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Content-Based Copyright Denial

Ned Snow
University of South Carolina - Columbia, snownt@law.sc.edu

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NED SNOW*

No principle of First Amendment law is more firmly established than the principle that government may not restrict speech based on its content. It would seem to follow, then, that Congress may not withhold copyright protection for disfavored categories of content, such as violent video games or pornography. This Article argues otherwise. This Article is the first to recognize a distinction in the scope of coverage between the First Amendment and the Copyright Clause. It claims that speech protection from government censorship does not imply speech protection from private copying. Crucially, I argue that this distinction in the scope of coverage between copyright and free speech law does not suggest a tension between them. To the contrary, the distinction enables copyright to further the purpose of free speech under the marketplace-of-ideas speech theory. Through copyright, Congress may alleviate failures in that marketplace which stem from individuals determining the value of speech for the collective. Furthermore, the possibility of Congress abusing this discriminatory power poses relatively minimal threat to speech because copyright denial does not altogether prevent speakers from realizing profit from their speech. This fact, coupled with viewpoint-neutrality and rational-basis restraints, alleviates the usual risks associated with government influencing content in the marketplace. Additionally, free-speech doctrine leaves room for the sort of discrimination that Congress would exercise in defining copyright eligibility according to content. Doctrines governing limited-public forums and congressional funding allow for content discrimination akin to content-based copyright denial.

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INTRODUCTION

The Supreme Court has described copyright as "the engine of free expression."[1] By providing authors an economic incentive to express their ideas, copyright plays a critical role in bringing ideas into the free-speech marketplace.[2] Does this mean, then, that as a matter of free-speech law, Congress must grant copyright to *all* original content? Although courts and scholars have recognized a special relationship between copyright and free speech, their discussion has focused on the speech interest of *copiers*, whose speech copyright suppresses.[3] The literature has mentioned the speech interest of the original *creator* only in passing.[4] In short, the question is left unanswered: Would content restrictions on copyright eligibility abridge the freedom of speech protected by the Speech Clause of the First Amendment?

If the Speech Clause does not preclude Congress from exercising content discrimination through its copyright power, lawmakers likely would seek to deny copyright for certain categories of content. Violent video games, for instance, have come under public scrutiny in the wake of the Sandy Hook, Aurora, and Columbine massacres.[5] Lawmakers might seek to deny copyright for such games in an attempt to reduce the financial incentive to create them.[6] Another example is pornography:

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1. Golan v. Holder, 132 S. Ct. 873, 890 (2012); Eldred v. Ashcroft, 537 U.S. 186, 219 (2003); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

2. *See Golan*, 132 S. Ct. at 890; *Eldred*, 537 U.S. at 219; *Harper*, 471 U.S. at 558.

3. *See, e.g.*, *Golan*, 132 S. Ct. at 890 (explaining First Amendment safeguards built into copyright doctrine that protect speech interests of the copier); *Eldred*, 537 U.S. at 219–21 (same); *Harper*, 471 U.S. at 558 (same); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 164–65 (1998); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 12–29 (2001); *see also* C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CALIF. L. REV. 283 (1979); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970); 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 (2000).

4. *See supra* note 3. Professor Ann Bartow recognized this issue in her argument that Congress should deny copyright for pornography. *See* Ann Bartow, *Copyright Law and Pornography*, 91 OR. L. REV. 1, 19–25, 48 (2012).

5. *See, e.g.*, Lou Kesten, *Shooting Renews Argument over Video-Game Violence*, U.S. NEWS & WORLD REP. (Dec. 19, 2012, 1:04 PM), http://www.usnews.com/news/business/articles/2012/12/19/shooting-renews-argument-over-video-game-violence.

6. *See generally* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 332 (1989); *cf.* Christopher Buccafusco & Christopher Jon Sprigman, *The Creativity Effect*, 78 U. CHI. L. REV. 31, 45–47 (2011).

lawmakers continue to seek ways to decrease pornographic material.[7] Copyright denial could yield that result.[8] Yet even if denying copyright would not decrease the material, lawmakers might believe that government should simply refrain from supporting pornographic content as a matter of principle. For various reasons, lawmakers would likely seek to deny copyright for certain categories of content—*if* the denial is constitutional.

This Article argues that content-based copyright denial does not offend the Speech Clause. Importantly, this Article does not address policy considerations related to specific content for which Congress might deny copyright. Specific content—such as pornography or violent video games—I use as potential examples, withholding any analysis about whether Congress should in fact deny copyright for such content. Questions of policy specific to particular content I leave for another work. In this Article, I limit my discussion to the constitutional question of free speech.[9] I conclude that both the doctrine and theory of free speech support a prospective denial of copyright based on content.

Part I sets forth the initial issue of whether copyright denial would constitute a speech abridgment given that Congress does not overtly suppress speech when it denies a copyright monopoly. Concluding that the denial would constitute an abridgment, the Article next examines whether constitutional doctrines suggest an exception to the principle of content neutrality for copyright denial. In particular, Part II argues that content-based copyright denial appears constitutional under speech doctrines that govern the contexts of limited-public forums and congressional spending. Part II also examines well-established copyright doctrines that, if constitutional, further suggest the constitutionality of content-based copyright denial. Upon examining these speech and copyright doctrines, the Article next considers theory. Part III argues that content-based copyright denial should be evaluated from the marketplace-of-ideas speech theory, and that that theory supports the denial. Lastly, Part IV discusses the limits on Congress's power to implement a content-based copyright regime.

I. COPYRIGHT DENIAL AS A SPEECH ABRIDGMENT

This Article argues that although content-based copyright denial would constitute an abridgment of free speech, the denial falls within a constitutional exception to the Speech Clause.[10] Before this Article examines the basis for the constitutional exception, this Part examines the initial claim that content-based copyright denial would amount to a speech abridgment. Simply put, would Congress's denial of a legal monopoly over a speaker's expression constitute an abridgment of that

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7. *See* Letter from Charles Grassley et al., U.S. Senators, to Eric H. Holder, Jr., U.S. Attorney Gen. (Apr. 4, 2011), *available at* http://www.politico.com/static/PPM153_obsc.html.

8. *See infra* Part III.B.1.

9. Related to the constitutional issue of whether the Speech Clause prohibits this discrimination is whether the Copyright Clause enables the discrimination. I address that related issue in more depth in another article. *See* Ned Snow, *Discrimination in the Copyright Clause*, 67 ALA. L. REV. (forthcoming 2016) (on file with the *Indiana Law Journal*).

10. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

speaker's speech? Part I.A considers the argument that copyright denial would not constitute an abridgment. Part I.B responds to this argument, concluding that speech doctrine suggests that the denial would constitute an abridgment.

A. Copyright Denial as Nonrestrictive of Speech

From one perspective, the argument makes sense that denying copyright would not constitute an abridgment of speech. Denying copyright would not leave a speaker any worse off than before she created her expression. The denial would not restrict her from speaking; it would merely prohibit her from having legally enforceable rights of exclusion.[11] Furthermore, denying copyright would not preclude a speaker from selling her expression.[12] Speakers who lack a copyright could still sell copies of their expression; they just could not prevent others from copying their expression,[13] which would drive down the price of their expression.[14] As a result of copyright denial, then, speakers lacking a copyright simply could not realize the increased revenue of monopoly pricing as compared to the revenue that they would realize in a pure laissez-faire market for expression.[15] Simply put, copyright denial would not deny speakers a market for their expression; it would merely deny them a monopoly advantage within the market.[16] And the Supreme Court has repeatedly stated that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."[17] Hence, denying speakers a copyright would seem to deny them only a monopoly subsidy of their right of speech. The denial would not seem to infringe that right.

Writings of Professor Edwin Baker invoke similar reasoning.[18] He argued that failing to extend copyright to speakers does not infringe their First Amendment

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11. *See generally* 17 U.S.C. § 102 (2012) (listing subject matter that does not receive a copyright); 17 U.S.C. § 106 (2012) (stating rights within a copyright).

12. *See* Landes & Posner, *supra* note 6, at 332 (describing the inefficient incentives of authors and publishers if copyright protection did not exist).

13. Speakers lacking a copyright would also lack the ability to prevent others from making a public distribution, a public performance, and a public display of their expression, as well as preparing a derivative work that is based on their expression. *See* 17 U.S.C. § 106 (stating rights within a copyright).

14. *See generally* Landes & Posner, *supra* note 6, at 326, 330 (describing problems with alternatives to copyright protection, the public good nature of expressive works, and the relatively low marginal cost of reproducing such works).

15. *See generally id.* (explaining how copyright is a solution to the public good problem). Absent copyright, there is an underproduction of the good owing to the lack of sufficient (monopoly) revenue.

16. Even then, the strength of that monopoly advantage is debatable. *See* Mark A. Lemley & Mark P. McKenna, *Is Pepsi Really a Substitute for Coke? Market Definition in Antitrust and IP*, 100 GEO. L.J. 2055, 2104–07 (2012) (explaining how doctrines of substantial similarity, derivative works, and fair use may reduce monopoly power of copyright).

17. United States v. Am. Library Ass'n, 539 U.S. 194, 212 (2003) (plurality opinion) (quoting Rust v. Sullivan, 500 U.S. 173, 193 (1991)).

18. *See* Baker, *supra* note 3, at 901, 903.

rights.[19] In the context of explaining the relationship between free speech and the copyright monopoly, Professor Baker stated:

> Most importantly, the Speech Clause's protection of individual liberty guards a person's right to engage in the activity of communicating, not a right to profit from or receive economic return for the activity. . . . Freedom of speech gives a person a right to say what she wants. It does not give the person a right to charge a price for the opportunity to hear or receive her speech.[20]

Professor Baker made this argument to justify an exception to copyright protection for noncommercial copying; and admittedly, noncommercial copying by defendants is distinct from Congress altogether denying copyright for specific content.[21] Nevertheless, his reasoning supports the general view that restricting copyright is not an abridgment of speech. Even though he made the argument while addressing a different issue, the underlying premise of his argument is clear: Copyright does not represent a right secured by the First Amendment. Denying it would not seem an abridgment.

This view also draws some support in case law. In *Authors League of America v. Oman*, the Second Circuit examined the manufacturing clause of the Copyright Act, which restricted the importation of copyrighted works based on their content.[22] Specifically, the manufacturing clause restricted the importation of foreign-manufactured works to those that did not constitute nondramatic, literary works.[23] The clause's criterion of nondramatic, literary works thus identified a subject matter of content for which authors' rights were limited: for that content, authors could not receive a copyright if they imported them into the country.[24]

The plaintiffs—a group of authors—argued that this restriction in the Copyright Act abridged their First Amendment rights to circulate ideas, as well as the First Amendment rights of the public to receive those ideas.[25] Circulating ideas across borders would deny them copyright, and that denial—the authors argued—constituted a speech abridgment.[26] The Second Circuit disagreed.[27] The *Oman* court explained that the First Amendment right to circulate and receive ideas does not imply a right of copyright protection.[28] In the court's words: "Put simply, the cases plaintiffs rely upon establish that there is a constitutional right to freely circulate one's ideas. They also establish the public's right to receive those ideas. They do not, however, create any

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19. *Id.*

20. *Id*; *see also* Nimmer, *supra* note 3, at 1203 ("The first amendment guarantees the right to speak; it does not offer a governmental subsidy for the speaker . . . .").

21. *See* Baker, *supra* note 3, at 901–04.

22. 790 F.2d 220 (2d Cir. 1986).

23. *See id.* at 221 (examining 17 U.S.C. § 601 (1985), which identifies the specific content prohibited by the manufacturing clause as "[nondramatic] literary material that is in the English language . . . .").

24. *Id.*

25. *Id.* at 221–22.

26. *Id.*

27. *Id.* at 223.

28. *Id.*

right to distribute and receive material that bears protection of the Copyright Act."[29] According to the *Oman* court, then, the First Amendment does not require Congress to grant copyright protection to authors.[30] And absent the First Amendment compelling a copyright grant, a copyright denial would not constitute an abridgment.

In trademark law, courts have employed the same rationale in upholding content-based restrictions. Congress has barred federal registration for any mark that "[c]onsists of or comprises immoral, deceptive, or scandalous matter . . . ."[31] On three separate occasions, federal courts have considered whether denying trademarks based on this content-based criteria violates the Speech Clause.[32] In each case, the court viewed the denial of trademark as not constituting speech suppression.[33] Beginning in 1981, the Federal Court of Customs and Patent Appeals explained: "No conduct is proscribed, and no tangible form of expression is suppressed. Consequently, appellant's First Amendment rights would not be abridged by the refusal to register his mark."[34] Again in 1994, the Federal Circuit quoted these two sentences to reject the same argument against the content-based criteria for federal trademark eligibility.[35] In 2003, the Federal Circuit yet again relied on this rationale, observing that the disputed content-based criterion does not "suppress any form of expression because it does not affect the applicant's right to use the mark in question."[36] Thus, in three instances courts have viewed content-based criteria for trademark eligibility as not raising speech concerns. Each court refused to recognize any suppression or abridgment where Congress withheld from speakers the property right of trademark.[37]

Although these cases provide support for the argument that copyright denial does not constitute an abridgment, they seem insufficient to compel this conclusion. As an initial matter, none of the cited courts engaged in considerable speech analysis; instead, all dismissed the speech arguments in a matter of a single sentence or two.[38]

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29. *Id.*

30. *See id.* ("[T]he cases plaintiffs rely upon establish that there is a constitutional right to freely circulate one's ideas. They also establish the public's right to receive those ideas. They do not, however, create any right to distribute and receive material that bears protection of the Copyright Act.").

31. 15 U.S.C. § 1052(a) (2012).

32. *In re* Boulevard Entm't, Inc., 334 F.3d 1336, 1343 (Fed. Cir. 2003); *In re* Mavety Media Grp. Ltd., 33 F.3d 1367, 1372–74 (Fed. Cir. 1994); *In re* McGinley, 660 F.2d 481, 485–87 (C.C.P.A. 1981).

33. *In re Boulevard*, 334 F.3d at 1343; *In re Mavety*, 33 F.3d at 1374; *In re McGinley*, 660 F.2d at 484.

34. *In re McGinley*, 660 F.2d at 484.

35. *In re Mavety*, 33 F.3d at 1374.

36. *In re Boulevard*, 334 F.3d at 1343.

37. *Id.*; *In re Mavety*, 33 F.3d at 1374; *In re McGinley*, 660 F.2d at 484. The Federal Circuit recently issued yet another opinion that upheld the three opinions that failed to recognize any First Amendment tension. *See In re* Tam, No. 2014–1203, 2015 WL 1768940 (Fed. Cir. Apr. 20, 2015). However, the Federal Circuit then vacated that recent decision, deciding to review the case *en banc*. *See In re* Tam, No. 2014–1203, 2015 WL 1883279 (Fed. Cir. Apr. 27, 2015). As of the printing of this Article, the Federal Circuit has not issued its *en banc* opinion.

38. *See In re Boulevard*, 334 F.3d at 1343; *In re Mavety*, 33 F.3d at 1374; Authors League

Furthermore, their contexts were markedly different from the issue of content-based copyright denial. In *Oman*, the Second Circuit considered speech that was subject to an author's importation rights, which represents a fairly narrow category of speech.[39] Similarly, the courts in the trademark cases were considering trademark speech, which Congress permissibly regulates to prevent consumer confusion in commerce.[40] Trademark represents a small subset of commercial speech,[41] hardly analogous to the scope of copyright, which may extend to all forms of protected speech.[42] Neither the speech in *Oman* nor the speech in the trademark cases reflects the broad scope of speech that copyright contemplates.[43] The conclusion, then, that denying copyright does not amount to a speech restriction should not follow merely from a few courts that have cursorily accepted content-based restrictions in other intellectual-property contexts. The court opinions do not deal with the substance of the argument for construing content-based copyright denials as speech abridgments.

B. Copyright Denial as Restrictive of Speech

As discussed in Part I.A, the argument that copyright denial does not constitute an abridgment is simple: content creators can speak without the subsidy of a property right, so there is no suppression of speech. This argument seems superficial because it ignores an important practical reality of speech—money.[44] Absent the money that copyright provides to speakers, much content would simply never be spoken.[45] Although the actual effect of denying copyright will depend on the particular motives

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of Am. v. Oman, 790 F.2d 220, 223 (2d Cir. 1986); *In re McGinley*, 660 F.2d at 484; Stephen R. Baird, *Moral Intervention in the Trademark Arena: Banning the Registration of Scandalous and Immoral Trademarks*, 83 TRADEMARK REP. 661, 686 (1993) (referring to the *McGinley* court's dismissal of the First Amendment challenge as lacking "a reasoned and well articulated analysis of the difficult underlying issues"); Kimberly A. Pace, *The Washington Redskins Case and the Doctrine of Disparagement: How Politically Correct Must a Trademark Be?*, 22 PEPP. L. REV. 7, 48 (1994) ("[The *McGinley*] court glossed over the difficult constitutional challenges in a cursory manner, without articulating any analysis for its decision.").

39. *See Oman*, 790 F.2d at 221–22.

40. *See generally* 15 U.S.C. §§ 1125(a), 1114(1) (2012).

41. Commercial speech has traditionally received less speech protection than other protected speech content. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562–63 (1980). *But see* Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2659 (2011) (extending heightened speech scrutiny in rejecting regulation of commercial pharmacy records).

42. *See* Bosley Med. Inst., Inc. v. Kremer, 403 F.3d 672, 677 (9th Cir. 2005) (viewing trademarks as commercial speech for First Amendment purposes); Taubman Co. v. Webfeats, 319 F.3d 770, 774 (6th Cir. 2003) ("The Lanham Act [which governs federal trademark law] is constitutional because it only regulates commercial speech, which is entitled to reduced protections under the First Amendment.").

43. *See generally* 17 U.S.C. § 102 (2012) (extending copyright protection to "original works of authorship fixed in any tangible medium of expression").

44. *See* Citizens United v. FEC, 558 U.S. 310, 351 (2010) ("All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech . . . .").

45. *See* Landes & Posner, *supra* note 6, at 332 (describing the inefficient incentives of authors and publishers if copyright protection did not exist).

and means of an individual author, it seems certain that in many instances the absence of a copyright monopoly will decrease speech production and dissemination.[46] Many content creators depend on copyright to support their speech.[47] Hence, removing copyright introduces a practical likelihood of silencing speakers.

Assuming, then, that copyright denial does silence some speakers, its discriminatory exercise would enable Congress to influence content in ways that common sense would find offensive to fundamental canons of free speech. Even the most egregious viewpoint discrimination would be permissible. A Republican-controlled Congress, for instance, could deny copyright for all content from MSNBC[48]—or withdraw the fair-use defense for any content criticizing the majority view.[49] Copyright would be a tool for driving specific ideas or viewpoints from the marketplace of ideas.[50] It would enable naked partisanship to affect speech content. Congress would be able to deny copyright for specific viewpoints, or for that matter, to specific speakers. In short, if denying copyright were not viewed as an abridgment, this would enable Congress to impose financial costs on viewpoints that otherwise would receive core protection under the First Amendment.

Supreme Court case law on free speech supports the view that denying copyright constitutes an abridgment of speech. The case of *United States v. National Treasury Employees Union* is instructive.[51] There, Congress prohibited federal employees from accepting honoraria for making speeches or writing articles, even where those speeches or articles would occur outside their employment.[52] The Court held this prohibition to be an unconstitutional abridgment.[53] Although there was no penalty for the speech, banning compensation for expression reduced the likelihood that speeches or articles would be made in the first place.[54] In the Court's words, "[the] ban chills potential speech before it happens. . . . [The] prohibition on compensation unquestionably imposes a significant burden on expressive activity."[55] Importantly, the Court recognized that the compensation represented a "significant incentive" to

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46. *See* Christopher A. Cotropia & James Gibson, *The Upside of Intellectual Property's Downside*, 57 UCLA L. REV. 921, 925–30 (2010).

47. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994) (reciting within a copyright case the quotation of Samuel Johnson: "[n]o man but a blockhead ever wrote, except for money" (citation omitted)).

48. *Cf.* Zeke J. Miller, *MSNBC Formally Apologizes for 'Demeaning' Tweet After Republican Party Boycott*, TIME (Jan. 30, 2014, 5:05 PM), http://time.com/3086/republican-party-organizes-msnbc-boycott-over-demeaning-tweet/ ("RNC Chairman Reince Priebus sent a letter Thursday morning to network President Phil Griffin saying he banned all RNC staff from 'appearing on, associating with, or booking any RNC surrogates on MSNBC,' and in a separate memo encouraged GOP elected officials and strategists to avoid the network as well.").

49. *See generally* 17 U.S.C. § 107 (2012) (stating the fair-use defense).

50. *See* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) ("[T]he government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.").

51. 513 U.S. 454 (1995).

52. *Id.* at 457.

53. *Id.*

54. *Id.* at 468.

55. *Id.*

produce expression.[56] The Court reasoned: "By denying [Government employees] that incentive, the honoraria ban induces them to curtail their expression if they wish to continue working for the Government."[57] Hence, the Court viewed the Speech Clause as extending protection to financial incentives to produce speech. Under *National Treasury*, then, denying compensation for expression amounts to an abridgment.

The facts and reasoning of *National Treasury* seem to imply that Congress may not deny copyright to content creators. Denying copyright could be viewed as a denial of compensation for speech, where property rights in expression (i.e., a copyright) would represent a form of compensation. Under *National Treasury*, such a denial would be tantamount to a speech restriction.[58] Like the honoraria ban, a copyright denial would chill speech before it ever happened. Furthermore, the honoraria ban in *National Treasury* was not content specific, whereas the copyright denial under consideration here is.[59] The Court in *National Treasury* noted the unconstitutionality of the honoraria ban *despite* the fact that the ban was not content specific.[60] Hence, this distinction seems to further condemn content-based copyright denial.[61]

The Supreme Court further reiterated the principle that denial of an economic incentive of speech may constitute an abridgment in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*.[62] Unlike in *National Treasury*, the denial of the economic benefit in *Simon & Schuster* was based on content.[63] There, New York's Son of Sam law required that criminals' income from their published accounts of crimes be placed into an escrow account for the crime victims.[64] Striking down the law, the Court explained that the law served as a

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56. *Id.* at 469.

57. *Id.*

58. *See id*.

59. *See id.* at 468.

60. *See id.* ("Although [the statute] neither prohibits any speech nor discriminates among speakers based on the content or viewpoint of their messages, its prohibition on compensation unquestionably imposes a significant burden on expressive activity.").

61. In *Citizens United v. FEC*, the Supreme Court strengthened the principle that free-speech protections extend to economic funding of speech. 558 U.S. 310 (2010). There, Congress had enacted a law that prohibited corporations from funding communications advocating the election or defeat of candidates. *Id.* at 318–19. In striking down this law, the Court explained: "All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech . . . ." *Id*. at 351. Because money from the marketplace makes the speech possible, the economic transaction that gives rise to the speech—that is, its funding—merits full speech protection.

This principle of protecting economic funding that gives rise to speech might be read to suggest that the economic benefit of receiving a copyright must be protected as analogous economic funding. Certainly the economic gain that results from copyright is the reason for much expression that arises. Therefore, restricting property rights based on particular content represents a restriction on an economic benefit that produces speech. Such a result seems to violate the general principle of *Citizens United*—economic benefits that make speech possible should be protected.

62. 502 U.S. 105 (1991).

63. *Id.* at 108.

64. *Id.*

"financial disincentive only on speech of a particular content."[65] As to the inappropriateness of such a disincentive, the Court observed: "[T]he government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."[66] Thus, discouraging ideas from entering the marketplace is fundamentally at odds with free speech, and such discouragement may occur by denying an economic benefit of speech. *Simon & Schuster* would therefore seem to proscribe denying copyright for the purpose of creating a financial disincentive to express content.

Of course in neither *National Treasury* nor *Simon & Schuster* did the economic benefit originate from the government. In both cases, Congress interfered with economic benefits that private parties would have provided speakers. Arguably, this might distinguish these cases from copyright. Copyright is not a private-party incentive for speech; it is a government-created incentive. It might seem that speech doctrine would be less tolerant of content-based conditions placed on private-party incentives to speak rather than content-based conditions placed on incentives that the government creates with its own resources.[67] Under this reasoning, may Congress allocate its resource of copyright based on speech content?

This line of reasoning is squarely rejected by First Amendment jurisprudence. According to the doctrine of unconstitutional conditions, "the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that benefit."[68] This doctrine the Supreme Court set forth in *Perry v. Sindermann*.[69] There, a state college decided not to renew a professor's employment contract, owing to the professor's criticism of school policy, which he voiced outside of his work environment.[70] The Court considered the speech implications of that employment decision, noting specifically that the professor was not entitled to continued employment.[71] Because the college's decision was based on the professor's criticism, the Court emphatically recognized that the decision constituted a content-based abridgment of speech.[72] The Court reasoned:

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65. *Id.* at 116.

66. *Id.*

67. *See, e.g.*, Waters v. Churchill, 511 U.S. 661, 671–72 (1994) (plurality opinion) ("[G]overnment as employer indeed has far broader powers than does the government as sovereign. . . . [T]he government must be able to restrict its employees' speech.").

68. Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996) (omission in original) (quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972)).

69. 408 U.S. 593, 597 (1972); *see also* Speiser v. Randall, 357 U.S. 513, 519 (1958) ("[T]he denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech. The denial is 'frankly aimed at the suppression of dangerous ideas.'" (quoting Am. Commc'ns Ass'n. v. Douds, 339 U.S. 382, 402 (1950))).

70. *Perry*, 408 U.S. at 594–95.

71. *Id.* at 597–98 ("[T]he [professor]'s lack of a contractual or tenure 'right' to re-employment for the 1969–1970 academic year is immaterial to his free speech claim.").

72. *Id.*

> [E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.[73]

The fact that the government was targeting specific content—the professor's viewpoint—offended a core principle of the Speech Clause. So even though the state was providing the employment, and even though the professor had no right to the employment, the state could not withhold the economic benefit. In the face of such blatant viewpoint discrimination, it makes no difference that the economic benefit reflects a government resource or that the speaker is not otherwise entitled to the benefit.

The Supreme Court's condemnation of content-based denials of government benefits should not be construed as applying only where the discrimination is viewpoint based. The Court reiterated its rejection of the content-based denial in *Arkansas Writers' Project, Inc. v. Ragland*, where the content discrimination was viewpoint neutral.[74] There, a state legislature provided a sales tax exemption for "religious, professional, trade and sports journals . . . ."[75] Under the statute, then, the tax status of magazines depended entirely on their content, yet not their viewpoints within that category of content.[76] The preferential treatment of general content categories was, according to the Court, "particularly repugnant to First Amendment principles."[77] The fact that the economic benefit of a tax exemption originated from government resources, and that the speakers were not otherwise entitled to it, was not relevant in the analysis.[78] The Court simply rejected content-based preferences in the state's allocation of economic benefits for speakers.[79]

As these cases illustrate, the Supreme Court views a denial of an economic benefit because of speech content as an abridgment of speech. The underlying rationale is simple, as the Court has explained: "The denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly."[80] So even where the government has discretion to award a benefit, denying that benefit because of speech content is impermissible: the government would be using the benefit to achieve an end that it otherwise could not—speech abridgment. Thus, speech law would seem to condemn a copyright regime that defines eligibility according to content. A black-letter application of the speech principle that precludes content-based denials of economic benefits would seem to preclude content-based copyright.

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73. *Id.* at 597.
74. 481 U.S. 221 (1987).
75. *Id.* at 224 (quoting Ark. Stat. Ann. § 84–1904(j) (1980 & Supp. 1985)).
76. *Id.* at 229.
77. *Id.*
78. *See id.* at 227–31.
79. *Id.* at 229–31.
80. Elrod v. Burns, 427 U.S. 347, 361 (1976).

II. A DOCTRINAL EXCEPTION TO CONTENT NEUTRALITY

Having established that content-based copyright denial amounts to an abridgment of speech, I turn to the argument that speech doctrine would recognize the denial as a permissible exception to its general rule of content neutrality. To be sure, content neutrality reflects a fundamental tenet of free speech.[81] The Supreme Court has articulated the principle of content neutrality as follows: "[A]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[82] On several occasions, the Court has explained that "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[83] The fact that society deems content undesirable does not give reason for government to discriminate against it.[84] Hence, under normal principles of free-speech jurisprudence, any exception for content-based copyright denial cannot be based on the fact that Congress finds content objectionable.

Absent a constitutional exception, content-based restrictions of speech are subject to the rigorous standard of strict scrutiny; specifically, the government must demonstrate that content-based restrictions are narrowly tailored to serve a compelling governmental interest.[85] This means that the government must show that an actual problem exists,[86] and not merely that the public disapproves of the content at issue.[87] The problem must require curtailment of speech content,[88] and the means of curtailing the speech must represent the least restrictive means available.[89] In view of this strict-scrutiny standard, the Court has observed: "It is rare that a regulation restricting speech because of its content will ever be permissible."[90]

In the copyright context, this strict-scrutiny framework would seem to preclude Congress from denying copyright for specific content. It is difficult to conceive of an actual problem that would justify Congress denying copyright for content—a problem that does not simply reflect societal rejection of the content itself. Although bad consequences that follow from specific content may seem to justify content restriction, denying copyright to authors does not seem a necessary means for alleviating those consequences, nor does copyright denial seem the least restrictive means for dealing with the consequences. For instance, suppose that the government

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81. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional.").

82. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733 (2011) (omission in original) (quoting Ashcroft v. ACLU, 535 U.S. 564, 573 (2002)).

83. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) (quoting United States v. Eichman, 496 U.S. 310, 319 (1990)).

84. *Id.*

85. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009).

86. *Brown*, 131 S. Ct. at 2738.

87. *Simon*, 502 U.S. at 118.

88. *See Brown*, 131 S. Ct. at 2738.

89. *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

90. *Brown*, 131 S. Ct. at 2738 (quoting United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 818 (2000)).

could demonstrate that violent video games do in fact cause some persons to engage in aggressive, unlawful behavior—a supposition that the Supreme Court recently called into doubt in *Brown v. Entertainment Merchants Association*.[91] It would be difficult to demonstrate that denying copyright is necessary to alleviate this alleged consequence of violent video games. Indeed, it is possible that by denying copyright protection, the copying of violent video games would increase, thereby increasing the undesirable consequence of the expression.[92] Demonstrating the effect of copyright denial—namely, that the denial would decrease content proliferation—would be practically impossible. Moreover, even assuming that the government could demonstrate that the denial would decrease content proliferation, such a decrease would likely affect many video-game players who do not act aggressively. Copyright denial would constitute an expansive means for dealing with a problem that likely affects a fairly limited group of speech recipients. The denial would not represent the least-restrictive means. Thus, under the heavy burden of strict scrutiny, it seems doubtful that Congress could ever employ content as a basis for denying copyright—especially for speech that receives full First Amendment protection.

Thus, my argument is not that content-based copyright denial would satisfy the general strict-scrutiny test for content-based speech regulation. Instead, I argue that existent doctrines creating exceptions to the principle of content neutrality for entire categories of speech suggest that the circumstances warranting those exceptions are present in the context of content-based copyright denial.[93] To this end, this Part examines both free-speech and copyright doctrines. Part II.A analyzes well-established exceptions to content neutrality in free-speech jurisprudence to conclude that, with proper constitutional restraints, content-based copyright denial would not offend free speech—independent of any strict-scrutiny analysis. Part II.B interprets copyright doctrines to reach the same conclusion.

A. Speech Doctrines

This Part argues that content-based copyright denial fits comfortably within existent speech doctrines. Specifically, the doctrine governing content regulation in limited-public forums[94] and the doctrine governing content-based subsidies through the spending power[95] both seem applicable to content-based denials of copyright.

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91. *Id.* at 2738–39 ("[The State] cannot show a direct causal link between violent video games and harm to minors. . . . [The studies purporting to show a connection between exposure to violent video games and harmful effects on children] do not prove that violent video games cause minors to act aggressively (which would at least be a beginning)." (emphasis omitted)).

92. *See* Cotropia & Gibson, *supra* note 46, at 925.

93. *See infra* Part III.

94. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829–30 (1995) (explaining that a government subsidy of speech may be a "metaphysical" limited-public forum, and that "necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it . . . for the discussion of certain topics").

95. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 588 (1998) ("Congress may 'selectively fund a program to encourage certain activities it believes to be in the public interest . . . .'" (quoting Rust v. Sullivan, 500 U.S. 173, 193 (1991)).

After discussing these doctrines, this Part distinguishes the case law discussed above that generally recognizes denials of economic benefits as speech abridgments.

1. Public-Forum Doctrine

The public-forum doctrine appears relevant in deciding whether Congress may deny copyright based on content. It addresses content regulation of speech in government-owned forums,[96] where forums may represent resources that the government has provided for private speakers.[97] Although the doctrine traditionally applies to physical forums (e.g., parks and sidewalks), the Supreme Court has also employed it in a metaphysical sense where the government has extended a resource as a conceptual forum for speech.[98] Specifically, the Court has applied the public-forum doctrine to analyze government funding of student organizations,[99] student publications,[100] a school mail system,[101] and a charitable contribution program.[102] Like these resources that represent conceptual forums giving rise to speech of private individuals, copyright represents a resource that government provides to facilitate private speech. Copyright is analogous to a public forum.

The Court has outlined four types of forums relevant to content regulation of speech.[103] The first two are the traditional-public and designated-public forums.[104] Both of these seem inapposite to copyright because both require strict scrutiny for any content-based discrimination.[105] Copyright, by contrast, has long recognized content discriminators that are not subject to strict scrutiny.[106] Specifically, the doctrines of originality, idea-expression, fact, and useful article all define copyright eligibility based on the content of expression, and none employ strict scrutiny.[107] Hence, the traditional-public and designated-public forums appear inapposite to copyright.

A third forum is the nonpublic forum.[108] The nonpublic forum is a forum "which is *not* by tradition or designation a forum for public communication."[109] Copyright

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96. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983).

97. *See id.*; *Rosenberger*, 515 U.S. at 829–30.

98. *See Rosenberger*, 515 U.S. at 830 (recognizing university funding as "a forum more in a metaphysical than in a spatial or geographic sense").

99. Christian Legal Soc'y v. Martinez, 561 U.S. 661, 667–69 (2010).

100. *Rosenberger*, 515 U.S. at 829–31.

101. *Perry*, 460 U.S. at 46–47.

102. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 801 (1985).

103. *See Perry*, 460 U.S. at 45–47. For a concise statement on the law of public forums, see Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1979–92 (2011).

104. *Perry*, 460 U.S. at 45–47.

105. *See id.*

106. *See* Eldred v. Ashcroft, 537 U.S. 186, 218–21 (2003) (describing idea-expression doctrine as one of copyright's built-in safeguards of free speech); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) (applying originality and fact discriminators to determine copyrightable content without engaging any free-speech analysis); *see also infra* Part II.B (discussing existing content discriminators in copyright law).

107. *See Eldred*, 537 U.S. at 218–21; *Feist*, 499 U.S. at 364; *see also infra* Part II.B.

108. *Perry*, 460 U.S. at 46.

109. *Id.* (emphasis added).

has existed for over two centuries to encourage public expression.[110] Hence, the nonpublic forum appears inapposite as well.

The fourth and final forum is the limited-public forum. The limited-public forum represents a forum created "for a limited purpose such as use by certain groups, or for the discussion of certain subjects . . . ."[111] Because a limited-public forum may exist for the discussion of certain topics, the government may preclude discussion of other topics within the forum.[112] According to the Supreme Court, limiting a forum for the discussion of certain topics—that is, subject-matter content discrimination—is permissible only if doing so upholds a "limited and legitimate purpose[]" for which the forum was created.[113] Stated another way, subject-matter content discrimination in a limited-public forum is permissible if it is "reasonable in light of the purpose served by the forum."[114] Viewpoint discrimination, however, is never permissible.[115] The government may not restrict the limited-public forum to particular viewpoints on a topic—only topics of discussion in support of the forum's purpose.[116]

The limited-public forum seems most analogous to copyright. The forum of copyright exists to encourage discussion of certain topics—specifically, those that promote the progress of science.[117] That is, the Constitution provides Congress power to legislate copyright in order "[t]o promote the Progress of Science . . . ."[118] There is a clear and constitutionally defined purpose for the resource of copyright that Congress extends to the public—promoting the progress of science.[119] And because Congress

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110. *See* Act of May 31, 1790, ch. 15, 1 Stat. 124 (stating purpose of Copyright Act as "the encouragement of learning"); *Eldred*, 537 U.S. at 219 (describing copyright as "the engine of free expression" (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985))).

111. *Perry*, 460 U.S. at 46 n.7 (citation omitted).

112. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.").

113. *Id.*

114. *Id.* (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).

115. *Id.*

116. *See id.*

117. *See* U.S. CONST. art. I, § 8, cl. 8; *infra* Part II.B.

118. *See* U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."). Notably, the purpose of copyright appears limited to the promotion of the progress of science, not extending to the promotion of "useful Arts." *See* Golan v. Holder, 132 S. Ct. 873, 888 (2012) ("Perhaps counterintuitively for the contemporary reader, Congress' copyright authority is tied to the progress of science; its patent authority, to the progress of the useful arts."); EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 116–18 (2002) (linking science with copyright and useful arts with patent); Ned Snow, *The Meaning of Science in the Copyright Clause*, 2013 BYU L. REV. 259, 273 n.53 (2013) (reciting authorities on the issue of whether Science corresponds to the copyright power and useful Arts to the patent power); Lawrence B. Solum, *Congress's Power to Promote the Progress of Science:* Eldred v. Ashcroft, 36 LOY. L.A. L. REV. 1, 12 (2002) ("[T]he structure of the Clause and its history of exposition makes clear the parallel structure that associates 'Science,' 'Authors,' and 'Writings' with the copyright power.").

119. *See* U.S. CONST. art. I, § 8, cl. 8.

has created this forum through its constitutional authority, its purpose is necessarily legitimate. Straightforwardly, then, the constitutional purpose of copyright suggests a forum created for a limited purpose, that is, a limited-public forum.

Copyright's subsidy characteristic also suggests its categorization as a limited-public forum. The Supreme Court recently observed that where a speech restriction constitutes a selective subsidy rather than an outright prohibition, this fact indicates the appropriateness of a limited-public-forum analysis.[120] The Court made this observation in *Christian Legal Society v. Martinez*, where it considered a state school's decision to withhold official recognition of a student organization.[121] In the Court's words: "Application of the less restrictive limited-public-forum analysis better accounts for the fact that [the school], through its RSO [Registered Student Organization] program, is dangling the carrot of subsidy, not wielding the stick of prohibition."[122] Similarly, copyright does not impose any prohibition or penalty on speech.[123] Rather, copyright provides authors a subsidy in the form of property rights,[124] which suggests its classification as a limited-public forum.

Finally, the argument that copyright should be construed as a limited-public forum draws support from the facts of *Rosenberger v. Rector & Visitors of the University of Virginia*.[125] There, a state university had denied funding for any student publication that manifested beliefs about deity or an ultimate reality.[126] In analyzing

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120. In *Christian Legal Society v. Martinez*, a student organization, the Christian Legal Society (CLS), sought to exclude students from its organization based on homosexual conduct or religious beliefs. 561 U.S. 661, 672 (2010). Because of these exclusions, Hastings Law School refused to give CLS official recognition as a student organization, which made CLS ineligible for a variety of privileges (e.g., funding, facility use). *Id.* at 669–70. At issue, then, was whether the Speech Clause precluded Hastings from denying the benefit of official recognition as a student organization. *Id.* at 678–80. In deciding this question, the Court applied a limited-public-forum analysis. *Id.*

One reason for the Court's application of limited-public forum was that the benefit was a subsidy rather than a prohibition. *Id.* at 682. In the Court's words:

> [T]his case fits comfortably within the limited-public-forum category, for CLS, in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies; CLS may exclude any person for any reason if it forgoes the benefits of official recognition. . . .
>
> In diverse contexts, our decisions have distinguished between policies that require action and those that withhold benefits. Application of the less-restrictive limited-public-forum analysis better accounts for the fact that Hastings, through its [student organization] program, is dangling the carrot of subsidy, not wielding the stick of prohibition.

Id. at 682–83 (citations omitted).

Because CLS could still exist as an organization, even if it did not comply with the law school's condition, the pressure to comply with the condition was indirect. *Id.* Denying the benefit was less severe than compelling compliance, and for that reason, the less-restrictive analysis of limited-public forum was appropriate.

121. *Id.*

122. *Id.*

123. *See supra* Part I.

124. *See generally* 17 U.S.C. § 106 (2012) (describing rights in copyright).

125. 515 U.S. 819 (1995).

126. *Id.* at 822–23.

the university's decision to deny funding, the Supreme Court characterized the funding as a limited-public forum.[127] Important to that characterization, the Court looked to the purpose of the university, which should inform the decision to fund student publications. That purpose appears analogous to the purpose of copyright (to promote the progress of science): the university exists to "encourage a diversity of views from private speakers," creating "a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition."[128] Similar in purpose, university subsidies and copyright would seem to fall within the same sort of forum, which according to the *Rosenberger* Court, is a limited-public forum.[129]

The conclusion that copyright represents a limited-public forum implies that Congress may exercise viewpoint-neutral content discrimination that is reasonable in light of copyright's purpose of promoting the progress of science.[130] Stated another way, the content discrimination must be, first, viewpoint neutral; and second, rationally related to advancing knowledge and learning. With respect to the viewpoint-neutrality restraint, this is often controversial: whether discrimination is based on the more general subject matter of content or the more specific viewpoint of content is context specific and often debated.[131] Yet that debate does not affect Congress's power to discriminate; rather, the debate merely defines the scope of its discriminatory power over particular content. The copyright context would be no different. Under the limited-public-forum doctrine, Congress could not deny copyright to specific viewpoints, and debate would likely surround the issue of whether a criterion for copyright denial constitutes a category of content or a viewpoint.[132]

With respect to the rational-relationship restraint of the limited-public-forum test, this restraint would mirror the rational-basis test for Congress's exercise of its copyright power. That rational-basis test would require that Congress not deny copyright for specific categories of content that, as a general matter, society regards as necessarily advancing knowledge and learning.[133] Congress could not, for instance, deny copyright specifically for texts related to the hard sciences: such a denial would be irrational in view of the purpose of copyright.[134] Therefore, with the viewpoint-neutrality and rational-basis restraints in place, denying copyright to a category of content appears a permissible speech restriction under the doctrine governing limited-public forums.

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127. *Id.* at 830.

128. *Id.* at 834–35; *see also* Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981) ("A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.").

129. *Rosenberger*, 515 U.S. at 830.

130. *See id.* at 829–30 (describing that content discrimination in a limited-public forum is permissible if it is "reasonable in light of the purpose served by the forum" (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985))).

131. *See, e.g.*, *id.* at 892–95 (Souter, J., dissenting) (disagreeing with majority on whether criterion represents viewpoint- or content-based discrimination).

132. *See infra* Part IV.A.

133. *See infra* Part IV.B.

134. *See infra* Part IV.B.

2. Spending-Power Doctrine

Speech doctrines that govern Congress's spending power appear relevant to whether Congress may extend copyright based on content. When Congress funds programs, its spending decisions may affect the content of speech.[135] In response to such content-based spending, the Supreme Court has crafted doctrines to enable the spending while protecting core speech interests.[136] These doctrines appear to inform the permissibility of content-based copyright denial owing to similarities between the spending and copyright powers. Both powers enable Congress to extend subsidies to the public: the spending power enables Congress to extend monetary funds; the copyright power enables Congress to extend property rights.[137] Part II.A.2 thus analyzes doctrine that governs content discrimination in Congress's exercise of the spending power.

a. Content Discrimination

Supreme Court jurisprudence allows Congress to exercise its spending power based on the content of speech.[138] In *National Endowment for the Arts v. Finley*, the Court considered federal legislation that required the National Endowment for the Arts (NEA) to consider "standards of decency and respect" in awarding grant funds for artistic works.[139] Congress implemented this condition in an apparent attempt to prevent pornographic works from receiving grants.[140] Following the direction from Congress, the NEA was subsequently sued by applicants who were denied funding; they argued that the "decency and respect" condition was an unconstitutional content restriction.[141] The Court disagreed, holding that Congress's discrimination was a permissible exercise of the spending power.[142] The Court explained: "[A]lthough the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."[143] Thus, Congress could examine content—even though the First Amendment may have otherwise prevented such discrimination—because Congress was extending a subsidy, rather than imposing a penalty.[144]

Key to the *Finley* holding is the fact that, as a general matter, the NEA program requires content discrimination.[145] The program requires the NEA to make judgments

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135. *See, e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587–88 (1998) (explaining necessity of favoring speech in funding decisions).

136. *See id.*

137. *Compare* U.S. CONST. art. I, § 8, cl. 1 (the Spending Clause), *with* U.S. CONST. art. I, § 8, cl. 8 (the Copyright Clause).

138. *See Finley*, 524 U.S. at 587–88.

139. *Id.* at 572.

140. *Id.* at 574–75.

141. *Id.* at 581.

142. *Id.* at 587–90.

143. *Id.* at 587–88.

144. *See id.*

145. *See id.* at 585–86.

regarding qualitative excellence of a work, which judgments amount to content-based discrimination.[146] And because the congressional program necessitates content discrimination in its very function, Congress was acting as a patron of expression, rather than as a sovereign overseeing expression.[147] The Court thereby distinguished the content discrimination in *Finley* from other subsidy-based acts of discrimination: when acting in the role of patron, Congress is justified where its funding might negatively affect artists' speech.[148] In the Court's words: "We recognize, as a practical matter, that artists may conform their speech to what they believe to be the decisionmaking criteria in order to acquire funding. But when the Government is acting as *patron* rather than as *sovereign*, the consequences of imprecision are not constitutionally severe."[149] The nature of the program requires Congress to act as patron of speech, and as patron, Congress steps outside its sovereign obligation to exercise content neutrality.[150]

Following *Finley*, the Supreme Court again held that Congress could exercise its spending power based on speech content in *United States v. American Library Association, Inc.*[151] There, Congress had conditioned funding for libraries on the implementation of Internet software that would filter pornography.[152] A group of libraries argued that this condition abridged speech rights.[153] Rejecting this argument, a plurality of the Court relied on *Finley* to uphold the content-based condition.[154] The plurality held that public funds may be spent on a program or purpose for which they were appropriated.[155] As in *Finley*, the Court held that the purpose of the congressional program guides the spending subsidy, even if that guidance involves content-based choices.[156]

Finley and *American Library* suggest that content discrimination in copyright would be permissible. To promote the progress of science through copyright,[157] Congress must act as patron of a certain category of speech—that which advances knowledge and learning.[158]

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146. *Id.*
147. *Id.* at 589.
148. *See id.*
149. *Id.* (emphasis added) (citation omitted).
150. *See id.*
151. 539 U.S. 194, 210–11 (2003) (plurality opinion).
152. *Id.* at 211–12.
153. *Id*. at 210.
154. *Id.* at 205.
155. *Id.* at 211–12.
156. *Id.* This principle of permissible discrimination in extending subsidies applies equally with respect to Congress's taxing power. *See* Regan v. Taxation with Representation of Wash., 461 U.S. 540, 548–50 (1982) (upholding legislation that denied tax-exempt status to organizations that attempt to influence legislation).
157. *See* U.S. CONST. art. I, § 8, cl. 8; *supra* note 118 (explaining correspondence between copyright and the progress of science).
158. This is not to say that in extending copyright Congress acts as patron of particular speech, as in *Finley*. The *Finley* Court recognized that the nature of the NEA program called for esthetic judgments to determine excellence, which resulted in particular content being favored over others. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 586 (1998). So in referring to Congress as patron, I do not mean to suggest that Congress patronizes specific content, but rather I refer to its patronage of the general category of works that

Stated in the Copyright Clause,[159] this purpose of copyright suggests that Congress may step outside its traditional role of sovereign, which is a role that would usually bar Congress from exercising content preference.[160] Accordingly, the Court's observation in *Finley* seems applicable to copyright: just as "Congress may 'selectively fund a program to encourage certain activities it believes to be in the public interest,'"[161] Congress may selectively copyright expression to promote the progress of science.

Notably, although the Supreme Court has provided Congress greater discriminatory discretion in exercising its spending power, that discretion is not without restraint. On several occasions, including in *Finley*, the Court warned against Congress providing a subsidy so as to "ai[m] at the suppression of dangerous ideas,"[162] or in other words, so as to "drive 'certain ideas or viewpoints from the marketplace.'"[163] In short, Congress cannot use its resources to reject or coerce a viewpoint,[164] so Congress could not deny copyright to viewpoints.

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promote the progress of science.

159. U.S. CONST. art. I, § 8, cl. 8 (providing Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

160. Admittedly, I have not addressed in this Article the specific issue of whether the stated purpose of the copyright power contemplates content discrimination. That issue I address elsewhere. *See* Snow, *supra* note 9. Here, I observe that to the extent that the power does contemplate content discrimination, the content-based purpose of the power is akin to the purpose of content-based programs that Congress funds.

161. *Finley*, 524 U.S. at 588 (quoting Rust v. Sullivan, 500 U.S. 173, 193 (1991)).

162. *Id*. at 587 (quoting Regan v. Taxation with Representation of Wash., 461 U.S. 540, 548 (1982)).

163. *Id.* (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)).

164. *Id.*; *see also* Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2330–32 (2013) (striking down a funding condition as coercively imposing a viewpoint that required a policy opposing prostitution and sex trafficking); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 536, 544, 547–48 (2001) (holding unconstitutional a funding condition for an organization that represented indigent clients in legal matters, where the condition prohibited the organization from challenging the constitutionality of welfare laws); FCC v. League of Women Voters, 468 U.S. 364, 366, 400–02 (1984) (holding unconstitutional a funding condition that Congress imposed on public-broadcasting stations, where the condition prohibited those stations from opining editorial viewpoints).

There is an exception to the usually inflexible rule against viewpoint discrimination, and it arises in the spending context. The exception occurs when the government is speaking its own viewpoint, or alternatively, when the government funds a private party to speak on its behalf. The Supreme Court has explained: "[V]iewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or . . . in which the government 'used private speakers to transmit specific information pertaining to its own program.'" *Velazquez*, 531 U.S. at 541 (citation omitted) (quoting Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833 (1995)). This situation, however, does not represent copyright. Congress is not the source of copyrighted expression; nor is Congress transmitting its own information through copyright holders. Rather, the copyright holders are private speakers who create the information within the copyrighted expression. So because copyright holders do not speak on behalf of Congress, spending-power jurisprudence leaves no room for Congress to

b. Resource Scarcity

Although the Supreme Court has afforded Congress considerable discretion to discriminate among content in exercising its spending power, the copyright power is arguably distinct from the spending power in one important respect. Spending decisions require an allocation of limited resources, whereas copyright decisions do not. Limited resources in spending decisions makes discrimination a practical necessity. Indeed, the *Finley* Court cited scarcity of funding as a reason for allowing the NEA to examine content in awarding artistic grants:[165] if the spending power were subject to a rule dictating content neutrality, Congress would need to fund either all activities that could give rise to speech content, or none at all.[166] Because the former option is not a practical possibility, the requirement of content neutrality would altogether erase the spending power.

Copyright, by contrast, provides the practical possibility of applying content neutrality to all content. The infrastructure in copyright law that is necessary to subsidize *some* content will—with minimal adjustment—be sufficient to subsidize *all* content.[167] That is to say, copyrighting all content would be just as cost efficient as copyrighting some content. Indeed, from an administrative standpoint, it could be more cost effective to administer property rights by introducing fewer content-based restrictions into copyright.[168] Simply put, enforcing content restrictions in copyright seems more trouble than it's worth. The argument, then, is that scarcity of funds excuses content discrimination in the spending context, but it does not in the copyright context.[169]

This resource-scarcity argument makes sense to a certain point. But the limited nature of Congress's resources represents only a secondary reason supporting

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favor viewpoints in defining copyright.

165. *See Finley*, 524 U.S. at 585 ("The NEA has limited resources, and it must deny the majority of the grant applications that it receives, including many that propose artistically excellent projects. . . . [I]t would be impossible to have a highly selective grant program without denying money to a large amount of constitutionally protected expression." (citation omitted)); *see also* Bowen v. Owens, 476 U.S. 340, 345 (1986) ("The program is a massive one, and requires Congress to make many distinctions among classes of beneficiaries while making allocations from a finite fund. In that context, our review is deferential.").

166. *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733 (2011) ("[A]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (omission in original) (quoting Ashcroft v. ACLU, 535 U.S. 564, 573 (2002))).

167. *See infra* note 168.

168. In this regard, former Attorney General William Rogers stated:

> [E]xaminations of any more than the question whether the works involved meet the specific statutory requirements of the [copyright] act may be regarded as not feasible administratively. In addition, for policy reasons it may not be thought appropriate for the Register to undertake to be a conservator of public morals.

41 U.S. Op. Att'y Gen. 395, 402 (1958).

169. *But see In re* McGinley, 660 F.2d 481, 485–86 (C.C.P.A. 1981) (allowing Congress to exercise content discrimination in the trademark context on the grounds that Congress may make policy judgments regarding the "time, services, and . . . funds of the federal government").

Congress's constitutional ability to affect speech content through spending. Simply put, the Supreme Court allows Congress to exercise content-based discretion in spending because discretion is part of that power.[170] Again in *Finley*, the Court's comments are instructive:

> Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." In doing so, "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."[171]

As part of its power to pursue policies that provide for general welfare, Congress has the inherent power to discriminate among possible policies to pursue, including those which affect speech content.[172] Congress's ability to make discriminatory choices in spending is not based entirely on its limited resources.[173] That fact is only one reason. Another more fundamental reason is that Congress is the constitutional institution to judge which policies will provide for, or impinge on, public welfare.[174] Congress's power to provide for general welfare implies a power to decide policy, even if that decision affects speech.[175]

In addition to the language of *Finley*, the holding of *American Library* contravenes the resource-scarcity argument.[176] As mentioned above, in *American Library* a plurality of the Court held constitutional a funding condition that libraries implement software that would filter pornography.[177] The condition did nothing to make additional content available; rather, the condition served only to block pornographic content, some of which constituted protected speech.[178] The same content that was available through the funding condition—*plus* more content (the pornography)—could have been available by *not* implementing the condition. In that situation, then, Congress could not rely on the rationale that its scarcity of funds precluded it from funding all content.[179] Simply put, the scarcity-of-funding

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170. *See, e.g.*, Regan v. Taxation with Representation of Wash., 461 U.S. 540, 549 (1983) ("Congressional selection of particular entities or persons for entitlement to this sort of largesse 'is obviously a matter of policy and discretion not open to judicial review unless in circumstances which here we are not able to find.'" (quoting Cincinnati Soap Co. v. United States, 301 U.S. 308, 317 (1937)).

171. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 588 (1998) (citation omitted) (quoting Rust v. Sullivan, 500 U.S. 173, 193 (1991)).

172. *See id.*

173. *See id.* ("So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities.").

174. *See id.* ("Congress may selectively fund a program to encourage certain activities it believes to be in the public interest . . . ." (internal quotation marks omitted)).

175. *See id.* at 587–88.

176. *See* United States v. Am. Library Ass'n, 539 U.S. 194, 214 (2003) (plurality opinion).

177. *See id.* at 200–01, 214.

178. *See id.* at 200–01.

179. *Id.* at 237 (Souter, J., dissenting) ("Since it makes no difference to the cost of Internet access whether an adult calls up material harmful for children or the Articles of Confederation,

argument justifies a decision to promote certain content, but it does not justify a decision to impede certain content. Thus, the permissibility of the filtering condition in *American Library* must have rested on the principle that "the government has broad discretion to make content-based judgments in deciding what private speech to make available to the public."[180] The discretion inherent in Congress's power to expend resources—not resource scarcity— justified *American Library*. In sum, the fact that resources are scarce in the spending context seems unpersuasive as an argument that the copyright power does not afford Congress content-based discretion.

c. Vagueness

Spending power jurisprudence addresses a concern with Congress denying copyright to a category of content. In specifying general categories of content that are ineligible for copyright, Congress might enable judges to impose their own subjective views of content.[181] For instance, if Congress were to create a copyright-eligibility requirement that barred copyright protection for pornography, judges might apply this requirement to deny protection for artistic works with nude models. Under free-speech jurisprudence, statutes that set forth criteria that provide excessive discretion in their enforcement may be challenged as unconstitutionally vague.[182] More specifically, the vagueness doctrine examines whether a statute "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[183] On this basis, it might seem that a criterion requiring judges to decide whether content is "pornographic" or "graphically violent" introduces unconstitutional vagueness.

Under the rationale of spending-power cases, this argument would not likely succeed. The Supreme Court in *Finley* addressed a similar argument; namely, that the criteria for funding—"decency and respect"—was unconstitutionally vague.[184] The Court rejected this argument, explaining:

> The terms of the provision are undeniably opaque, and if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns. . . .
>
> In the context of selective subsidies, it is not always feasible for Congress to legislate with clarity. Indeed, if this statute is unconstitutionally vague, then so too are all Government programs

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blocking (on facts like these) is not necessitated by scarcity of either money or space." (footnote omitted)).

180. *Id.* at 204 (plurality opinion).

181. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104,108–09 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." (footnote omitted)).

182. *See id.*

183. *Id.*

184. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 583–89 (1998).

> awarding scholarships and grants on the basis of subjective criteria such as "excellence."[185]

This explanation suggests that the Court rarely, if ever, applies the vagueness doctrine to statutes that award subsidies. Furthermore, courts do not usually apply the vagueness doctrine to find a civil law unconstitutional.[186] The vagueness doctrine, then, would not likely preclude Congress from designating imprecise content discriminators as a basis for denying copyright. Copyright's context of selective subsidies excuses the imprecision involved with applying content-based criteria to entertainment.

In a brief departure from free-speech jurisprudence directly addressing vagueness, I here call attention to the fact that the Supreme Court has addressed an issue related to vagueness in the specific context of applying a content-based criterion for copyright eligibility.[187] This occurred in the 1903 case of *Bleistein v. Donaldson Lithographing Co*.,[188] which I discuss at great length in another article that addresses more fully the issue of whether the Copyright Clause gives power to exercise content discrimination.[189] Here, I mention only that *Bleistein* teaches that Congress may not designate a content-based criterion so general—such as designating that a copyrightable work must be "fine" or "attractive"—that it would effectively delegate Congress's discriminatory authority to the judiciary.[190] This teaching is consistent with the modern vagueness and nondelegation doctrines as applied to selective subsidies.[191] Only extremely deferential content-based criteria would be held unconstitutionally vague.

3. Distinctions from Other Economic-Benefit Denials

Although the speech doctrines discussed in Part II.A.1 and Part II.A.2 above suggest the constitutionality of content-based copyright denial, those doctrines do not specifically address case law regarding denials of economic benefits. Recall that Supreme Court case law recognizes denials of economic benefits as speech abridgments.[192] At first glance, and as discussed above, this case law seems damning for content-based copyright.[193] But these cases are distinct from the copyright context in one critical respect: where economic-benefit denials have constituted a speech

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185. *Id.* at 588–89.

186. *See* Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498–99 (1982) ("The [Supreme] Court has also expressed greater tolerance of [vague] enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.").

187. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250–52 (1903).

188. *Id.*

189. *See* Snow, *supra* note 9.

190. *See Bleistein*, 188 U.S. at 250–52.

191. *Cf.* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 589 (1998); Touby v. United States, 500 U.S. 160, 165 (1991) ("Congress may not constitutionally delegate its legislative power to another branch of Government.").

192. *See supra* Part I.B.

193. *See supra* Part I.B.

abridgment, the speakers could not both realize the economic benefit and speak the content at issue. Specifically, the economic-benefit denials consisted of denying any possibility of profits,[194] denying employment opportunities,[195] and denying tax benefits.[196] In none of these situations could the speakers realize the benefit if they spoke the content, so the denial was unconstitutionally coercive. By contrast, denying copyright does not preclude speakers from both speaking the content and receiving the economic benefit of profiting from their speech. The absence of copyright does not imply the absence of the opportunity to profit.[197] It implies only the absence of a government-backed legal monopoly.[198] Copyright denial is therefore distinct from the economic-abridgment case law on the grounds that in the copyright context, government precludes speakers from employing only *one* means for realizing the economic benefit, rather than precluding speakers from employing *any* means for realizing that benefit. As a result, copyright appears much less coercive than other economic-denial contexts where the Court has recognized a speech abridgment.

The other contexts where the Court recognized economic denials as abridgments are also distinguishable from copyright in that they lacked speech-centric safeguards to prevent congressional abuse of content-based discretion. Specifically, the other contexts lacked any restraints relating to viewpoint neutrality or rational basis. In contrast to those other contexts, Supreme Court jurisprudence has permitted content discrimination where government extends economic benefits with rational-basis and viewpoint-neutrality restraints in place—that is, the contexts of limited-public forums and congressional funding for programs.[199] Hence, the constitutional restraints on content-based copyright denials suggest their similarity with the contexts where the Court has allowed Congress to discriminate in extending economic benefits, as opposed to those contexts where the Court has not.

B. Copyright Doctrines

This Part considers copyright doctrine to inform the doctrinal question of whether content-based copyright violates the Speech Clause. Part II.B.1 observes established copyright doctrines that deny copyright protection to categories of content which receive full First Amendment protection. Part II.B.2 argues that Congress's actions under the fair-use doctrine strongly suggest that Congress may exercise content-based discrimination in defining copyright eligibility. Part II.B.3 examines case law that addresses the relationship between copyright and free speech, *Golan v. Holder*[200] and *Eldred v. Ashcroft*.[201]

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194. *See* United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 457 (1995); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991).

195. *See* Perry v. Sinderman, 408 U.S. 593, 596–97 (1972).

196. *See* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 222 (1987).

197. *See supra* Part I.A.

198. *See generally* Landes & Posner, *supra* note 6, at 332 (describing the inefficient incentives of authors and publishers if copyright protection did not exist).

199. *See supra* Part II.A.1–2.

200. 132 S. Ct. 873, 889–93 (2012).

201. 537 U.S. 186, 192–94 (2003).

1. A History of Content-Based Copyright Denial

A history of Congress engaging in a particular act may serve as evidence that the act is constitutional.[202] With this principle in mind, I here observe different copyright doctrines though which Congress has denied copyright to categories of content that receive First Amendment protection. That history suggests that Congress could deny copyright for other categories of content that represent protected speech.

Consider the originality doctrine. It bars copyright protection for content that is not sufficiently creative.[203] But a lack of creativity is not reason to deny First Amendment protection.[204] Consider that truths and facts represent a category of content that is not copyrightable.[205] Yet factual and truthful content lies at the core of protected speech.[206] Consider the idea-expression dichotomy. That doctrine limits copyright to the expression of ideas, not inclusive of the ideas themselves—an ostensible content-based restriction.[207] Those same ideas, however, receive strong protection under the First Amendment.[208] Finally, consider the useful-article doctrine. It denies copyright for content consisting of an object whose aesthetic design cannot be distinguished from its utilitarian function.[209] Nevertheless, such a distinction between expression and functionality does not bar the object's protection as speech.[210] Thus, existent doctrines in the Copyright Act establish a history of content discrimination without free-speech offense. They suggest that the fact that content receives protection from government abridgment does not imply that content must receive protection from private copying.

The history of Congress in trademark and patent law lends further support to the conclusion that free-speech doctrine does not preclude Congress from exercising content discrimination in denying copyright. Like the copyright power, Congress's patent power enables Congress to incentivize expression that discloses inventions.[211]

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202. *See id.* at 200–01 (reciting the long history of Congress granting authors term extensions on existing works as evidence of constitutionality of act).

203. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346–47 (1991).

204. *See* Dex Media W., Inc. v. City of Seattle, 696 F.3d 952, 965 (9th Cir. 2012) (holding that telephone directories receive full First Amendment protection).

205. 17 U.S.C. § 102(b) (2012) ("In no case does copyright protection for an original work of authorship extend to any idea . . . ."); *Feist*, 499 U.S. at 347–48 ("Section 102(b) of [the Copyright Act] is universally understood to prohibit any copyright in facts."); Baker v. Selden, 101 U.S. 99, 100–01 (1879) ("Where the truths of a science or the methods of an art are the common property of the whole world, any author has the right to express the one, or explain and use the other, in his own way.").

206. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) (explaining that the function of the marketplace of ideas is to seek truth).

207. *See Feist*, 499 U.S. at 349–50.

208. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (barring government from acting to "drive certain ideas or viewpoints from the marketplace").

209. *See* 17 U.S.C. § 101 (2012).

210. *See, e.g.*, Mastrovincenzo v. City of New York, 435 F.3d 78, 95–96 (2d Cir. 2006) (examining whether a utilitarian object has expressive purpose for speech protection).

211. *See* U.S. CONST. art. I, § 8, cl. 8 (providing Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors

Under that power, Congress has legislated to discourage the expression of certain content by denying patent protection for inventions directed toward human organisms[212] and for inventions relating to nuclear energy or atomic bombs.[213] Under trademark law, Congress incentivizes expression that will reduce consumer confusion as to the source of goods or services.[214] To that end, since 1905 Congress has denied federal registration for any trademark that consists of immoral or scandalous matter.[215] This history suggests a simple conclusion: that the Speech Clause does not preclude Congress from denying an intellectual-property right based on content.

2. Content-Based Discretion in Fair Use

Another instance of Congress exercising content discrimination in copyright law arises in the fair-use doctrine. Congress has defined specific categories of content that are more likely to qualify as fair uses of original expression.[216] Stated another way, Congress has defined categories of content that copiers should be able to repeat without punishment.[217] Those categories include content related to news, criticism, and education.[218] Importantly, this content discrimination in fair use is relevant to free speech because copying expression may represent speech.[219] Through copying another's expression, a copier may attempt to communicate her own ideas by using the original expression.[220] Copiers may engage in second-speaker speech. This fact has led the Supreme Court to recognize fair use as a "First Amendment accommodation[]," so that copyright does not suppress second-speaker speech.[221] So because copying in some instances constitutes second-speaker speech, Congress's specification of fair-use categories (for example, news, criticism, and education) represents content-based discrimination of second-speaker speech.[222] By defining

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the exclusive Right to their respective Writings and Discoveries"); 35 U.S.C. § 112 (2012) (requiring a written description of invention to receive a patent).

212. Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 634, 118 Stat. 3, 101.

213. 42 U.S.C. § 2181(a) (2012).

214. *See generally* 15 U.S.C. § 1125(a) (2012) (imposing liability for consumer confusion in trademark law).

215. *See* 15 U.S.C. § 1052(a) (2012) (barring federal registration for any mark that "[c]onsists of or comprises immoral, deceptive, or scandalous matter"); Act of Feb. 20, 1905, Pub. L. No. 59-84, ch. 592, § 5(a), 33 Stat. 724, 725 (barring federal registration for a mark that "[c]onsists of or comprises immoral or scandalous matter"). Trademark arises under Congress's commerce power. *See* Trade-Mark Cases, 100 U.S. 82, 96 (1879).

216. 17 U.S.C. § 107 (listing that the following fair-use purposes are not an infringement of copyright: "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research . . . .").

217. *See id.*

218. *Id.*

219. *See supra* note 3.

220. *See supra* note 3.

221. Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

222. *See* 17 U.S.C. § 107 (2012).

which sort of content receives fair-use protection, Congress has defined which sort of content should receive speech protection.[223]

Significantly, Congress's content-based definition of fair use is not without practical consequence, for the remedies of copyright infringement may involve severe criminal and financial penalties.[224] Copiers who engage in second-speaker speech (against whom Congress has discriminated in defining content-based categories of fair use) face criminal and financial penalties for speaking.[225] By contrast, speakers of original expression (against whom Congress might discriminate in defining copyright eligibility) would face the absence of a government-backed monopoly for speaking. So if Congress abuses its content-based discretion in defining fair use, legitimate speakers of second-speaker speech (that is, fair uses for which Congress has denied fair use) would face jail time[226] and punitive damages;[227] by contrast, if Congress were to abuse its content-based discretion in defining copyright eligibility, speakers of original expression would face only an absence of a legal monopoly. The penalties, then, for second-speaker speech are much harsher than those for original expression. And this matters because insofar as free-speech doctrine allows for content-based discretion in deciding fair-use speech suppression (where the effects of congressional abuse would severely curtail speech given the harsh penalties for such second-speaker speech), it would seem to follow that free-speech doctrine would also allow for content-based discretion in deciding copyright-eligibility suppression (where the effects of abuse are relatively mild given the absence of penalties for such original expression). If Congress may discriminate in defining the fair-use doctrine, it would seem that Congress may also discriminate in denying copyright to original speakers.

Congress's treatment of fair use further illustrates the discretion that Congress may exercise in setting boundaries for speech-protective doctrines in copyright. Consider the interplay of fair use with the Digital Millennium Copyright Act (DMCA).[228] The DMCA punishes individuals who circumvent encryption technology to gain access to copyrighted material.[229] By punishing anti-circumvention technologies, Congress has precluded second-speech speakers from making fair uses of copyrighted material.[230] That is to say, Congress has denied

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223. *See id.*

224. *See id.* § 504 (stating civil remedies for copyright infringement, including statutory damages); *id.* § 506 (stating criminal remedies for copyright infringement).

225. *See id.* § 504; *id.* § 506.

226. *See* 18 U.S.C. § 2319 (2012).

227. *See* 17 U.S.C. § 504 (2012).

228. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C. and 28 U.S.C.).

229. 17 U.S.C. § 1201(a)(1) (2012) ("No person shall circumvent a technological measure that effectively controls access to a work protected under this title.").

230. *See* 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, 420–29 (1999) (arguing that the anticircumvention provision of the DMCA unconstitutionally restricts speech); Jacqueline D. Lipton, *Solving the Digital Piracy Puzzle: Disaggregating Fair Use from the DMCA's Anti-Device Provisions*, 19 HARV. J.L. & TECH. 111, 124–36 (2005) (reciting criticisms against DMCA's fair use protection).

speech of fair users for the purpose of furthering an anti-infringement policy. Is this denial of fair use permissible, given that fair use represents a "First Amendment accommodation[]" of copyright law?[231] Courts have answered yes, opining that the DMCA's effect on fair use lies within Congress's constitutional discretion.[232]

Thus, Congress's preference for certain content as fair use, as well as Congress's disregard for fair use in enacting the DMCA, suggests that Congress has constitutional discretion to define the boundaries of copyright law in a way that may affect protected speech interests. Content-based copyright seems to fit within that discretion. Defining copyright eligibility according to content appears consistent with Congress's treatment of speech interests in the fair-use context.

3. Statements of the Modern Court

The Supreme Court has never considered the question of whether a content-based denial of copyright offends the Speech Clause. But the Court has made a few statements that could be interpreted as suggesting a position on this question in the cases of *Eldred v. Ashcroft*[233] and *Golan v. Holder*.[234] In *Eldred*, the Court considered Congress's extension of the copyright term for an additional twenty years, and the extension as applied to works that authors had already created (under a shorter term).[235] In *Golan*, the Court considered Congress's similar act of recopyrighting works whose term had already expired.[236] In both cases, petitioners challenged Congress's acts on First Amendment grounds: the actions of Congress unjustifiably suppressed second-speaker speech.[237] The Court dismissed those challenges on the basis that the purpose of copyright—to incent free speech—justified Congress's expanding the monopoly protection.[238] The Court further observed that copyright was

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231. Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

232. *See* Chamberlain Grp., Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1198 (Fed. Cir. 2004) ("The possibility that § 1201 [of the DMCA] might prohibit some otherwise noninfringing public uses of copyrighted material arises simply because the Congressional decision to create liability . . . . " (citations omitted)); Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 322 (S.D.N.Y. 2000), *aff'd sub nom*. Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001).

The *Reimerdes* court's comments are instructive on this issue:

> [Fair use] has been viewed by courts as a safety valve that accommodates the exclusive rights conferred by copyright with the freedom of expression guaranteed by the First Amendment.
>
> . . . .
>
> . . . If Congress had meant the fair use defense to apply to such [DMCA] actions, it would have said so. Indeed, as the legislative history demonstrates, the decision not to make fair use a defense to a claim under [the anticircumvention provision of the DMCA] was quite deliberate.

Reimerdes, 111 F. Supp. 2d at 322.

233. 537 U.S. 186 (2003).

234. 132 S. Ct. 873 (2012).

235. 537 U.S. at 192–93.

236. 132 S. Ct. at 878.

237. *See Golan*, 132 S. Ct. at 878; *Eldred*, 537 U.S. at 218.

238. *Golan*, 132 S. Ct. at 890; *Eldred*, 537 U.S. at 218–19. The *Eldred* Court stated:

insulated from free-speech objections because copyright has doctrines that safeguard free-speech interests—namely, fair use and the idea-expression dichotomy.[239] In short, the Court in *Eldred*, and again in *Golan*, concluded that copyright's speech-centered purpose and its speech-centered safeguards excuse copyright from the usual sort of speech review that the Court applies in other contexts.[240]

These comments might suggest that the Court would not read the Speech Clause as restricting Congress from exercising content discrimination in copyright. The Court made clear that it does not subject copyright to the normal speech-protective doctrines of the First Amendment;[241] so under that reasoning, doctrines precluding content discrimination might not apply in copyright. Stated another way, the Court gave Congress a pass against free-speech scrutiny in *Eldred* (and again in *Golan*),[242] so arguably the Court would give Congress the same pass were it to employ content-based criteria to determine copyright eligibility.

On the other hand, the Court's comments might suggest the opposite conclusion. As an initial matter, the Court's comments that purport to diminish the importance of First Amendment considerations in copyright law were made in the context of analyzing speech interests of copiers—not creators. Specifically, the Court examined only the speech interests of the second-speaker copier, as evidenced by its brief observation that the First Amendment "bears less heavily when speakers assert the right to make other people's speeches."[243] Similarly, with respect to the speech-protective doctrines that the Court cited as alleviating free-speech concerns (fair use and idea-expression dichotomy), those doctrines alleviate free-speech concerns only with regard to speech interests of copiers—not creators. Therefore, the leniency with which the Court applied free-speech doctrines to copyright might be read as applying only to the speech interests of copiers.

Eldred and *Golan* may be further read to suggest against content discrimination in defining copyright eligibility. The Court in both cases described copyright as "the engine of free expression."[244] This statement could be interpreted to mean that the Court views the copyright system as important as the very doctrines of free speech: both copyright and free speech exist to increase speech production. So if both doctrines are equivalent in function, it would seem that content-based restraints on

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> We reject petitioners' plea for imposition of uncommonly strict scrutiny on a copyright scheme that incorporates its own speech-protective purposes and safeguards. The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles. Indeed, copyright's purpose is to *promote* the creation and publication of free expression.

Eldred, 537 U.S. at 218–19 (emphasis in original).

239. *Golan*, 132 S. Ct. at 890; *Eldred*, 537 U.S. at 219–20.

240. *Golan*, 132 S. Ct. at 889–91; *Eldred*, 537 U.S. at 218–21.

241. *Eldred*, 537 U.S. at 218–19 ("We reject petitioners' plea for imposition of uncommonly strict scrutiny on a copyright scheme that incorporates its own speech-protective purposes and safeguards. . . . In addition to spurring the creation and publication of new expression, copyright law contains built-in First Amendment accommodations.").

242. *See Golan*, 132 S. Ct. at 889–91; *Eldred*, 537 U.S. at 218–21.

243. *Eldred*, 537 U.S. at 221.

244. *Id.* at 219 (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985)); *Golan*, 132 S. Ct. at 890 (quoting *Eldred*).

copyright's incentive function would be equivalent to content-based restraints on free-speech doctrine.[245] Hence, the Court's emphasis on the importance of copyright in facilitating free speech could suggest that the Court would apply free-speech principles to protect the speech interests of first-speaker creators in the copyright context. If that were the case, content-based copyright denial would be no different from content-based speech abridgment.[246]

Ultimately, the Court's comments do not definitively decide the issue. Although the Court suggested that the First Amendment bears less heavily in copyright, those comments were relevant only for the speech interest of the copier.[247] And the Court made its First Amendment pronouncements in the context of evaluating legislation that extended copyright protection, which furthers the speech interest of content creators, as distinct from legislation that denies copyright to content, which diminishes the speech interest of content creators. Moreover, although the Court described copyright as "the engine of free expression,"[248] that mere description seems insufficient to determine a weighty doctrinal speech issue. To be sure, the Court's comments were made in contemplation of an issue distinct from the one under consideration in this Article. Hence, although comments of the Court could be construed to support either position, they are not definitive by any means.

III. THEORETICAL SUPPORT FOR THE EXCEPTION

Although Part III describes how speech and copyright doctrines may be interpreted to suggest that content-based copyright denial does not offend the Speech Clause, this fact does not imply the same conclusion under speech theory. This Part therefore examines whether free-speech theory allows for, and indeed supports, Congress designating particular categories of content as ineligible for the monopoly subsidy of copyright. In short, does free-speech theory support content-based copyright denial?

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245. *Cf.* Tushnet, *supra* note 3, at 37 (interpreting the Court's "engine of free expression" characterization of copyright as meaning that the Court recognized "First Amendment interests on both sides of a copyright case").

246. In both *Eldred v. Ashcroft* and *Golan v. Holder*, the Court referred to the congressional acts under consideration as content-neutral copyright legislation. *See Golan*, 132 S. Ct. at 884 (reciting the district court's premise that "[URAA] does not regulate speech on the basis of its content"); *Eldred*, 537 U.S. at 218 (referring to the petitioner's argument "that the CTEA is a content-neutral regulation of speech"). That the Court made this reference to content neutrality could suggest that a content- or viewpoint-discriminatory Copyright Act would be subject to strict scrutiny, and thereby unconstitutional. This interpretation, however, gives too much weight to comments that referenced how others (the petitioners in *Eldred* and the district court in *Golan*) characterized the acts under consideration.

247. *See Eldred*, 537 U.S. at 221.

248. *Id.* at 219 (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985)); *Golan*, 132 S. Ct. at 890 (quoting *Eldred*).

A. A Choice Between Speech Theories

The answer to the question above depends on which free-speech theory is under consideration.[249] Speech theories may be grouped into two general categories: those based on the utility that speech provides individual speakers and those based on the collective good that speech provides collective society.[250] The former group I refer to as individual-utility speech theory. That theory recognizes speech protection because of speech's inherent value to individual speakers: specifically, speech allows individuals to realize self-fulfillment, to exercise autonomy, to participate in cultural experience and democratic governance, and to achieve human dignity and self-gratification.[251] Under individual-utility theory, then, speech is protected for its own sake.[252]

By contrast, collective-good theory of free speech posits that speech rights exist to facilitate an end that is desirable from the collective perspective of society.[253] The collective-good theory that is most recognized in jurisprudence and scholarship is the marketplace-of-ideas theory.[254] Justice Oliver Wendell Holmes, who penned this

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249. *See* 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 2:3 (2014) (recognizing three classic theories of free speech: "marketplace of ideas"; "human dignity and self-fulfillment"; and "democratic self-governance").

250. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 785–86 (2d ed. 1988) (questioning whether the purpose of free speech is to further a collective end or to realize an end in itself).

251. *See* SMOLLA, *supra* note 249, § 2:21; C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978) ("Speech is protected not as a means to a collective good but because of the value of speech conduct to the individual. The liberty theory justifies protection because of the way the protected conduct fosters individual self-realization and self-determination without improperly interfering with the legitimate claims of others."); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) ("[T]he constitutional guarantee of free speech ultimately serves only one true value, which I have labeled 'individual self-realization.'").

252. *See* SMOLLA, *supra* note 249, § 2:21.

253. *See id.*

254. *See generally* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 16 (1982) (recognizing the influence of the marketplace-of-ideas theory); SMOLLA, *supra* note 249, § 2:4 ("The marketplace theory is perhaps the most famous and rhetorically resonant of all free speech theories, though it has often been attacked by modern scholars. It remains, nevertheless, a central driving force in contemporary free speech thinking."). Another collective-good theory is the theory of self-governance. This theory draws primary support from Alexander Meiklejohn and Robert Bork, who argued that the primary purpose of free speech is its importance to democracy: free speech enables the democratic process of debating policy and electing officials. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26–28 (1971); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255–57. As argued by these scholars, the self-governance theory represents a collective-good theory of free speech. *See* SMOLLA, *supra* note 249, §§ 2:6, 2:21 (commenting that self-governance theory benefits the collective). Yet this theory has also been interpreted as serving self-realization values. *See* Redish, *supra* note 251, at 601–11 (interpreting self-governance theory of free speech as benefiting the individual). It therefore may be categorized as either a collective-good theory or an

theory into American jurisprudence, explained that the right of free speech rests on the premise "that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[255] Thus, under the marketplace-of-ideas theory, free speech exists to enable the best forum for producing truth.[256] Free speech, in other words, exists to yield a collective good.

At first glance, the prospect of content-based copyright denial seems in conflict with both speech theories. Under individual-utility theory, content-based copyright denial lacks justification. Suppose, for instance, that both the creator and the recipient of pornography realize self-fulfillment from generating and receiving that content. If Congress were to deny copyright for pornographic works, this would likely decrease profit opportunities for the pornography creator, which might preclude him the financial means to reach his audiences, and for that matter, the financial means to support his desire to engage in that speech. Neither the pornography creator nor his audience would realize their individual self-fulfillment. Likewise, marketplace theory seems inconsistent with content-based copyright denial. Such denials would represent Congress interfering with the laissez-faire forces of the marketplace of ideas. Congressional favoring of content would seem to interrupt the best test for truth—"the power of the thought to get itself accepted in the competition of the market."[257] Thus, content-based copyright denial does not seem to fare well under either speech theory.

This conclusion is premature, however. As discussed in Part III.B, content-based copyright denial may actually correct problems in the marketplace of ideas that would otherwise impede the marketplace from realizing its purpose. That discussion, however, is appropriate only if copyright should be evaluated from the marketplace-of-ideas perspective, rather than individual utility. The remainder of Part III.A therefore considers which speech theory is most appropriate for evaluating copyright doctrine. Although this question merits much more discussion, I offer a few brief observations in the sections below that suggest copyright makes sense only through the free-speech theory of marketplace of ideas.

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individual-utility theory, depending on its interpretation.

255. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also* SMOLLA, *supra* note 249, at § 2:16.

256. It may be that the ultimate good is not truth, but rather "the best *test* of truth." *See Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (emphasis added). Holmes appears skeptical that truth can actually be known, and so he seeks "the best *test* for truth." *See id.* (emphasis added); SCHAUER, *supra* note 254, at 20 (characterizing Holmes's marketplace-of-ideas depiction as skeptical of the ability to know objective truth). That is to say, Holmes may value the process of finding truth over a standard of truth. Yet as Professor Frederick Schauer observes, a theory of majority rule for truth distorts the meanings of *true*, *good*, *sound*, or *wise*. *See id.* at 22. Professor Schauer states: "If free speech is justified because it defines the process that produces knowledge, and if that knowledge is in turn defined by the very same process, we are saying nothing at all." *Id.* Marketplace of ideas as a theory of truth, then, seems focused on truth as the end of free speech, not merely the process of having a diversity of viewpoints with majority preference ruling. *See id.* For purposes of this Article, however, this distinction is not essential. I rely only on the premise that the marketplace theory seeks an end of free speech that reflects a collective, rather than individual, benefit for society.

257. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

1. The Argument for Marketplace Theory

The very function of copyright suggests that a collective-good theory of free speech—rather than a theory based on a speaker's individual utility—must be the theory that sets boundaries on the copyright power. Copyright suppresses copiers from speaking another's expression.[258] That is, copyright suppresses speech.[259] Consider the student who plagiarizes a paper, the musician who publicly performs a composer's notes, or the critical reviewer who quotes from a book: each represents a copier who is attempting to communicate ideas through expression, albeit repeated expression. Such copiers constitute second speakers of content that derives from first speakers.[260] Copyright, then, suppresses the repeated speech of second speakers in order to incentivize original speech of first speakers. As discussed below, that basic function of copyright implies that the copyright system can be justified under only the marketplace-of-ideas theory—not individual-utility theory.

The marketplace theory of free speech provides a compelling justification for suppressing expression of the second speaker. In the first place, the marketplace theory is most concerned with speech entering and spreading through the marketplace.[261] This ideal of the marketplace justifies second-speaker speech suppression: that suppression is necessary to incentivize speakers to create and disseminate original ideas. The Supreme Court alluded to this point while explaining the relationship between the freedom of speech and copyright's suppression of second-speaker speech.[262] In *Eldred v. Ashcroft*, and in *Golan v. Holder*,[263] the Court responded to First Amendment challenges to Congress retroactively altering the copyright term.[264] In denying that challenge in *Eldred*, the Court explained: "The First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches."[265] Thus, the Court observed that free speech concerns are less important in evaluating copyright's suppression of second speakers. The Court was more concerned with first speakers, ostensibly because they enable content to enter

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> Copyright law restricts speech: it restricts you from writing, painting, publicly performing, or otherwise communicating what you please. If your speech copies ours, and if the copying uses our "expression," not merely our ideas or facts that we have uncovered, the speech can be enjoined and punished, civilly and sometimes criminally.

Lemley & Volokh, *supra* note 3, at 165–66.

259. *See id.*; Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2433–34, 2466–70 (1998) (relying on the premise that copied expression is speech requiring procedural protections).

260. *See supra* Part II.B.2 (describing copyright's suppression of second-speaker speech).

261. *See Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); SMOLLA, *supra* note 249, § 2:19 ("The marketplace theory is thus best understood *not* as a guarantor of the final conquest of truth, but rather as a defense of the *process* of an open marketplace." (emphasis in original)).

262. *See* Golan v. Holder, 132 S. Ct. 873, 889–91 (2012); Eldred v. Ashcroft, 537 U.S. 186, 218–21 (2003).

263. *See supra* Part II.B.3 for a summary of these cases.

264. *See Golan*, 132 S. Ct. at 878; *Eldred*, 537 U.S. at 218.

265. *Eldred*, 537 U.S. at 221.

the marketplace of ideas. Again in *Eldred* and *Golan*, the Court articulated this reasoning to justify copyright's suppression of second-speaker speech: "[The Framers] also saw copyright as an 'engine of free expression[:] By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.'"[266] In these comments, the Court justified copyright's suppression of copied speech through a speech theory that values both the creation and the dissemination of ideas, strongly suggesting the marketplace of ideas. In short, copyright's very function of suppressing second speakers to enable first-speaker speech indicates a speech theory that places a priority on facilitating the creation and dissemination of new ideas—namely, the marketplace-of-ideas theory.

This is not to say, however, that second-speaker expression has no value in the marketplace of ideas. Indeed, second speakers further disseminate ideas for public evaluation, and in this way, the copyright monopoly might retard public knowledge. Yet the benefit of incenting and disseminating new ideas outweighs the limited suppression of second-speaker dissemination—under the values that control marketplace theory. Marketplace theory recognizes that the collective benefit—more ideas entering the marketplace—is greater than the collective cost—limited suppression of free dissemination.[267] Therefore, only because of copyright's potential to increase the supply of ideas does the marketplace theory value suppression of second-speaker speech.

But of course there are exceptions. It is possible that the marketplace of ideas would recognize more value in some instances of second-speaker speech as compared to the strength of the first-speaker monopoly. Consider, for instance, a newspaper that quotes a damning confession from a private memoir of a political candidate.[268] Marketplace theory would value the speech interest of the second-speaker newspaper in disseminating the expression over the monopoly interest of the original author, who seeks to employ copyright to keep his expression private rather than as a financial tool to achieve greater dissemination. Consider a critical parody that copies a work to criticize the original message.[269] In that particular instance, marketplace theory would value the second speaker's attempt to express a new idea of criticism more so than it would value the first speaker's monopoly, especially where the first speaker attempts to employ copyright as a

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266. *Golan*, 132 S. Ct. at 890 (quoting *Eldred*, 537 U.S. at 219); *see also* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.").

267. *See Harper & Row*, 471 U.S. 539 at 558 ("The Framers intended copyright itself to be an engine of free expression. By establishing a marketable right to use one's expression, copyright supplies the economic incentive to create and disseminate ideas."); Tushnet, *supra* note 3, at 36-37 (interpreting the *Harper* Court's statement that copyright is the "engine of free expression" to mean that copyright serves a First Amendment purpose by "preserv[ing] creators' incentives to put creative material in the marketplace").

268. *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1115–16 (1990) (advocating fair use for a newspaper wishing to quote from a personal letter of a political candidate).

269. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580–84 (1994) (examining the parody of a musical work).

means to block the second speaker's criticism from entering the marketplace.[270] In such situations, the second speaker is essential for the public to gain access to, and thereby pass judgment on, content. Accordingly, marketplace theory would not justify copyright's suppression in those particular circumstances.

Consistent with this conclusion, copyright has developed a doctrine to give priority to second speakers in such situations—the doctrine of fair use.[271] The fair-use doctrine further suggests the applicability of marketplace theory in evaluating copyright. According to the Supreme Court, fair use represents a doctrine with "speech-protective purposes and safeguards," thus indicating that it is relevant to speech interests of second speakers.[272] To that end, the doctrine examines how second speakers employ another's original expression, and in that examination, fair use focuses on whether the second speaker's use furthers societal interests. If the use furthers purposes that benefit the collective good, then the use is likely permissible. Statutory examples of fair use include uses with a purpose of "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[273] Tellingly, each of these statutory examples of fair use serves an end that benefits the collective good of society.[274] They are not focused on the individual benefit of the user, but rather the collective benefit to society. The collective-good focus of fair use thus supports marketplace theory of free speech, as opposed to an individual-utility theory.

Marketplace theory is further apparent in fair use through its inquiry into whether a second speaker's copying transforms the original expression.[275] This transformative inquiry examines whether the copying is intended to communicate a new idea, and new ideas are valuable only from a marketplace perspective, not from an individual-utility

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270. *See id.* at 590–94 (holding that the fair-use doctrine would protect parodic use of a copyrighted work).

271. 17 U.S.C. § 107 (2012); *Campbell*, 510 U.S. at 578–94.

272. *Eldred v. Ashcroft*, 537 U.S. 186, 218–19 (2003); *see also supra* Part II.B.2 (discussing speech-protective function of fair use).

273. 17 U.S.C. § 107.

274. The second factor in the fair-use doctrine considers whether the original work is creative, or alternatively, factual in nature. *Id.* § 107(2) (examining "the nature of the copyrighted work"); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563–64 (1985) (explaining that the second fair-use factor distinguishes between "factual works" and "works of fiction or fantasy"); Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191, 200 (3d Cir. 2003) (relying on *Harper*'s interpretation of the second fair-use factor to draw a distinction between creative works and factual works). This distinction between creative works and factual works further suggests a collective-good basis for determining fairness, for it implies that society is attempting to encourage certain types of works (creative works) over other types (factual works).

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> The central purpose of [the fair use] investigation is to see, in Justice Story's words, whether the new work merely "supersede[s] the objects" of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative."

Campbell, 510 U.S. at 579–80 (citations omitted).

perspective.[276] That is, the newness of an idea has value in the marketplace of ideas because it introduces the possibility of additional benefit to the public; by contrast, the newness of an idea does not suggest greater individual utility for a speaker. For that matter, fair use simply does not consider individual utility of first or second speakers.[277] Thus, the copyright system's suppression of second-speaker speech, as well as the fair-use doctrine as an exception to that system, imply that the marketplace-of-ideas theory of free speech should be the standard to evaluate copyright.

2. The Argument Against Individual-Utility Theory

Unlike marketplace theory, individual-utility theory of free speech is inconsistent with copyright's function of suppressing second-speaker speech. As Professor Tushnet has observed, individual-utility theory recognizes value in pure copying by second speakers: second speakers may copy to realize the utility that comes from participating in cultural activities, from affirming another's belief, or from persuading others.[278] Indeed, second speakers may gain individual utility from repeating the original expression as much as, or in some instances more than, the original speaker.[279] In view of this value that second speakers realize from repeating expression, suppressing the second speaker appears to offend individual-utility theory of speech.

This offense is not excused by the fact that copyright's monopoly incentivizes the creation of new content. Under individual-utility theory, the potential profit that derives from the copyright monopoly is irrelevant to the inherent value of speech for individuals. Speech is worth protecting—according to individual-utility theory—so that speakers may realize self-fulfillment, define themselves, exercise individual autonomy, participate in culture and democratic governance, or achieve human dignity and self-gratification.[280] The potential to financially profit is not a speech value recognized by individual-utility theory.[281] Therefore, incentivizing the creation of speech does not justify copyright's suppression of the second speaker, according to principles of individual-utility theory.

Perhaps, though, it is arguable that copyright enables more instances of individual utility than without it. Specifically, copyright may provide a first speaker the financial means to reach her audience (and thereby realize individual utility); after that dissemination by the first speaker, at least some of the audience may also realize

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276. *Id.* at 579. Professor Rebecca Tushnet has provided a compelling argument for why courts should not overemphasize the transformative nature of uses as the key component of fair use. *See* Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 555–60 (2004). She observes First Amendment values in copying that are based on self-autonomy theories. *See id.* at 538, 566–81.

277. *Cf.* Tushnet, *supra* note 276, at 587–88 (suggesting that fair use could be fixed to accord with theories of free speech that recognize self-autonomy of speakers).

278. *See id.* at 538, 566–81 (defending copying "as a method of self-expression and self-definition consistent with autonomy-based accounts of freedom of speech").

279. Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After* Eldred, 44 Liquormart, *and* Bartnicki, 40 HOUS. L. REV. 697, 726–27 (2003).

280. *See supra* note 251.

281. *Cf. supra* note 251.

individual utility through licensing the speech.[282] For instance, *The National Review* might produce its content not to realize a profit but rather to persuade readers of its political position. The profit that the magazine realizes through the copyright system is necessary for the magazine to fulfill its individual end of participating in democratic governance. Hence, the monopolistic suppression of second speakers might find justification in its enablement of the first speaker to reach his audience, and furthermore, in its facilitation of individual utility for second speakers who license the speech. In this way, copyright would serve the individual-utility theory through facilitating speech dissemination—independent of copyright's incentivizing authors who create for financial profit. Arguably, then, the copyright system supports an individual-utility theory of free speech.

Although it may be true that in some instances copyright could support the realization of speakers' individual utility, this fact does not imply that individual-utility theory should be relevant in evaluating speech issues in copyright doctrine. Judicial practicalities and established copyright doctrine imply that individual-utility theory cannot be the standard for evaluating copyright. Applying individual-utility theory to copyright doctrine would require judges to evaluate whether each first speaker needs the copyright monopoly to realize the financial means for reaching her audience. Only in that situation would second-speaker suppression be justified under individual-utility theory. Courts would need to determine whether *The National Review* in fact requires the copyright monopoly to fulfill its apparent purpose in speaking. Only in that circumstance would individual-utility theory recognize the necessity of second-speaker suppression. And such a judicial endeavor—assessing whether individual authors need the monopoly—would introduce great uncertainty and subjectivity in a degree well beyond "the metaphysics of the law."[283] Judges would be unable to determine this fact.

Nor have judges tried to determine such a fact.[284] In the two-century history of copyright, this sort of case-by-case examination of first-speaker need for copyright monopoly has simply never occurred. It has not occurred in judicial assessment of whether content is eligible for copyright protection. It has not occurred in fair use, which, as discussed above, examines whether second-speaker expression will further collectively valued categories of speech.[285] Copyright has not applied an inquiry into whether a particular author requires the copyright monopoly to disseminate her speech—with respect to both the term of the copyright and the particular rights. Therefore, any benefit that copyright provides to speakers' individual utility appears incidental to, rather than a justification for, the copyright system's suppression of second speakers.

The conclusion of this discussion is that copyright makes sense only from a collective-good theory of free speech, and in particular, the marketplace-of-ideas

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282. *See* Tushnet, *supra* note 3, at 37 ("[C]opyright aids free speech because effective dissemination of creative work costs money." (internal quotation omitted)).

283. Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901).

284. This is, of course, a descriptive argument that marketplace theory best describes the doctrine and practice of copyright law. It is an entirely different question as to whether copyright law should change to better accommodate individual-utility theory of free speech. *See generally* Tushnet, *supra* note 276, at 587–88.

285. *See supra* Part II.B.2.

theory—not an individual-utility theory. As a system of suppressing second speakers to incentivize the creation and dissemination of original speech, copyright furthers collective goods that follow from original speech. It does not further individual utility of second speakers. Although copyright serves the individual utility of speakers who need financial means to reach their audiences, that fact alone does not justify copyright's general suppression of second speakers. The function of copyright, therefore, points to marketplace theory. And just as marketplace theory must be the theory for evaluating content-based suppression of second speakers, marketplace theory must be the speech theory for evaluating content-based suppression of first speakers. Specifically, marketplace theory must analyze the suppression of speech that could result from Congress refusing to extend copyright to first speakers. That analysis follows.

B. Copyright's Correction of Marketplace Failures

Does content-based copyright denial support the marketplace theory of free speech? The answer requires a fundamental understanding of how copyright functions within the marketplace of ideas. In essence, copyright represents a system for taxing and subsidizing the proliferation of ideas. Copyright taxes the repetition of copied speech in order to subsidize the creation and dissemination of original speech. That is, the government taxes the free flow of information when it imposes the cost of the copyright monopoly on recipients of content. At the same time, the government subsidizes the creation of content when it transfers the benefit of the copyright monopoly to content creators. Copyright therefore functions to further some speech (original speech) at the expense of other speech (copied speech).

Copyright's tax-and-subsidy system of speech is consistent with a laissez-faire model of the marketplace of ideas. The strength of the marketplace of ideas is its process for deriving truth—a democratic process without government interference.[286] Yet, as discussed above, copyright's tax-and-subsidy speech system is justified within the marketplace of ideas because that system apparently gives rise to an increase in the output and dissemination of ideas.[287] The marketplace apparently works better with copyright than without it. The corollary of this justification, then, is that market forces are by themselves insufficient to produce the maximum and best output of ideas. In the absence of copyright's tax-and-subsidy system, a laissez-faire marketplace of ideas falls short of fostering an environment wherein the most truth may prevail—at least this appears to be an assumption of the Speech Clause (under marketplace theory) when read in conjunction with the Copyright Clause.[288] Stated another way, to the extent that the Speech Clause exists to foster a process wherein truth may prevail, that Clause fails to provide ample incentive for speakers to create original expression. The Copyright Clause provides that incentive.[289]

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286. *See* SMOLLA, *supra* note 249, § 2:20.

287. *See supra* Part III.A.1 (examining justification for second-speaker speech suppression under marketplace-of-ideas theory of free speech).

288. *Compare* U.S. CONST. amend. I (the Speech Clause), *with* U.S. CONST. art. I, § 8, cl. 8 (the Copyright Clause).

289. Tellingly, the focus of the Copyright Clause—promoting the progress of science—furthers the ultimate end of the marketplace theory—truth proliferation. *See* Snow, *supra* note 118, at 265.

Thus, a constitutional implication of the Copyright Clause is that the marketplace of ideas falls short of fully achieving its purpose. This insight is important because copyright appears to alleviate another problem of the marketplace. That other problem is simple: the marketplace exists to promote the collective good of society,[290] yet it relies on value judgments of individuals who place greatest value on their own individual interests.[291] The end of the marketplace reflects a collective value, whereas the means to achieve that end reflects individual values.[292] This distinction in valuations is critical, ultimately causing market failures.[293] Imperfect information, negative externalities, and transaction costs arise in the marketplace of ideas, inhibiting its efficient or proper functioning.[294] More specifically, an individual's inaccuracies in assessing content value for the collective and an individual's inability to control the structure of copyright monopolies hinder the end of the marketplace.[295] Part III.B.1 and Part III.B.2 below discuss these problems of the marketplace of ideas and how Congress may alleviate them through enacting a content-based copyright regime.

1. Accuracy

Perhaps most problematic about the pure laissez-faire model of the marketplace theory is the fact that it yields great inaccuracy through its method of content assessment. Individual values that inform content-purchasing decisions do not always represent collective values.[296] Individual values often do not align with collective values of content that should be promoted.[297] A simple example illustrates this point: collectively, the public may desire to further scientific research over defamatory falsehoods; yet individually, more members of the public prefer defamatory tabloids over scientific papers. The same could be said of the difference between individual and collective valuations of gun safety material and graphically

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290. *See supra* Part III.A; *supra* note 256.

291. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

292. *See id.*

293. *Cf.* Baker, *supra* note 251, at 965 & n.5 ("Just as real world conditions prevent the laissez-faire economic market—praised as a social means to facilitate optimal allocation and production of goods—from achieving the socially desired results, critics of the classic marketplace of ideas theory point to factors that prevent it from successfully facilitating the discovery of truth or generating proper social perspectives and decisions."); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5, 15–17 (1984) (describing the laissez-faire economic model that free-speech theory follows and criticizing that model for employing faulty assumptions); Tushnet, *supra* note 3, at 44 (observing that speech regulation can improve the functioning of the speech market).

294. *See generally* Brett M. Frischmann, *Speech, Spillovers, and the First Amendment*, 2008 U. CHI. LEGAL. F. 301, 310–21 (2008) (exploring the externalities of speech and recognizing the need for government to aid speakers in internalizing externalities).

295. *See* TRIBE, *supra* note 250, § 12-1, at 786 ("Especially when the wealthy have more access to the most potent media of communication than the poor, how sure can we be that 'free trade in ideas' is likely to generate truth?").

296. *See id.*

297. *See* Mark H. Moore, *Introduction to the Harvard Law Review Symposium: Public Values in an Era of Privatization*, 116 HARV. L. REV. 1212, 1213 (2003).

violent video games: collectively society may prefer the former, but individually more members prefer the latter. Simply put, individual valuations of content often fail to account for collective goals of society. As a result, by relying on individual choices to achieve a collective end, marketplace theory introduces a significant likelihood that its purpose will fail—the purpose being a forum that represents the best test for truth. The focus of individual choices does not align with the focus of the collective public good.

Related to this problem of inaccurate assessments of the collective value of content is the problem of third-party externalities.[298] Individual perspectives fail to account for harmful externalities to the collective.[299] For instance, commentators argue that some violent video games may cause aggressive behavior, possibly leading to serious social harms in extreme cases.[300] Even if this is true, this fact likely does not make a difference to authors of those games, who presumably do not consider harmful externalities in deciding which content to create. As with any market, the marketplace of ideas is not immune from decision makers failing to internalize the social costs of individual decisions.[301]

A final criticism related to the inaccuracy of individual content assessment is that individual consumers of content may lack sufficient information to determine content value. On the assumption that some content may lead to harmful effects for the individual who consumes it, individual consumers may lack this knowledge. For instance, suppose that certain pornographic content leads some of its consumers to engage in behavior that destroys family relationships, or to engage in sexual predatory behavior.[302] The likelihood that these events would actually happen would seem relevant for individual consumers of pornographic content. Yet that information is not likely to be known by those consumers. Individuals lack resources to gather and assess data relating to the value of content in their particular situation. Simply put, individual assessment of content is often based on imperfect information.

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298. Frischmann, *supra* note 294, at 310–21.

299. *Id.*

300. *See, e.g.*, Brad J. Bushman & Craig A. Anderson, *Violent Video Games and Hostile Expectations: A Test of the General Aggression Model*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1679, 1684 (2002) ("[T]he present study supports the General Aggression Model–based prediction that exposure to violent media can influence the amount of aggressive expectations that people conjure up in response to potential conflict situations."); Youssef Hasan, Laurent Bègue, Michael Scharkow & Brad J. Bushman, *The More You Play, the More Aggressive You Become: A Long-Term Experimental Study of Cumulative Violent Video Game Effects on Hostile Expectations and Aggressive Behavior*, 49 J. EXPERIMENTAL SOC. PSYCHOL. 224, 224–27 (2013) (testing cumulative effect of violent video games and concluding that "aggressive behavior and hostile expectations increased over days for violent game players, but not for nonviolent video game players"). *But see* A. SCOTT CUNNINGHAM, BENJAMIN ENGELSTÄTTER & MICHAEL R. WARD, UNDERSTANDING THE EFFECTS OF VIOLENT VIDEO GAMES ON VIOLENT CRIME 1, *available at* http://ssrn.com/abstract=1804959 ("[A] one percent increase in violent games is associated with up to a 0.03% decrease in violent crime.").

301. *Cf.* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968) ("Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.").

302. *See* Robert P. George, *The Concept of Public Morality*, 45 AM. J. JURIS. 17, 17–18 (2000) (arguing that pornography causes "moral harm").

A pure laissez-faire model of the marketplace theory may therefore lead to problems of inaccuracy in the theory's attempt to assess the collective value of content.

These problems of inaccuracy stem from individuals assessing content value. Applied correctly, a collective institution, with its collective perspective and resources, can reduce the likelihood of these inaccuracies. Congress represents that collective institution. As the constitutional means for collective action by members of the public, Congress brings a collective perspective for realizing value. By constitutional design, Congress values expression according to its value for the collective—not the individual. Congress recognizes the greater social value of scientific research papers over defamatory tabloids. Similarly, Congress's collective perspective considers societal effects of content that the individual view may not even consider. Congress might identify harmful effects of violent video games on innocent third parties, where individual players might not. Finally, Congress has more resources than individual consumers to identify information relevant to its social value—from both a societal and an individual perspective.[303] For instance, Congress has means to determine the likelihood of harm to consumers of pornography, as well as to innocent third parties, whereas consumers themselves may not. Therefore, by allowing Congress to determine which content should receive copyright, Congress can exercise the perspective and expend the resources necessary to ensure the most accurate assessment of content most likely to achieve a collective end.

2. Efficiency

The pure laissez-faire model of free speech is inefficient in its means for incentivizing the creation of new ideas into the marketplace. Under laissez-faire principles of a market, all content creators should receive the same reward for speaking.[304] Only if all content receives the same property rights would it seem that government is not favoring certain content.[305] All content, then, would need to receive the same copyright term, the same specific rights, and the same remedies for infringement.[306]

This implication suggests an inefficient suppression of second-speaker speech.[307] Not all content requires the same grant of property rights to effect an incentive for its

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303. For instance, the additional resources of Congress justify its imposition of automobile safety measures, where consumers apparently are unable to identify attendant harms. *See* 15 U.S.C. § 1381 (repealed 1994) ("[T]he purpose of this chapter is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents."); Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1175 (1988) (describing Congress's automobile safety legislation) ("[A]ll consumers were not necessarily free to choose safe or safer cars, nor were they adequately informed to make a correct choice. Congress thus rejected arguments that the market alone would provide the level of automobile safety that Congress now sought to ensure.").

304. *See generally* John H. Garvey, *Freedom and Choice in Constitutional Law*, 94 HARV. L. REV. 1756, 1762–65 (1981) (explaining laissez-faire principles).

305. *See id.*

306. *See id.*

307. *See supra* Part II.B.2 (explaining second-speaker speech suppression).

creation and dissemination.[308] Stated differently, in order to provide sufficient incentive for original authors to speak content, copyright law need not suppress certain second-speaker expression for as long a duration as copyright law must suppress other expression.[309] For instance, the copyright term for computer programs may not need to be as long as the term for full-feature films: perhaps computer programmers would create the same programs if the copyright term were five years instead of the current life-plus-seventy years.[310] This possibility suggests an unnecessary suppression of second speakers, who serve to further disseminate ideas for public evaluation.[311] Thus, the uniform set of property rights granted to all content suggests that some second speakers must remain silent longer than necessary to incentivize content creation.

In selecting the copyright term and scope of rights, Congress must balance the public's interest in incentivizing original content against the public's interest in gaining access to (and shaping opinion about) content. Unavoidably, that balance will vary according to general categories of content. For instance, the monopoly term necessary to incentivize news broadcasts, which consumers usually watch for only the first showing, may be considerably shorter than the monopoly term necessary to incentivize historical fiction, which consumers may watch repeatedly. Similarly, the public interest in gaining access to news broadcasts may be greater than its interest in gaining access to historical fiction.[312] Efficiency in the marketplace suggests, then, that the suppression of second-speaker speech should be tailored according to content. By tailoring copyright's speech suppression according to content, the marketplace can reduce wasteful suppression.

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308. *See* Jessica Litman, *The Economics of Open Access Law Publishing*, 10 LEWIS & CLARK L. REV. 779, 782 (2006) ("The role of copyright in the dissemination of scholarly research is in many ways curious, since neither authors nor the entities that compensate them for their authorship are motivated by the incentives supplied by the copyright system.").

309. *See* Cotropia & Gibson, *supra* note 46, at 929–30 (noting reasons other than legal monopolies which may spur the creation of intellectual-property goods, and observing that optimal level of copyright protection is often industry specific); *see also* Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623, 624 (2012) (questioning copyright's assumption that external incentives are necessary); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 515 (2009) ("[T]he desire to create can be excessive, beyond rationality, and free from the need for economic incentive. . . . [A] copyright law that treats creativity as a product of economic incentives can miss the mark and harm what it aims to promote.").

310. 17 U.S.C. § 302 (2012).

311. If copyright limits such second-speaker dissemination only to individuals with financial means to obtain a license, the law would favor the judgment of those with financial means over those without that means. Simply put, copyright would favor the wealthy over the poor, ultimately affecting the public's assessment of content. Marketplace theory, therefore, values second-speaker dissemination—even if not as much as it values first-speaker creation and dissemination.

312. *Compare* Nash v. CBS, 899 F.2d 1537, 1542 (7th Cir. 1990) (recognizing that historical fiction receives weaker copyright protection than other categories of content), *with* Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (recognizing public interest in accessibility of the Kennedy shooting film).

Determining copyright rights and terms according to content enables efficient structuring of copyright's speech suppression. Such discrimination allows Congress to identify content that requires longer terms and stronger rights to incentivize original creation and dissemination, as well as content that requires greater second-speaker dissemination. Congress might specify that certain content should have longer or shorter terms, be more or less likely to be subject to fair uses, be subject to specific monopoly price controls, and be denied or granted particular rights. Indeed, Congress has already exercised such discrimination in specifying that works that are more creative are less likely to be subject to fair use,[313] that nondramatic-musical works are subject to a compulsory licensing scheme,[314] that sound recordings lack a right of public performance,[315] and that certain visual arts have moral rights.[316] Consistent with its current practice, then, Congress should be able to structure incentives according to content by engaging in content-based copyright denial.

IV. THE POTENTIAL FOR ABUSE

Although defining copyright eligibility according to content may facilitate accuracy and efficiency in the marketplace of ideas, the mere possibility of these benefits does not imply their actuality. Individual members of Congress do not always act for the collective good.[317] They are subject to motives relating to power and wealth, which may color a member's decision about whether content yields a collective good.[318] Suppose, for instance, that a filmmaker contributes large sums of money to congressional campaigns, and as a result, is able to persuade members of Congress to extend the copyright term for films—or for that matter, to extend the term for that filmmaker only.[319] Congress's ability to be accurate in its judgment is of no worth if its members' motives cannot be trusted to act for the collective good. Indeed, the very benefit of having a marketplace theory of free speech is that individual members of the public are more trustworthy than collective governing bodies.[320] The judgments that members of the public make about content reflect their

313. *See* 17 U.S.C. § 107(2) (2012); *supra* note 274.

314. 17 U.S.C. § 115.

315. *Id.* § 106(4), (6).

316. *See id.* § 106A; Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 264 (2009) ("[M]oral rights have been part of U.S. federal law since the enactment of the Visual Artists Rights Act of 1990 ('VARA'), an amendment to the Copyright Act.").

317. *See* Frank Newport, *Americans: My Member OK, Most in Congress Are Not*, GALLUP (Oct. 15, 2014), http://www.gallup.com/poll/178487/americans-member-congress-not.aspx.

318. Professor Jessica Litman has convincingly mapped the history and practice of content industries capturing Congress's copyright power. *See* JESSICA D. LITMAN, DIGITAL COPYRIGHT 31–32 (2001); Jessica Litman, *The Politics of Intellectual Property*, 27 CARDOZO ARTS & ENT. L.J. 313, 314–16 (2009); Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 878–79 (1987).

319. *See* Timothy B. Lee, *15 Years Ago, Congress Kept Mickey Mouse Out of the Public Domain. Will They Do It Again?*, *The Switch*, WASH. POST (Oct. 25, 2013), http://www.washingtonpost.com/blogs/the-switch/wp/2013/10/25/15-years-ago-congress-kept-mickey-mouse-out-of-the-public-domain-will-they-do-it-again.

320. *See* SMOLLA, *supra* note 249, § 2:20.

beliefs about the merits of that content—not a promise for campaign financing. The same cannot be said for members of Congress.[321]

In addition to this problem of untrustworthy motives, there is no reason to believe that members of Congress are not subject to the same inaccuracies of judgment that befall members of the public. Members of Congress might allow incorrect political, religious, or ideological views to influence their opinions about which expression will benefit or harm the collective good—or even what the collective good is. A majority of Congress, for instance, may believe that material which endorses, or alternatively criticizes, principles of the Tea Party is detrimental to the collective good of society. That majority view, however, may not be correct. So just as imperfect information may influence individuals in the marketplace, so also may imperfect information influence members of Congress—at the expense of a minority view that is correct.

These possibilities suggest that Congress's power to practice content discrimination in defining copyright eligibility should not be absolute. Limits must exist. Part IV.A through Part IV.D below consider both legal and practical limits on the reach of Congress's power to influence speech through denying copyright to specific content.

A. Viewpoint Discrimination

Perhaps the strongest check against members of Congress employing copyright to further personal agendas and inaccurate beliefs lies in a core principle of free speech: that government may not discriminate based on a speaker's viewpoint.[322] Marketplace theory places the greatest value on protecting specific viewpoints.[323] Protecting viewpoints from government interference protects the marketplace's process for merit-based competition among specific ideas.[324] The process is paramount, representing a democratic ideal for determining the legitimacy of ideas. The principle of viewpoint neutrality therefore guards against government picking sides in, and thereby influencing, the democratic process for judging ideas.[325] So even if circumstances justify government deciding the topic of debate, government may never pick sides in that debate. Above all else, marketplace theory preserves judgment of viewpoints for the public.

Free speech theory would thus prevent Congress from practicing viewpoint discrimination in defining copyright eligibility. Congress could deny copyright only

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321. *See* Newport, *supra* note 317.

322. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992) ("When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists.").

323. *See id.* at 388–94.

324. *See* City of Madison Joint School Dist. No. 8 v. Wis. Emp't Relations Comm'n, 429 U.S. 167, 175–76 (1976) ("To permit one side of a debatable public question to have a monopoly in expressing its views . . . is the antithesis of constitutional guarantees.").

325. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785–86 (1978) ("Especially where . . . the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." (footnote omitted)).

for general categories of content—not particular viewpoints.[326] This would guard against members of Congress employing the copyright power to realize personal or political gain rather than the collective good. It would mean that Congress could not deny copyright to content that specifically condones, or condemns, principles of the Tea Party, as contemplated in the above example. Similarly, Congress could not extend the copyright term for a particular speaker. Congress's content discrimination must be viewpoint neutral.

B. Rational Basis

An additional constitutional check against congressional abuse of the copyright power arises in the rational-basis restraint that applies to all congressional powers.[327] In another work, I argue that Congress's power to extend copyright according to content stems from the Copyright Clause's grant that Congress may exercise its copyright power "To promote the Progress of Science."[328] Like any other grant, Congress's discriminatory denial of content would be subject to a review of whether the denial rationally relates to promoting the progress of science.[329] In the context of content-based copyright denial, this would mean that Congress could not deny copyright to specific categories of content that necessarily promote progress in science.[330]

Whether a specific category of content necessarily promotes progress in science is based on both the meaning of *Progress of Science* as well as society's common understanding of that category of content.[331] *Progress of Science* suggests advancements in knowledge and learning.[332] So if society has a common understanding that a specific category of content promotes advancements in knowledge and learning, Congress may not deny copyright for that category of content. To deny it a copyright would fail a rational-basis review of Congress's exercise of the copyright power.[333] For instance, Congress could not deny copyright to a broad category of content designated as "all content relating to the hard sciences": the common understanding of the hard sciences is that that category of

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326. For instance, if Congress were to deny copyright for pornographic works, it could not do so in a way that discriminated with respect to a particular viewpoint about women. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985) (Easterbrook, J.) (holding viewpoint discriminatory a criterion that punished expression that portrayed women "as submissive in matters sexual or as enjoying humiliation"). Instead, Congress could choose a viewpoint-neutral criterion such as expression that is indecent, that is pornographic, or that has visual depictions that are harmful to minors. *See* United States v. Am. Library Ass'n, 539 U.S. 194, 201, 210–11 (2003) (plurality opinion) (upholding condition that Congress placed on funding for libraries, where condition restricted libraries from allowing pornographic images based on, *inter alia*, criterion of "'visual depictions' that are 'harmful to minors'" (quoting 20 U.S.C. §§ 9134(f)(1)(A)(i) and (B)(i))).

327. *See generally* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 (1938) (articulating rational-basis review standard for congressional acts).

328. U.S. CONST. art. I, § 8, cl. 8; Snow, *supra* note 9, at 5–42.

329. Snow, *supra* note 9, at 19–22.

330. *Id.*

331. *Id.* at 18–22.

332. *See id.* at 9–22.

333. *Id.* at 19–22.

content unquestionably promotes advancements in knowledge and learning.[334] Similarly, society generally considers musical compositions and musical performances as content effecting beneficial knowledge.[335] The same could be said of political and religious categories of content, which enjoy core speech protection because of their value to society.[336] As evidenced by free-speech jurisprudence, society views the categories of political and religious content as necessarily advancing knowledge.[337] On the other hand, such a common understanding does not exist for pornography, violent video games, or most other specific categories of entertainment.[338] Thus, rational-basis review of Congress's power to discriminate in promoting the progress of science bars Congress from denying copyright to specific categories of content that society commonly deems as advancing knowledge or providing social benefit.[339]

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334. *Id.* at 19–21.

335. *Id.* at 21.

336. *See id.*; U.S. CONST. amend. I (barring Congress from making a law that prohibits the free exercise of religion); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people." (internal quotations omitted)).

337. *See* Citizens United v. FEC, 558 U.S. 310, 340 (2010) ("[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are subject to strict scrutiny . . . ." (citation omitted) (internal quotation marks omitted)); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) ("Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed, in Anglo–American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing, or even acts of worship." (emphasis in original) (citations omitted)).

338. *See* Snow, *supra* note 9, at 21–22. This judgment about content for particular categories of content would be akin to the judgment that courts must make in determining whether a trademark is immoral or scandalous. In commenting about that judgment, the Federal Circuit has noted:

> In order to prove that [a particular trademark] is scandalous, the [government] must demonstrate that the mark is shocking to the sense of truth, decency, or propriety; disgraceful; offensive; disreputable; . . . giving offense to the conscience or moral feelings; [or] calling out for condemnation. . . . Furthermore, whether the mark [in question], including innuendo, comprises scandalous matter is to be ascertained (1) from the standpoint of not necessarily a majority, but a *substantial composite* of the general public, and (2) in the context of contemporary attitudes.

In re Mavety Media Grp. Ltd., 33 F.3d 1367, 1371 (Fed. Cir. 1994) (emphasis added) (internal citations and quotations omitted).

339. This conclusion does not mean, however, that Congress could not deny copyright for any content with such a common understanding. It means only that Congress may not specify such content as ineligible for copyright. For example, if Congress specified pornography as

C. Practical Effects of Abuse

These two limits on Congress's copyright power—viewpoint neutrality and rational basis—leave much content subject to discrimination, and so these limits do not prevent the potential for congressional abuse. Suppose, for instance, that Congress were to withhold copyright for late-night comedy shows, owing to criticisms that such shows were directing towards the majority political party. On its face, such a denial would reflect neither viewpoint discrimination nor an irrational exercise of its power to promote progress in science. Specifically, the criterion of late-night comedy shows does not indicate that Congress is acting against a particular viewpoint, even if most late-night shows happen to criticize particular political viewpoints. Further, societal values do not indicate a common understanding that late-night comedies necessarily promote advancements in knowledge and learning. Nevertheless, if Congress were to deny copyright for the comedy shows because of their political criticisms, the denial would reflect congressional motives that do not further the marketplace of ideas. The question to consider is thus: should the possibility of congressional abuse preclude content-based copyright?

This possibility should not preclude content-based copyright. As an initial matter, it is worth noting that viewpoint-based denials that employ seemingly viewpoint-neutral criteria, such as in the hypothetical example above, represent a relatively limited class—only those situations where an entire category of content is expressing a single view (for example, the entire class of late-night comedy shows express a single view, that is, criticism of the majority political party). My argument should not be interpreted as a justification for viewpoint-based copyright denial. Rather, I am arguing that the limited instances where viewpoint-based denial does occur—for an ostensibly content-based reason—should not justify altogether stripping Congress of its discretion to deny copyright. And here is why: copyright denial does not prevent speech from occurring. The influence of copyright denial is relatively limited. Speech suppression by copyright denial does not result from the threat of a criminal or civil penalty; if suppression does occur, it is from the threat of depriving a particular means of financial revenue. Specifically, the effect of withholding copyright is simply denying profit that derives from a government-enforced monopoly—not withholding any and all profit.[340] Copyright represents only one means of realizing profit. Internet technologies, for instance, provide other means for realizing profits: they enable architectural rights of exclusion.[341] Or simply selling the first copy, without any right of exclusion, yields an opportunity for profit—albeit not as much as an extended monopoly.[342]

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ineligible for copyright, an author of pornography could not circumvent this denial by inserting a political statement within the pornographic material. The presence of the political statement would not imply that Congress's choice to deny copyright to pornographic material would be irrational. Hence, the common understanding that certain content advances knowledge does not imply that that content necessarily must receive a copyright; it implies only that Congress may not designate that content specifically as ineligible for copyright.

340. *See supra* Part I.A.

341. *See* Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 514–15 (1999).

342. *See* Landes & Posner, *supra* note 6, at 332.

So even if Congress were to deny copyright for late-night comedy shows because of a viewpoint-based motive, the shows could still exist. Perhaps they would be funded through pay-per-view streaming technologies, or perhaps funded by advertisers who valued its initial showing.[343] Copyright denial might affect content production, but it would not altogether deny the opportunity for that production. Even without copyright, financial means for speaking still exist, so content can still be voiced and heard. In short, denying speakers a copyright subsidy does not deny speakers the right to enter the marketplace of ideas. The potential for congressional abuse does not imply a risk of heightened speech consequences. Hence, both the potential for abuse and the potential for silencing speakers as a result of that abuse are limited.

D. Congress as an Untrustworthy Actor

Despite the potential benefits of content-based copyright denial,[344] the constitutional restraints against abuses of power,[345] and the practical limitations on copyright influencing speech,[346] there is still reason to prefer content neutrality. Congress has a history of acting more for political gain than for the collective good.[347] Indeed, in the area of copyright specifically, there is reason to believe that Congress has ceded its lawmaking authority to industry.[348] Against this history, the argument to trust Congress seems weak. The benefit of content-based copyright denial consists of a mere possibility: Congress *might* exercise its discretion to benefit the collective good. So Congress might act for the collective, but its history suggests that it will not.[349] Even with viewpoint-neutral and rational-basis restraints, much discretion would be left open to Congress.[350] And a bare possibility that Congress could exercise that discretion to benefit the collective seems unpersuasive as a reason to allow the discretion in the first place.

The argument that Congress has exercised similar discretion in other matters also seems unpersuasive as a justification for content-based copyright denial. Speech is unlike any other public resource.[351] He who controls the content of speech controls the power of the idea. Control of speech represents control of thought. So although

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343. *See* Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1831–32 (1995).

344. *See supra* Part III.B.

345. *See supra* Part IV.A–B.

346. *See supra* Part IV.C.

347. *See* FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985) ("Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.").

348. *See* LITMAN, *supra* note 318, at 31 ("In 1998, copyright lobbyists persuaded Congress to enact a twenty-six-thousand-word, fifty-page coda to the copyright statute . . . .").

349. *See FEC*, 470 U.S. at 497; Newport, *supra* note 317.

350. *See supra* Part IV.C.

351. *See* Palko v. Connecticut, 302 U.S. 319, 326–327 (1937) (describing the "freedom of thought, and speech . . . [as] the matrix, the indispensable condition, of nearly every other form of freedom").

some circumstances exist where Congress has discretion that may affect speech, those circumstances are not the same as choosing among which ideas to promote for public consumption. Hence, even if Congress's discrimination is only with respect to general categories of speech, and even if there are other alternatives to speak without copyright, these facts alone do not seem to justify even a limited degree of control over speech in the marketplace of ideas. The choice of which ideas to promote seems appropriate only for speakers—not Congress.

Why, then, should we trust Congress with a power to discriminate among content in the marketplace of ideas? To surrender this most valuable right to a government institution that has repeatedly proven itself untrustworthy, there must be a problem worth fixing. There must be a problem that amounts to more than inefficiencies and inaccuracies. In short, there must be a problem with content that is so bad that even Congress would act in the best interest of the collective to fix it, and furthermore, the benefit of fixing that problem must outweigh the costs of misusing the power. There must be a problem that justifies the seemingly extreme remedy of government influence over ideas.

Admittedly, this argument is powerful. The history and incentives of Congress should always give pause in ceding Congress greater authority, especially in the context of speech. Yet a very real problem justifies the risk involved. Serious social harms follow from certain content. Consider pornography, violent video games,[352] hate speech,[353] and crime-facilitating speech:[354] some scholars argue that the harms that these expressions cause are so serious that they should not receive free-speech protection. For instance, some have argued that pornography harms the social institutions of marriage and family;[355] harms women both generally and specifically (in the production process);[356] provokes bad norms; and damages children's moral development.[357] If accurate, these effects would be highly destructive for the social infrastructure of society. Although I do not attempt to prove the actuality of these harms, I observe others who forcefully argue that socially destructive harms derive from categories of speech such as those listed above.[358] Furthermore, although I refer to Congress's power to deny copyright, I do not argue that denying copyright would necessarily reduce content proliferation for every specific category of content. More study is required to formulate a conclusion on whether copyright denial would effect a desired outcome for specific content.[359] Here, I argue only that Congress should be able

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352. *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733, 2761–71 (2011) (Breyer, J., dissenting).

353. *See, e.g.*, Rosalie Berger Levinson, *Targeted Hate Speech and the First Amendment: How the Supreme Court Should Have Decided* Snyder, 46 SUFFOLK U. L. REV. 45 (2013).

354. *See* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005).

355. *See* George, *supra* note 302, at 17–18.

356. *See* MARTHA C. NUSSBAUM, *Objectification*, *in* SEX & SOCIAL JUSTICE 213, 213–14 (1999); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 16–17 (1985).

357. *See* Andrew Koppelman, Essay, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1647–72 (2005).

358. *See supra* notes 351–56 and accompanying text.

359. *See* Cotropia & Gibson, *supra* note 46, at 929–30 (noting reasons other than legal monopolies which may spur the creation of intellectual-property goods, and observing that

to examine the issue. I argue that the apparent harms from some content justify a collective examination of whether copyright denial is appropriate to reduce production.

Despite the alleged harms, the law has been reluctant to control, much less examine, such content. Unless the harm is verifiable and immediate, the law is loath to censor.[360] If the harms cannot be proven, if the harms cannot be shown to consistently arise as a consequence of the content, or if the harms do not pose immediate danger, the harms do not justify government silencing an idea.[361] But in the meantime, the harms may continue. Outside the ambit of unprotected speech, it would seem that the harmful content cannot be controlled. A majority cannot stop the minority from speaking socially destructive content, despite its apparent threat to the collective well-being and proper functioning of civil society. What is to be done?

Copyright is the compromise. Content-based copyright denial represents the middle ground between banning content whose harmful effects are unverifiable, inconsistent, or nonimmediate and protecting content whose harmful effects may destroy the social fabric of society. Copyright allows the majority of citizens to exercise influence over content in a way that does not rise to the level of coercion present in other means of content control.[362] In short, harms that threaten to undermine civil society justify the limited risk of trusting Congress to exercise its copyright power based on content.

Thus, problems that pose significant harms to society at large justify content-based copyright denial. Although Congress is not a trustworthy actor for extending privileges of speech, Congress is the only actor to deal with those problems. And copyright is the best compromise.

CONCLUSION

Content-based copyright denial does not offend the Speech Clause—from either a doctrinal, theoretical, or practical standpoint. Doctrinally, content-based copyright denial fits within jurisprudence dealing with content-based restrictions in the contexts of limited-public forums and in spending subsidies.[363] Copyright represents a limited-public forum because copyright exists to facilitate private speech of a certain sort—that which promotes the progress of science.[364] Copyright also represents a subsidy of property rights that is analogous to a monetary subsidy under Congress's spending power.[365] Under these doctrines, Congress may deny copyright based on content insofar as Congress specifies a viewpoint-neutral category of content, and insofar as that category reasonably relates to promoting the progress of science.[366]

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optimal level of copyright protection is often industry specific).

360. *See generally* SMOLLA, *supra* note 249, §§ 4:18–19.

361. *See* Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (per curiam) (requiring speech to incite imminent lawless action to be unprotected by First Amendment); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (describing speech that is not protected by the First Amendment).

362. *See supra* Part I.B.

363. *See supra* Part II.A.

364. *See supra* Part II.A.1.

365. *See supra* Part II.A.2.

366. *See supra* Part II.A.

Theoretically, content-based copyright denial furthers the purpose of the marketplace-of-ideas speech theory. The power to deny copyright based on content enables Congress to correct failures in the marketplace that arise from individuals defining values of the collective.[367] The power further enables Congress to structure copyright so that public access to ideas may be realized as soon as possible, avoiding wasteful speech suppression.[368]

Practically, content-based copyright denial is workable. The power would be checked by the restraints of viewpoint neutrality and rational basis.[369] Moreover, even if Congress were to deny copyright to speech that should not be discouraged, the speech could still be had.[370] As a content subsidy, copyright represents a soft means for influencing content. And that means is a practical necessity in view of subtle but destructive harms that threaten civil society.[371] Copyright, then, represents a compromise between censorship and apathy—a means for dealing with speech that poses significant yet unprovable costs.

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367. *See supra* Part III.B.1.
368. *See supra* Part III.B.2.
369. *See supra* Part IV.A–B.
370. *See supra* Part IV.C.
371. *See supra* Part IV.D.