.”

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

Since Iredell represented the Federalist position, his concession becomes even more significant after the Antifederalists succeeded in obtaining the adoption of the Bill of Rights, including a Free Press Clause, ratified in 1791. The First Amendment states: “Congress shall make no law ... abridging the freedom of speech, or of the press.”⁹⁵ This explicit recognition of the freedom of the press in the Bill of Rights only further solidified the connection between the freedom of the press and Congress’s copyright power. As Madison, the introducer of the amendment, described, “The article of amendment, instead of supposing in Congress a power that might be exercised over the press, provided its freedom was not abridged, was meant as a positive denial to Congress of any power whatsoever on the subject...”⁹⁶ The connection between the Free Press and the Copyright Clause was direct: one limited the other. Given the debate at the time of the ratification of the Constitution and the drafting of the Bill of Rights, we can fairly conclude that the Framers understood the freedom of the press to limit, specifically, the ability of government to restrict the printing press under copyright law, whether in the form of technology limits or a prepublication licensing system.

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

⁹⁵ U.S. CONST. amend. I.

⁹⁶ James Madison, Report on the Virginia Resolutions (Jan. 1800), *reprinted in* 5 THE FOUNDERS’ CONSTITUTION 143 (Philip B. Kurland & Ralph Lerner eds., 1987).

Copyright Clause. Indeed, we have more documentary evidence related to the Framers' views of the relationship between copyright and the freedom of the press than we do about the originality and limited times requirements, both of which the Supreme Court has already defined in interpreting the Copyright Clause.⁹⁷ Individuals on both sides of the debate over the Free Press Clause drew explicit connections between the scope of copyright and the freedom of the press. And they both referred to the history of copyright and the freedom of the press in England—a history that, as I have explained above, shows the connection between copyright and the freedom of the press following the dismantling of the repressive system of press regulation that ruled England for over 150 years. As quoted above, Whitehall and Williamson both expressly described the “licensing” system in England as odious and unconstitutional under the new Constitution. I believe it is fair to infer from these passages that the Framers viewed the technology controls under the Printing Acts (i.e., the limits on the number and ownership of presses) with the same disfavor. The technology limits on the printing press were a crucial part of the Printing Acts, along with the licensing requirement, as is evident in Blackstone's description of the freedom of the press.⁹⁸ It would be hard to imagine that the Framers so expressly disfavored the licensing system of the Printing Acts, yet tacitly approved the restrictive technology limits on the press imposed by those same Acts.

b. Textual analysis of the Free Press Clause

i. Original meaning of “the press”

Further support for my position can be found in a close analysis of the text of the Free Press Clause. As originally understood, the Free Press Clause was meant to protect the printing press. Thus, technology limits on the press, such as limits on their number, would be anathema to the very notion of the freedom of the press.

At the time of the Framing, the term “the press” referred to the printing press.⁹⁹ It was common back then to refer to the printing press simply as “the press.”¹⁰⁰ As Thomas Sheridan's dictionary defined it in

⁹⁷ See *Feist Publ'ns., Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 345 (1999) (originality); *Eldred v. Ashcroft*, 537 U.S. 186, 199 (2003) (“limited Times”).

⁹⁸ 4 BLACKSTONE'S COMMENTARIES, *supra* note 71, at 152 n.a.

⁹⁹ David Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 446-47 (2002). For a description of the (primitive) technology of the printing press in early America, see JEFFREY L. PALSEY, *THE TYRANNY OF PRINTERS: NEWSPAPER POLITICS IN THE EARLY AMERICAN REPUBLIC* 25-26 (2001).

¹⁰⁰ Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371, 1401-02 (2003) (“When the First Amendment was written, the ‘press’ was literally the same as the printing press, merely a tool that any citizen could use to speak.”); see WILLIAM

1780, the press meant “the instrument by which books are printed”¹⁰¹—no definition of “press” included journalists or news reporters as a collective group or institution. The centrality of the printing press to the whole concept of the freedom of the press is evident in Jefferson’s description of Virginia’s proposal of a Free Press Clause to the Constitution: “Besides other objections of less moment, she will insist on annexing a bill of rights to the new constitution, i.e. a bill wherein the government shall declare ... 2. *Printing presses free.*”¹⁰²

While the “press” may have also been understood to refer to the small-time printers and agents involved in printing or, more generally, to the collective enterprise of printing or publishing, the early understanding of the press did not refer to our modern notion of journalists or news reporters as an institution or group.¹⁰³

The absence of journalists from the early definition of “press” is understandable. It bears out the fact that the technology of the printing press preceded, by several hundred years, the development of journalism. Journalism as an occupation or profession had yet to fully develop by the late 1700s.¹⁰⁴ In early America, printing presses were small-time operations, consisting of one or two people, which required much labor.¹⁰⁵ The printers did not typically investigate news on their own; instead, they usually reported the news by copying it from other sources.¹⁰⁶ While political reporting and commentary comprised a good deal of the material printed in the early America, the commentary, typically in pamphlets, were more partisan propaganda than objective newsreporting. As Bernard Bailyn describes, “they were always essentially polemical, and aimed at rapidly shifting targets: at suddenly developing problems, unanticipated arguments, and swiftly rising, controversial figures.”¹⁰⁷ The pamphlets were written by

E. BERRY ET AL., *LAST RIGHTS: REVISITING FOUR THEORIES OF THE PRESS* 156-57 (John C. Nerone ed., 1995).

¹⁰¹ THOMAS SHERIDAN, *A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE* (1780).

¹⁰² Letter from Thomas Jefferson to C.W.F. Dumas (Feb. 12, 1788), in *THE COMPLETE BILL OF RIGHTS*, *supra* note 90, at 116 (emphasis added).

¹⁰³ Noah Webster’s first American dictionary published in 1828 did include the additional definition of “press” to include “[t]he art or business of printing and publishing,” with the following example: “A free press is a great blessing to a free people; a licentious press is a curse to society.” NOAH WEBSTER, *AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* (Johnson Reprint ed. 1970). The definition was third in the order, following (i) a machine by which any body is squeezed and (ii) a machine for printing; a printing-press.

¹⁰⁴ Anderson, *supra* note 99, at 446.

¹⁰⁵ HAZEL DICKEN-GARCIA, *JOURNALISTIC STANDARDS IN NINETEENTH-CENTURY AMERICA* 18-19 (1989).

¹⁰⁶ *Id.*

¹⁰⁷ BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 4 (1967).

amateur writers, who held other occupations as “lawyers, ministers, merchants, or planters.”¹⁰⁸

Early newspapers were also highly partisan, at times even tied to a political party.¹⁰⁹ This politicization of newspapers reflected the earlier enlistment of newspapers for the political cause against Great Britain.¹¹⁰ Historians have even gone so far to describe this early period of American newspapers as “the era of the party press.”¹¹¹ The description is hardly exaggeration, given that the Federalists and Antifederalists both had their own newspapers.¹¹² To the extent that news was just reported (without particular slant), the information tended to consist of recounts of foreign news from foreign papers.¹¹³ On the domestic front, “news” had a much more political slant.¹¹⁴ It was not until the Civil War when newspapers in the United States embraced more neutral, fact-based news reporting as the predominant industry standard (a transformation that coincided with the development of the telegraph).¹¹⁵ It took several decades more for “objectivity” to be recognized as the standard for news reporting.¹¹⁶

Given the partisan state of newspapers and pamphlets at the time of the Founding, it seems evident that the Framers had a much broader notion of “the press” in mind than pure newsreporting. The printing press did more than just report news stories; at the time of the Framing, it offered a conduit for people to express their opinions, especially (but not only) political ones. An important feature of the freedom of the press was its technological focus. The printing press was revolutionary because it enabled mass production and dissemination of speech by a technology that was theoretically open to all, not just to the monks who scribed books¹¹⁷ or the Stationers who ran the presses in England with the Crown’s backing.

As Andrew Bradford, the founder of *The American Weekly Mercury*, wrote in 1734, the freedom of the press was “a Liberty, within the Bounds of Law, for any Man to communicate to the public, his Sentiments.”¹¹⁸ Under the well-known alias “Cato,” libertarian writers John

¹⁰⁸ *Id.* at 13-14.

¹⁰⁹ PALSEY, *supra* note 99, at 21.

¹¹⁰ *Id.* at 41; *see also id.* at 31, 36. Earlier, the history of newspapers in England had followed a similar partisanship. *See* DEAZLEY, *supra* note 54, at 11-12.

¹¹¹ DICKEN-GARCIA, *supra* note 105, at 32.

¹¹² *Id.* at 36.

¹¹³ DONALD H. STEWART, *THE OPPOSITION PRESS OF THE FEDERALIST PERIOD 21-22* (1969).

¹¹⁴ *Id.* at 28.

¹¹⁵ *Id.* at 52-55, 60.

¹¹⁶ *Id.* at 98.

¹¹⁷ ROSE, *supra* note 12, at 9.

¹¹⁸ LEONARD W. LEVY, *FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON* 41 (1966).

Trenchard and Thomas Gordon wrote in 1733, “the free Use of the Press . . . is open to all.”¹¹⁹ Writing later against the Sedition Act of 1798, Madison explained that the U.S. Constitution created a government “altogether different” from the British regime, one that recognized “a different degree of freedom in the use of the press.”¹²⁰ The inclusion of the word “use” in “the free use of the press” and “freedom in the use of the press” makes unmistakably clear that Madison, Trenchard, and Gordon were referring to the machine of the printing press. Jefferson made it even clearer in one of his letters to Madison, in which Jefferson wrote: “Among other enormities, [the Sedition Act] undertakes to make certain matters criminal tho’ one of the amendments to the Constitution has expressly taken *printing presses*, etc., out of their coercion.”¹²¹

When the Free Press Clause was drafted for the Bill of Rights (first by Madison), the Framers had numerous examples of free press clauses or statements to draw from. It is evident in these predecessor materials that the technology of the printing press was chief among the concerns for constitutional protection, as Professor Anderson has shown in his exhaustive account of the history of the Free Press Clause.¹²² Even before the American Revolution, the Continental Congress declared in an address to Quebec in 1774, “The importance of this [freedom of the press] consists, besides the advancement of truth, science, morality, and arts in general, *in its diffusion* of liberal sentiments on the administration of Government, *in its ready communication* of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.”¹²³ Here, the Continental Congress saw the importance of the printing press in disseminating viewpoints.

The state constitutions during the Revolutionary War recognized similar concerns about protecting the press. Nine of the eleven state constitutions adopted during this period expressly recognized the freedom of the press.¹²⁴ Indeed, the state governments at this time may have perceived the freedom of the press as being even more important a right to protect than the freedom of speech, given that only one state, Pennsylvania, expressly recognized the freedom of speech as well.¹²⁵ The original state constitution

¹¹⁹ *Id.* at 31.

¹²⁰ 4 ELIOT’S DEBATES ON THE CONSTITUTION 569-70 (1907).

¹²¹ Letter from Thomas Jefferson to James Madison (June 7, 1798), in 7 THE WRITINGS OF THOMAS JEFFERSON 266-67 (P. Ford ed. 1896).

¹²² Anderson, *supra* note 86, at 455-94.

¹²³ ADDRESS TO THE INHABITANTS OF QUEBEC (1774), reprinted in 1 SCHWARTZ, *supra* note 82, at 223.

¹²⁴ Anderson, *supra* note 86, at 464-65.

¹²⁵ *Id.* at 465.

of Pennsylvania recognized: “That the people have a right to freedom of speech, and writing, *and publishing their sentiments; therefore the freedom of the press ought not to be restrained.*”¹²⁶

The Framers at the Constitutional Convention did not adopt a Free Speech Clause (or a Bill of Rights). But several Framers—George Mason of Virginia, Elbridge Gerry of Massachusetts, and Charles Pinckney of South Carolina—suggested it, late into the Convention; their proposals were rejected.¹²⁷ (It is noteworthy that Pinckney had also been responsible for several proposals for the Copyright Clause.¹²⁸) The movement for a Free Press Clause resurfaced in the ratifying debates. In ratifying the U.S. Constitution (then absent a Bill of Rights), Virginia proposed the inclusion of a free press clause with language similar to the Pennsylvania Constitution: “That the people have a right to freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of liberty and ought not be violated.”¹²⁹ Madison (who was eventually persuaded about the need for a Bill of Rights) adopted the Virginia language in his proposed Free Press Clause.¹³⁰ Eventually, the language was shortened and modified to what is now contained in the First Amendment.¹³¹

Legal scholars have long underappreciated the central importance technology played in the concept of the freedom of the press, as well as the importance the freedom of the press had for copyright law. The freedom of the press was perhaps best encapsulated by English barrister Francis Ludlow Holt, who wrote in his book published in the U.S. in 1818, “[t]he liberty of the press, ... properly understood, is the personal liberty of the writer to express his thoughts in the more improved way invented by human ingenuity in the form of the press.”¹³² As Professor Anderson has concluded, “Contemporaneous references uniformly indicate that freedom of the press meant freedom to express one’s views through use of the

¹²⁶ 1 SCHWARTZ, *supra* note 82, at 266 (emphasis added). The Pennsylvania state constitution referred to the printing press in another clause: “The printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of government.” *Id.* at 273.

¹²⁷ Anderson, *supra* note 86, at 467.

¹²⁸ Ochoa & Rose, *supra* note 79, at 688-89.

¹²⁹ Anderson, *supra* note 86, at 473.

¹³⁰ *Id.* at 478.

¹³¹ *Id.* at 475-86. I recount the changes to the language of the Free Press Clause in the next section.

¹³² NELSON, *supra* note 70, at 18-19; *see also* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION 605 (1868) (“We understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for publication, so long as it is not harmful in its character, when tested by such standards as the law affords.”).

printing press.”¹³³ What the printing press allowed was the mass publication of works of all kinds, increasing exponentially the number of people who could publish their own works and who could have access to countless other works published by others. To speak anachronistically, the printing press was the Internet of its day. It transformed the world from handwritten material scribed by monks to a world of printed material mass produced by machines. People felt it necessary to protect this revolutionary technology from governmental control, given the century and a half of abuses of the Crown and Parliament in controlling virtually all aspects of the presses, including their total number, ownership, and use in England. Once press regulation was dismantled in favor of a freedom of the press, copyright law could claim no authority for restricting the press.

ii. Relationship between “speech” and “the press”

My interpretation is further supported by the textual construction of the Free Speech and Press Clauses. The clauses are written together to prohibit Congress from “abridging the freedom of speech, or of the press.” The construction makes it likely that the Framers meant “of speech” and “of the press” to be interpreted in parallel manner.¹³⁴ In the first clause, “of speech” modifies or describes “freedom”—but not as a possessive. In other words, freedom of speech does not mean “speech’s freedom,” as if speech itself possessed freedom. It is the *individual* who possesses the freedom of speech. If we interpret “the freedom of the press” in parallel fashion, then it becomes clear that “the press” does not refer to an institutional press (as in journalists). For such a construction would mean that “of the press” is used as a possessive, rendering the freedom of the press to mean “the (institutional) press’s freedom”—as if the institutional press had a separate right recognized for itself, an interpretation propounded by the late-Justice Stewart (but without success to the entire Court).¹³⁵

The more plausible construction of “the freedom of speech, or of the press” is that all individuals possess the freedom of speech *and* of the press, the latter making it clear that government should not be allowed to control or restrict speech-facilitating technologies.¹³⁶ This dual

¹³³ Anderson, *supra* note 99, at 446 n.90.

¹³⁴ See Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1267 (1992) (“[T]he two rights in the federal Bill are *in pari materia*; each must be construed in relation to the other, and it would be curious if freedom of the printed word were drastically more truncated than freedom of oral expression.”).

¹³⁵ Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633 (1975) (“[T]he Free Press Clause extends protection to an institution.”).

¹³⁶ My interpretation of “press” is consistent with the Supreme Court’s broad understanding of the term. The Court has never adopted the position that only members of the press can invoke the Free Press Clause. See *Pennkamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring) (“[T]he purpose of the Constitution was not to erect the

understanding of (i) the freedom of speech and (ii) the freedom of the press as protecting separate, but related rights comports with the interpretive principle to avoid rendering constitutional text mere surplusage.¹³⁷

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

The first quote below is Virginia’s proposal, which had language similar to the Pennsylvania Constitution. Madison adopted substantially the Virginia language in his proposed Free Press Clause to the House, as noted in the quote 2.¹³⁸ The House Committee of the Eleven made a stylistic change to Madison’s proposal, shortening the construction to “the freedom of speech, and of the press.”¹³⁹ The House Committee of the Whole then approved the language and reported it to the House in August 1789, as noted below in quote 3; the House proposal combined the Speech/Press Clauses with Madison’s proposal for Assembly and Petition Clauses.

In September 1789, the Senate considered the Bill of Rights proposals, including the Free Press Clause. The Senate inserted “Congress” into the Free Speech and Press Clauses, and “or” was substituted in place of “and,” as noted in quote 4. The Senate modeled its language on the House proposal for the Religion Clauses, which at first read: “Congress shall make no law establishing religion, or prohibiting the free exercise thereof; nor shall the rights of conscience be infringed.”¹⁴⁰ Eventually, the Senate combined the language of the Religion, Free Press/Speech, Petition, and Assembly Clauses into one amendment, as noted in quote 5. After a report from Madison, the House proposed, as noted in quote 6, what turned out to be close to the final language adopted in the Bill of Rights.

(1) **Virginia proposal:** “That the people have a right to freedom of speech, and of writing and publishing their sentiments;

press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it.”).

¹³⁷ See *Marbury v. Madison*, 5 U.S. 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect.”); *Myers v. United States*, 272 U.S. 52, 151 (1926) (same). For further discussion of this interpretive principle, see Akhil Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1 (1998).

¹³⁸ 2 SCHWARTZ, *supra* note 82, at 1026.

¹³⁹ *Id.* at 1050.

¹⁴⁰ *Id.* at 1122.

that the freedom of the press is one of the greatest bulwarks of liberty and ought not be violated.”¹⁴¹

(2) **Madison proposal to House:** “The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.”¹⁴²

(3) **House language:** “The freedom of speech, and of the press, and the right of the people peaceably to assemble, and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed.”¹⁴³

(4) **Senate first change:** “That Congress shall make no law abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances.”¹⁴⁴

(5) **Senate second change:** “Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people to peaceably assemble, and petition to the government for the redress of grievances.”¹⁴⁵

(6) **House final change (adopted in Bill of Rights):** “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise of religion; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and petition to the government for the redress of grievances.”¹⁴⁶

This drafting history confirms that the Framers viewed the freedom of the press as a separate, but related right to the freedom of speech. In order to understand the meaning of “or” in “the freedom of speech, or of the press,” we need look no further than the Religion Clauses that precede the Free Speech/Press Clauses. The word “or” was first introduced in the Religion Clauses, and, probably for stylistic reasons when the two sets of clauses were combined, the Senate changed the prior wording “the freedom of speech, and of the press” to “the freedom of speech, *or* the press” (quote

¹⁴¹ *Id.* at 842.

¹⁴² *Id.* at 1026.

¹⁴³ *Id.* at 1122.

¹⁴⁴ *Id.* at 1149.

¹⁴⁵ *Id.* at 1153.

¹⁴⁶ *Id.* at 1160. The Senate agreed to the change. *Id.* at 1163.

4 above). Yet the House was not satisfied with that wording and clarified the language to “the freedom of speech, or *of* the press,” further noting a separate dimension to the press (versus speech) (quote 6 above). In the Religion Clauses, its two clauses are similarly differentiated by the word “or,” in the phrase “Congress shall make no law respecting an establishment of religion, *or* prohibiting the free exercise of religion.” Under the Court’s precedents, the Establishment Clause and the Free Exercise Clause protect two separate, but related rights.¹⁴⁷ By parallel construction, the Free Speech and the Free Press Clauses should as well.

Based on the historical materials and text of the Free Press Clause, I believe the most plausible reason why the “freedom of the press” was recognized in addition to “freedom of speech”¹⁴⁸ was the perceived need to specify protection for the use of the machine itself. Around that time period, some questioned whether anyone could ever have a natural or inherent right to use a machine, which had been developed by man “in a late progress of society.”¹⁴⁹ But, as Holt wrote, “To this it may be answered, that the rights of nature, that is to say, of the free exercise of our faculties, must not be invidiously narrowed to any single form or shape. They extend to every shape, *and to every instrument*, in which, and by whose assistance, those faculties can be exercised.”¹⁵⁰

Thus, in my view, the freedom of the press is designed to address— or, at least, to clarify that the entire Free Speech and Press Clause covers¹⁵¹—a governmental restriction on speech technology. Based on the drafting history and the inclusion of both “speech” and “the press” within the First Amendment freedoms, and the historical documents relating to the Framers’ debate over the Free Press Clause, we can reasonably conclude that the freedom of the press originally indicated constitutional protection specifically for the printing press and the ability of individuals to utilize this technology free of government control. While the freedom of speech protects an individual’s basic right of expression, the freedom of the press is meant to ensure that speech technologies are free of governmental control.

¹⁴⁷ Cutter v. Wilkinson, 544 U.S. 709, 719 (2005).

¹⁴⁸ Levy and Anderson both conclude that the freedom of the press originated before the freedom of speech. LEONARD LEVY, LEGACY OF SUPPRESSION 5-6 (1960); Anderson, *supra* note 86, at 487. The state constitutions all recognized the freedom of the press, but only one (Pennsylvania) recognized the freedom of speech. *Id.*

¹⁴⁹ LEVY, *supra* note 148, at 19.

¹⁵⁰ NELSON, *supra* note 70, at 18-19 (emphasis added); *see id.* at 19 (“The same character, therefore, of natural rights is conveyed to every right which is natural in its origin and *principle through all the possible modes and instruments of exercising and launching it into action and employment.*”) (emphasis added).

¹⁵¹ To borrow Amar’s terminology, it is possible that the “press” aspect of the Free Speech and Press Clause was meant to “clarify” or to “remove doubt” as to the First Amendment protection for speech technologies. *Cf.* Amar, *supra* note 137, at 12.

2. Historical evidence from the First Congress and the Copyright Act of 1790

My understanding of the relationship between the Free Press and Copyright Clauses is also supported by the First Congress’s enactment of the first copyright act. Exercising its Copyright Clause power, the First Congress enacted a copyright statute in 1790 modeled, in large part, on the Statute of Anne.¹⁵² Like the Statute of Anne, the Copyright Act of 1790 established a copyright system in which authors received copyrights in their works for limited terms of fourteen years (renewable once).¹⁵³ Like the Statute of Anne, the 1790 Act did not attempt to limit or regulate the printing presses (as the old Printing Acts in England had). The copyright system established by the First Congress conferred limited exclusive rights in works of authorship, but—importantly—not in any of the machines or technologies that enabled mass publication. Against this backdrop, printing presses proliferated in the early Republic. In 1790, the nation had approximately 100 newspapers, a number that would double by the end of the decade.¹⁵⁴ As Thomas Nachbar describes, “in 1798 the fledgling republic had more than 200 publishers, printers, and booksellers spread through New York, Boston, Philadelphia, Baltimore, and Charleston, and they were intensely competitive.”¹⁵⁵

This traditional model of copyright—with its avoidance of any limits on speech technologies—was followed for over 200 years in the United States. From 1790 to 1992, every single U.S. copyright ever enacted stayed clear of any direct regulation of the machines that enabled mass copying and publication.¹⁵⁶ While the U.S. system had a manufacturing clause from 1891 to 1986 that required foreign authors to print their books with U.S. printers, the provision did not regulate in any way the printing machines in the U.S., or who could print what in the U.S.¹⁵⁷ Instead, the manufacturing clause required foreigners to make use of U.S. printers,

¹⁵² Fred Fisher Music Co. v. M. Whitmark & Sons, 318 U.S. 643, 650 (1943) (“As might have been expected, this Act reflected its historical antecedents.”).

¹⁵³ Act of May 31, 1790, 1 Stat. 124. Patterson argued that the Copyright Clause’s specification of “authors” for the exclusive rights to their writings “most likely reflect[s] an intent not to give Congress the power to make a law regulating the press.” Patterson, *Free Speech*, *supra* note 11, at 32.

¹⁵⁴ STEWART, *supra* note 113, at 16.

¹⁵⁵ Thomas B. Nachbar, *Constructing Copyright’s Mythology*, 6 GREEN BAG 2d 37, 45 (2002).

¹⁵⁶ See Act of May 31, 1790, 1 Stat. 124; Act of Feb. 21, 1793, ch. 11, 1 Stat. 322; Act of Apr. 29, 1802, ch. 36, 2 Stat. 171; Act of February 3, 1831, ch. 16, 4 Stat. 436; Act of March 3, 1891, 26 Stat. 1106; Act of March 4, 1909, ch. 320, 35 Stat. 1080; Pub. L. No. 94-553, 90 Stat. 2572 (1976); see also Patterson, *Free Speech*, *supra* note 11, at 35 (noting how U.S. copyright law in nineteenth century did not allow control over the printing press).

¹⁵⁷ See Act of March 3, 1891, 26 Stat. 1106; Act of March 4, 1909, ch. 320, 35 Stat. 1080; Pub. L. No. 94-553, 90 Stat. 2572 (1976).

whoever they may be and whatever their technology. It was not until the failed Audio Home Recording Act (AHRA) in 1992 that a copyright provision attempted to directly regulate a copy technology in the U.S.¹⁵⁸

The Supreme Court has also protected this traditional model of copyright, viewing attempts to regulate speech technologies as suspect. As Jane Ginsburg has identified, the Supreme Court has traditionally rejected attempts of copyright owners to block new technologies.¹⁵⁹ In a variety of cases over the past 100 years, including the *Sony* case, the Court has demonstrated a “[s]olicitude for . . . nascent dissemination industry,”¹⁶⁰ particularly where copyright holders attempt to stop or otherwise control a new technology for disseminating speech.

This over-200-year tradition of copyright’s avoidance of regulating speech technologies, which dates back to the First Congress’s enactment of the first copyright act, is constitutionally significant in two respects. First, in interpreting the Copyright Clause, the Supreme Court has placed importance on the existence of a long tradition in copyright law dating back to the First Congress. Under the First Congress canon of construction,¹⁶¹ the Supreme Court has long recognized, particularly in the copyright context:

The construction placed upon the constitution by the first act of 1790 and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive.¹⁶²

In *Eldred*, the most recent case involving the Copyright Clause, the Court reaffirmed this canon, stating: “To comprehend the scope of Congress’ power under the Copyright Clause, ‘a page of history is worth a volume of logic.’”¹⁶³

¹⁵⁸ 17 U.S.C. §§ 1001-1010; see Joseph Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 118 (2004) (“[P]erhaps most significantly, the AHRA for the first time expressly regulated technology within a particular market.”).

¹⁵⁹ Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1622-26 (2001).

¹⁶⁰ *Id.* at 1623.

¹⁶¹ See generally Michael Bhargava, Comment, *The First Congress Canon the Supreme Court Use of History*, 94 CAL. L. REV. 1745 (2006).

¹⁶² *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884).

¹⁶³ *Eldred v. Ashcroft*, 537 U.S. 186, 200 (2003).

Second, as this canon reflects, the Court places importance on the Framers' intent to identify the outer parameters of Congress's power under the Copyright Clause. Given the historical evidence before and at the time of the Framing, I believe it is fairly evident that the Framers did not believe that Congress had the power to restrict speech technologies through copyright law. The absence of such regulation in the first Copyright Act presents an example "where the government conduct at issue was *not* engaged in at the time of adoption . . . [because] it was thought to violate the right embodied in the constitutional guarantee,"¹⁶⁴ in this case, the Free Press Clause.

3. The Supreme Court's interpretation of the Free Press Clause

The Supreme Court's interpretation of the Free Press Clause has tended to focus on the Free Speech Clause or the First Amendment more generally for its analysis, without exploring as much the contours of the Free Press Clause. Although the Supreme Court has yet to fully explore the history of the Free Press Clause,¹⁶⁵ its cases do support the historical understanding of the freedom of the press that I have outlined above.

First, the Supreme Court has recognized that the Framers adopted the freedom of the press in response to the abuses of the Crown under the Printing Acts. As Justice Scalia explained in a recent case:

The First Amendment's guarantee of "the freedom of speech, or of the press" prohibits a wide assortment of government restraints upon expression, but the core abuse against which it was directed was the scheme of licensing laws implemented by the monarch and Parliament to contain the "evils" of the printing press in 16th- and 17th-century England. The Printing Act of 1662 had "prescribed what could be printed, who could print, and who could sell."¹⁶⁶

Justice Scalia could have added that the Printing Act of 1662 also limited the total number of presses in England,¹⁶⁷ which was another means for the Crown to control piracy and heresy.

¹⁶⁴ McIntyre v. Ohio Election Comm'n., 514 U.S. 334, 372 (1995) (Scalia, J., dissenting).

¹⁶⁵ The most extensive historical discussion can be found in two concurring opinions, one by Justice Thomas and the other by the late Chief Justice Burger. *See id.* at 334, 358 (1995) (Thomas, J., concurring); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 795 (1978) (Burger, C.J., concurring).

¹⁶⁶ *Thomas v. Chicago Park District*, 534 U.S. 316, 320 (2002).

¹⁶⁷ *See SIEBERT*, *supra* note 12, at 238.

In addition, the Court has recognized the centrality of the printing press to the First Amendment. In rejecting a ban on leafletting on public streets, the Court characterized the freedoms of speech and of the press as encompassing the “freedom to speak, write, *print* or distribute information or opinion.”¹⁶⁸

Furthermore, the Court has taken a very broad view of the freedom of press, consistent with the historical understanding. Although the Supreme Court has at times referred to journalists or newspapers as “the press” in the modern sense,¹⁶⁹ its cases have never limited the freedom of the press to just journalists. Instead, the Court has recognized that “[t]he press *in its historic connotation* comprehends every sort of publication which affords a vehicle of information and opinion.”¹⁷⁰

Perhaps most importantly, the Court has recognized that the freedom of the press encompasses other speech technologies that have developed after the printing press. As the Court stated in *United States v. Paramount Pictures*,¹⁷¹ “We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.”¹⁷² Although the Supreme Court has more recently analyzed regulations of speech technologies under the Free Speech Clause (or more generally under the First Amendment without delineation between the freedom of speech and the freedom of the press),¹⁷³ the Court’s precedents discussing the Free Press Clause are consistent with

¹⁶⁸ *Schneider v. State*, 308 U.S. 147, 161 (1939) (emphasis added).

¹⁶⁹ *See, e.g., Minnesota Star & Tribune Co. v. Minnesota Comm’r Revenue*, 460 U.S. 575, 581 (1983); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 251-52 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 698-99 (1972).

¹⁷⁰ *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (emphasis added). *Cf.* Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 104, 134 (1992) (“[T]he First Amendment yokes the freedom of speech to the freedom of the press and thereby signals an intent to embrace all communication, regardless of the precise medium of transmission.”); Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 905 (“[T]he enumerated rights of “speech” and “press”—and the broader structural logic of the Constitution’s scheme of republican self-government—imply that this nonenumerated form of political expression must likewise be a right retained by members of the self-governing citizenry.”).

¹⁷¹ 334 U.S. 131, 166 (1948).

¹⁷² *Id.*; *see also Branzburg*, 408 U.S. at 704 (freedom of the press includes “the right of the lonely pamphleteer who uses carbon paper or a mimeograph as much as of the large metropolitan publisher who utilizes the latest photocomposition methods”)

¹⁷³ *See, e.g., Red Lion Broad., Co. v. FCC*, 395 U.S. 367, 394 (1969). Whether the Supreme Court should rely on the Free Press Clause (separate from the Free Speech Clause) I leave for future inquiry. One could argue that as long as the Free Speech Clause is understood to cover whatever the Free Press Clause would cover, the Court’s current approach is acceptable. *Cf. Amar, supra* note 137, at 18 (“I suspect that we would pretty much use the First Amendment in the same way, using the speech clause to pick up whatever slack was created by the absence of a press clause.”).

the historical understanding of the freedom of the press I have outlined above.

II. The *Sony* Safe Harbor Is a First Amendment Safeguard that Protects the Freedom of the Press

The historical connection between the Copyright Clause and the Free Press Clause I have outlined above has been largely overlooked in legal scholarship. Although many scholars have written about the history of each Clause separately, few have drawn any direct connection between the two Clauses.¹⁷⁴ Patterson and Joyce's essay published in 2003 appears to be the first piece of legal scholarship that attempts to draw this direct connection. Yet even their insightful essay fails to discuss the significance of the documentary evidence of the Framers' debate over the relationship between the Copyright Clause and the Free Press Clause.¹⁷⁵ Perhaps even more surprisingly, nor has the Supreme Court. Even though the Court has interpreted the Copyright Clause and its connection to the First Amendment,¹⁷⁶ the Court has yet to discuss the historical materials related to the Free Press Clause as it bears on the Copyright Clause. This omission is reflective of the Court's more general reluctance (or perhaps failure) to plumb the historical origin of the Free Press Clause in the context of First Amendment claims.

Understanding the history of the Free Press Clause, however, has profound consequences for copyright law today. First, the history demonstrates that the Framers viewed the Free Press Clause to impose limits on the Copyright Clause power, specifically with respect to regulations of technology. Second, the history and long tradition of copyright law's avoidance of regulating speech technologies, dating back to the first Copyright Act of 1790, all confirm the vital importance of the *Sony* safe harbor to copyright law today. The *Sony* safe harbor operates as a traditional First Amendment safeguard within copyright law that protects speech technologies and free press interests. Without it, copyright law's attempts to regulate technologies would likely violate the First Amendment, or, at the very least, require First Amendment scrutiny.

¹⁷⁴ Within the scholarship related to the freedom of the press, much of the focus has been on the prepublication licensing requirement under the British Crown, a classic prior restraint under First Amendment jurisprudence. This focus has led to the Printing Acts sometimes being referred to as "Licensing Acts." See Astbury, *supra* note 28, at 296 ("This Printing Act was a comprehensive measure for the control of the press, but it is often referred to as the Licensing Act because of its provisions for the prepublication, or, more correctly, the preprinting censorship of all forms of printed materials."). The Printing Acts required more than just licensing, however. Very little attention has been devoted to the Crown's limit on the total number of presses under the Printing Acts.

¹⁷⁵ Patterson & Joyce, *supra* note 11, at 942-43.

¹⁷⁶ See *infra* notes 177-211 and accompanying text.

A. First Amendment Limits on the Copyright Clause

The relationship between the First Amendment and copyright law has always been a delicate one. Copyrights restrict speech, keeping others from utilizing copyrighted works in a number of ways—not just copying, publishing, and performing those works, but even creating new derivative works (meaning new expression) based on copyrighted materials. At the same time, however, the Copyright Clause of the Constitution clearly anticipated that Congress would establish a system of copyright in the U.S. to grant authors exclusive rights over their writings. And, when the Framers drafted the First Amendment in the Bill of Rights, the Framers must have thought that copyright can coexist with the First Amendment.¹⁷⁷ But how can it, if copyright law restricts speech in so many basic ways?

1. The doctrine of First Amendment safeguards—the *Harper Court’s* First Amendment solution to copyright law

The Supreme Court’s answer to this conundrum came first in *Harper & Row, Publishers, Inc. v. Nation Enterprises*.¹⁷⁸ In the case, the Nation magazine asserted a First Amendment right to publish parts of President Ford’s memoirs that it had obtained from a stolen copy of the manuscript before Ford’s book had even been published.¹⁷⁹ The Court, however, did not see a First Amendment problem at all in enforcing copyright in this case.

First, copyright law complements the First Amendment, the Court explained, by providing the economic incentives for authors to create and disseminate works of expression. In an oft-quoted line from *Harper & Row*, the Court asserted that “the Framers intended copyright itself to be the *engine of free expression*” by giving “the economic incentive to create and disseminate ideas.”¹⁸⁰ Although the Court offered no citation to any source, historical or otherwise, to support its bare assertion, the Court’s view is consistent with the historical evidence from the Framing discussed in Part I above. Federalist James Iredell, for example, defended the Copyright Clause power on similar incentive grounds, as quoted above.¹⁸¹

¹⁷⁷ See *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

¹⁷⁸ 471 U.S. 539 (1985).

¹⁷⁹ *Id.* at 542-43.

¹⁸⁰ *Id.* at 558 (emphasis added).

¹⁸¹ See *supra* note 92 and accompanying text.

Second, the *Harper* Court explained that copyright law can avoid further First Amendment problems by incorporating doctrines that protect First Amendment interests. These “First Amendment safeguards” contained within copyright law effectively keep copyright law from unduly restricting the freedom of speech. For example, the “idea/expression dichotomy ‘strike[s] a *definitional balance* between the First Amendment and the Copyright Act by permitting free communication of facts [or ideas] while still protecting an author’s expression.’”¹⁸² Also, the fair use doctrine accommodates free speech interests by allowing “latitude for scholarship and comment” for fair uses of copyrighted works.¹⁸³ These two copyright doctrines operate as “First Amendment protections . . . already embodied in the Copyright Act[.]”¹⁸⁴ Accordingly, no First Amendment scrutiny is ordinarily warranted for an application of copyright law.

The Court did not come up with the doctrine of First Amendment safeguards on its own. In 1970, Paul Goldstein and Melville Nimmer both wrote articles—apparently without knowledge of the other’s—that laid the groundwork for the doctrine. Goldstein argued that the idea-expression dichotomy acted as a “First Amendment safeguard” in the context of copyright law.¹⁸⁵ Similarly, Nimmer contended that the idea-expression dichotomy, for the most part, “represents an acceptable *definitional balance* as between copyright and free speech interests.”¹⁸⁶ A definitional balance attempts “to draw a line between that speech which may be prohibited under copyright law, and that speech which, despite its copyright status, may not be abridged under the command of the first amendment.”¹⁸⁷ Both Goldstein and Nimmer analogized to the actual malice standard under *New York Times v. Sullivan*,¹⁸⁸ which provides a First Amendment safeguard for libel law by setting forth a higher standard of tort liability to accommodate First Amendment concerns.¹⁸⁹

One important feature of a First Amendment safeguard is that it is over-protective of speech. In drawing the line between protected and unprotected speech, a First Amendment safeguard effectively puts a “thumb on the scale” for speech to guard against chilling of speech activities. For example, in *Sullivan*, the Supreme Court devised a First Amendment standard of liability for libel actions against public officials that allows some

¹⁸² 471 U.S. at 556 (emphasis added).

¹⁸³ *Id.* at 560.

¹⁸⁴ *Id.*

¹⁸⁵ Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 989, 1018 (1970).

¹⁸⁶ Nimmer, *Copyright*, *supra* note 11, at 1192 (emphasis added).

¹⁸⁷ *Id.* at 1185.

¹⁸⁸ 376 U.S. 254 (1964).

¹⁸⁹ Goldstein, *supra* note 185, at 992, 1000; Nimmer, *Copyright*, *supra* note 11, at 1184-85.

libel or false statements to go unremedied if made without actual malice (i.e., without knowledge or reckless disregard of the falsity).¹⁹⁰ This means that negligently made falsehoods about public officials must be allowed, even though they are false and even defamatory under traditional standards of tort liability.¹⁹¹ A First Amendment safeguard is overprotective of speech, in order to create breathing room for expressive activity that might otherwise be chilled under a lower standard of liability. As the Court explained in *Sullivan*:

As Madison said, “Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.” . . . That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”¹⁹²

The idea-expression dichotomy and the fair use doctrine operate in similar fashion in copyright law. Even copyrighted expression must often yield to free speech interests under these copyright doctrines. For example, in *Baker v. Selden*, the Court held that accounting forms with a “peculiar arrangement of columns and headings” could *not* be copyrighted because the underlying system (or idea) embodied by the forms, which was not patented, must be left for the public’s free use.¹⁹³ Even though the forms consisted of a “peculiar arrangement” that probably would have easily satisfied the originality requirement for obtaining a copyright as a compilation,¹⁹⁴ the Court ruled against copyright in order to protect the free dissemination of the idea or system of accounting that was embodied in the forms. Subsequent courts have extended the idea-expression dichotomy even further in the merger doctrine, under which copyright does not extend to original expression if there are so few ways of expressing the same concept.¹⁹⁵ These doctrines carve out breathing room for the free exchange of ideas, even to the point of denying copyrights to original expression. Likewise, the fair use doctrine allows people to make unauthorized uses of copyrighted works for fair use purposes, such as criticism or comment. Even though the early copyright acts did not contain a fair use provision, courts have from “the infancy of copyright protection . . . thought [it]

¹⁹⁰ *Sullivan*, 376 U.S. at 283-84.

¹⁹¹ The *New York Times v. Sullivan* standard provides a prophylactic rule, in that it protects some libelous speech in order to encourage free, uninhibited discourse. See Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 934-35 (1999).

¹⁹² *Sullivan*, 376 U.S. at 271.

¹⁹³ *Baker v. Selden*, 101 U.S. 99, 100 (1880).

¹⁹⁴ Cf. *Kregos v. Associated Press*, 937 F.2d 700, 708 (2d Cir. 1991) (pitching form potentially copyrightable).

¹⁹⁵ *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678-79 (1st Cir. 1967).

necessary to fulfill copyright’s very purpose, ‘to promote the Progress of Science and useful Arts.’”¹⁹⁶ Fair use allows what otherwise would be considered copyright infringement to go free, in the name of free speech interests. In cases of parody fair use, the Court has even recognized that the parody can destroy the entire value of the copyrighted work, “kill[ing] demand for the original,” and still be a permissible fair use.¹⁹⁷

2. The traditional contours of copyright—*Eldred’s* elaboration of when First Amendment scrutiny is required of copyright law

Harper was not the Court’s final word on the First Amendment and copyright law. Some lower courts had mistakenly interpreted *Harper* to mean that copyrights are “categorically immune from challenges under the First Amendment.”¹⁹⁸ In *Eldred*,¹⁹⁹ the Court rejected that notion, but concluded that the First Amendment safeguards in copyright law typically obviate the need for First Amendment scrutiny of copyright law. In a key passage, the Court explained when First Amendment scrutiny is necessary for an application of copyright law:

The [copyright term extension] . . . does not oblige anyone to reproduce another’s speech against the carrier’s will. [1] Instead, it protects authors’ original expression from unrestricted exploitation. Protection of that order does not raise free speech concerns present when [2] the government compels or burdens the communication of particular facts or ideas. To the extent such assertions raise First Amendment concerns, copyright’s built-in free speech safeguards are generally adequate to address them. We recognize that the D.C. Circuit spoke too broadly when it declared copyrights “categorically immune from challenges under the First Amendment.” But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.²⁰⁰

In this passage, the *Eldred* Court appears to distinguish between two types of cases: (1) cases involving individuals asserting the right to use copyrighted expression of others, and (2) cases involving individuals not asserting the right to use copyrighted expression of others, but instead having a right to make their own speech without burden from the government.

¹⁹⁶ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994).

¹⁹⁷ *Id.* at 591-92.

¹⁹⁸ *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001).

¹⁹⁹ 537 U.S. 186 (2002).

²⁰⁰ *Id.* at 221 (bracketed numbers inserted).

In what I call Category 1 cases, “speakers assert the right to make [use of] other people’s [copyrighted] speeches,” as was the case in both *Harper* and *Eldred*.²⁰¹ In a Category 1 case, as long as “Congress has not altered the traditional contours of copyright protection,” no First Amendment scrutiny is required. Why? Because the First Amendment safeguards in copyright law are deemed to have provided sufficient accommodation for First Amendment interests of users of copyrighted content. On the other hand, First Amendment scrutiny is required in a Category 1 case if the traditional contours of copyright protection *have* been altered.²⁰²

In Category 2 cases, the government burdens or compels an individual’s right to make her own speech (without copying the copyrighted works of others without authorization), as was the case with cable providers in *Turner Broadcasting* who were obligated under the “must carry” provisions of the Cable Television Consumer Protection and Competition Act to carry certain local programming.²⁰³ In a Category 2 case, some level of First Amendment scrutiny applies; in *Turner* it was intermediate scrutiny.²⁰⁴ The *Eldred* Court described *Turner* as raising a more serious First Amendment question because cable operators were being forced by law to carry the content of others (network broadcasters). Although the *Eldred* Court did not discuss it, we could easily imagine a copyright law that would require strict scrutiny. For example, imagine that Congress enacted a law that denied copyrights based on content or even viewpoint to works that supported Osama Bin Laden or that contained sexually indecent photographs. In this case, the individual’s right to make her own speech would be burdened by a viewpoint or content-based restriction, which necessitates strict scrutiny under the Court’s precedents.²⁰⁵

The more typical copyright infringement suit would fall within the Category 1 cases, however. In most cases, the enforcement of copyrights does not raise any First Amendment problems—or even require any First Amendment scrutiny—given the existence of First Amendment safeguards within copyright law. Unless the traditional contours of copyright protection are in some way changed, First Amendment scrutiny of copyright law is unnecessary.

²⁰¹ *Id.* at 221.

²⁰² See Daniel A. Farber, *Conflicting Visions and Contested Baselines: Intellectual Property and Free Speech in the “Digital Millennium,”* 89 MINN. L. REV. 1318, 1349 (2005).

²⁰³ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (plurality).

²⁰⁴ *Id.* at 661-62.

²⁰⁵ *Id.* at 642.

Thus, under *Eldred*, the “traditional contours of copyright” is the key concept for determining if a copyright law requires First Amendment scrutiny in Category 1 cases. If Congress has “altered the traditional contours of copyright protection,” further First Amendment scrutiny is necessary. Unfortunately, the *Eldred* Court said very little about the meaning of “traditional contours of copyright protection” or its relationship to the First Amendment safeguards, so we are left to much guesswork.

With that caveat in mind, I argue that the concept of “traditional contours of copyright protection” includes (i) the traditional First Amendment safeguards in copyright law and (ii) other traditional copyright doctrines. As to the first category, all traditional First Amendment safeguards within copyright law (such as fair use and idea-expression, the two safeguards the Court has expressly noted) fall within the category of “traditional contours of copyright.” If Congress abrogated either doctrine, First Amendment scrutiny would be required (and it is very likely that such a change in copyright law would be unconstitutional).

As to the second category, I believe there may be other traditional copyright doctrines besides the traditional First Amendment safeguards, such as the basic exclusive rights of copyright.²⁰⁶ Thus, First Amendment scrutiny would be necessary either if Congress altered a traditional First Amendment safeguard such as fair use and idea-expression, or if Congress changed a traditional contour of copyright protection, such as by granting super-copyright protections or *sui generis* rights without formally altering one of the First Amendment safeguards within copyright law.

My interpretation is supported by several passages in *Eldred*. First, the language contained in “traditional First Amendment safeguards” and “traditional contours of copyright protection” are different. While both contain the notion of “traditional,” the former term focuses on First Amendment *safeguards*—which are typically exemptions to copyright, such as fair use and idea-expression. The latter term focuses on the contours of *copyright protection*—which could include the exclusive rights of the copyright holder,²⁰⁷ instead of just exemptions to copyrights. Indeed, when

²⁰⁶ Cf. Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 491-500 (2004) (arguing that prior formalities of U.S. copyright law dating back to the first Copyright Act constitute a “traditional contour of copyright protection”); Lawrence Lessig, *Creative Economies*, 1 MICH. ST. L. REV. 33, 41 (2006) (same). The Ninth Circuit rejected a First Amendment challenge based on this argument. *Kahle v. Gonzales*, --- F.3d ----, 2007 WL 136727 (9th Cir. Jan. 22, 2007).

²⁰⁷ See Alfred C. Yen, *Eldred, the First Amendment, and Aggressive Copyright Claims*, 40 HOUS. L. REV. 673, 687 (2003) (“If Congress had expanded the substantive rights enjoyed by copyright holders, thereby altering the ‘traditional’ balance between the rights of copyright holders and others, the Court would have taken a far dimmer view of extending copyright’s duration.”).

one thinks of copyright protection, one probably thinks first of the basic exclusive rights of the copyright holder—i.e., the protections copyright affords the copyright holder—instead of exemptions or exceptions to those rights.

This subtle distinction between First Amendment safeguards and copyright protection is illuminated by the *Eldred* Court’s citation of case law. Immediately after introducing the concept of “traditional contours of copyright protection,” the Court cited two cases: (1) a direct cite to *Harper & Row*, to the passage where the Court discussed 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”;²⁰⁸ and (2) a comparative cite to *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, a case in which the Court upheld the grant of stronger trademark rights over the term “Olympic” to the U.S. Olympic Commission.²⁰⁹

The *Eldred* Court’s first cite to *Harper & Row* makes clear that the Court considers the traditional First Amendment safeguards within copyright law to comprise part of the “traditional contours of copyright protection.” Indeed, the entire discussion of fair use and idea-expression in that section, which leads up to the introduction of the concept of “traditional contours,” leaves practically no doubt about this point.²¹⁰

But the *Eldred* Court’s second cite to the “Olympic” trademark case is also instructive. The case involved a First Amendment challenge to a statute²¹¹ that gave stronger-than-usual trademark rights over the word “Olympic” to the United States Olympic Committee. The statute did not require proof of a likelihood of confusion for a successful trademark claim as is required under the Lanham Act for trademark claims; nor did it allow the typical defenses to trademark infringement. The Supreme Court upheld the statute, but only after *applying* First Amendment scrutiny. As the Court explained: “Even though this protection may exceed the *traditional rights* of a trademark owner in certain circumstances, the application of the Act to this commercial speech is not broader than necessary to protect the legitimate congressional interest and therefore does not violate the First Amendment.”²¹²

²⁰⁸ Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 560 (1985) (emphasis added).

²⁰⁹ 483 U.S. 522 (1987).

²¹⁰ Eldred v. Ashcroft, 537 U.S. 186, 219-21 (2003).

²¹¹ The Amateur Sports Act, § 10, 92 Stat. 3048 (codified at 36 U.S.C. § 380).

²¹² *United States Olympic Comm’n*, 483 U.S. at 530 (emphasis added).

If we applied a similar approach to copyright, a court would apply First Amendment scrutiny to a copyright law that altered the traditional scope of copyright by granting a super-copyright to some works. Even though no formal alteration of a First Amendment safeguard such as fair use or idea-expression has occurred, there has been a change to the traditional contours of copyright, necessitating First Amendment review. To borrow the language from the *Olympic* case, “this protection may exceed the *traditional rights* of a [copyright] owner.” In such case, a court would apply First Amendment scrutiny.

3. The Free Press Clause limit on the Copyright Clause

The Supreme Court has yet to consider whether the Free Press Clause imposes any limits on Congress’s power under the Copyright Clause. In both *Harper* and *Eldred*, the Court spoke generally of the “First Amendment,” without delineating or even mentioning either the Free Speech or Free Press Clauses. But neither case involved any regulation of speech technologies, so no Free Press Clause issue was even presented.

In the future, though, it seems very likely that the Court will have to consider the constitutionality of a copyright law that restricts a speech technology, given the increased pressure in Congress to use copyright law to regulate technologies. In Part I, I sketched out the history of the Free Press Clause, which I believe indicates that the Framers understood the Clause as limiting Congress’s power to regulate speech technologies through copyright law. This history can no longer be ignored, if the Supreme Court eventually considers a case involving the constitutionality of a law restricting a speech technology under copyright or other law.

The Court’s doctrine of First Amendment safeguards suggests, however, that the Court may be reluctant to entertain a direct Free Press or First Amendment challenge to a copyright provision. Instead, the Court probably will seek first to examine whether copyright law already provides some definitional balance or First Amendment safeguard to accommodate Free Press concerns to protect speech technologies. In the next section, I show how it already does.

C. The *Sony* Safe Harbor Is a Traditional First Amendment Safeguard

My core thesis, developed below, is that the *Sony* doctrine serves as a traditional First Amendment safeguard to protect the same interests as the original understanding of the freedom of the press. As such, the *Sony* safe harbor has constitutional importance for our copyright system at least of the

same degree as the fair use and idea-expression doctrines—although I leave for another day whether the *Sony* safe harbor is constitutionally required. The *Sony* safe harbor provides a definitional balance to address free press concerns in copyright law.

1. The *Sony* safe harbor

In *Sony*, the movie studios staked out a copyright claim that was, in the Supreme Court’s view, “unprecedented.”²¹³ It was unprecedented in that never before had copyright law been invoked to “impose copyright liability upon the distributors of copying equipment,” in this case, Sony’s newly developed betamax or video recorder.²¹⁴ Although the home video recorder was relatively new at the time, other copying equipment, starting with the printing press, had existed for generations—without such attempted interference by copyright holders. The two movie studios in *Sony*, Universal and Disney, were seeking to shut down the sale of all Sony video recorders.²¹⁵

Judge Ferguson, who presided over the trial, well understood that the movie studios’ argument implicated not just the VCR, but many other technologies:

Selling a staple article of commerce, e.g., a typewriter, a recorder, a camera, a photocopying machine technically contributes to any infringing use subsequently made thereof, but this kind of “contribution,” if deemed sufficient as a basis for liability, would expand the theory beyond precedent and arguably beyond judicial management.²¹⁶

The Supreme Court agreed with Judge Ferguson’s decision, even adopting his approach in analogizing to the staple article of commerce doctrine from patent law.²¹⁷ In what has become probably the most quoted passage in *Sony*, the Court held:

The staple article of commerce doctrine must strike a balance between a copyright holder’s legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of

²¹³ Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 421 (1984).

²¹⁴ *Id.*

²¹⁵ *Id.* at 420 (plaintiffs sought “an injunction against the manufacture and marketing of Betamax VTR’s”).

²¹⁶ Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 461 (C.D. Cal. 1979).

²¹⁷ *Sony*, 464 U.S. at 456.

commerce. Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.²¹⁸

Thus, in order for the *Sony* doctrine to apply, the technology must be “capable of commercially significant noninfringing uses.”²¹⁹ The video recorder easily satisfied this test, in the Court’s view, because it allowed consumers to record broadcast shows for “time-shifting” purposes to record and later to watch a show.²²⁰ The two movie studios had no legitimate claim to stop all other copyright holders—such as Fred Rogers from *Mr. Rogers’ Neighborhood*—who had no objection to allowing consumers to make such time-shift recordings of their shows.²²¹ Even further, the Court held that the two studios had no legitimate claim to stop time-shift recordings of their own broadcast shows, even if consumers recorded them without the studios’ authorization.²²² Such time shift recording was a fair use, the Court concluded. The Court noted the lack of any evidence that the two studios would be harmed by such recordings, as well as the societal interest in having greater access to broadcast programs that were freely televised.²²³

In 2005, the Court revisited the *Sony* doctrine in *Grokster*, a case involving the liability of two distributors of p2p software that enabled users to engage in “file sharing” over the Internet, including for illegal copying of copyrighted music. Although the Supreme Court agreed with the music and movie industries that summary judgment had been improperly granted to the defendants, the Court based its decision on a ruling that was much narrower than the industries sought. Most importantly, the Court reaffirmed the basic tenet of the *Sony* doctrine, and strengthened, I believe, its foundation by describing it, for the first time, as a “safe harbor.”²²⁴

But the Court also made clear that the *Sony* safe harbor did not immunize technology developers from liability if they “actively induced” infringement, “as shown by clear expression or other affirmative steps taken [by them] to foster infringement.”²²⁵ Active inducement can be shown, for

²¹⁸ *Id.* at 442.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 446.

²²² *Id.* at 447-48.

²²³ *Id.* at 454-55.

²²⁴ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2781 n.12 (2005).

²²⁵ *Id.* at 2770.

example, by advertising or providing instructions encouraging or advising consumers to use the product in question for infringing purposes.²²⁶

The *Sony* safe harbor, in other words, does not create complete immunity.²²⁷ Instead, the *Sony* safe harbor protects (1) the developer of a technology capable of a substantial noninfringing use for acts in designing, developing, distributing, and supporting the technology; but does not protect (2) the developer for any other conduct that demonstrates an intent or active step of inducement.

The Court was careful in ensuring that the inducement claim not be allowed to water down the *Sony* safe harbor. A defendant’s “mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability.”²²⁸ “[O]rdinary acts incident to product distribution, such as offering customers technical support or product updates,” cannot in themselves be considered active inducement.²²⁹ Culpable intent cannot be imputed from a “product’s characteristics.”²³⁰

On the whole, I believe the Court’s framework in *Sony* and *Grokster* provides a sensible approach to secondary liability, one that is sensitive to the needs of copyright holders in enforcing their copyrights and the needs of technology developers to have breathing room for “the development of technologies with lawful and unlawful potential.”²³¹

2. The *Sony* safe harbor protects speech-facilitating technologies and free press concerns

Although the Supreme Court has not expressly described the *Sony* doctrine as a First Amendment safeguard—and no prior legal scholarship about *Sony* has even suggested it—the conclusion necessarily follows, I

²²⁶ *Id.* at 2779.

²²⁷ The Supreme Court appeared to suggest, if not hold, that the *Sony* safe harbor applies to vicarious liability (in addition to contributory liability). *Sony*, 464 U.S. at 435 n.17 (1982) (“[R]easoned analysis of respondents’ unprecedented claim necessarily entails consideration of arguments and case law which may also be forwarded under other labels.”); see also *Grokster*, 125 S. Ct. at 2776 n.9. The Ninth Circuit, however, has held that *Sony* does not apply to shield a defendant against vicarious liability. *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001) (*Sony* “provides a defense only to contributory infringement, not to vicarious infringement”). The Seventh Circuit takes the opposite view. See *In re Aimster Copyright Ltgn.*, 334 F.3d 643, 654 (7th Cir. 2003) (“[T]he Court, treating vicarious and contributory infringement interchangeably, ... held that Sony was not a vicarious infringer either.”).

²²⁸ *Grokster*, 125 S. Ct. at 2780.

²²⁹ *Id.*

²³⁰ *Id.* at 2779.

²³¹ *Id.* at 2780.

believe, from the principles the Court has adopted. At least on the surface, such a claim may seem surprising. After all, when the Supreme Court first articulated the *Sony* safe harbor, the Court analogized to a provision in the Patent Code, which limits contributory patent infringement from proscribing the mere sale of a “staple article or commodity of commerce suitable for substantial noninfringing use.”²³² But the *Sony* Court made no mention of any First Amendment safeguard. Nor did the Court in *Grokster*.

I believe the Court’s silence was understandable, however. At the time of the *Sony* case, the Supreme Court had yet to even articulate the doctrine of First Amendment safeguards for *any* copyright doctrine.²³³ And, although one of the fifty-five *amici* briefs in *Grokster* did raise the issue,²³⁴ none of the courts below or parties’ briefs did. It is important to bear in mind, moreover, that both the fair use and idea-expression doctrines were not formally characterized as First Amendment safeguards until the *Harper* decision in 1985, many years after they had been in existence in copyright law. These cases show that First Amendment safeguards can operate within copyright law without being formally recognized as such by the Court until later.

If we test the *Sony* doctrine under *Eldred*’s definition of a First Amendment safeguard, I believe it becomes evident that the *Sony* doctrine is one of “copyright’s internal safeguards to accommodate First Amendment concerns.”²³⁵ The First Amendment interest lies in allowing the development of technologies that facilitate the widespread production and dissemination of speech, technologies that I call “speech-facilitating technologies” or “speech technologies” for short.

The *Sony* safe harbor protects technologies, like the recorder, copier, and printing press, that facilitate the dissemination of speech. By providing a safe harbor for the development of such speech-facilitating technologies, the *Sony* doctrine accommodates First Amendment concerns. It leaves breathing room for the development of those technologies that can facilitate the production and dissemination of speech. As long as a technology in question has a substantial noninfringing use, it falls within the *Sony* safe harbor and is protected from copyright claims—even if the technology can also be used for infringement.

²³² *Sony*, 464 U.S. at 440.

²³³ *Harper & Row* was decided in 1985, a year after *Sony*, so the Court had yet to consider the doctrine of First Amendment safeguards in copyright law at the time of *Sony*.

²³⁴ Brief of Professors Edward Lee, Peter Shane, & Peter Swire as *Amici Curiae* in Support of Respondents, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005), 2005 WL 508111.

²³⁵ *Eldred v. Ashcroft*, 537 U.S. 186, 221 n.24 (2003).

Notice that the *Sony* safe harbor has all the hallmarks shared by the other First Amendment safeguards already discussed. First, it establishes a standard of liability and a *definitional balance* for copyright law. The definitional balance consists of a “balance between a copyright holder’s legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce.” Those other areas of commerce involve the development of speech-facilitating technologies. *Sony* itself recognized the First Amendment interests at stake. In rejecting the movie studios’ attempt to stop *Sony*’s production of the video recorder, the Court emphasized several times the public’s interest in the video recorder, which could increase the viewing public’s access to broadcast shows.²³⁶ The video recorder allows people to make “time shift” recordings of broadcast show for later viewing, a practice that the Court ultimately concluded was a fair use. Just as there is a free speech interest in allowing people to make fair uses of copyrighted works, so too there is a free speech (or free press) interest in allowing the production of technologies that make those fair uses even possible. For, without the video recorder, no one in *Sony* could have made any fair use recordings whatsoever.²³⁷

Second, just like the *New York Times v. Sullivan* standard for libel, the *Sony* safe harbor is overprotective of speech. Even though a technology can be used—and, in fact, is used—for copyright infringement, the *Sony* safe harbor allows the development and distribution of the technology as long as it is capable of a substantial noninfringing use. The Court made it clear that it looks to both actual *and* potential uses of a technology, and a potential use that is commercially significant is enough.²³⁸ Although four dissenting justices in *Sony* would have adopted a more restrictive test finding liability if a technology’s primary (actual) use is for copyright infringement,²³⁹ the majority adopted a definitional balance that was far more protective of speech technologies. In fact, the balance struck by the *Sony* Court is reminiscent of Madison’s view of the printing press, as quoted by the *Sullivan* Court: “Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the

²³⁶ As noted by the Supreme Court, the district court found that the video recorder “served the public interest in increasing access to television programming, an interest that is consistent with the First Amendment policy of providing the fullest possible access to information through public airwaves.” *Sony*, 464 U.S. at 425 (internal quotations omitted). The Supreme Court relied on this view in its decision. *Id.* at 421 (“‘time shifting’[] enlarges the television viewing audience”); *id.* at 454 (“public interest in making television broadcasting more available”).

²³⁷ *Id.* at 456 (rejecting “a flat prohibition against the sale of machines that make such [fair use] copying possible”).

²³⁸ *Id.* at 442.

²³⁹ *Id.* at 491, 493 (Blackmun, J., dissenting).

press.”²⁴⁰ The *Sony* Court itself even noted the role the printing press had in the development of copyright.²⁴¹

The thornier question is whether the *Sony* safe harbor can be considered a *traditional* First Amendment safeguard or contour of copyright protection. While both the fair use and idea-expression doctrines can be traced back to the 19th century, the Court did not formally recognize the *Sony* doctrine until the late 20th century, in 1984 by the Supreme Court and in 1979 by the district court. By this measure, in terms of formal judicial recognition, the *Sony* doctrine might appear to lack the longevity necessary to be considered a “traditional” safeguard. But, upon closer inspection, the *Sony* doctrine may reflect more of the “tradition” of our copyright system than one may think. One of the reasons the *Sony* doctrine was not formally recognized until 1984 was the simple fact that, prior to *Sony*, no court had ever had the opportunity to consider such an “unprecedented attempt to impose copyright liability upon the distributors of copying equipment.”²⁴² Before *Sony*, copyright holders had never tried to stop the manufacture of a technology under copyright law—certainly not the printing press. And, until very recently, no Copyright Act, starting with the first act of 1790, ever attempted, in any way, to regulate directly the printing press or other speech-facilitating technologies, much less stop their production.

Even though the *Sony* doctrine was not formally recognized by the Court until 1984, I believe it is historically accurate to say that one of the “traditional contours of copyright protection” in the United States was that copyright did not allow copyright holders to regulate technologies, such as a copying device.²⁴³ As the Court in *Sony* put it, “[s]uch an expansion of the copyright privilege is beyond the limits of the grants authorized by Congress.”²⁴⁴

The reason for this historical limit to copyright’s scope traces back to the freedom of the press, as discussed at length above. This concept informed the Framers, who drafted both the Copyright Clause and the Free Press Clause. The Framers wanted to prevent “the scheme of licensing laws implemented by the monarch and Parliament to contain the ‘evils’ of the printing press in 16th- and 17th- century England.”²⁴⁵ The Printing Act had limited the number of presses and master printers as a part of the repressive regime that gave the Stationers control over the entire printing industry.

²⁴⁰ *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964) (quoting 4 ELLIOT’S DEBATES ON THE FEDERAL CONSTITUTION 571 (1876)).

²⁴¹ *Sony*, 464 U.S. at 430.

²⁴² *Id.* at 421.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Thomas v. Chicago Park District*, 534 U.S. 316, 320 (2002).

That monopoly included power not only over what could be published, but over the technology of mass publication itself. This regulation of the press was dismantled when the Printing Act was allowed to lapse and eventually a reformed system of limited copyrights was instituted in its place. Under the reformed system of copyright, the state did not attempt to give authors (or publishers) any control over the technology of the printing press. There was, in other words, the beginning of a freedom of the press.

The *Sony* safe harbor serves the same interest today. While the *Grokster* Court was right to recognize that the doctrine “leaves breathing room for innovation and a vigorous commerce,”²⁴⁶ it could have said more: the *Sony* doctrine leaves breathing room for innovation and a vigorous commerce specifically in *speech-facilitating technologies*. All of the technologies at issue under the *Sony* safe harbor—the video recorder, the copy machine, peer-to-peer file sharing software, etc.—involve the production or dissemination of works of expression. By definition, copyrighted works involve expression or speech, so technologies that copy, publish, or disseminate copyrighted works all necessarily involve speech, and all necessarily implicate First Amendment values.

Indeed, the facts in *Sony* closely approximate the kind of historical abuse that the freedom of the press was designed to end. During the 1980s, the movie studios were hoping to market the videodisc player, a technology that could play, but not record, shows—a limitation in technology that was attractive to the movie studios, which feared copyright infringement of their works.²⁴⁷ In fact, a major developer of the videodisc player was MCA, which owned Universal Studios, one of the plaintiffs in *Sony* that was seeking to prohibit the manufacture of the competing betamax player manufactured by Sony, which, of course, could record.²⁴⁸ Had Universal Studios been successful in enjoining Sony from manufacturing the betamax, Universal would have been able to limit the number of video recorders in the market in the same way that the Printing Act limited the number of printing presses in England, all in an effort to control “piracy.” The *Sony* Court viewed the movie studio’s claim as so “extraordinary” because they were “seek[ing], in effect, to declare VTR’s contraband.”²⁴⁹ One might add: in the same way that the Stationers were able to declare unregistered printing presses contraband.

²⁴⁶ Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 125 S. Ct. 2764, 2778 (2005).

²⁴⁷ Randall Picker, *From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the Propertization of Copyright*, 70 U. CHIC. L. REV. 281, 290 (2003).

²⁴⁸ J. LARDNER, FAST FORWARD: A MACHINE AND THE COMMOTION IT CAUSED 26-30, 119, 316-328 (1987).

²⁴⁹ Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 421 (1984).

Copyright liability has First Amendment safeguards. The Court has identified two of them, the fair use and idea-expression doctrines, which together provide breathing room for individuals to use copyrighted works without authorization. In this Part, I have made the case for why the *Sony* safe harbor operates as a comparable First Amendment safeguard within copyright law to allow breathing room for individuals to develop speech-facilitating technologies. Whereas fair use and idea-expression focus on speech itself, the *Sony* safe harbor focuses on protecting those technologies that make mass publication of speech even possible.

III. Applying the Freedom of the Press 2.0

My theory has important ramifications for copyright law today. First, to the extent Congress attempts to operate outside of the *Sony* safe harbor and departs from its protections, First Amendment scrutiny would be required—with particular recognition of the Framers’ view of the Free Press Clause. Second, in applying the *Sony* safe harbor, courts must consider its First Amendment goal of providing breathing room for the development of speech technologies. I propose four free press principles for courts to consider when applying *Sony*.

A. Copyright Regulations of Speech Technologies Outside of the *Sony* Safe Harbor Must Be Subject to First Amendment Scrutiny

If Congress enacts a copyright law that regulates technology outside of *Sony*’s protection as a First Amendment safeguard, First Amendment scrutiny would be required.²⁵⁰ Also, courts must take into account the Framers’ view of the Free Press Clause as a limit on the Copyright Clause power.

Under First Amendment jurisprudence, governmental restrictions on technologies that facilitate the production or dissemination of speech are subject to some form of First Amendment scrutiny. From the printing press²⁵¹ to broadcast radio²⁵² to cable television²⁵³ to the Internet,²⁵⁴ the

²⁵⁰ The DMCA is one such example. It goes beyond the scope of this Article to analyze how the DMCA would fare under First Amendment scrutiny. The few courts that have considered various First Amendment challenges to the DMCA have all upheld the statute as constitutional. *See Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 453-59 (2d Cir. 2001) (applying intermediate scrutiny); *321 Studios v. Metro Goldwyn Mayer Studios*, 307 F. Supp. 2d 1085, 1099-1103 (N.D. Cal. 2004) (same); *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002) (same). L. Ray Patterson compared the DMCA to the Licensing Act of 1662 in England. L. Ray Patterson, *The DMCA: A Modern Version of the Licensing Act of 1662*, 10 J. INTELL. PROP. L. 33 (2002). I reserve judgment.

²⁵¹ *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 253 (1974).

Supreme Court has been solicitous in recognizing how technologies of speech—and governmental regulations of them—implicate important First Amendment concerns. Typically, the question for the Court is what level of First Amendment scrutiny should apply to governmental regulation of a speech-related technology, not whether there should be any scrutiny at all. Except for government regulation of broadcast media, which have been scrutinized under a more lenient (and controversial) standard due to a once perceived technological difference in broadcasting,²⁵⁵ laws that regulate speech-facilitating technologies are typically subject to ordinary First Amendment scrutiny.²⁵⁶ And even with broadcast regulations, some First Amendment scrutiny applies.

Indeed, restrictions as seemingly minor as regulations on the use of loudspeakers or sound amplifiers in public are subject to First Amendment scrutiny.²⁵⁷ In *Kovacs v. Cooper*, the Supreme Court upheld, as reasonable, a city ordinance that barred “sound trucks with broadcasts of public interest, amplified to a loud and raucous volume, from the public ways of municipalities.”²⁵⁸ The Court noted that sound trucks were allowed “in places such as parks or other open spaces off the streets.”²⁵⁹ This city ordinance contrasted with the one in *Saia v. New York*, which prohibited all sound trucks used “for advertising ... or for the purpose of attracting the attention of the passing public,” anywhere in public.²⁶⁰ The Court easily concluded that this flat prohibition was unconstitutional because it was “not

²⁵² See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969); *National Broad. Co. v. United States*, 319 U.S. 190, 226-27 (1943).

²⁵³ See *Turner Broad. Sys., Inc., v. FCC*, 512 U.S. 622, 639 (1994) (plurality).

²⁵⁴ See *Reno v. ACLU*, 521 U.S. 844, 870 (1997); *Ashcroft v. ACLU*, 535 U.S. 564, 566 (2002).

²⁵⁵ The Court has attempted to justify the deferential standard for broadcasting based on (i) the premise that the spectrum available for broadcasting is scarce, thus justifying governmental intervention; and (ii) the “pervasiveness” of broadcast reception in the privacy of homes that does not allow viewers to readily screen out content before they are seen. See *Red Lion*, 395 U.S. at 390; *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (plurality). Both rationales have been roundly criticized as no longer, if ever, true. See, e.g., Yoo, *supra* note 10, at 266-306.

²⁵⁶ *Turner I*, 512 U.S. at 637.

²⁵⁷ See *Kovacs v. Cooper*, 336 U.S. 77, 78 (1949); *Saia v. New York*, 334 U.S. 558, 559 (1948); see also Michael J. Burstein, Note, *Towards a New Standard for First Amendment Review of Structural Media Regulation*, 79 N.Y.U.L. REV. 1030, 1037-38 & nn. 42-49 (2004) (cataloguing cases in which First Amendment scrutiny applied to “limits on local telephone companies’ provision of video services, surcharges on non-locally produced cable programming, municipalities’ grants of exclusive local cable franchises, open access requirements for cable Internet service provision, limits on cable channel allocation to affiliated programmers (vertical ownership rules), limits on the total number of subscribers that can be served by a single cable provider (horizontal ownership rules), and ‘must carry’ requirements as applied to satellite television providers”).

²⁵⁸ *Kovacs*, 336 U.S. at 87.

²⁵⁹ *Id.* at 85.

²⁶⁰ *Saia*, 334 U.S. at 558.

narrowly drawn to regulate the hours or places of use of loud-speakers, or the volume of sound (the decibels) to which they must be adjusted.”²⁶¹

These cases embody the Court’s larger First Amendment concern in protecting outlets of communication for the free flow of information and ideas.²⁶² As the Court recognized in *Sullivan*, the First Amendment guards against “shut[ting] off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.”²⁶³ The First Amendment attempts “to secure ‘the widest possible dissemination of information from diverse and antagonistic sources.’”²⁶⁴ In *Sullivan*, the Court recognized that the standards of liability may be “deficient for failure to provide the safeguards for freedom of the speech and of the press by the First and Fourteenth Amendments.”²⁶⁵ Government regulations of a medium for the communication of ideas require First Amendment scrutiny, as much as required for government regulations of communication itself.

Against this First Amendment jurisprudence, it would be extremely difficult to explain how copyright law could regulate speech-facilitating technologies without any First Amendment concern whatsoever. Not even broadcasting gets a First Amendment free pass. Although copyright law typically avoids First Amendment scrutiny, as I have explained above, it does so only because the Court has found sufficient First Amendment safeguards built in copyright law. By protecting the development of speech-facilitating technologies under copyright law, the *Sony* safe harbor acts as one such First Amendment safeguard—or definitional balance—within copyright law. The only reason copyright law’s regulation of speech-facilitating technologies can avoid First Amendment scrutiny is the accommodation for such technologies already provided by the *Sony* doctrine.

²⁶¹ *Id.* at 559.

²⁶² See *Turner I*, 512 U.S. at 657; *Watchtower Bible and Tract Society of New York, Inc. v. Stratton*, 536 U.S. 150, 162 (2002) (recognizing “the historical importance of door-to-door canvassing and pamphleteering as vehicles for the dissemination of ideas”).

²⁶³ 376 U.S. 254, 266 (1964).

²⁶⁴ *Id.* Robert Post describes the scope of the First Amendment as extending not only to speech and any “medium” through which the speech—e.g., a projector displaying a movie—occurs, but also to the entire social interaction itself. Robert Post, *Encryption Source Code and the First Amendment*, 15 BERKELEY TECH. L.J. 713, 716-17 (2000). Post defines “medium” as “a set of social conventions and practices shared by speakers and audience.” Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1253 (1995).

²⁶⁵ *Sullivan*, 376 U.S. at 264.

Thus, if Congress were to enact a copyright law restricting speech technologies outside of *Sony*, some First Amendment scrutiny would apply. It seems doubtful that a prohibition on the production or sale of a speech-facilitating technology that has a substantial noninfringing use could withstand First Amendment scrutiny. As the Supreme Court has stated, “[a] complete ban can be narrowly tailored, *but only if* each activity within the proscription’s scope is an appropriately targeted evil.”²⁶⁶ A technology with a substantial noninfringing use is *not* an appropriately targeted evil—copyright law has no claim to stopping such a legitimate use of a technology. For the same reason, under intermediate scrutiny, the prohibition would fail the narrow tailoring prong. As the Court in *Sony* recognized, banning such a legitimate technology would “enlarge the scope of ... statutory monopolies to encompass control over an article of commerce that is not the subject of copyright protection.”²⁶⁷

My point, however, is not to prove that such a copyright regulation of speech technology outside of *Sony* would violate the First Amendment. Instead, it is to show that, at the very least, First Amendment scrutiny would be required.²⁶⁸ And any court considering the constitutionality of such an enactment must consider the Framers’ view of the Free Press Clause as a limit on the Copyright Clause. While Congress can choose to “unwind” *Sony*,²⁶⁹ or operate outside of its protections, the First Amendment always remains in play.

B. Courts Should Apply the *Sony* Safe Harbor Broadly as a First Amendment Safeguard

If we understand the *Sony* doctrine as a First Amendment safeguard, we must keep in mind its First Amendment aims in protecting speech-facilitating technologies when applying the doctrine. As the *Eldred* Court recognized (referring to the canon of construction to avoid constitutional doubt), “it is appropriate to construe copyright’s internal safeguards to accommodate First Amendment concerns.”²⁷⁰ Once *Sony* is recognized as one such internal safeguard, courts must construe it, as the Supreme Court has instructed, “to accommodate First Amendment concerns.”

²⁶⁶ Frisby v. Schultz, 487 U.S. 474, 485 (1988) (emphasis added).

²⁶⁷ Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 421 (1984).

²⁶⁸ Even if a court had found secondary liability against Sony and ordered the payment of damages, First Amendment scrutiny would still be required. Cf. *Sullivan*, 376 U.S. at 256 (First Amendment standards of liability for award of damages in libel action). For further discussion, see Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998).

²⁶⁹ Cf. Peter S. Menell & David Nimmer, *Unwinding Sony* (2006) (manuscript).

²⁷⁰ *Eldred v. Ashcroft*, 537 U.S. 186, 221 n.24 (2003) (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994)).

I do not have the space to examine fully all of the contours of the *Sony* safe harbor as a First Amendment safeguard. Let me suggest, however, four principles that courts should recognize in applying the *Sony* safe harbor's overriding First Amendment concern of accommodating the development of speech-facilitating technologies.

First, in determining what is a "substantial" noninfringing use, courts must consider the *qualitative* significance of a particular use, not just the quantitative aspect. From the First Amendment perspective, the qualitative weight of speech may be more important than the quantitative.²⁷¹ After all, the value of speech is much more than just a number or head count.²⁷² The speech of one individual can be just as substantial as the speech of an entire nation.²⁷³ In other contexts, such as fair use and infringement, "substantiality" is determined in both a qualitative and quantitative sense.²⁷⁴

Second, flexibility in applying the *Sony* safe harbor is necessary because the test must accommodate many different kinds of technology over time. A hard-and-fast rule or strict test of proportionality is unlikely to be able to deal adequately with all the nuances posed by new technologies.²⁷⁵ As Congress recognized in codifying a flexible standard of fair use in the 1976 Act, fair use is "especially important 'during a period of rapid technological change,' and 'the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.'"²⁷⁶ The fair use doctrine is applied on a case-by-case basis to "afford[] considerable 'latitude for scholarship and comment,' and even for parody."²⁷⁷

²⁷¹ See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 198 (1983).

²⁷² See Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 831-32 (1994).

²⁷³ Just think of Lincoln's Gettysburg Address, or Martin Luther King, Jr.'s "I Have a Dream" speech.

²⁷⁴ For fair use, see 17 U.S.C. § 107; *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 565 (1985). For infringement, see *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 75 (2d Cir. 1997). In patent law, under the staple article of commerce doctrine, the Federal Circuit has not taken a strict quantitative or proportionality approach. See, e.g., *Alloc Inc. v. Int'l Trade Comm'n*, 342 F.3d 1361, 1374 (Fed. Cir. 2003) (making no determination of proportion of uses); *C.R. Bard, Inc. v. Advanced Cardiovascular Sys.*, 911 F.2d 670, 674 (Fed. Cir. 1990) (evidence of 40 to 60 percent noninfringing use would allow a reasonable jury to find a substantial noninfringing use). Courts analyzing of substantiality of noninfringing use of an invention under patent law have analyzed both quantitative and qualitative evidence of substantiality. See, e.g., *Pickholtz v. Rainbow Technologies*, 260 F. Supp. 2d 980, 989 (N.D. Cal. 2003).

²⁷⁵ Edward Lee, *Rules and Standards for Cyberspace*, 77 NOTRE DAME L. REV. 1275, 1307-08 (2002).

²⁷⁶ *Universal City Studios, Inc. v. Sony Corp. of America*, 480 F. Supp. 429, 456 (C.D. Cal. 1979) (quoting H. Rep. No. 1476, at 5679).

²⁷⁷ *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003).

Third, courts should be wary of imposing what amounts to the death penalty on a new technology before it has had a chance to develop. In applying the *Sony* doctrine, a court should consider whether the technology in question is new or developing. In such case, greater leeway should be allowed for the new technology's development and much less weight should be given to the actual uses of the technology. Because the *Sony* safe harbor attempts to provide breathing room for the development of technologies that have "a lawful promise," courts must avoid rushing to judgment by predicating liability on a brief snapshot of a new technology's uses in the market.

Fourth, cost-benefit and products liability analyses cannot replace the *Sony* safe harbor, as some scholars propose,²⁷⁸ without rendering copyright law extremely vulnerable to First Amendment challenge. Neither type of analysis is adequate, or even appropriate, to protect free press and speech interests—indeed, tort and economic analyses are inherently deficient to handle First Amendment concerns.²⁷⁹ Under the Court's precedents, speech is valued as an end in itself,²⁸⁰ and society must bear the costs of protecting speech.²⁸¹ In the end, economic efficiency is not the measuring stick of the First Amendment.²⁸²

Conclusion

In the near future, both Congress and the courts will be increasingly forced to consider attempts by copyright holders to regulate and even to prohibit speech-facilitating technologies. For that reason, it is imperative to understand (i) how the *Sony* safe harbor functions as a First Amendment safeguard in copyright law, consistent with (ii) the tradition of copyright in

²⁷⁸ See, e.g., Douglas Lichtman & William Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J.L. & TECH. 395 (2003); Randal C. Picker, *Rewinding Sony: The Evolving Product, Phoning Home and Duty of Ongoing Design*, 55 CASE W. RES. L. REV. 749 (2005); Brief of Professors Peter S. Menell, David Nimmer, Robert P. Merges, and Justin Hughes, as *Amici Curiae* in Support of Petitioners, *MGM Inc. v. Grokster, Ltd.*, reprinted in 20 BERKELEY TECH. L.J. 511 (2005).

²⁷⁹ See Sunstein, *supra* note 272, at 829-31; see also MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* (2006).

²⁸⁰ Kathleen Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 963 (1995) ("Whether the exchange of ideas is valued for its connection to truth, self-government, or individual autonomy, the point in each setting is that speech is valuable independent of people's willingness to pay for it.").

²⁸¹ See *Schneider v. State*, 308 U.S. 147, 162 (1939) ("Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press.").

²⁸² *Id.* at 164 ("If it is said that these means are less efficient ... , the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.").

respecting a freedom of the press—a general antipathy to allowing the government to control or limit the printing press or other technologies of speech. For over two hundred years since the origin of copyright in the First Copyright Act of 1790, the tradition of our copyright system has been to avoid any direct regulation of or interference with technologies that facilitate the dissemination of speech. Although Congress or the courts may decide to depart from that tradition, any such departures must be subject to the same First Amendment scrutiny that applies to every other type of law that regulates speech technologies outside of copyright law. When it comes to restricting speech technologies, not even copyright law gets a First Amendment free pass.

