# CENSORSHIP, COPYRIGHT, AND FREE SPEECH:

# SOME TENTATIVE SKEPTICISM ABOUT THE CAMPAIGN TO IMPOSE FIRST AMENDMENT RESTRICTIONS ON COPYRIGHT LAW

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## INTRODUCTION

A burgeoning tide of scholarship urges courts to subject copyright law to heightened scrutiny under the Free Speech Clause. Articles of this genre commonly begin by trying to shock the reader into recognizing the repressive character of copyright law. For example: "In some parts of the world, you can go to jail for reciting a poem in public without permission from state-licensed authorities. Where is this true? One place is the United States of America [if the poem in question is protected by copyright]."[1] Another example: "Copyright gives the government authority to seize books and enjoin their sale, award damages against booksellers, or even send them to jail. . . . If the justification were anything other than copyright, these sweeping powers would be seen as a gaping hole at the heart of free speech rights."[2]

The authors then go on to make a variety of recommendations, some more radical than others, but all variations upon the same message: copyright law has been unjustifiably exempted from First Amendment

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1. Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality,* 112 YALE L.J. 1, 3 (2002).

2. Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation,* 42 B.C. L. REV. 1, 4-5 (2000).

restrictions, and it is time for courts to examine its constitutionality more aggressively. These arguments have never found much favor with the Supreme Court.[3] They once again met with a frosty reception in *Eldred v. Ashcroft*,[4] but *Eldred* is unlikely to stem the tide of academic criticism.

As an outsider to copyright scholarship, I want to express some skepticism about this intellectual trend. In my view, there is a good reason why courts have traditionally regarded copyright law as consistent with the Free Speech Clause. Most of Free Speech law rests on a concern about censorship: it rests, in other words, on a judgment that government ought not to prohibit the dissemination of ideas because it deems them wrong or harmful.[5] For example, the government ought not suppress speech because it criticizes politicians or policies, or because it is subversive, or because it is counter-cultural, or because it deals with delicate subject-matters such as sex or religion. Copyright is not censorious in this way. Copyright does not pick and choose among ideas and subject-matters. Smutty pictures and subversive tracts get copyright protection along with reverent hymns and patriotic speeches.

Of course, censorship is not the only concern of Free Speech law. The prohibition upon censorship does not, for example, fully explain the "public forum doctrine" or First Amendment restrictions on "time, place, and manner" laws. Later, we will consider these areas of First Amendment doctrine in more depth. Still, the story of copyright should at least begin with a recognition that copyright is not censorship, rather than with shocked expressions of outrage that Americans might be

3. The leading precedent is *Harper & Row Publishers, Inc. v. Nation Enters.,* 471 U.S. 539 (1985). *Harper & Row* rejected a First Amendment challenge to copyright law; the Court emphasized that copyright is an "engine of free expression," *id.* at 558, and that "First Amendment protections [are] already embodied in [copyright law's] distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude . . . afforded by fair use . . . ." *Id.* at 560.

4. 537 U.S. 186 (2003). *Eldred* dealt with two challenges to the constitutionality of the Copyright Term Extension Act, Pub. L. No. 105-298, § 102(d)(1)(B), 112 Stat. 2827-2828 (1998) (codified as amended at 17 U.S.C. § 302 (2000)). In addition to their First Amendment challenge, petitioners contended that the Act was outside of Congress' enumerated powers. This article does not treat the enumerated powers claim; for discussion, see Thomas Nachbar, *Judicial Review and the Quest to Keep Copyright Pure*, 2 J. ON TELECOMM. & HIGH TECH. L. 33 (2003).

5. *See, e.g., Turner Broad. Sys. v. Fed. Communications Comm'n*, 512 U.S. 622, 641 (1994) (regulations that "stifle[] speech on account of its message" contravene an "essential" First Amendment right because they attempt to "suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion"); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) ("above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content"). *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 790 (2d ed. 1988) (if the Free Speech clause is "not to be trivialized, it must mean that government cannot justify restrictions on free expression by reference to the adverse consequences of allowing certain ideas or information to enter the realm of discussion and awareness").

arrested for reciting (copyrighted) poems or for disseminating (copyrighted) books. And, I shall argue, the distinction between copyright and censorship in fact takes us pretty far. Once we realize the importance of that distinction to Free Speech law, the case for imposing judicially enforced restrictions upon copyright policy becomes weak.

## I. CONTEXT

Even if the United States had no copyright laws, you could go to jail for reciting a poem in public. Shouting Jabberwocky in a crowded theater or a courtroom will probably do the trick (you will be charged with trespass or disorderly conduct).[6] In fact, you could be sanctioned for reciting an original poem of your own devising in public *or in private*. Suppose that you work for a company, and as part of your contract you promise to keep certain secrets that you learn on the job. Despite your promise, you decide (in exchange for a tidy sum) to share the secrets with a competitor. Your company learns of this plan and successfully seeks an injunction to keep you from talking. You decide to ignore the injunction. Because you are in a playful mood, you decide to report your secrets in the form of a poem (which you recite in public or in private; it makes no difference). You can be held in contempt of court (and perhaps prosecuted for theft as well).[7]

It would be possible to multiply these examples at some length. It is not, in other words, at all shocking that you can go to jail for reciting a poem. And, in fact, despite the outraged rhetoric that seems common in the new wave of copyright and First Amendment scholarship, none of the authors claim that Americans have a right to sell copies of duplicated works or to perform plays without paying royalties. Copyright's critics all agree, in other words, that copyright laws can justify seizing books, jailing people for reciting poems, and so on – just as most people and courts have long believed.[8]

So why the sudden concern about copyright's constitutionality? The most important explanation has to do with the evolution of American copyright policy. Copyright law has become increasingly

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6. Yochai Benkler worries that, in principle, copyright might restrain one from reciting Jabberwocky. 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, 390-91 (1999). In practice, one is free to recite the poem because, as Benkler notes, it has passed into the public domain. *Id.*

7. *See, e.g.,* 18 U.S.C. § 1832(a)(2) (2003) (making it a crime to "communicate" trade secrets without authorization).

8. *See, e.g.,* Jed Rubenfeld, *supra* note 1, at 48-49 (arguing that it is fully constitutional to prohibit the "pirating" of other people's work); Tushnet, *supra* note 2, at 3 ("copyright is constitutional, in large part because it . . . encourage[s] speech by the people it protects").

restrictive. Congress and the courts have extended the term of copyright protection, widened protection for "derivative works," and narrowed the "fair use" exception.[9] Many scholars have suggested that while traditional copyright laws may have left ample room for free expression, the new, more vigorous policies do not.[10] These new intrusions on liberty have goaded lawyers and scholars into re-examining the relationship between copyright and free speech.

At the same time, new digital technologies have expanded the opportunity for individual users to appropriate and disseminate copyrighted works. Internet users equipped with relatively cheap computers can download, edit, and distribute text, pictures, music and movies. In other words, not only is copyright law becoming more restrictive, but it is doing so when there is an increasingly wide range of expressive behavior for it to restrict.[11] These developments, of course, are related. Movie studios and the music business (among others) have sought tougher copyright laws in order to prevent people from using the new technologies to copy their products.[12] Still, it seems reasonable to regard new technology as an independent cause of revisionist thinking about copyright's First Amendment status. Some scholars and lawyers may have been motivated by a sense of lost opportunities: just when technology promised wondrous forms of new expression – such as Hollywood-style movies made at home by school children manipulating video clips on desktop machines – copyright restrictions snatched away (or at least compromised) the magic that technology had made possible.

These first two causes – more restrictive laws and expanded opportunities to use existing works – pertain to the subject-matter of copyright law. There may be a third cause for the new interest in copyright's constitutionality, one that emanates beyond copyright's borders in the theoretical currents that shape scholarship about free speech. Constitutional thinkers have become increasingly concerned about the character of American public discourse. They worry that it is inegalitarian, so that rich people drown out the voices of poor people, or that it is banal, so that commercial entertainment suffocates individual artistry. Copyright plays a villain in this story. It protects the interests of media giants at the expense of the little people. If copyright laws were

9. For specific examples of these changes, *see, e.g.,* Lawrence Lessig, *Copyright's First Amendment,* 48 U.C.L.A. L. Rev. 1057, 1065 (2001), and Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein,* 54 Stanford L. Rev. 1, 17-19 and 20-24 (2001).

10. *See, e.g.,* Lessig, *supra* note 9, at 1062-1065; Netanel, *supra* note 9, at 17-26.

11. Netanel, *supra* note 9, at 28-29.

12. *See, e.g., id.,* at 63-65 (giving examples of rent-seeking by media interests), and Joseph P. Liu, *Copyright and Time: A Proposal,* 101 Mich. L. Rev. 409, 448 (2002) (commenting upon the power of the "copyright industries").

less restrictive, then perhaps American public discourse could be more democratic, varied, creative, or fulfilling.[13]

I sympathize with the claim that some elements of copyright law have gone too far. But the fact that copyright restrictions are unwise does not entail that they should be subject to First Amendment scrutiny. Copyright's critics recognize that point, of course, and they also know that copyright does not, on its face, appear to involve discrimination on the basis of viewpoint or content. They have accordingly offered thoughtful arguments to back up their claim that copyright poses a serious threat to the Freedom of Speech; the sections that follow take up some of those arguments.

## II. COPYRIGHT AND FREE SPEECH

### *A. Is Copyright Suspect Simply Because it Targets Speech?*

Copyright law obviously restricts expression. Moreover, it restricts only expression. If a law prohibits noise, you can violate it either by revving a motorcycle engine or by delivering a loud speech; if a law prohibits the publication of derivative works, you can violate it *only* by engaging in expressive activity. In that sense, copyright law explicitly *targets* expressive activity. Some copyright scholars assume that this targeting creates at least a *prima facie* case for heightened scrutiny under the First Amendment, so that copyright can escape such scrutiny only if it falls under some special exception to ordinary First Amendment doctrines.[14]

This view is plausible enough, and it undoubtedly has some support in the way that the Supreme Court ordinarily discusses free speech. I believe, however, that it is fundamentally mistaken. At issue is the basic question, "From *what* must speech be free in order for 'the freedom of speech' to exist?" Must it be free from any restraints whatsoever? Or must it be free only from certain kinds of especially destructive or dangerous restrictions?[15]

On the first view, of course, complete freedom of speech would be unattainable. There are all sorts of restrictions on speech. You cannot shout in crowded theaters or seize control of printing presses, for example. If you are an attorney, you cannot divulge the secrets of your clients. You cannot sign contracts without subjecting yourself to liability

13. *See, e.g.,* Yochai Benkler, *supra* note 6, at 377-84, 400-08.

14. *See, e.g.,* Tushnet, *supra* note 2, at 5-6; Netanel, *supra* note 9, at 42-47.

15. An exactly analogous question arises with regard to the Free Exercise Clause. Christopher L. Eisgruber and Lawrence G. Sager, *Congressional Power and Religious Liberty After* City of Boerne v. Flores, 1997 Sup. Ct. Rev. 79, 110-11 (1997).

in the future. You cannot duplicate and republish works protected by copyright. Proponents of the first view would, of course, concede the validity of these and many other restrictions on speech. They would, however, say that we had traded away some of our "freedom of speech" in order to achieve other goals.

That claim strikes me as counter-intuitive. I do not believe that we sacrifice our freedom of speech, even in small measure, when we pass laws that criminalize disorderly conduct in theaters, establish property rights in printing presses, protect client secrets, impose contractual liability, or prohibit the unauthorized duplication of books and movies. It is more sensible, I think, to say that the freedom of speech is not at issue in such cases. Speech need not be *free from any restraints whatsoever* in order to be genuinely *free*. Instead, speech need be free only from certain kinds of regulations, such as (paradigmatically) viewpoint-based censorship or (almost as importantly) some kinds of content-based censorship.[16]

Free Speech doctrine is largely consistent with this view. When risks of censorship are low, laws regulating speech receive relatively minimal scrutiny. For example, when the Supreme Court deals with "time, place, and manner" regulations or with laws that impose incidental burdens on expressive conduct, it uses tests articulated in *Ward v. Rock Against Racism*[17] and *United States v. O'Brien*.[18] Professor Netanel correctly notes that courts usually apply these tests in ways that "give considerable deference to government regulation."[19] As interpreted, the tests appear "to prohibit only gratuitous inhibition of speech, where the governmental interest behind a regulation would actually be achieved more effectively if the regulation did not exist."[20]

### *B. Is Copyright Content-Based?*

The crucial question, in my view, is not whether copyright regulates speech (it obviously does), but whether it exhibits the characteristic vices that should trigger heightened First Amendment scrutiny. Does it? Some scholars have contended that, initial appearances notwithstanding,

16. On the distinction between content-based and content-neutral laws, *see, e.g.,* Laurence Tribe, *supra* note 5, at 789-804; Netanel, *supra* note 9, at 30-36, 47-54; Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 47-57 (1987); Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 758-63 (1997).

17. 491 U.S. 781 (1989).

18. 391 U.S. 367 (1968).

19. Netanel, *supra* note 9, at 55.

20. *Id.* For a thorough treatment of First Amendment restrictions upon content-neutral laws, *see generally* Stone, *supra* note 16. For further discussion of the application of these restrictions to copyright, *see infra* text accompanying notes 35-45.

copyright restriction is content-based and so demands heightened scrutiny under existing First Amendment doctrine. One version of this argument contends that copyright law is content-based simply because one must analyze the content of a publication in order to determine whether it infringes upon a copyright: the content must duplicate, or at least derive from, the protected work.[21] In that respect, copyright restrictions are different from "time, place, and manner" restrictions, which regulate or prohibit all speech without regard to its content. If, for example, a law prohibits loud noises near hospitals, you need not know the content of a speech to determine whether it violates the law – all you need to know is the decibel level.

As Professor Netanel has pointed out, this argument rests on a misconception about the reasons for caring whether a law is content-based.[22] It makes sense to subject government regulation to more intense judicial scrutiny when the government seeks to suppress discussion about particular subject-matters, such as politics, religion, or sexuality. When the government does that, it exhibits the core vice of censorship. Its regulation presupposes that the public cannot be trusted to deal competently with information about some topic and that the public is accordingly better off if the government regulates the flow of such communication. Copyright law is not content-based in this sense. Courts must indeed inspect the content of communications to determine whether they infringe upon copyrights. But copyright law does not treat some topics differently from others.

There is a second, more sophisticated argument about why we should regard copyright law as content-based. This argument begins by pointing out that some provisions of copyright law do favor communications about some topics over other communications. The "fair use" doctrine allows speakers greater latitude to use protected works when matters of public concern are at stake. This preference for speech about matters of public concern is arguably content-based in the relevant sense.[23]

There is something odd about this argument. Its asks us to believe that copyright law becomes *worse* from a First Amendment perspective because of a restriction that not only makes it *less* restrictive, but does so with regard to core First Amendment subjects. Indeed, First Amendment doctrine itself contains a discrimination like the one in the "fair use" provisions. Under *Times v. Sullivan*[24] and its progeny,

21. Mark A. Lemley and Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L. J. 147, 186 (1999).

22. Netanel, *supra* note 9, at 48-50.

23. Tushnet, *supra* note 2, at 25-27.

24. 376 U.S. 254 (1964).

defendants in libel suits acquire special First Amendment protection if their speech deals with matters of public concern.[25] It would be strange if copyright law became subject to heightened First Amendment scrutiny only because it afforded speakers protections comparable to those recommended by the First Amendment itself.

Copyright's critics, however, claim a precedent on their side. *Regan v. Time, Inc.,*[26] dealt with a federal statute that made it unlawful to produce photographic images of United States currency. The law contained an exception that allowed the use of such images in news reports or other reports on matters of public concern. The Supreme Court held that the exception rendered the statute impermissibly content-based.[27] Copyright's critics say that *Regan* compels us to conclude that copyright law, too, is content-based.[28]

The anti-counterfeiting law at issue in *Regan* differs from copyright law in at least one important respect. The anti-counterfeiting law would have been content-based even without the exception for matters of public concern. The government had decided that one particular subject-matter – namely, the appearance of United States currency – required special regulation. This was not a traditional case of censorship: the government was worried that pictures of money might facilitate counterfeiting, not that these pictures would lead people to form dangerous ideas. Still, the law in *Regan* was a step closer to the kinds of problems that motivate First Amendment doctrine's special concern with content-based regulations.

I would not, however, want to stake too much on this formal distinction between copyright law and the anti-counterfeiting statute at issue in *Regan*. *Regan* is a peculiar case. It is hardly a compelling foundation for accepting what is already a peculiar argument – namely, that copyright law becomes worse, rather than better, by incorporating a "fair use" doctrine that favors speech related to matters of public concern.[29] If *Regan* entailed this result, that would be a good reason to abandon *Regan*, not to doubt copyright's constitutionality. The fact that copyright's critics put forward such an odd, counter-intuitive argument for their position seems, in my judgment, to weaken rather than buttress their claims.

I accordingly believe that Professors Netanel and Chemerinsky are correct when they conclude that copyright law is a content-neutral, not

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25. *See, e.g.,* TRIBE, *supra* note 5, at 873-86.

26. 468 U.S. 641 (1984).

27. *Id.* at 648-49.

28. Tushnet, *supra* note 2, at 25-26. (Netanel reads *Regan* differently, *supra* note 9, at 51-52, as consistent with a content-neutral treatment of copyright law.)

29. Justice Stevens observed as much in his separate opinion in *Regan*. 468 U.S. at 698 & n.1.

content-based, restriction upon speech.[30] The same cannot be said, however, of some laws recently enacted in the name of copyright. In particular, some provisions of the Digital Millennium Copyright Act (DMCA) appear to prohibit the dissemination of information about how to circumvent anti-copying technology.[31] Professor Netanel has coined the term "paracopyright" to describe this law: it does not simply prohibit copying, but prohibits speech (including highly original speech) about how to engage in copying.[32] "Paracopyright" restrictions on speech are classic instances of content-based regulation: the government is regulating speech about a particular topic (namely, the circumvention of copy-protection technology) because it fears that the dissemination of such ideas will have harmful consequences. Insofar as "paracopyright" regulates speech in this way, it should be tested according to the demanding standards applicable to content-based regulation. This conclusion about "paracopyright" does not, however, provide any reason to reassess the conclusion that ordinary copyright law is content-neutral. "Paracopyright" and copyright are, for these purposes, very different animals.

### *C. Is Copyright Like Libel?*

Can we analogize copyright law to libel law? Libel law might seem to share certain key characteristics with copyright law.[33] For example, libel law does not, on its face, target any particular topic or viewpoint; it permits speech on any topic, so long as it is not defamatory, and, conversely, it prohibits defamatory speech on any topic. Yet, despite this apparent neutrality, libel law is subject to heightened First Amendment scrutiny. Since *Times v. Sullivan*, speakers who criticize public officials enjoy First Amendment immunity even for false statements unless they act with reckless disregard for the truth. *Sullivan*, unlike *Regan*, is a core First Amendment precedent, and some scholars suggest that it is now time for courts to announce a copyright law counterpart to *Sullivan*.

Libel is not like copyright, however. Libel's apparent neutrality is deceptive. As *Sullivan* itself illustrates, libel law creates opportunities for viewpoint-based censorship on a case-by-case basis. Libel law empowers judges and juries to decide which speech is defamatory, and they may

30. Netanel, *supra* note 9, at 49-50; Erwin Chemerinsky, 36 Loy. L. A. L. Rev. 83, 93-94 (2002).

31. 17 U.S.C. § 1201 (2000). The law stipulates that no person shall "offer to the public" or "otherwise traffic" in anti-circumvention technology. 17 U.S.C. § 1201(2). That prohibition may be read to prohibit publication of information about how to circumvent copy-protection devices.

32. Netanel, *supra* note 9, at 24-26.

33. *See, e.g.,* Rubenfeld, *supra* note 1, at 26-27; Benkler, *supra* note 6, at 393-94.

favor popular plaintiffs over unpopular speakers. It does not matter that judges and juries, rather than legislators, exercise this censorial power.

Libel law is, moreover, censorial on its face. It puts you at risk of liability when you make critical remarks about people, but not when you say nice things about them. In the domain of politics, this asymmetry favors some viewpoints over others: you can get sued if you criticize government officials but not if you praise them.

This concern with censorship may not fully explain *Sullivan*'s expansive rule. Its protections are very broad. Some people believe that *Sullivan* goes much further than is needed to eliminate the risk of viewpoint-based censorship. If so, the decision might be justifiable only on the basis of a claim that libel law, even if applied even-handedly, would leave us with an insufficiently robust political discourse. That sort of rationale would take us much closer to concerns legitimately raised by copyright policy, and we will consider it in the next subsection. For the moment, I want only to emphasize that one cannot draw casual analogies between the First Amendment treatment of libel and copyright. Libel law triggers First Amendment concerns about government censorship, whereas copyright does not.[34]

### *D. Does Copyright Leave Enough Space for Expressive Activity?*

Some important First Amendment doctrines do not seem explicable in terms of a concern about viewpoint-based or content-based censorship. The "public forum doctrine" is a good example.[35] The doctrine requires government to allow speech in "traditional public fora," such as streets and parks. Government cannot forbid expressive activity in these fora even if it does so even-handedly and across-the-board.

Perhaps one can justify this doctrine as an effort to "smoke out" hidden cases of viewpoint discrimination. One might suspect that when legislatures prohibit speech in traditional public fora, they are usually

34. During discussion of this paper at the Conference in Boulder, some of copyright's critics contended that copyright was no less censorial than libel law. They offered *Religious Tech. Ctr. v. Netcom On-Line Comm. Servs., Inc.*, 923 F. Supp. 1231 (N.D. Cal. 1995), as an example of copyright's censorial tendencies. In that case, Scientologists used copyright law to prohibit former members, who were critical of the church, from publishing church documents on the web. *Id.* at 1238. But this case is not remotely comparable to *Times v. Sullivan*, where a state institution – namely, a jury – used libel law to punish critics of government officials. On the contrary, *Religious Tech. Ctr.* shows the even-handedness of copyright law: the court protected an unpopular minority (the Scientologists) from mainstream criticism, and it did so at the initiative of a purely private party (the church itself). *Id.* at 1265-66. The First Amendment's central concern is with laws that enable the government to pick and choose among ideas – and *Religious Tech. Ctr.* does not involve that vice.

35. *See, e.g., Schneider v. State of New Jersey*, 308 U.S. 147 (1939) (invalidating an ordinance that prohibited the distribution of leaflets on public property); Chemerinsky, *supra* note 16, at 918-34; Stone, *supra* note 16, 86-94.

trying to suppress social and political protests. If so, the public forum doctrine would help to effectuate the core First Amendment interest in preventing government censorship. But it seems plausible that the public forum doctrine also reflects other normative judgments, such as the judgment that we are better off if political debate is robust, and that we lack sufficient space for such argument if the government excludes it from parks and streets.[36] Something similar might be said about the broad, highly protective rules of *Times v. Sullivan*. The best justification for those rules might relate not only to the risk that libel law will be applied in discriminatory fashion, but also to a judgment that libel law, even if fairly applied, would leave too little "space" for energetic political exchange.

Perhaps, then, one can justify First Amendment restrictions on copyright law by analogy to the public forum doctrine. The idea would be that today's new, more restrictive copyright laws leave us with too little "space" for expressive activity, just as do statutes that prohibit speech on the streets or in parks. Is that a plausible claim?

Certainly one can imagine copyright regimes so drastic that they would threaten to suffocate public discourse. Melville Nimmer analyzed these possibilities in a classic article published more than three decades ago.[37] He contended, for example, that if people were unable to republish certain news photographs, they might have no way to discuss important political matters.[38] If copyright law were to dispense with the crucial distinction between "idea" and "expression," then the publication of one article on a subject might prevent anybody else from making – or criticizing – the points asserted by the author.[39] Copyright would eat away the discursive space until nothing more remained to be said!

It thus seems obvious that, at some point, highly restrictive copyright laws would pose First Amendment problems, even if the laws involved no viewpoint-based or content-based censorship. It is therefore an error to say, as the United States Court of Appeals for the District of Columbia Circuit recently did, that "copyrights are categorically immune

36. "The Court's analysis of content-neutral restrictions is designed primarily to assure that adequate opportunities for free expression remain open and available . . . . The Court's analysis is also shaped, however, by such secondary considerations as disparate impact, public property, tradition, discrimination against speech, incidental effect, and communicative impact." Stone, *supra* note 16, at 117. *See also* Tribe, *supra* note 5, at 978 ("even a wholly neutral government regulation or policy . . . may be invalid if it leaves too little breathing space for communicative activity, or leaves people with too little access to channels of communication, whether as would-be speakers or as would-be listeners").

37. Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. Rev. 1180 (1970).

38. *Id.* at 1197-99.

39. *Id.* at 1186.

from First Amendment challenges."[40] But the conditions on copyright law that we have thus far discussed (that is, the ones that Nimmer identified many years ago) are rather minimal. In that respect, they are parallel to the guarantees of the public forum doctrine. It is worth noting how *little* that doctrine guarantees. It does not, for example, guarantee access to the mass media. More generally, the doctrine does not guarantee that people will have the means necessary to express their message effectively. Nor does it forbid the government from applying "time, place, and manner" regulations to parks and public streets. The public forum doctrine only preserves one set of venues for speech that might otherwise have no outlet whatsoever.[41]

Copyright's contemporary critics ask more than that. They insist that unless speakers have the right to adapt, reuse, and reproduce film clips, music, and other works originally produced by others, they may not be able to express their ideas as exquisitely as they might otherwise do. Yochai Benkler, for example, laments the plight of a child who wants to incorporate a clip from *Schindler's List* into a class presentation about her grandmother and the Holocaust, but finds herself stymied by the restrictions of copyright law.[42] The public forum doctrine does not promise anybody such refined forms of expression; it guarantees only access to the barest, most commonly shared of communicative resources.

I do not, however, want to overstate my point. The Court's rulings about content-neutral regulations have been varied and complex, if not inconsistent.[43] It is possible to use some of these decisions to support arguments calling for heightened scrutiny of copyright laws. Professor Netanel has made a careful and interesting argument of that kind.[44] But it would be a mistake to suppose that Professor Netanel's argument, or others like it, involve merely a straightforward extension of well-established Free Speech doctrine into the domain of copyright. Such arguments instead depend upon contestable choices among competing precedents and, ultimately, controversial normative arguments about the

40. Eldred v. Reno, 239 F.3d 372, 375 (D.C. Cir. 2001), *aff'd sub nom.* Eldred v. Ashcroft, 123 S. Ct. 769 (2003).

41. "The 'public forum' doctrine holds that restrictions on speech should be subject to higher scrutiny when, all other things being equal, that speech occurs in areas playing a vital role in communication–such as . . . streets, sidewalks, and parks–especially because of how indispensable communication in these places is to people who lack access to more elaborate (and more costly) channels of communication." TRIBE, *supra* note 5, at 987 (footnotes omitted).

42. Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 570-71 (2000).

43. See Stone, *supra* note 16, at 48-54 and *passim*.

44. Netanel, *supra* note 9, at 54-67. Netanel's argument relies heavily on *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

point of First Amendment law – arguments such as Professor Netanel's claim that "the First Amendment must ensure that systemic political infirmities have not skewed public discourse and shortchanged the underrepresented public interest in expressive diversity."[45]

## III. TWO CONCEPTIONS OF CONSTITUTIONAL RIGHTS

I want now to set these arguments in a more abstract context. One might conceive the role of constitutional rights in two different ways. On one conception, the purpose of rights is to produce an optimal environment for important activities and pursuits – such as expression, religion, political participation, and intimate relationships. On a second, competing conception, rights have a more limited goal: their point is only to proscribe certain forms of government action that are especially damaging to important activities and pursuits. The first conception focuses on the ideal of *optimal flourishing*; the second conception focuses on *categorical prohibitions* of government practices that pose special threats to constitutional values.

These distinct conceptions of rights carry different entailments. A conception built around the goal of *optimal flourishing* will inevitably concern itself with the incidental, unintended effects of laws. For example, any law that defines property rights in communicative resources (such as copyrights, printing presses, and broadcast spectrum) will have some impact upon the capacity of people to express themselves. This impact will be of concern to a conception of free speech that aims at *optimal flourishing.* In general, the impact of laws on expressive flourishing will be complex: most laws will increase the expressive autonomy of some people and decrease the expressive autonomy of others. Their precise impact will depend on a number of contingent, empirical factors that may be difficult to assess. The jurisprudence of *optimal flourishing* will therefore be thoroughly pragmatic and beset with trade-offs and blurred lines: it will be an effort to say how much of a burden on liberty is "too much" within a framework that both treats every

45. Netanel, *supra* note 9, at 63. I am skeptical about this formulation of First Amendment goals. Suppose, for example, that we have two copyright regimes, A and B. Regime A would do more to encourage speech by large producers (e.g., Disney) and Regime B would do more to encourage speech by small, avant garde movie studios. Should we assume that Regime B is better, from a First Amendment perspective, than Regime A, because it promotes greater "diversity"? Would that be true even if most people preferred Regime A, because they preferred the informational products produced by Disney to the informational products produced by the smaller studios? Much of the recent scholarship about First Amendment and copyright seems to assume that these questions obviously deserve 'yes' answers – but I am not at all sure of that.

burden as a cause for constitutional regret and simultaneously acknowledges that some burdens will inevitably exist.

A conception of rights built around *categorical prohibitions* can have a different character. Because it focuses on certain, especially damaging forms of government action, it may limit itself to intentional burdens upon liberty (though it need not do so). For example, a *categorical* conception of Free Speech need not concern itself with every burden on expressive activity, but only those that take certain forms. It might prohibit the government from intentionally suppressing ideas it deems dangerous, but allow regulations that have the incidental effect of favoring some ideas over others.

Of course, a good government should promote flourishing. It is not enough for the government to abstain from censorship and other especially damaging practices. Those who regard rights as *categorical prohibitions* do not deny this obvious truth. They maintain, however, that the Constitution provides for flourishing by establishing competent legislatures rather than by defining rights. A well-constituted legislature will pursue optimal flourishing effectively; constitutional rights, conceived as *categorical prohibitions*, will prevent that legislature from turning its considerable powers to certain tempting (but illegitimate) purposes.

Copyright's critics implicitly assume an *optimal flourishing* conception of Free Speech rights.[46] Copyright's restrictions upon speech are incidental in character: they arise not out of a scheme designed to suppress a particular viewpoint or subject-matter, but out of laws designed to serve other interests (namely, to encourage expression by establishing a system of property rights in it). These purposes are legitimate and valuable; if copyright offends the First Amendment, it does so because the net balance of benefits and harms to expressive activity is sub-optimal.

As applied to copyright, the *optimal flourishing* conception may broaden the scope of judicially enforceable First Amendment rights. But the conception need not expand rights. Under it, the crucial question is always (and simply) whether a challenged regulation of speech has a net beneficial impact on expressive activity. Suppressing the speech of some people might actually enhance the expressive activity of others. That, in fact, is the lesson that Rebecca Tushnet draws from her analysis of copyright's constitutionality. She believes that the best way to reconcile

46. Such a perspective is manifest in, for example, Erwin Chemerinsky's claim that "The First Amendment seeks to maximize the dissemination of information." Chemerinsky, *supra* note 30, at 83. I do not believe that is so; the First Amendment seeks to eliminate certain pernicious governmental barriers to the dissemination of information, not to maximize information flow.

copyright with free speech is through an analysis of the net impact of copyright on expressive activity, and she recommends transporting that approach to other First Amendment topics, such as the regulation of campaign finance and pornography.[47] In those domains, the net-impact analysis might permit more regulation of speech than is currently permitted by First Amendment doctrine.

The distinction between *optimal flourishing* and *categorical prohibitions* is not special to Free Speech law. Lawrence G. Sager and I have applied a similar distinction to analyze Free Exercise law and constitutional rights more generally.[48] The choice between the two conceptions of rights is a large one, and there is something to be said on both sides of the issue. For the moment, I want to make only three observations about the issue. First, the structure of Free Speech law is more consistent with the *categorical prohibitions* conception of rights. In general, incidental burdens on speech are governed by the relatively toothless *O'Brien* test. Free Speech doctrine becomes demanding only when censorship, or some other distinctive vice of government is in play. Second, the current treatment of copyright law is not anomalous; on the contrary, it is perfectly consistent with the larger themes of Free Speech doctrine. Copyright law gets minimal First Amendment scrutiny because it is not censorious. Third, even if one finds the *optimal flourishing* conception otherwise attractive, it will be difficult for judges to implement. The net effect of any given law on speech will often be complex and unpredictable.[49] A jurisprudence of *categorical prohibitions* will, to be sure, present challenges of its own, but, in my view, these challenges are likely to be more tractable for courts than those presented by a jurisprudence of *optimal flourishing*.[50]

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47. Tushnet, *supra* note 2, at 37-44.

48. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1254-70, 1282-91 (1994) (distinguishing between "unimpaired flourishing" and "equal regard"); Christopher L. Eisgruber & Lawrence G. Sager, *Religious Liberty and the Moral Structure of Constitutional Rights*, 6 LEGAL THEORY 253 (2000) (generalizing the contrast between these two ways of conceptualizing religious freedom). *See also* Lawrence G. Sager, *Of Tiers of Scrutiny and Time Travel: A Reply to Dean Sullivan*, 90 CAL. L. REV. 819, 822-23 (2002) (commenting on the "categorical" character of Equal Protection norms).

49. For example, strong copyright laws may benefit established publishers and broadcasters at the expense of newer, smaller firms, but it is not clear whether this result is good or bad from the standpoint of expressive flourishing: many people may value the informational products of established firms more highly than the products of newer ones.

50. I discuss the limits of judicial competence in CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 168-204 (2001) and Christopher L. Eisgruber, *Constitutional Self-Government and Judicial Review: A Reply to Five Critics*, 37 U.S.F. L. REV. 115, 180-88 (2002).

## IV. CONCLUSION

Copyright law is unfamiliar terrain for me, and so I offer the ideas in this essay with some trepidation. My tentative conclusion, however, is that copyright's contemporary critics have exaggerated the tensions between copyright and First Amendment doctrine. Much Free Speech doctrine is concerned, implicitly or explicitly, with censorship: that is, with government efforts to suppress the expression of ideas it deems dangerous. Most laws that trigger heightened First Amendment scrutiny involve at least the risk of government censorship. With copyright, that risk is low. For that reason, it is not surprising that First Amendment doctrine has expressed so little concern about copyright laws. It is possible, of course, to argue that we would be better off if courts scrutinized copyright law more aggressively. But it seems to me an error to suppose that copyright restrictions are inconsistent with the basic principles of Free Speech doctrine as it now stands.