I. Introduction

Ever since the days of the printing press, copyright law has affected the regulation of technology that mass produces books and other works for dissemination to the public. But, historically, it only did so indirectly. Instead of regulating the technology of the printing press itself, the first copyright act in England, known as the Statute of Anne, only regulated the products of printing, i.e., who owned the exclusive rights to print and publish works of authorship. The printing press itself was left off-limits from monopoly and government control, marking a profound change from the prior regime of the British Crown under which the printing presses were regulated in virtually all respects, including a strict limit on the total number of presses allowed in England. That limitation on the number of printing presses, along with the requirement of licensing and registration before any work could be published, effectively served the dual ends of censorship and monopoly. Limiting the number of presses was intended to limit publications deemed heretical or piratical. In other words, control over the technology effectuated control over content. The Statute of Anne replaced this repressive regime of press regulation with a system of authors' rights, which did not regulate any aspect of the printing press or the machines of mass publication. Copyright law thus was borne with a freedom of the press—an aversion to government control over the technology that enables the mass publication of speech. This basic corollary of copyright—a freedom of the press—lasted for well over two hundred years.

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

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

Parallel to these developments in copyright law was the 1998 enactment of the Digital Millennium Copyright Act (DMCA), which even more directly regulates technologies of production by prohibiting the manufacture and sale of technologies that can be used to circumvent encryption of copyrighted works. Although these circumventing technologies may be
different in kind from technologies that themselves mass produce copies like printing presses or copiers, the DMCA anti-circumvention law shares a similar aim with the aforementioned claims that seek to use secondary liability to regulate technologies directly, instead of regulating the mere acts of copying.

This major shift in copyright law to encompass the direct regulation of technology can no doubt be attributed to advances in digital technology, especially those related to the Internet and forms of digital copying. Digital technology makes it easier for everyone to make near perfect copies instantaneously, often in ways that constitute copyright infringement. In the future, we can only expect more lawsuits brought by copyright holders to regulate technology that enables the mass production, copying, and dissemination of works. The music and movie industries already have attempted to regulate digital video recorders (DVRs) such as TiVo through copyright litigation and all digital receivers for radio and television under the controversial “broadcast flag” proposal in Congress.

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

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

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

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

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

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

II. The Freedom of the Press and Copyright Law’s Origin

After nearly three hundred years of existence, dating back to the Statute of Anne in England, one would think that the history of copyright law would be well understood by now. It is not. Courts, historians, and commentators have hardly considered, much less understood, the important relationship between the historical development of the freedom of the press and the origin of copyright law that was fundamental to copyright law’s original design. Copyright law began in England as a less restrictive alternative to the Crown’s restraints on the printing press, including severe limits on the total number of presses that were allowed. The origin of copyright law was one in which the notion of the freedom of the press operated as an important limit on government control over technology; attempts by government to dictate or limit the extent to which the public could use technologies of mass publication were viewed as suspect. The Framers and ratifying states of the U.S. Constitution embraced this tradition even more strongly, recognizing this important limit in the Free Press Clause. This history is detailed below.

A. THE FREEDOM OF THE PRESS AND COPYRIGHT IN ENGLAND

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

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

Indeed, the Crown controlled the printing presses in virtually all aspects. The Crown instituted (1) a system of monopolies...
over printing under which the Crown limited the number of printing presses and master printers, and gave authority to print materials to only a select few, notably, the Stationers’ Company, and (2) a system of licensing under which all materials had to be approved for publication. The two systems were, in fact, both parts of the same system of regulation of printing in England that was established under the Tudor reign.

Spurred by the religious schism from the Catholic Church, Henry VIII imposed the first prepublication licensing requirement under the Proclamation of 1538. In 1557, Philip and Mary (a devout Catholic) granted the royal charter of incorporation to the Stationers’ Company, a guild of printers and publishers that became the only authorized group allowed to print books (other than those individuals who were granted printing patents directly from the Crown). Although Henry and Mary were on opposite sides of the religious schism, both saw the importance of regulating the presses as a way to control the content of publications, particularly, religious views.

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

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

This strict regulation of the press instituted by the Crown was replicated-and even further tightened-under Parliament’s rule beginning in the mid-1600s following the execution of Charles I. The Printing Acts of 1649, 1653, and 1662 carried forward the repressive printing controls, including the restrictive limits on the number of printing presses. Indeed, the Act of 1662 stated that there was no surer means of reducing the licentiousness of the press “than by reducing and limiting the number of Printing-Presses, and by ordering and settling the said Art or Mystery of Printing by Act of Parliament, in manner as herein after is expressed.” To that end, the Printing Act of 1662 strictly limited the total number of master printers in all of England to twenty and the printing presses each could own to just two. The goal was to reduce, by “death or otherwise,” the number of master printers to twenty.

From the beginning, this regime of controlling who could print, what could be printed, and how many presses could be used served the dual purposes of censorship and monopoly. As copyright historian Mark Rose explains, “censorship and trade regulation became inextricable, and this was a marriage that was to endure until the passage of the Statute of Anne in 1710.” The Stationers’ Company effectively held a perpetual monopoly over all book printing in England. Backed by the Crown, the printers controlled the presses and everything that was printed. The authors themselves generally held no rights to print their works. The Stationers sought the maintenance of these strict limits on the number of presses as a way to increase their
monopoly over the printing industry and to stop the “piracy” of works published by unlicensed printers.70 Unlike the Crown, they were not so much concerned about censorship as they were about controlling the entire publishing industry.71 Controlling the presses—the only technology of mass publication—enabled the Stationers to protect their monopoly for over a century.72

2. The Transition to the Freedom of the Press and a Reformed System of Copyright. During the repressive regime of press regulation in the 1600s, a counter-movement for a “freedom of the press” began. In 1629, Michael Sparke, who ran an unauthorized press, charged that the Star Chamber decree “directly intrench[es] on the hereditary liberty of the subject’s persons and goods.”73 Without referring to the “freedom of the press” explicitly, John Milton wrote Areopagitica in 1644,74 in which he criticized the Crown’s regulation of the press: “If we think to regulate printing, thereby to rectify manners, we must regulate all recreations and pastimes, all that is delightful to man.”75 Although Milton, an official censor himself at one time,76 probably condoned some forms of regulation of speech that were “utterly maleficient,” he advocated for unlicensed printing that left truth to be sorted out in debate.77 Other authors including Samuel Hartlib,78 William Walwyn,79 and Henry Robinson,80 wrote in favor of a freedom in “printing” or the “press.” John Lilburne, a key leader in the Leveller party, advocated for the freedom of the press and “that the Press might be open for us as you.”81 In 1649, the Leveller party petitioned Parliament to recognize a freedom of the press: “As for any prejudice to Government thereby, if Government be just in its Constitution, and equal in its distributions, it will be good, if not absolutely necessary for them, to hear all voices and judgments, which they can never do, but by giving freedom to the Press . . . .”82

The same banner was taken up by John Locke, one of the most influential political thinkers of his time. In Liberty of the Press, written in 1694 and 1695,83 he argued for man’s “liberty to print *325 whatever he would speak.”84 One of Locke’s key insights was to recognize a connection between the freedom of the press and the need to reform the publishing monopoly held by the Stationers’ Company.85 He suggested moving to a system of copyright in which authors, not publishers, held the rights for a limited term.86 Similarly, Daniel Defoe, writing in 1704 about “the Regulation of the Press,” described a “Liberty in Printing”87 and also called for the recognition of rights for authors in their works, particularly against “Press-Piracy” (a precursor to what we now call copyright infringement).88 Importantly, both Locke and Defoe attempted to reconcile the recognition of copyrights for authors with the freedom of the press.89 At bottom, the two issues were intertwined.

Concurrently, there were several efforts in Parliament to reinstate a licensing system after the Printing Act was not renewed, such as the Bill for Regulating of Printing and Printing Presses in February 1695.90 That bill allowed the trade to be “open to all Persons” and contained no limit on the number of presses, but was later amended in November of that same year to limit the presses to certain locations within England to protect the Stationers from competition.91 The Stationers again invoked fears of book “piracy” in an effort to have Parliament pass tighter regulation of the printing industry.92 None of these bills ever passed, however.93 The sentiment for a freedom of the press had begun to take hold. In 1695, when the Printing Act was allowed to lapse, the change was monumental:

*326 There were no more restrictions on the number (or location) of printers, or on the numbers of journeymen or apprentices. There were no restrictions of the import of books. Above all, there was no longer any legal obligation to enter new books on the Stationers’ Register, and, . . . certainly no guarantee that the courts would uphold the claims of the copy-owning booksellers.94

As before, when the Star Chamber was abolished, the Stationers lobbied heavily for re-securing their old rights.95 Eventually, they asked for property rights in the books they printed instead of a reinstatement of the Printing Act, which appeared to have fallen out of favor.96 But they received something very different when, in 1710, Parliament enacted the Statute of Anne, the first copyright act in England.97 The Act established, “for the Encouragement of Learning,” a system of copyrights for authors limited to a fourteen year term, renewable once.98

Although the ideas of freedom of the press, authors’ rights, and copyrights of limited duration were not necessarily viewed as a systematic bloc, they worked together to free the printing press from governmental and monopoly control. If an individual had the “liberty to print whatever he would speak,”99 then neither the Stationers nor the Crown could control the number of printing presses and printers, or what could be printed. Additionally, if authors held the right to print their own works, neither the Stationers nor the Crown could have a monopoly on the entire printing industry.100 But, to avoid substituting one
monopoly for *327 another, Parliament decided the copyrights that authors received should be of limited duration.101 With this change, the technology of the printing press was no longer subject to government control.

Of the innovations in this reformed copyright system, the most underappreciated among legal scholars is its approach to technology. Perhaps this is understandable as commentators have more often focused on what the Statute of Anne said, instead of what it did not say. Of course, what the Statute of Anne said was that (1) copyright had a limited term and (2) the rights accrued to authors.102 While significant, these two more commonly recognized innovations of the Statute of Anne pale in comparison to the revolutionary change effectuated by its departure from the past press regulations. Notably, the Statute of Anne did not attempt to limit the number of printing presses or printers, or otherwise regulate the presses as was the case under the Printing Acts.103

The significance of this sea change cannot be overstated. For over one hundred years, the Printing Acts (and the earlier Star Chamber Decree of 1586) ruled the presses in England until the final Act lapsed in 1695.104 The Stationers tried desperately to have another Printing Act enacted; indeed, thirteen bills were rejected between 1695 and 1704.105 But, instead of a Printing Act, the Statute of Anne was enacted. When viewed in this historical context, the most important innovation of the Statute of Anne was probably contained in what it did not say: the Statute of Anne made no attempt to control the printing presses as the Printing Acts did *328 before.106 No longer could the Crown or Parliament control the technology of the presses to protect publishers from piracy. Nor, for that matter, could the newly recognized class of authors assert any statutory power over the technology. This sea change ushered in a reformed system of copyright shaped, and ultimately limited, by the freedom of the press.

The connection between copyright and the freedom of the press is also evidenced in the original understanding of the freedom of the press. It is well recognized that copyright originally developed in reaction to the advent of the printing press, which multiplied exponentially the number of copies of a work that could be made.107 What is often overlooked today, however, is that the freedom of the press also developed in response to the printing press.

Indeed, the freedom of the press historically meant the freedom of the printing press. In seventeenth and eighteenth century England, “press” referred to the technology of the printing press or, more generally, to the publishing of any material by the printing press.108 The “press” only later became associated more narrowly with journalism.109 Samuel Johnson’s Dictionary of the English Language, for example, defined “press” in 1778 as “[t]he instrument by which books are printed.”110 No definition included any reference to the modern understanding of the press as agents who report *329 news.111 The freedom of the press stood broadly for “the personal liberty of the writer to express his thoughts in the more improved way invented by human ingenuity in the form of the press.”112 It marked a sentiment that government should not be allowed to control or interfere with the public’s ability to use the technology that enabled the mass production of speech.

Blackstone took a more limited view of the freedom of the press as consisting of “no previous restraints upon publication, [but] not in freedom from censure from criminal matter when published.”113 Even under this more limited view, however, he tied the freedom of the press in England to the end of the press regulation under the Printing Acts,114 “which limited the number of printers, and of presses which each should employ, and prohibited new publications unless previously approved by proper licensers.”115 In this key passage, Blackstone specifically recognized how the Crown’s limits on the technology-and not just the prepublication licensing system-operated as restraints on the freedom of the press.116 After the Printing Acts expired, “the press became properly free . . . and has ever since so continued,” Blackstone concluded.117

This brief history of the freedom of the press and copyright law in England illuminates several important points for understanding the tradition in which copyright law developed, first in England and later in the United States. First, demands for a freedom of the press were intended to stop the government’s and the Stationers’ control over the printing press.118 Second, copyright law developed in conjunction with the notion of the freedom of the press, as a part of the effort to dismantle monopoly control over the printing press and what could be printed by whom.119 Finally, the copyright system *330 replaced a regime of press regulation in which the government could control and limit the technology of the press itself with a reformed system of authors’ rights that left the printing presses free of regulation.120 Copyright was born with the freedom of the press, not against it.121
B. THE FREEDOM OF THE PRESS AND COPYRIGHT IN EARLY AMERICA

This part explains how the Framers understood a connection between copyright law and the freedom of the press, and, specifically, a connection between the Copyright Clause and the Free Press Clause. The connection was one of limitation: the Free Press Clause limited the Copyright Clause.

1. The Connection Between the Copyright Clause and the Free Press Clause. Most conventional accounts of the Framers’ understanding of copyright focus primarily, if not exclusively, on the Copyright Clause, which was part of the Constitution ratified in 1788. This account, however, only tells half the story. The adoption of the Free Press Clause in the Bill of Rights was equally as important to the origin and design of copyright in the United States. At the center of both copyright and the freedom of the press in the early Republic was the technology of the printing press. It would be no exaggeration to describe the Free Press Clause as “the companion-piece of the Copyright Clause,” as Professors Patterson and Joyce suggest.

a. Documentary Evidence Related to the Framing. First, let us begin with the Copyright Clause, which states that Congress shall have 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.” Similar in design to the Statute of Anne, the Copyright Clause authorizes the grant of copyright to authors for limited times, to promote the progress of learning. Although the historical record related to the Framers’ adoption of the Copyright Clause is rather scant (we have records of Madison’s and Pinckney’s several proposals, but no records of any Convention debate), it is fairly well accepted that the Framers drafted the Clause in reaction to the abuses of monopoly grants under the Crown in England. As the Supreme Court has recognized, the Copyright Clause “was written against the backdrop of the practices-eventually curtailed by the Statute of Monopolies-of the Crown in granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public.” Accordingly, the Clause acts as both “a grant of power and a limitation.” Madison’s journal indicates that the Framers agreed upon the Copyright Clause, which had been introduced during the last weeks of the Convention, with no one speaking against it.

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

The Federalists recognized the strength of the Antifederalists’ objection, even after the Federalists had succeeded in avoiding the inclusion of a Bill of Rights in the drafting of the Constitution. During the state ratification process, therefore, the Federalists attempted to allay the Antifederalists’ concerns. James Wilson, a Framers at the Convention and a leading Federalist, gave an impassioned speech at the State House Yard in Philadelphia to address the Antifederalists’ objections; Wilson’s speech was widely published in thirty-four newspapers across twenty-seven towns. Concerning the freedom of the press, Wilson contended:

*333 [T]he liberty of the press, which has been a copious subject of declamation and opposition: what controul can proceed from the federal government, to shackle or destroy that sacred palladium of national freedom? If, indeed, a power similar to that which has been granted for the regulation of commerce, had been granted to regulate literary publications, it would have been as necessary to stipulate that the liberty of the press should be preserved inviolate, as that the impost should be general in its operation.... In
truth, . . . the proposed system possesses no influence whatever upon the press; and it would have been merely nugatory, to have introduced a formal declaration upon the subject; nay, that very declaration might have been construed to imply that some degree of power was given, since we undertook to define its extent.142

Wilson’s rejoinder to the Antifederalist objection voiced the mainline position of the Federalists: if no power was expressly given to Congress in the Constitution, Congress could not infringe upon any right within that area.143

But what is most notable in Wilson’s address is his small concession (italicized above) that a free press clause would be needed if Congress had a power “to regulate literary publications.”144 Apparently, Wilson did not view the Copyright Clause, which gives Congress the power to grant exclusive rights over literary works, as a power that “regulate[s] literary publications.” Wilson, however, offered no explanation on why the Copyright Clause did not constitute such a power as one might reasonably think. After all, copyrights certainly do regulate the copying and dissemination of *334 literary publications.145 Wilson’s terse explanation left the Federalist position open to attack.

And attack the Antifederalists did. The Antifederalists specifically pointed to the Copyright Clause as the power by which the new Congress could control the technology of the printing press,146 as had been the case in England under the Printing Acts.147 As Robert Whitehall of Pennsylvania explained:

Tho[ugh] it is not declared that Congress have a power to destroy the liberty of the press; yet, in effect, they will have it . . . . They have a power to secure to authors the right of their writings. Under this, they may license the press, no doubt; and under licensing the press, they may suppress it.148

Federalist James Iredell offered a more lengthy response to the Antifederalists’ argument, specifically emphasizing the coexistence of a reformed copyright system and the freedom of the press in England following the enactment of the Statute of Anne.149 In this *335 passage, it becomes manifest how closely the issues of copyright and the freedom of the press were associated in the minds of the Framers:

The liberty of the press is always a grand topic for declamation, but the future Congress will have no other authority over this than to secure to authors for a limited time an exclusive privilege of publishing their works. This authority has been long exercised in England, where the press is as free as among ourselves or in any country in the world; and surely such an encouragement to genius is no restraint on the liberty of the press, since men are allowed to publish what they please of their own, and so far as this may be deemed a restraint upon others it is certainly a reasonable one, and can be attended with no danger of copies not being sufficiently multiplied, because the interest of the proprietor will always induce him to publish a quantity fully equal to the demand. Besides, that such encouragement may give birth to many excellent writings which would otherwise have never appeared. If the Congress should exercise any other power over the press than this, they will do it without any warrant from this constitution, and must answer for it as for any other act of tyranny.150

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

We have been told that the liberty of the press is not secured by the new Constitution. Be pleased to examine the Plan, and you will find that the liberty of the press and the laws of Mahomet are equally affected by it. The new government is to have the power of protecting literary property; the very power which you have by a special act delegated to the present congress. There was *336 a time in England, when neither book, pamphlet, nor paper could be published without a license from government. That restraint was finally removed in the year 1694 and, by such removal, their press became perfectly free, for it is not under the restraint of any license. Certainly the new government can have no power to impose restraints.151
The debate between the Antifederalists and Federalists over the freedom of the press is quite significant in three respects. First, both sides explicitly considered the possibility that copyright could infringe upon the freedom of the press if enacted with a licensing system, as Whitehall pointed out, no doubt referring to the old British system. Even Iredell, a Federalist, appeared to concede that copyright can act as a “power over the press” when he explained that Congress would be acting unconstitutionally if it exercised “any other power over the press”-meaning any power other than copyright.

Second, both the Antifederalists and Federalists referred to the practices in England as the source of their arguments-the Antifederalists pointed to the former system of press regulation under the British Crown to support their criticism of Congress’s copyright power, while the Federalists pointed to the reformed system of copyright after the Printing Acts had lapsed and the Statute of Anne was enacted as the basis for their rejoinder. These references further validate the importance of considering the English history of copyright in attempting to understand the Framers’ views of copyright and the freedom of the press.

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

Iredell, however, conceded a very important point: “If the Congress should exercise any other power over the press than this, they will do it without any warrant from this constitution, and must answer for it as for any other act of tyranny.” He thus admitted that even without a free press clause, Congress would be without constitutional authority to “exercise any other power over the press” through copyright law other than the basic kind of system of authors’ rights modeled after the Statute of Anne-i.e., “no other authority over this than to secure to authors for a limited time an exclusive privilege of publishing their works.”

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

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

Admittedly, there is no single piece of documentary evidence of the Framers’ intent that expressly states the constitutional principle outlined above. But that is the case with most, if not all, questions of constitutional law. Moreover, the documentary evidence related to the debates over the Free Press Clause is much more extensive than that related to the Copyright Clause.
Indeed, there is more documentary evidence related to the Framers’ views of the relationship between copyright and the freedom of the press than there is about the originality and limited times requirements, both of which the Supreme Court has defined in interpreting the Copyright Clause. Individuals on both sides of the debate over the Free Press Clause drew explicit connections between the scope of copyright and the freedom of the press. Both sides also referred to the history of copyright and the freedom of the press in England—a history that, as explained above, shows the close connection between copyright and the freedom of the press following the dismantling of the repressive system of press regulation that ruled England for over 150 years. As quoted above, Whitehall and Williamson both expressly described the “licensing” system in England as odious and unconstitutional under the new Constitution. It is thus fair to infer from these passages that the Framers viewed the technology controls under the Printing Acts (i.e., the limits on the number and ownership of presses) with similar disfavor. The technology limits on the press and the licensing requirement both were crucial parts of the Printing Acts, as is evident in Blackstone’s description of the freedom of the press. It would be difficult to imagine that the Framers so expressly disfavored the licensing system of the Printing Acts, yet tacitly approved the restrictive technology limits on the press imposed by those same Acts.

b. Textual Analysis of the Free Press Clause.

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

At the time of the Framing, the term “the press” referred to the printing press. In fact, it was common to refer to the printing press simply as “the press.” Thomas Sheridan’s dictionary defined the press in 1780 as “the instrument by which books are printed”; no definition of “press” included journalists or news reporters as a collective group or institution. The centrality of the printing press to the whole concept of the freedom of the press is evident in Jefferson’s description of Virginia’s proposal of a free press clause amendment to the Constitution: “Besides other objections of less moment, she will insist on annexing a bill of rights to the new constitution, i.e. a bill wherein the government shall declare . . . [p]rinting presses free.”

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

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

Early newspapers were also highly partisan, at times even tied to a political party. This politicization reflected the earlier enlistment of newspapers for the political cause against Great Britain. Historians have even gone so far as to describe this early period of American newspapers as “the era of the party press.” The description is hardly an exaggeration given that the Federalists and Antifederalists both had their own newspapers. To the extent that news was reported without a slant, the information tended to consist of recounts of foreign news from foreign papers. Domestically, news had a much more political slant. Not until the Civil War did U.S. newspapers embrace more neutral, fact-based news reporting as the predominant industry standard (a transformation that coincided with the development of the telegraph). It took several decades more for “objectivity” to be recognized as the standard for news reporting.
Given the partisan state of newspapers and pamphlets during the Framing, it seems evident that the Framers had a much broader notion of “the press” than pure news reporting. The printing press did more than simply report news stories; at the time of the Framing, it offered a conduit for people to express opinions, especially (but not only) political ones. An important feature of the freedom of the press was its technological focus. The printing press was revolutionary because it enabled mass production and dissemination of speech by a technology that was theoretically open to all, not just to monks who scribed books or Stationers who ran the presses in England with the Crown’s backing.  

As Andrew Bradford, founder of The American Weekly Mercury, wrote in 1734, the freedom of the press was “a Liberty, within the Bounds of Law, for any Man to communicate to the Public, his Sentiments.” Under the well-known alias Cato, libertarian writers John Trenchard and Thomas Gordon wrote in 1733 of “the free Use of the Press, which is open to all.” Later, writing against the Sedition Act of 1798, Madison explained that the U.S. Constitution created a government “altogether different” from the British regime, one that recognized “a different degree of freedom in the use of the press.” The inclusion of the word “use” in “the free use of the press” and “freedom in the use of the press” makes it unmistakably clear that Madison, Trenchard, and Gordon were referring to the machine of the printing press. Jefferson made it even clearer in a letter to Madison: “[A]mong other enormities, [the Sedition Act] undertakes to make printing certain matters criminal, tho’ one of the amendments to the Constitution has expressly taken . . . printing presses . . . out of their coercion.”

*343 When the Free Press Clause was drafted by Madison, the Framers had numerous examples of free press clauses or statements from which to draw. It is evident in these predecessor materials that the technology of the printing press was chief among the concerns for protection, as shown by Professor Anderson in his exhaustive account of the history of the Free Press Clause. Even before the American Revolution, the Continental Congress declared in an address to Quebec in 1774:  

The importance of this [freedom of the press] consists, beside the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.

Here, the Continental Congress saw the importance of the printing press in disseminating viewpoints.

States during the Revolutionary War recognized similar concerns about protecting the press. Nine of the eleven state constitutions adopted during this period expressly recognized the freedom of the press. Indeed, the state governments at this time may have perceived the freedom of the press as even more important a right to protect than the freedom of speech, given that only one state, Pennsylvania, expressly recognized the freedom of speech as well. The original state constitution of Pennsylvania recognized: “That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained.”

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

Legal scholars have long underappreciated the central importance technology played in the concept of the freedom of the press, as well as the importance it had for copyright law. The freedom of the press was perhaps best encapsulated by English barrister Francis Ludlow Holt, who wrote in his book, published in the United States in 1818, “[t]he liberty of the press . . .
properly understood, is the personal liberty of the writer to express his thoughts in the more improved way invented by human ingenuity *345 in the form of the press." As Professor Anderson has concluded, "Contemporaneous references uniformly indicate that freedom of the press meant freedom to express one’s views through use of the printing press."209

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

ii. Relationship Between “Speech” and “the Press.” This interpretation is further supported by the textual construction of the Free Speech and Press Clauses. The clauses are written together to prohibit Congress from "abridging the freedom of speech, or of the press,"210 The construction makes it likely that the Framers meant "of speech" and "of the press" to be interpreted in parallel manner.211 In the first clause, "of speech" modifies or describes "freedom" - but not as a possessive. In other words, freedom of speech does not mean "speech’s freedom," as if speech itself possessed freedom. It is the individual who possesses the freedom of speech. Interpreting *346 “the freedom of the press” in a parallel fashion, it becomes clear that “the press” does not refer to an institutional press (as in journalists). For such a construction would mean that “of the press” is used as a possessive, rendering the freedom of the press to mean “the (institutional) press’s freedom” - as if the institutional press had a separate right recognized for itself, an interpretation propounded by the late-Justice Stewart (but without success to the entire Court).212

The more plausible construction of “the freedom of speech, or of the press” is that all individuals possess the freedom of speech and of the press, the latter making it clear that government should not be allowed to control or restrict speech-facilitating technologies.213 This dual understanding of the freedom of speech and the freedom of the press as protecting separate, but related, rights comports with the interpretive principle to avoid rendering constitutional text mere surplusage.214

Granted, this reading effectively interprets “or” to mean something closer to “and” in this context. But the drafting history and text of the First Amendment support this interpretation. Below I describe the progression of the drafting language of the Free Press Clause,215 indicating that the Framers likely understood “or” in “the freedom of speech, or of the press” as a conjunction describing two separate, but related rights - the freedom of speech and the freedom of the press.216

The first quote below is Virginia’s proposal, which contained language similar to the Pennsylvania Constitution.217 Madison *347 substantially adopted the Virginia language in his free press clause proposed to the House.218 The House Committee of the Eleven made a stylistic change to Madison’s proposal, shortening the construction to “the freedom of speech, and of the press.”219 The House Committee of the Whole then approved the language and reported it to the House in August 1789.220 The House proposal combined the Speech and Press Clauses with Madison’s proposal for Assembly and Petition Clauses.221

In September 1789, the Senate considered the Bill of Rights proposals, including the Free Press Clause.222 The Senate inserted "Congress" into the proposed free speech and press clauses, and “or” was substituted in place of “and.”223 The Senate modeled its language on the House proposal for the Bill of Rights Religion Clauses, which initially read: “Congress shall make no law establishing religion, or prohibiting the free exercise thereof; nor shall the rights of conscience be infringed.”224 Eventually, the Senate combined the language of the proposed Religion, Free Press and Speech, Petition, and Assembly Clauses into one amendment.225 After a report from Madison, the House proposed what was eventually the final language adopted in the Bill of Rights.226

The following quotations show the development of the Free Press Clause, described in detail above:

(1) Virginia proposal: “That the people have a right to freedom of speech, and of writing and publishing their sentiments; that
the freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated."

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

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

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

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

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

This drafting history confirms that the Framers viewed the freedom of the press as a separate but related right to the freedom of speech. In order to understand the meaning of “or” in “the freedom of speech, or of the press,” we need look no further than the Religion Clauses that precede the Free Speech and Free Press Clauses. The word “or” was first introduced in the Religion Clauses, and, probably for stylistic reasons when the two sets of clauses were combined, the Senate changed the prior wording “the freedom of speech, and of the press” to “the freedom of speech, or of the press.” Yet the House was not satisfied with that wording and clarified the language to “the freedom of speech, or of the press,” further noting a separate dimension to the press compared to speech. The two Religion Clauses are similarly differentiated by the word “or,” in the phrase “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Under the Court’s precedents, the Establishment Clause and the Free Exercise Clause protect two separate but related rights. By parallel construction, the Free Speech and the Free Press Clauses should as well.

Principles of grammar further support this interpretation. When used after the negative “no,” the word “or” commonly operates as a conjunction joining different elements of equal status—effectively operating in a similar fashion as “and” does without the use of the negative. For example, if I wanted to identify two of my possessions, I might say, “I own a house and car.” But if I did not own either, I would say, “I own no house or car.” It would be at least a poor choice of words, if not grammatically incorrect, for me to say “I own no house and car.” Similarly, in the First Amendment, the use of the negative “no” in “Congress shall make no law” necessitates the use of “or” to differentiate the separate things forbidden by the Amendment. It would have been an awkward choice of construction if Congress had drafted the Amendment using the conjunction “and” in combination with the negative “no.” The Amendment would then have clumsily read: “Congress shall make *350 no law respecting an establishment of religion, and prohibiting the free exercise thereof; and abridging the freedom of speech, and of the press; and the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” Under such a version, one plausibly could argue that the First Amendment would not be violated unless the law in question violated all of the rights listed—i.e., a law that respects the establishment of religion and prohibits the free exercise thereof; and abridges the freedom of speech, and of the press; and the right of the people peaceably to assemble, and to petition the government for a redress of grievances. Such a construction, however, would reduce the First Amendment to a nullity.

Based on the historical materials and text of the Free Press Clause, the most plausible reason why the “freedom of the press” was recognized in addition to “freedom of speech” was the perceived need to specify protection for the use of the machine itself. Around the time of the Framing, some questioned whether anyone ever could have a natural or inherent right to use a
machine, which had been developed by man “in a late progress of society.” *239* But, as Holt wrote, To this it may be answered, that the rights of nature, that is to say, of the free exercise of our faculties, must not be invidiously narrowed to any single form or shape. They extend to every shape, and to every instrument, in which, and by whose assistance, those faculties can be exercised. . . . “The same character, therefore, of natural rights is conveyed to every right which is natural in its *`351* origin and principle through all the possible modes and instruments of exercising and launching it into action and employment.” *240*

Thus, the freedom of the press is designed to address-or, at least, to clarify that the entire Free Speech and Press Clauses cover—a governmental restriction on speech technology. Based on the drafting history, the inclusion of both “speech” and “the press” within the First Amendment freedoms, and the historical documents relating to the Framers’ debate over the Free Press Clause, we can reasonably conclude that the freedom of the press originally indicated constitutional protection specifically for the printing press and the ability of individuals to utilize this technology free of government control. *241* While the freedom of speech protects an individual’s basic right of expression, the freedom of the press is meant to ensure that speech technologies are free of governmental control. *242*

2. Historical Evidence from the First Congress and the Copyright Act of 1790. My understanding of the relationship between the Free Press and Copyright Clauses is also supported by the First Congress’s enactment of the first copyright act. Exercising its Copyright Clause power, the First Congress enacted a copyright statute in 1790 largely modeled on the Statute of Anne. *243* Like the Statute of Anne, the Copyright Act of 1790 established a copyright system in which authors received copyrights in their works for limited terms of fourteen years, renewable once. *244* Like the Statute of Anne, the 1790 Act did not limit or regulate the printing presses as the British Crown had under the old Printing Acts. *245* The *`352* copyright system established by the First Congress conferred limited exclusive rights in works of authorship but, importantly, not in any of the machines or technologies that enabled mass publication. *246*

Against this backdrop, printing presses proliferated in the early Republic. *247* In 1790, the nation had approximately one hundred newspapers, a number that would double by the end of the decade. *248* As Thomas Nachbar describes, “in 1798 the fledgling republic had more than 200 publishers, printers, and booksellers spread through New York, Boston, Philadelphia, Baltimore, and Charleston, and they were intensely competitive.” *249*

This traditional model of copyright with its avoidance of any limits on speech technologies was followed for over two hundred years. *250* From 1790 to 1992 every U.S. copyright law enacted stayed clear of direct regulation of the machines that enabled mass copying and publication. *251* While the U.S. legal system did have a manufacturing limitation from 1891 to 1986 that required foreign authors to print their books with U.S. printers, the provision did not in any way regulate the printing machines or who could print what in the United States. *252* Instead, the manufacturing limitation required foreign authors to make use of U.S. printers, whoever they may be and whatever their technology. *253* It was not until the Audio *`353* Home Recording Act (AHRA) in 1992 that a copyright provision attempted to directly regulate a copy technology in the United States. *254*

The Supreme Court also has protected this traditional model of copyright, viewing attempts to regulate speech technologies as suspect. As Jane Ginsburg identified, the Supreme Court has traditionally rejected attempts of copyright owners to block new technologies. *255* In a variety of cases over the past one hundred years, including the Sony case, the Court has demonstrated a “[s]olicitude for a nascent dissemination industry,” particularly where copyright holders attempt to stop or otherwise control a new technology used to disseminate speech. *256*

This two hundred year tradition of copyright law’s avoidance of regulating speech technologies, dating back to the First Congress’s enactment of the first copyright act, *257* is constitutionally significant in two respects. First, in interpreting the Copyright Clause, the Supreme Court has emphasized the existence of a long tradition in copyright law beginning with the First Congress as an important consideration. *258* Under the First Congress canon of construction, *259* the Supreme Court has long recognized, particularly in the copyright context:

The construction placed upon the Constitution by the first act of 1790, and the act of 1802, by the men
who *354 were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive.260

In the most recent case involving the Copyright Clause, the Court reaffirmed this canon, stating: “To comprehend the scope of Congress’ power under the Copyright Clause, ‘a page of history is worth a volume of logic.’” *351

Second, as this canon reflects, the Court places importance on the Framers’ intent to identify the outer parameters of Congress’s power under the Copyright Clause. Given the historical evidence before and at the time of the Framing, it is fairly evident that the Framers believed Congress had no power to restrict speech technologies through copyright law. The absence of such regulation in the first Copyright Act presents an example “where the government conduct at issue was not engaged in at the time of adoption . . . [because] it was thought to violate the right embodied in the constitutional guarantee,”262 in this case, the Free Press Clause.

3. The Supreme Court’s Interpretation of the Free Press Clause. The Supreme Court’s interpretation of the First Amendment’s Free Press Clause has tended to focus on the Free Speech Clause or the First Amendment generally, without fully exploring the contours of the Free Press Clause.263 Nevertheless, the Court’s decisions do support the historical understanding of the freedom of the press outlined above.264

*355 First, the Supreme Court has recognized that the Framers adopted the freedom of the press in response to the abuses of the Crown under the Printing Acts.265 As Justice Scalia recently explained:

The First Amendment’s guarantee of “the freedom of speech, or of the press” prohibits a wide assortment of government restraints upon expression, but the core abuse against which it was directed was the scheme of licensing laws implemented by the monarch and Parliament to contain the “evils” of the printing press in 16th- and 17th-century England. The Printing Act of 1662 had “prescribed what could be printed, who could print, and who could sell.”266

Justice Scalia could have added that the Printing Act of 1662 also limited the total number of presses in England267 as another means for the Crown to control piracy and heresy.

In addition, the Court has recognized the centrality of the printing press to the First Amendment. In rejecting a ban on leafletting on public streets, the Court characterized the freedoms of speech and of the press as encompassing the “freedom to speak, write, print or distribute information or opinion.”268

Furthermore, the Court has taken a very broad view of the freedom of press, consistent with the historical understanding.269 Although the Supreme Court has at times referred to journalists or newspapers as “the press” in the modern sense,270 its decisions never have limited the freedom of the press to just journalists.271 Instead, *356 it has recognized that “[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.”272

Perhaps most importantly, the Court has recognized that the freedom of the press encompasses other speech technologies that developed after the printing press.273 The Court stated in United States v. Paramount Pictures, Inc.: “We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.”274 Although the Supreme Court has more recently analyzed regulations of speech technologies under the Free Speech Clause or more generally under the First Amendment without delineation between the freedom of speech and the freedom of the press,275 the Court’s precedents discussing the Free Press Clause are consistent with the historical understanding of the freedom of the press outlined above.

III. The Sony Safe Harbor Is a First Amendment Safeguard That Protects the Freedom of the Press
The historical connection between the Copyright Clause and the Free Press Clause described above largely has been overlooked in *357* legal scholarship. Although many scholars have written about the separate history of each clause, few have drawn a direct connection between the two clauses.\(^\text{276}\) Patterson and Joyce’s 2003 essay appears to be the first piece of legal scholarship that attempts to draw this direct connection.\(^\text{277}\) Yet, despite their insight, they failed to discuss the significance of the documentary evidence of the Framers’ and the ratifying states’ debate over the relationship between the Copyright Clause and the Free Press Clause.\(^\text{278}\) Perhaps even more surprisingly, so has the Supreme Court. Even though the Court has discussed the Copyright Clause and its connection to the First Amendment,\(^\text{279}\) it has yet to discuss the historical materials related to the Free Press Clause as they bear on the Copyright Clause. This omission is reflective of the Court’s general reluctance (or perhaps failure) to plumb the historical origin of the Free Press Clause in the context of First Amendment claims.

Understanding the history of the Free Press Clause, however, has profound consequences for copyright law today. First, the history demonstrates that the Framers viewed the Free Press Clause as imposing limits on the Copyright Clause power, specifically with respect to regulations of technology.\(^\text{280}\) Second, the history and long tradition of copyright law’s avoidance of regulating speech technologies, dating back to the first Copyright Act of 1790, confirms the vital importance of the Sony safe harbor to modern copyright law. The Sony safe harbor operates as a traditional First Amendment safeguard within copyright law that protects speech *358* technologies and free press interests.\(^\text{281}\) Without it, copyright law’s attempts to regulate technologies would likely violate the First Amendment, or, at the very least, require First Amendment scrutiny.

A. FIRST AMENDMENT LIMITS ON THE COPYRIGHT CLAUSE

The relationship between the First Amendment and copyright law always has been a delicate one. Copyrights restrict speech, keeping others not only from copying, publishing, and performing copyrighted works, but also from creating new derivative works (meaning new expression) based on copyrighted materials.\(^\text{282}\) At the same time, however, the Copyright Clause of the Constitution clearly anticipated that Congress would establish a system of copyright in the United States to grant authors exclusive rights in their writings. Additionally, when the Framers drafted the First Amendment, they must have believed copyright could coexist with the First Amendment.\(^\text{283}\) But how, if copyright law restricts speech in so many basic ways?

1. The Doctrine of First Amendment Safeguards—the Harper Court’s First Amendment Solution to Copyright Law. The Supreme Court’s answer to this conundrum came first in Harper & Row, Publishers, Inc. v. Nation Enterprises.\(^\text{284}\) In that case, The Nation magazine asserted a First Amendment right to publish parts of President Ford’s memoirs it had obtained from a stolen copy of the manuscript before Ford’s book had been published.\(^\text{285}\) The Court, however, did not see a First Amendment problem in enforcing copyright law against The Nation magazine for violating Ford’s copyright.\(^\text{286}\)

First, the Court explained that copyright law complements the First Amendment by providing the economic incentives for authors *359* to create and disseminate works of expression.\(^\text{287}\) In an oft-quoted line from Harper & Row, the Court asserted that “the Framers intended copyright itself to be the engine of free expression” by giving “the economic incentive to create and disseminate ideas.”\(^\text{288}\) Although the Court offered no sources, historical or otherwise, to support its bare assertion, its view is consistent with the historical evidence from the Framing discussed in Part II above.\(^\text{289}\) For example, as quoted above, Federalist James Iredell defended the Copyright Clause power on similar incentive grounds.\(^\text{290}\)

Second, the Harper Court explained that copyright law can avoid further First Amendment problems by incorporating doctrines that protect First Amendment interests.\(^\text{291}\) These “First Amendment safeguards” effectively keep copyright law from unduly restricting the freedom of speech. For example, the “idea/expression dichotomy ‘strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts [or ideas] while still protecting an author’s expression.’”\(^\text{292}\) Also, the fair use doctrine accommodates free speech interests by allowing “latitude for scholarship and comment” for fair uses of copyrighted works.\(^\text{293}\) These two copyright doctrines operate as “First Amendment protections already embodied in the Copyright Act[ ].”\(^\text{294}\) Accordingly, no First Amendment scrutiny is ordinarily warranted for an application of copyright law.
The Court did not develop the doctrine of First Amendment safeguards on its own. In 1970, Paul Goldstein and Melville Nimmer both wrote articles—apparently without knowledge of the other’s work—that laid the groundwork for the doctrine. Goldstein argued that the idea-expression dichotomy acted as a “First Amendment safeguard” in the context of copyright law.299 Similarly, Nimmer contended that the idea-expression dichotomy, for the most part, “represents an acceptable definitional balance as between copyright and free speech interests.”300 A definitional balance attempts “to draw a line between that speech which may be prohibited under the copyright law, and that speech which, despite its copyright status, may not be abridged under the command of the first amendment.”301 Both Goldstein and Nimmer analogized to the actual malice standard created in New York Times v. Sullivan,302 which provides a First Amendment safeguard for libel law by setting forth a higher standard of tort liability to accommodate First Amendment concerns.303

One important feature of a First Amendment safeguard is that it is overprotective of speech. By delineating between protected and unprotected speech, a First Amendment safeguard effectively puts a “thumb on the scale” for protected speech to guard against chilling of speech activities. For example, in Sullivan, the Supreme Court devised a First Amendment standard of liability for libel actions against public officials that allows some libel or false statements to go unremedied if made without actual malice (i.e., without knowledge or reckless disregard of the falsity).304 This means falsehoods negligently made about public officials must be allowed, even if they are false or even defamatory under traditional standards of tort liability.305 A First Amendment safeguard overprotects speech to create breathing room for expressive activity that might otherwise be chilled under a lower standard of liability. As the Sullivan Court explained:

*361 As Madison said, “Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.” . . . That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the “breathing space” that they “need . . . to survive.”306

The idea-expression dichotomy and the fair use doctrine operate in similar fashion in copyright law. Even copyrighted expression must often yield to free speech interests under these copyright doctrines.307 For example, in Baker v. Selden, the Court held that accounting forms with a “peculiar arrangement of columns and headings” could not be copyrighted because the underlying system (or idea) embodied by the forms, which was not patented, must be left for the public’s free use.308 Even though the forms consisted of a “peculiar arrangement” that probably would have easily satisfied the originality requirement for obtaining a copyright as a compilation,309 the Court ruled against copyright protection in order to promote the free dissemination of the idea or system of accounting that was embodied in the forms.310 Subsequent courts have extended the idea-expression dichotomy even further with the merger doctrine, under which copyright does not extend to original expression if there are too few ways of expressing the same concept.311 These doctrines carve out breathing room for the free exchange of ideas, even to the point of denying copyrights to original expression. Likewise, the fair use doctrine allows unauthorized uses of copyrighted works for fair use purposes, such as criticism or comment.312 Even though the early copyright acts did not contain a fair use provision, courts have from “the infancy of copyright protection . . . thought [it] necessary to fulfill copyright’s very purpose, ‘to promote the Progress of Science and useful Arts.’ ”313 In furtherance of free speech and other interests, fair use allows what otherwise would be considered copyright infringement.314 In cases of parody fair use, the Court has even recognized that the parody can destroy the entire value of the copyrighted work, “kill[ing] demand for the original” and still be a permissible fair use.315

2. The Traditional Contours of Copyright—Eldred’s Elaboration of When First Amendment Scrutiny Is Required of Copyright Law. Harper was not the Court’s final word on the First Amendment and copyright law. Some lower courts mistakenly interpreted Harper to mean that copyrights are categorically immune from challenges under the First Amendment.316 In Eldred, the Court rejected that notion.317 In a key passage, the Court explained when First Amendment scrutiny is necessary for an application of copyright law:

The [Copyright Term Extension Act] . . . does not oblige anyone to reproduce another’s speech against the carrier’s will. Instead, it protects authors’ original expression from unrestricted exploitation. Protection of that order does not raise the free speech concerns present when the government compels or burdens the communication of particular facts or ideas. . . . To the extent such assertions raise First Amendment concerns, copyright’s built-in free speech safeguards are generally adequate to address them. We recognize that the D.C. Circuit spoke too broadly when it declared copyrights “categorically immune from challenges under the First Amendment.” But when, as in this case, Congress has not altered the traditional
contours of copyright protection, further First Amendment scrutiny is unnecessary.\footnote{314}

In this passage, the Eldred Court appears to distinguish between two types of cases: (1) those involving individuals asserting the right to use copyrighted expression of others, and (2) those involving individuals not asserting the right to use copyrighted expression of others, but instead having a right to make their own speech without burden from the government.\footnote{315} I refer to these types of cases as Category 1 and 2 cases, respectively.

In Category 1 cases, “speakers assert the right to make [use of] other people’s [copyrighted] speeches,” as was the case in both Harper and Eldred.\footnote{316} In these cases, as long as “Congress has not altered the traditional contours of copyright protection,” no First Amendment scrutiny is required.\footnote{317} Why? Because the First Amendment safeguards in copyright law are deemed to provide sufficient accommodation for First Amendment interests of users of copyrighted content.\footnote{318} On the other hand, First Amendment scrutiny is required in a Category 1 case if the “traditional contours” of copyright protection have been altered.\footnote{319}

In Category 2 cases, the government burdens or compels an individual’s right to make her own speech without any unauthorized\footnote{364} copying of the copyrighted works of others. This was the case with cable providers in Turner Broadcasting who were obligated under the “must-carry” provisions of the Cable Television Consumer Protection and Competition Act of 1992 to carry certain local programming.\footnote{320} In a Category 2 case, some level of First Amendment scrutiny applies; in Turner, it was intermediate scrutiny.\footnote{321} The Eldred Court described Turner as raising a more serious First Amendment question because cable operators were being forced by law to carry the content of others (network broadcasters).\footnote{322} Although the Eldred Court did not discuss it, we easily could imagine a copyright law that would require strict scrutiny. For example, if Congress enacted a law that denied copyrights based on content or viewpoint to works that supported Osama Bin Laden or that contained sexually indecent photographs, the individual’s right to make her own speech would be burdened by a viewpoint or content-based restriction, which necessitates strict scrutiny under the Court’s precedents.\footnote{323}

The more typical copyright infringement suit would fall within the Category 1 cases. In most cases, the enforcement of copyrights does not raise First Amendment problems—or even require any First Amendment scrutiny—given the existence of First Amendment safeguards within copyright law. Unless the traditional contours of copyright protection are changed, First Amendment scrutiny of copyright law is unnecessary.\footnote{324}

Thus, under Eldred, “traditional contours of copyright” is the key concept for determining if a copyright law requires First Amendment scrutiny in Category 1 cases.\footnote{325} If Congress has “altered the traditional contours of copyright protection,” further\footnote{365} First Amendment scrutiny is necessary.\footnote{326} Unfortunately, the Eldred Court said little about the meaning of traditional contours of copyright protection or its relationship to the First Amendment safeguards,\footnote{327} so we are left with some guesswork.

With that caveat in mind, I argue that the concept of traditional contours of copyright protection includes (i) the traditional First Amendment safeguards in copyright law and (ii) other traditional copyright doctrines. As to the first category, all traditional First Amendment safeguards within copyright law such as fair use and the idea-expression dichotomy (the two safeguards the Court has expressly noted) fall within the category of traditional contours of copyright.\footnote{328} If Congress abrogated either doctrine or any other traditional First Amendment safeguard in copyright law, First Amendment scrutiny would be required, and such a change in copyright law would very likely be unconstitutional.

As to the second category, there may be other traditional copyright doctrines besides the traditional First Amendment safeguards, such as the basic exclusive rights of copyright.\footnote{329} Thus, First Amendment scrutiny would be necessary either if Congress altered a traditional First Amendment safeguard such as fair use and the idea-expression dichotomy or if Congress changed a traditional contour of copyright protection, such as by granting super-copyright protections or sui generis rights without formally altering one of the First Amendment safeguards within copyright law.

This interpretation is supported by several passages in Eldred. First, the language contained in traditional First Amendment...
safeguards and traditional contours of copyright protection is different. While both contain the notion of “traditional,” the former term focuses on First Amendment safeguards, such as fair use and idea-expression, which typically are exemptions to copyright. The latter term focuses on the contours of copyright protection, which may include the exclusive rights of the copyright holder instead of just exemptions to copyrights. Indeed, when one thinks of copyright protection, one probably thinks first of the basic exclusive rights of the copyright holder—i.e., the protections copyright law affords the copyright holder—instead of exemptions or exceptions to those rights.

This subtle distinction between First Amendment safeguards and copyright protection is illuminated by the Eldred Court’s citation of case law. Immediately after introducing the concept of traditional contours of copyright protection, the Court cited two cases: (1) a direct citation to the passage in Harper & Row where the Court discussed the “First Amendment protections already embodied in the Copyright Act’s distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use”, and (2) a comparative citation to San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, a case in which the Court upheld the grant of stronger trademark rights over the term “Olympic” to the U.S. Olympic Committee.

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

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

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

In Golan v. Gonzalez, the Tenth Circuit adopted aspects of the general approach to traditional contours outlined above. The case involved a First Amendment challenge to Congress’s removal of thousands of works from the public domain under a copyright amendment commonly referred to as the restored copyright provision. The Tenth Circuit rejected the government’s argument that the traditional contours of copyright are limited to just two doctrines, fair use and the idea-expression dichotomy. Applying a historical and functional approach, the court found a “time-honored tradition of allowing works in the public domain to stay there” so the public can freely benefit from the works. Because the restored copyright provision altered this tradition by removing works from the public domain, First Amendment scrutiny was required.

Golan establishes an important First Amendment precedent for copyright law. It marks the first time a court has required First Amendment scrutiny of a copyright law, and clarifies the doctrine of traditional contours of copyright, following the Eldred decision. Under the Tenth Circuit’s approach, copyright laws that do not alter fair use or the idea-expression dichotomy may still be subject to First Amendment scrutiny if they alter some other traditional contour of copyright law. As discussed above, this approach faithfully carries out the Supreme Court’s teaching in Eldred. The traditional contours of copyright go beyond fair use and idea-expression. As the Tenth Circuit in Golan recognized, the principle that works in the public domain remain in the public domain is one such traditional contour of copyright law. As this Article explains, copyright law’s long
avoidance of regulating speech technologies is another.

\[369\] 3. The Free Press Clause Limit on the Copyright Clause. The Supreme Court has yet to consider whether the Free Press Clause imposes any limits on Congress’s power under the Copyright Clause. In both Harper and Eldred, the Court spoke generally of the “First Amendment” without delineating or even mentioning either the Free Speech Clause or Free Press Clause.\[351\] But neither case involved regulation of speech technologies, so no Free Press Clause issue was presented.

In the future, though, it seems very likely that the Court will have to consider the constitutionality of a copyright law that restricts a speech technology, given the increased pressure in Congress to use copyright law to regulate technologies. Part I described the history of the Free Press Clause, which indicates that the Framers understood the Clause as limiting Congress’s power to regulate speech technologies through copyright law.\[352\] This history can no longer be ignored, if the Supreme Court eventually considers a case involving the constitutionality of a law restricting a speech technology under copyright or other law.

The Court’s doctrine of First Amendment safeguards suggests, however, that the Court may be reluctant to entertain a direct Free Press or First Amendment challenge to a copyright provision.\[353\] Instead, it probably will first seek to examine whether copyright law already provides some definitional balance or First Amendment safeguard to accommodate free press concerns. The following part shows how copyright law already does.

B. THE SONY SAFE HARBOR IS A TRADITIONAL FIRST AMENDMENT SAFEGUARD

The core thesis developed below is that the Sony doctrine serves as a traditional First Amendment safeguard to protect the same interests as the original understanding of the freedom of the press.\[354\] As such, the Sony safe harbor has constitutional importance for our copyright system at least of the same degree as the fair use and idea-expression doctrines.\[355\] The Sony safe harbor provides a definitional balance to address free press concerns in copyright law.

1. The Sony Safe Harbor. In Sony, the movie studios staked out a copyright claim that was, in the Supreme Court’s view, “unprecedented.”\[356\] It was unprecedented in that never before had copyright law been invoked to “impose copyright liability upon the distributors of copying equipment,” which in this case, was Sony’s newly developed betamax or video recorder.\[357\] Although the video recorder was relatively new at the time, other copying equipment, starting with the printing press, had existed for generations without such attempted interference by U.S. copyright holders.\[358\] The two movie studios in Sony, Universal and Disney, were seeking to shut down the sale of all Sony video recorders.\[359\]

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

Selling a staple article of commerce—e.g., a typewriter, a recorder, a camera, a photocopying machine—technically contributes to any infringing use subsequently made thereof, but this kind of “contribution,” if deemed sufficient as a basis for liability, would expand the theory beyond precedent and arguably beyond judicial management.\[360\]

\[371\] The Supreme Court agreed with Judge Ferguson’s decision, even adopting his approach in analogizing to the staple article of commerce doctrine from patent law.\[361\] In what has become probably the most quoted passage in Sony, the Court held:

The staple article of commerce doctrine must strike a balance between a copyright holder’s legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce. Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.\[362\]
Thus, in order for the Sony doctrine to apply, the technology must be “capable of commercially significant noninfringing uses.”363 The video recorder easily satisfied this test, in the Court’s view, because it allowed consumers to record broadcast shows for “time-shifting” purposes to later watch a show.364 The two movie studios had no legitimate claim to stop all other copyright holders—such as Fred Rogers from Mr. Rogers’ Neighborhood—who had no objection to allowing consumers to record their shows.365 Even further, the Court held that the two studios had no legitimate claim to stop time-shift recordings of their own broadcast shows, even if consumers recorded them without the studios’ authorization.366 The Court concluded that such time-shift recording was a fair use, noting the lack of any evidence that the two studios would be harmed by such recordings and the societal interest in having greater access to broadcast programs that were freely televised.367

*372 In 2005, the Court revisited the Sony doctrine in Grokster, a case involving the liability of two distributors of peer-to-peer software that enabled users to engage in “file sharing” over the Internet, including for illegal copying of copyrighted music.368 Although the Supreme Court agreed with the music and movie industries that summary judgment had been improperly granted to the defendants, the Court based its decision on a ruling that was much narrower than the industries sought.369 Most importantly, the Court reaffirmed the basic tenet of the Sony doctrine and strengthened its foundation by describing it, for the first time, as a “safe harbor.”370

But the Court also made clear that the Sony safe harbor did not immunize technology developers from liability if they actively induced infringement, “as shown by clear expression or other affirmative steps taken [by them] to foster infringement.”371 Active inducement can be shown, for example, by advertising or providing instructions encouraging or advising consumers to use the product in question for infringing purposes.372

The Sony safe harbor, in other words, does not create complete immunity.373 Instead, it protects (1) the developer of a technology capable of a substantial noninfringing use for acts in designing, developing, distributing, and supporting the technology; but it does not protect (2) the developer for any other conduct that *373 demonstrates an intent or active step of inducement of infringement.374

The Court was careful to ensure that the inducement claim would not be allowed to water down the Sony safe harbor, noting that a defendant’s “mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability.”375 “[O]rdinary acts incident to product distribution, such as offering customers technical support or product updates,” cannot in themselves be considered active inducement.376 Culpable intent cannot be imputed from a “product’s characteristics.”377

On the whole, I believe the Court’s framework in Sony and Grokster provides a sensible approach to secondary liability, one that is sensitive to the needs of copyright holders in enforcing their copyrights and the needs of technology developers to have breathing room for “the development of technologies with lawful and unlawful potential.”378

2. The Sony Safe Harbor Protects Speech-Facilitating Technologies and Free Press Concerns. Although neither the Supreme Court nor any prior legal scholarship has expressly described the Sony doctrine as a First Amendment safeguard, the conclusion necessarily follows from the principles the Court has adopted. At least on the surface, this claim may seem surprising. After all, when the Supreme Court first articulated the Sony safe harbor, the Court analogized to a provision in the Patent Code, which limits contributory patent infringement from proscribing the mere sale of a “staple article or commodity of commerce suitable for substantial noninfringing use.”379 Neither the Sony Court nor the Grokster Court mentioned any First Amendment safeguard in describing the Sony doctrine.

The Court’s silence was understandable, however. At the time of the Sony case, the Supreme Court had yet to even articulate the *374 doctrine of First Amendment safeguards for any copyright doctrine.380 And, although one of the fifty-five amici briefs in Grokster did raise the issue,381 none of the courts below or parties’ briefs did. Moreover, it is important to bear in mind that both the fair use and idea-expression doctrines were not formally characterized as First Amendment safeguards until the Harper decision in 1985, many years after they had been in existence in copyright law.382 These cases show that First
Amendment safeguards can operate within copyright law without being formally recognized as such by the Court until later. If we test the Sony doctrine under Eldred’s definition of a First Amendment safeguard, it becomes evident that the Sony doctrine is one of “copyright’s internal safeguards to accommodate First Amendment concerns.” The First Amendment interest lies in allowing the development of technologies that facilitate the widespread production and dissemination of speech, technologies that I call “speech-facilitating technologies” or “speech technologies” for short.

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

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

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

The thornier question is whether the Sony safe harbor can be considered a traditional First Amendment safeguard or contour of copyright protection. While both the fair use and idea-expression doctrines can be traced to the nineteenth century, the Court did not formally recognize the Sony doctrine until the late twentieth century. By this measure, in terms of formal judicial recognition, the Sony doctrine might appear to lack the longevity necessary to be considered a traditional safeguard. But, upon closer inspection, the Sony doctrine reflects more of the “tradition” of our copyright system than one might think. One of the reasons the Sony doctrine was not formally recognized until 1984 was the simple fact that prior to Sony no court had the opportunity to consider such an “unprecedented attempt to impose copyright liability upon the distributors of copying equipment.” Before Sony, U.S. copyright holders had not tried to stop the manufacture of a technology under copyright law—certainly not the printing press. And, until very recently, no Copyright Act, starting with the first Act of 1790, ever attempted to regulate directly the printing press or other speech-facilitating technologies, much less stop their production.

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

The reason for this historical limit to copyright’s scope traces back to the freedom of the press, as discussed above. This concept informed the Framers who drafted both the Copyright Clause and the Free Press Clause. They wanted to prevent “the scheme of licensing laws implemented by the monarch and Parliament to contain the ‘evils’ of the printing press in 16th- and 17th-century England.” The Printing Acts limited the number of presses and master printers as a part of the repressive regime that gave the Stationers control over the entire printing industry. That monopoly included power not only over what could be published, but also over the technology of mass publication itself. This regulation of the press was dismantled when the last Printing Act lapsed and eventually a reformed system of limited copyrights was instituted in its place. Under the reformed system of copyright, the state did not attempt to give authors or publishers any control over the technology of the printing press. There was, in other words, the beginning of a freedom of the press.

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

Indeed, the facts in Sony closely approximate the kind of historical abuse that the freedom of the press was designed to end. During the 1980s, movie studios were hoping to market the videodisc player, a technology that could play, but not record, shows, which was a technological limitation attractive to those studios that feared copyright infringement of their works. In fact, a major developer of the videodisc player was MCA, which owned Universal Studios, a plaintiff in Sony that sought to prohibit the manufacture of the competing Betamax player manufactured by Sony, which, of course, could record. Had Universal Studios been successful in enjoining Sony from manufacturing the Betamax, it would have been able to limit the number of video recorders in the market in the same way that the Printing Act limited the number of printing presses in England—all in an effort again to control “piracy.” The Sony Court viewed the movie studio’s claim as so “extraordinary” because they were “seek[ing], in effect, to declare [video recording devices then known as] VTR’s contraband.” This is the same type of extraordinary action the Stationers were able to accomplish when *379 unregistered printing presses were declared contraband and destroyed.

The Sony safe harbor is a traditional contour of copyright law also based on its reinforcement of the long-standing teaching of Baker v. Selden. In Baker, the Supreme Court held that certain accounting forms were not copyrightable because they embodied an unpatented system of accounting. Copyright law does not protect useful systems—that is the province of patents. As the Baker Court stated, “The copyright of a work on mathematical science cannot give to the author an exclusive right to the methods of operation which he propounds, or to the diagrams which he employs to explain them, so as to prevent an engineer from using them whenever occasion requires.” In Sony, the Court expressed similar concerns. If applied too broadly, secondary liability in copyright law could extend monopoly rights over useful systems and technology. “It seems extraordinary to suggest,” the Court cautioned, “that the Copyright Act confers upon all copyright owners collectively, much less the two respondents in this case, the exclusive right to distribute VTR’s simply because they may be used to infringe copyrights. That, however, is the logical implication of their claim.”

Copyright law has First Amendment safeguards. The Court has expressly identified two of them, the fair use and idea-expression doctrines, which together provide breathing room for individuals to use copyrighted works without authorization. This Part has presented the case for why the Sony safe harbor operates as a comparable First Amendment safeguard within copyright law to allow breathing room for individuals to develop speech-facilitating technologies. Whereas fair use and idea-expression focus on speech, the Sony safe harbor focuses on protecting those technologies that make mass publication of speech even possible.
This understanding of Sony and its relationship to the freedom of the press has important ramifications for copyright law today. First, to the extent Congress attempts to operate outside of the Sony safe harbor and depart from its protections, First Amendment scrutiny would be required—without particular recognition of the Framers’ view of the Free Press Clause. Second, in applying the Sony safe harbor, courts must consider its First Amendment goal of providing breathing room for the development of speech technologies. I propose four free press principles for courts to consider when applying Sony.

A. COPYRIGHT REGULATION OF SPEECH TECHNOLOGIES OUTSIDE OF THE SONY SAFE HARBOR MUST BE SUBJECT TO FIRST AMENDMENT SCRUTINY

If Congress enacts a copyright law that regulates technology outside of Sony’s protection as a First Amendment safeguard, First Amendment scrutiny would be required.416 Courts also must take into account the Framers’ view of the Free Press Clause as a limit on the Copyright Clause power.

Under First Amendment jurisprudence, governmental restrictions on technologies that facilitate the production or dissemination of speech are subject to some form of First Amendment scrutiny.417 From the printing press418 to broadcast419 radio419 to cable television420 to the Internet421 the Supreme Court has been solicitous in recognizing how technologies of speech and governmental regulations of them—implicate important First Amendment concerns. Typically, the question for the Court is what level of First Amendment scrutiny should apply to governmental regulation of a speech-related technology, not whether there should be any scrutiny at all. Except for government regulation of broadcast media, which has been scrutinized under a more lenient (and controversial) standard due to a once-perceived technological difference in broadcasting,422 laws that regulate speech-facilitating technologies are typically subject to ordinary First Amendment scrutiny.423 And even with broadcast regulations, some First Amendment scrutiny applies.

Indeed, restrictions as seemingly minor as regulations on the use of loudspeakers or sound amplifiers in public are subject to First Amendment scrutiny.424 In Kovacs v. Cooper, the Supreme Court425 upheld, as reasonable, a city ordinance that barred “sound trucks with broadcasts of public interest, amplified to a loud and raucous volume, from the public ways of municipalities.”426 The Court noted that sound trucks were allowed “in places such as parks or other open spaces off the streets.”426 This city ordinance contrasted with the one in Saia v. New York, which prohibited all sound trucks used “for advertising purposes or for the purpose of attracting the attention of the passing public,” anywhere in public.427 The Court easily concluded that this flat prohibition was unconstitutional because it was “not narrowly drawn to regulate the hours or places of use of loud-speakers, or the volume of sound (the decibels) to which they must be adjusted.”428

These cases embody the Court’s larger First Amendment concern of protecting outlets of communication for the free flow of information and ideas.429 As the Court recognized in New York Times Co. v. Sullivan, the First Amendment guards against “shut[ting] off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.”430 The First Amendment attempts “to secure ‘the widest possible dissemination of information from diverse and antagonistic sources.’”431 In Sullivan, the Court recognized that the standards of liability may432 be “deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments.”432

Government regulation of a medium for the communication of ideas requires First Amendment scrutiny, just as much as direct government regulation of communication itself does.

Against this First Amendment jurisprudence, it would be extremely difficult to explain how copyright law could regulate speech-facilitating technologies without any First Amendment concern whatsoever. Not even broadcasting gets a First Amendment free pass.433 Although copyright law typically avoids First Amendment scrutiny, as explained above, it does so only because the Court has found sufficient First Amendment safeguards built into copyright law.434 By protecting the development of speech-facilitating technologies under copyright law, the Sony safe harbor acts as one such First Amendment safeguard—or definitional balance-within copyright law. The only reason copyright law’s regulation of speech-facilitating

*380 IV. Applying the Freedom of the Press 2.0

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These cases embody the Court’s larger First Amendment concern of protecting outlets of communication for the free flow of information and ideas.429 As the Court recognized in New York Times Co. v. Sullivan, the First Amendment guards against “shut[ting] off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.”430 The First Amendment attempts “to secure ‘the widest possible dissemination of information from diverse and antagonistic sources.’”431 In Sullivan, the Court recognized that the standards of liability may432 be “deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments.”432

Government regulation of a medium for the communication of ideas requires First Amendment scrutiny, just as much as direct government regulation of communication itself does.

Against this First Amendment jurisprudence, it would be extremely difficult to explain how copyright law could regulate speech-facilitating technologies without any First Amendment concern whatsoever. Not even broadcasting gets a First Amendment free pass.433 Although copyright law typically avoids First Amendment scrutiny, as explained above, it does so only because the Court has found sufficient First Amendment safeguards built into copyright law.434 By protecting the development of speech-facilitating technologies under copyright law, the Sony safe harbor acts as one such First Amendment safeguard—or definitional balance-within copyright law. The only reason copyright law’s regulation of speech-facilitating
technologies under secondary liability can avoid First Amendment scrutiny is the accommodation for such technologies already provided by the Sony doctrine.

Thus, if Congress were to enact a copyright law restricting speech technologies outside of Sony, some First Amendment scrutiny would apply. It seems doubtful that a prohibition on the production or sale of a speech-facilitating technology that has a substantial noninfringing use could withstand First Amendment scrutiny. As the Supreme Court has stated, “[a] complete ban can be narrowly tailored, but only if each activity within the proscription’s scope is an appropriately targeted evil.” A technology with a substantial noninfringing use is not an appropriately targeted evil; copyright law has no claim to stopping such legitimate use of a technology. For the same reason, under intermediate scrutiny, the prohibition would fail the narrow tailoring prong. As the Court in Sony recognized, banning such a legitimate technology would “enlarge the *384 scope of . . . statutory monopolies to encompass control over an article of commerce that is not the subject of copyright protection.”

My objective, however, is not to prove that such a copyright regulation of speech technology outside of Sony would violate the First Amendment. Instead, it is to show that, at the very least, First Amendment scrutiny would be required. Any court considering the constitutionality of such an enactment must consider the Framers’ view of the Free Press Clause as a limit on the Copyright Clause.

B. COURTS SHOULD APPLY THE SONY SAFE HARBOR BROADLY AS A FIRST AMENDMENT SAFEGUARD

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

This Article does not fully examine all of the contours of the Sony safe harbor as a First Amendment safeguard. Suggested here, however, are four principles that courts should recognize in applying the Sony safe harbor’s overriding First Amendment concern of accommodating the development of speech-facilitating technologies.

First, in determining what is a “substantial” noninfringing use, courts must consider the qualitative significance of a particular use. *385 not just the quantitative aspect. From the First Amendment perspective, the qualitative weight of speech may be more important than the quantitative. After all, the value of speech is much more than just a number or head count. The speech of one individual can be just as substantial as the speech of an entire nation. In other contexts, such as fair use and infringement, substantiality is determined in both a qualitative and quantitative sense.

Second, flexibility in applying the Sony safe harbor is necessary as the test must accommodate many different kinds of technology over time. A hard-and-fast rule or strict test of proportionality is unlikely to deal adequately with all the nuances posed by new technologies. As Congress recognized in codifying a flexible standard of fair use in the 1976 Act, fair use is “especially important ‘during a period of rapid technological change,’ and ‘the courts must be free to adapt the doctrine to particular situations on a case by case *386 basis.’” The fair use doctrine is applied on a case-by-case basis to “afford[ ] considerable ‘latitude for scholarship and comment,’ and even for parody.”

Third, courts should be wary of imposing what amounts to the death penalty on a new technology before it has had a chance to develop. In applying the Sony doctrine, a court should consider whether the technology in question is new or developing. If it is, then greater leeway should be allowed for the new technology’s development, and much less weight should be given to the actual uses of the technology. Because the Sony safe harbor attempts to provide breathing room for the development of technologies that have “a lawful promise,” courts must avoid rushing to judgment by predicing liability on a brief snapshot of a new technology’s uses in the market.
Fourth, cost-benefit and products liability analyses cannot replace the Sony safe harbor, as some scholars propose,\textsuperscript{446} without rendering copyright law extremely vulnerable to First Amendment challenge. Neither type of analysis is adequate, or even appropriate, to protect free press and speech interests. Indeed, tort and economic analyses are inherently deficient to handle First Amendment concerns.\textsuperscript{447} Under the Court’s precedents, speech is valued as an end in itself,\textsuperscript{448} and society must bear the costs of protecting \textsuperscript{*387} speech.\textsuperscript{449} In the end, economic efficiency is not the measuring stick of the First Amendment.\textsuperscript{450}

C. RESPONDING TO THE TORT CRITICISM OF THE SONY SAFE HARBOR

In two recent articles, Professors Menell and Nimmer offer a forceful challenge to the Sony safe harbor. First, they question whether Sony is jurisprudentially defensible as a judge-made doctrine to the Copyright Act.\textsuperscript{451} Second, they assert that the Sony safe harbor has been replaced, at least de facto if not de jure, by tort law principles of products liability and the duty of technology developers to investigate a reasonable alternative design that can reduce copyright infringement on their devices.\textsuperscript{452} Although Menell and Nimmer’s arguments are elegantly and exhaustively made, neither of their contentions is persuasive in my view.

1. Tort Law Is Not the “Wellspring” for the Copyright Act. First, Menell and Nimmer contend that the Sony safe harbor is based on the Supreme Court’s mistaken premise that a “historic relationship” exists between copyright and patent law that can justify applying patent law’s staple article of commerce doctrine to copyright law.\textsuperscript{453} In their view, the Supreme Court should have relied on the text and legislative history of the Copyright Act, which supposedly indicate that Congress intended secondary liability under copyright law to be guided by “traditional tort-based doctrines.”\textsuperscript{454} Indeed, Menell \textsuperscript{*388} and Nimmer even go so far as to assert that the law of torts is the “wellspring for determining the boundaries of copyright liability.”\textsuperscript{455}

Based on their “tort wellspring” theory of copyright law, Menell and Nimmer conclude that the Supreme Court was wrong—indeed, even “intrepid”\textsuperscript{456} and “cavalier”\textsuperscript{457}—to recognize the Sony safe harbor, instead of applying tort principles, particularly cost-benefit analysis under products liability, asking whether the technology developers could have come up with a “reasonable alternative design” for their technologies to reduce the amount of copyright infringement.\textsuperscript{458}

Menell and Nimmer’s “tort Wellspring” theory is misguided. The argument assumes that Congress’s reliance on a few general concepts of tort law (regarding joint tortfeasors, indirect liability, misappropriation, and remedies) in drafting the Copyright Act indicates that Congress meant to incorporate all other tort doctrines (such as products liability and reasonable alternative design analysis) into copyright law, using all of tort law as the “wellspring” for copyright law.\textsuperscript{459} Under their theory, a federal court presumably could incorporate into copyright law even the most controversial standards of tort law, such as strict liability or market share liability. For that matter, corporate copyright holders might themselves be subject to comparative negligence defenses if they failed to take reasonable care in reducing infringement of their works—for example, by failing to develop technologies and measures of their own that reduce copyright infringement of their works.

But this sweeping “wellspring” assumption proves too much. The Copyright Act is not a federal tort statute. Instead, the Act is intended to promote progress and learning, consistent with the \textsuperscript{*389} Copyright and Patent Clause. Accordingly, the Copyright Act is a delicate compromise of competing interests of copyright holders and the public. And, in the end, “[t]he copyright law, like the patent statutes, makes reward to the owner a secondary consideration.”\textsuperscript{460} The primary concern “lie[s] in the general benefits derived by the public from the labors of authors.”\textsuperscript{461}

There is a big difference, moreover, between Congress relying on traditional principles of secondary liability as mere background assumptions in drafting the Copyright Act and a court thereby asserting the authority to incorporate all tort principles, including products liability, into the Copyright Act as Menell and Nimmer propose. Even in tort law, secondary liability is different from products liability. Courts dealing with the secondary liability of product manufacturers, such as gun manufacturers, for the misconduct of third parties in using their products have been generally unreceptive to imposing liability against the product manufacturers.\textsuperscript{462} It is hard to imagine that when Congress passed the Copyright Act in 1976, it
Menell and Nimmer’s “wellspring” theory finds no support in the text or the legislative history of the Copyright Act. The Copyright Act says next to nothing about secondary liability, other than the language “to authorize” in discussing the scope of exclusive rights under copyright. The Act makes no mention of applying products liability principles to secondary liability, or applying tort law generally as the wellspring for determining all of copyright liability.

*390 The legislative history of the 1976 Copyright Act does include references to joint and several liability and secondary liability under tort law, as Menell and Nimmer note. But this is an uncontroversial point; no one seriously disputes that copyright law recognizes joint or secondary liability. In discussing the legislative history, Menell and Nimmer point only to passages discussing the traditional tort doctrines of respondeat superior and other forms of secondary liability, joint and several liability, and remedies. But from there, Menell and Nimmer make the gigantic leap that Congress intended all other tort doctrines—such as products liability—to be applied to secondary liability under copyright law, as if somehow all of tort law was the “wellspring” for copyright law. This giant leap is unsupported by reference to any passage of the Copyright Act or legislative history, much less any copyright case upon which Congress relied, that indicates products liability principles should be incorporated into copyright law.

Examining the issue on the merits raises serious doubts about the desirability of the Menell/Nimmer approach—even putting aside, for the moment, the First Amendment issues they ignore. Menell and Nimmer assume that the tests for products liability and reasonable alternative design are clear, uncontroversial, and easily importable into copyright law. They are not.

As John Vargo has shown in an exhaustive study in 1996, the standard for products liability has been deeply contested among the states. Indeed, according to Vargo’s study, the very test that Menell and Nimmer place so much stock in—an analysis of a reasonable alternative design—has not been adopted by the majority of states as a requirement for products liability. Menell and Nimmer fail to explain why a federal court should adopt for copyright law a products liability doctrine that so few states recognize even for tort law. Menell and Nimmer’s theory is, in effect, an invitation for federal courts to enter the legal quagmire over the proper standard of products liability—a question over which the fifty states (not to mention legal commentators) have been so deeply divided. Importing products liability into copyright law would be, in short, a mess.

Menell and Nimmer also ignore the economic loss rule in products liability, which does not allow a plaintiff to recover for mere economic losses. The economic loss rule has been adopted in the majority of states and is recognized in both the Second and Third Restatements of Torts. The rule is meant to protect manufacturers from potentially limitless liability in tort law for products that have caused no physical injury. As the California Supreme Court explained in one of the seminal cases:

The distinction rests . . . on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer’s business unless he agrees that the product was designed to meet the consumer’s demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer’s liability is limited to damages for physical injuries and there is no recovery for economic loss alone.

Thus, if Menell and Nimmer’s “tort wellspring” theory is faithfully applied to copyright law, Menell and Nimmer’s own argument appears to fall apart; under the economic loss rule, copyright holders would be barred from recovering any damages from product manufacturers because, in the typical copyright lawsuit, economic losses to the copyright holder are the only form of damages ever incurred. Perhaps Menell and Nimmer would apply a mutant form of products liability that would
expose manufacturers to liability well beyond what the majority of states would allow. However, such an approach would run counter to their entire “tort wellspring” theory of the Copyright Act and would call into serious question the judicial administrability of their theory. Federal courts would be left at sea, trying to figure out why they must selectively apply principles of products liability under the Menell/Nimmer approach, adopting the minority rule of reasonable alternative design while rejecting the majority rule of economic loss. At that point, tort law would not be a wellspring, but instead, a quagmire for copyright law. Such a mutant form of products liability could not possibly be what Congress ever envisioned for the Copyright Act.

*393 2. The Sony Court Was Correct to Consider Patent Law. Contrary to Menell and Nimmer’s argument, a historic kinship exists between copyright law and patent law that justifies the Supreme Court’s consideration of patent law doctrine in Sony. Both copyright law and patent law emanate from the same source: Congress’s power under the Copyright and Patent Clause, which gives 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.” 475 The Framers viewed patents and copyrights as constituting the same type of thing: a grant of “exclusive Right.”

The Framers’ view reflected the historical treatment of inventions and books in England, both of which fell under the Crown’s grant of letters patent as a part of its royal prerogative.476 Originally, the exclusive rights over inventions and books in England were not considered distinctly as “patents” or “copyrights,” but simply under the general rubric of patents.478 As copyright historian Mark Rose explains, “when printing privileges first appeared, printing patents and grants for mechanical inventions were not different in kind.” 479 And when Parliament enacted the first copyright act in England in 1710, “it was plain that the Statute of Anne treated copyrights on the model of patents.” 480

Although copyright law and patent law have developed into distinct bodies of law (as the Sony Court expressly noted481), the historical origin of copyright and patent from letters patent, and the Copyright and Patent Clause itself, both clearly demonstrate a historical kinship between copyright and patent. Indeed, it is hard to imagine a stronger historical kinship between legal concepts than *394 being derived from a single, common origin, as recognized at the time of the Framing and directly referenced in the Constitution itself in the term “exclusive Right.” 482 Menell and Nimmer simply overlook this clear historical connection that dates back to the Framers, and, even earlier, to the development of letters patent under the British Crown.

Menell and Nimmer also gloss over the long line of cases in which the Supreme Court has compared copyright and patent laws.483 One of the seminal cases, Kalem Co. v. Harper Brothers, 484 involved the very doctrine at issue in Sony: secondary liability. Justice Holmes, writing for an unanimous Court, turned to principles of contributory liability found in patent cases to support the Court’s conclusion that such liability should lie in copyright law.485 In numerous other cases besides Sony, the Court has drawn similar comparisons between copyright and patent law.486 The long pedigree of this approach deserves respect as an interpretive principle, given the Court’s *395 repeated recognition that “a page of history is worth a volume of logic,” especially in intellectual property cases.487

Moreover, almost from the beginning of copyright law, courts have crafted judge-made doctrines, often to avoid potential First Amendment problems, even though the relevant copyright act contained no explicit textual basis for the doctrines. Indeed, some of the most fundamental doctrines in copyright law today—the fair use doctrine,488 the idea-expression dichotomy,489 the first sale doctrine,490 the noncopyrightability of judicial opinions,491 and the avoidance of judicial evaluation of the artistic merit of a work492—originated from courts in deciding issues not addressed by the text of the Copyright Act. The Sony doctrine is another such doctrine in this long line of judge-made doctrines. If tort law were truly the wellspring of copyright law as Menell and Nimmer would have it, some of the most foundational doctrines of our copyright law, such as the fair use doctrine and the idea-expression dichotomy, would have never been recognized.

3. News of the Sony Safe Harbor’s Demise Is Greatly Exaggerated. Menell and Nimmer also resort to a “legal realist” argument, which is encapsulated well in the title of their article: “Legal Realism in Action: Indirect Copyright Liability’s Continuing Tort Framework and Sony’s De Facto Demise.” 493 Menell and Nimmer argue that subsequent responses to Sony by Congress, the courts, and *396 technology companies establish that the real standard being used today is products
Menell and Nimmer’s “legal realist” argument is unpersuasive. First, they give practically no acknowledgement to the undisputed fact that the Supreme Court reaffirmed the central teaching of Sony just recently in 2005, even elevating it to “safe harbor” status. It seems hard to believe that such a recent Supreme Court decision somehow could be rendered defunct by “practical reality” within only two years.

Moreover, as an empirical matter, Menell and Nimmer fail to provide sufficient evidence for their de facto argument. They provide no surveys or studies of the market response to Sony, so their assertion of “reality” turns out to be anecdotal and conjectural. But even they concede that “it would be absurd to maintain that the [Sony] opinion has had no effect on corporate actors in designing which products to offer.” Even further, they admit that Sony has affected “the incentives of technology developers by holding out a broad safe harbor.” They also acknowledge that their own standard of products liability is not the standard used by some technology developers. In terms of empirical support, Menell and Nimmer point to only a half dozen or so examples of how the market responded to a particular technology—such as audiocassettes, the digital audio tape, computers, mp3 players, digital cameras, DVRs, and online video sharing—in ways that did not require (as of yet) a court decision on whether the Sony safe harbor applied to protect the technology in question. Yet, in many of these cases, even Menell and Nimmer concede that the Sony ruling influenced the market response.

Although Menell and Nimmer emphasize that, after the Sony case, the safe harbor has been sparingly applied, if at all, in court decisions, they also admit that copyright owners have avoided litigating the Sony doctrine for many years because technology developers “possessed a liability shield” under Sony. Given the sheer number of technology companies that submitted amici briefs in the recent Grokster case successfully asking the Court to reaffirm the Sony doctrine, it is clear that many technology companies view Sony as establishing an important legal principle for technological innovation.

An even bigger hole in Menell and Nimmer’s argument is their failure to establish that their own standard of reasonable alternative design is the de facto standard, instead of the Sony safe harbor. Every copy, recording, or digital device today arguably could incorporate some feature to reduce copyright infringement that copyright holders could argue would provide a reasonable alternative design under the Menell/Nimmer standard. Yet so many devices today—the copier, scanner, printer, fax machine, tape recorder, iPod, mp3 player, digital camera, camcorder, personal desk assistant, multi-function cellphone with video camera, DVR, DVD burner, computer, email software, and the Internet infrastructure and protocols make virtually no attempt to control for copyright infringement. If products liability and reasonable alternative design were truly the de facto standard as Menell and Nimmer assert, one would expect something quite different than the technological devices that exist today.

Other than Judge Posner’s opinion in Aimster (and one district court case from the Seventh Circuit applying Aimster), as of this writing no judicial decision—before or after Grokster—has relied on a “reasonable alternative design” in considering a claim of secondary liability in copyright law. Although Menell and Nimmer criticize Sony as “shaky and vague Supreme Court precedent,” their attack seems hollow in light of the Grokster Court’s recent reaffirmation of the Sony safe harbor along with the recognition of an alternative inducement claim. In fact, since the Sony decision, no court has imposed copyright liability on a technology developer for merely designing and distributing a technology that is capable of substantial noninfringing use (without engaging in other acts that induce infringement). Following Grokster, the lower courts have continued to recognize the Sony safe harbor (apart from inducement claims) in the few cases in which the issue arose indirectly. In none of these copyright cases has products liability analysis been even mentioned.

Of course, Congress could attempt to alter the Sony framework. But so far Congress has not done so, with the exception of the failed Audio Home Recording Act (AHRA) (which became effectively defunct when digital audio tape technology never took hold) and the Digital Millennium Copyright Act (DMCA). Menell and Nimmer point to these two copyright amendments as indication that Congress might prefer a standard of liability different from Sony. I think the proper inference from these two limited departures from Sony is exactly the opposite: Congress knew how to override Sony as a general safe harbor in copyright law, but it has not done so for over twenty years and running. In any event, to the extent Congress passes a law that departs from the First Amendment safeguard contained in the Sony safe harbor, First Amendment
From a First Amendment perspective, the “reasonable alternative design” standard is entirely inadequate to protect speech technologies from excessive government meddling. The standard would subject every speech-facilitating technology to a potential copyright lawsuit. Because figuring out what constitutes a “reasonable alternative design” is an inherently fact-intensive question, no speech-facilitating technology would ever be immune from a copyright lawsuit. Indeed, the standard would have allowed a legal challenge to the printing press itself, which contained no copyright control measures at all. The same could be said of the telephone. Alexander Graham Bell envisioned the telephone as a device to send (presumably copyrighted) music over wires, yet the phone itself had no features to reduce copyright infringement.

In hindsight, it may seem unlikely that the printing press or telephone would have been banned under copyright law, but the history in England of banning presses proves otherwise. New technologies, it must be remembered, are difficult to defend because their commercial uses are inchoate, developing, and often unpredictable. The Sony case is instructive. Even though the movie studios hoped to ban the VCR, the machine later turned out to be the biggest financial boon for the movie industry, as even Menell and Nimmer concede. Although Menell and Nimmer assert that the VCR would have passed muster under their alternative standard, the facts in Sony belie this suggestion. Determining what is a “reasonable” alternative design is a fact-intensive inquiry that is extremely malleable, if not subjective. Applying Menell and Nimmer’s standard, a jury in 1979 could well have found at least two reasonable alternative designs existed in Sony: a video player that did not record content (as the movie studios had sought with the video disk player) or that was equipped with a filtering device (as the movie studios sought to prove in the district court). Indeed, that is precisely the suggestion of Judge Posner in the Aimster case, who adopted a cost-benefit analysis that Menell and Nimmer favor.

Under Menell and Nimmer’s standard, the VCR could have been banned forever. And given the problem of hindsight bias, alternative designs offered at the time of trial might be deemed to be “reasonable,” even though they might not have been reasonable or even feasible at the time the new technology was first developed. Either way, the increased chances of facing a copyright lawsuit under a products liability standard could significantly chill investment in and development of new speech-facilitating technologies. As Justice Scalia recognized during oral argument in Grokster, “I’m going to get sued right away [as a developer of new technology]. I know I’m going to get sued right away, before I have a chance to build up a business.” Venture capitalists probably would not invest in companies developing new speech technologies that run the serious risk of facing a lawsuit right after their distribution, especially because copyright law might make the venture capitalists themselves liable as well.

Indeed, it is conceivable that the Internet might not even exist today if Menell and Nimmer’s approach had been adopted in place of Sony. As Professor Reese explains, a products liability standard would have subjected the developers of the Internet to liability because they did not incorporate “reasonable” designs to stop copyright infringement. After all, the developers of the Internet did not include any mechanisms to reduce copyright infringement in designing the Internet. In other words, the developers of the Internet provided the breeding ground for Napster and all online copyright infringement, or so one might argue. As the Nimmer treatise itself states, “If machinery that allows copying is subject to challenge, then the Internet as a whole may be at risk. For the Internet itself, in one tendentious view at least, is ‘nothing other than one gigantic copying machine.’” When the Internet was first designed, copyright holders could have asserted that a “reasonable alternative design” would be a proprietary network in which users are readily identifiable and in which all copyrighted content must come with an authenticated, filterable seal from the copyright owner before it can be transmitted or posted. At the very least, some copyright control features should have been incorporated into the original design of the Internet. Under the reasonable alternative design test, the Internet as we know it might well have been banned.
Professor Reese’s example should provide us with pause. Although the critics of Sony seem to have great faith in the courts’ ability to evaluate new speech technologies and possible alternative designs, there is little reason for such blind faith. Courts are neither technologists nor good predictors of innovation or new technologies. Mining courts in reasonable alternative design analysis for speech technologies would take them beyond their judicial competence. The problem for courts is multiplied exponentially for new technologies that develop or change rapidly in today’s Internet Age.

In the end, products liability or cost-benefit analysis is doomed to failure in this context. It asks a question that cannot be answered except by normative judgments about incommensurable concerns. The value of a technology that facilitates the dissemination of speech is not reducible into costs and benefits that are commensurable. While the cost of infringement might be valued in terms of lost sales, we value speech in this country not in monetary terms, but as an end in itself. As Professor Sunstein elegantly stated, “If we value speech either as an intrinsic good or because it is instrumental to a well-functioning deliberative process, we will value it in a quite different way from toasters.”

The wisdom of Sony is that it establishes a prophylactic safe harbor that keeps courts and technology developers from becoming saddled with extremely facile analysis of the putative “costs” and “benefits” of inherently incommensurable endeavors, i.e., the value of speech versus the value of altering the design of a machine to reduce copyright infringement. Although the critics of Sony disagree with its calculus, Sony’s broad protection for speech technologies carries out the First Amendment goal of providing breathing room for speech activities and speech technologies. Under the First Amendment calculus, “the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted.” Protecting the First Amendment rights of individuals to develop and use the printing press and other speech technologies creates costs that society must bear.

Thus, even if we adopt products liability as the standard for secondary liability under copyright law as Professors Menell and Nimmer propose, tort law must always answer to the First Amendment. That is the core teaching of New York Times Co. v. Sullivan and its progeny. The law of copyright is no different. If the Sony safe harbor were dismantled as some critics seek, First Amendment scrutiny would be required for any attempt by copyright law to regulate speech technologies under principles of products liability. While Congress can “unwind” Sony or operate outside of its protections, the First Amendment always remains in play.

V. Conclusion

In the near future, both Congress and the courts will be increasingly forced to consider attempts by copyright holders to regulate and even to prohibit speech-facilitating technologies. For that reason, it is imperative to understand how the Sony safe harbor functions as a First Amendment safeguard in copyright law, consistent with the tradition of copyright in respecting a freedom of the press, including a general antipathy to allowing the government to control or limit the printing press or other technologies of speech. For over two hundred years, since the origin of copyright in the First Copyright Act of 1790, the tradition of our copyright system has been to avoid any direct regulation of or interference with technologies that facilitate the dissemination of speech. Although Congress or the courts may decide to depart from that tradition, any such departures must be subject to the same First Amendment scrutiny that applies to every other type of law that regulates speech technologies outside of copyright law. When it comes to restricting speech technologies, not even copyright law gets a First Amendment free pass.

Footnotes

a1 Associate Professor of Law, The Ohio State University Michael E. Moritz College of Law. I thank Martha Chamallas, David Goldberger, David McGowan, Mark Rose, Pam Samuelson, Chris Sprigman, and Peter Shane for their insightful comments on earlier drafts. I am indebted to Katherine Hall for her assistance in locating the historical materials discussed herein. Edward Olszewski provided excellent research assistance. My colleagues at the Moritz College of Law also deserve special thanks for their
thoughtful feedback to my presentation of the Article at a faculty workshop.

1 See Statute of Anne, 1710, 8 Ann., c. 19 (Eng.) (providing only for “the sole Liberty of Printing and Reprinting” held by authors or those to whom authors have given or sold their rights).

2 Id.

3 See infra notes 39, 46, 48, 54-55 and accompanying text.

4 See infra notes 49-50 and accompanying text.


6 See infra notes 96-102 and accompanying text.

7 See infra note 103 and accompanying text.

8 See infra notes 243-54 and accompanying text.


10 Id.

11 Id. at 442.


13 Id. at 933-37.

14 Id.

15 See 17 U.S.C. § 1201(a)(2) (2000) (“No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that . . . is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title . . . .”).

The “broadcast flag” mandate would require “all devices capable of receiving broadcast DTV signals [to] include pre-approved technology that would limit the redistribution—but not the copying—of any DTV programming whose broadcast signal included a special bit of data (the Broadcast Flag).” See Molly Shaffer Van Houweling, Communications’ Copyright Policy, 4 J. Telecomm. & High Tech. L. 97, 103 (2005) (discussing failure of broadcast flag order). The Federal Communications Commission (FCC) promulgated a broadcast flag rule, but the D.C. Circuit held that the rule fell outside the FCC’s authority. Am. Library Ass’n v. FCC, 406 F.3d 689, 703 (D.C. Cir. 2005). The Senate has considered several broadcast flag bills, including one proposed by Senator Fritz Hollings. S. 2048, 107th Cong. (2002).

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See infra note 175 and accompanying text.

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See infra notes 191-95 and accompanying text.

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See infra notes 133-51 and accompanying text.

21

U.S. Const. art. I, § 8, cl. 8.

22

See infra notes 379-410 and accompanying text.

23

See infra notes 416-37 and accompanying text.

24

See infra notes 438-50 and accompanying text.
Legal scholarship examining the connection between copyright and the freedom of the press or the connection between the Copyright and Free Press Clauses has been scant. Even Melville Nimmer, who wrote a seminal article about the connection between copyright and the First Amendment and an article specifically on the Free Press Clause, did not draw the connection. See Melville B. Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 UCLA L. Rev. 1180, 1186-1204 (1970) [hereinafter Nimmer, Copyright] (attempting to reconcile copyright and First Amendment); Melville B. Nimmer, Introduction-Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?, 26 Hastings L.J. 639 (1975) (discussing meaning of “freedom of the press”).


See infra notes 33-43 and accompanying text.

See infra notes 121-262 and accompanying text.

See infra notes 33-42 and accompanying text.

See infra note 54 and accompanying text.

See infra notes 69-106 and accompanying text.

See infra notes 241-54 and accompanying text; see also U.S. Const. amend. I.

The Crown’s power to control the press was, from its inception, unlimited. Siebert, supra note 5, at 28. During the sixteenth and seventeenth centuries, the Crown controlled the entire printing industry by allowing printing only through (i) special grants of printing patents or royal prerogatives to individuals who were favorites of the Crown or (ii) the Stationers’ Company, a chartered guild of printers and publishers. Mark Rose, Authors and Owners 12 (1993).

See infra notes 60-67 and accompanying text.

See infra notes 73-97 and accompanying text.

See Act of May 31, 1790, ch. 15, 1 Stat. 124 (1790) (repealed 1831) (containing no direct regulation of printing press).

See Patterson, supra note 26, at 27 (noting that Queen Mary’s most important official act was chartering Stationers’ Company); Rose, supra note 33, at 12 (noting that royal charter gave guild monopoly on printing).

See Siebert, supra note 5, at 47-63 (chronicling licensing system in England from time of Henry VIII).

See id. at 28 (noting that what Henry VIII began, his daughter Elizabeth completed).

Id. at 49.

Id. at 65. Initially, the printers who owned the printing presses also served as the publishers of the works. See Patterson, supra note 26, at 45-46 (detailing various arrangements between printers and publishers). Over time, printers and publishers (or “booksellers”) came to be separate entities. Id.

See Siebert, supra note 5, at 51-52 (comparing goals of Henry VIII and Mary in controlling presses).

Id. at 61.

Star Chamber Decree for Orders in Printing, 1586, 28 Eliz., §§ 1-2; Siebert, supra note 5, at 69.

Star Chamber Decree for Orders in Printing § 2.

Id. § 3.

Id. § 4; see also Siebert, supra note 5, at 69 (providing regulation requiring ecclesiastical authorities to approve new master printers).

Siebert, supra note 5, at 71.

Id. at 107-12.

See infra notes 110-17 and accompanying text.

Siebert, supra note 5, at 61-62. In 1560, there were eight or ten master printers; by 1600, there were thirty. Id. at 56.

Star Chamber Decree for Orders in Printing, 1586, 28 Eliz., § 3.

Id. § 2.

See, e.g., Siebert, supra note 5, at 99 (describing Kingston press and attempts to keep it out of authorities’ hands).

Id. at 85.


See Patterson, supra note 26, at 6 (describing censorship efforts).

Id.

See Siebert, supra note 5, at 221 (listing several press control regulations).

See, e.g., id. at 221, 228, 238 (describing authorization of Council of State to determine number of presses).

Licensing of the Press Act, 1662, 14 Car. 2., c. 33 (Eng.) (emphasis added).

Id. §§ 11-12.

Id. § 11.

Rose, supra note 33, at 13; see also id. at 15 (“Since both copyright and censorship were understood in terms of regulation of the press, it was difficult even to think about them as separable practices.”).

See id. at 15 (noting Stationers’ Company monopoly).

See id. at 22 (describing Parliamentary edict of 1642, one of few acts that gave authors any rights).

See Siebert, supra note 5, at 68 (discussing Stationers’ Company).
See id. at 134-36 (describing tight control Stationers’ Company had over printing industry).

72 See id. at 86 (noting success of regulations during Elizabeth’s reign).

73 Id. at 140.


75 Milton, supra note 74.

76 Siebert, supra note 5, at 196.

77 Hocking, supra note 74, at 5 (stating Milton’s belief that truth and falsehood should grapple freely).

78 Id. at 192.

79 Id. at 193 (“[T]he Press may be free for any man that writes nothing highly scandalous or dangerous to the state.” (quoting Walwyn)).

80 Id. at 194-95 (quoting Robinson as advocating “greater liberty of speech, writing, Printing”).

81 Id. at 199-201.

82 Id. at 201.


84 Id. at 331.

85 See id. at 332 (noting Stationers’ Company monopoly).

86 Id. at 337.

87 Daniel Defoe, Essay on the Regulation of the Press 12 (Basil Blackwell 1704).
88 Id. at 27.


91 Id. at 13-14.

92 Id. at 18; see also Siebert, supra note 5, at 307 (noting Stationers’ argument that failure to revive bill would result in impoverishment of English families and “enriching of Dutch printers”).

93 Deazley, supra note 90, at 28; Siebert, supra note 5, at 306.

94 Feather, supra note 89, at 50.

95 See infra note 105 and accompanying text (discussing Stationers’ efforts to have another Printing Act enacted).

96 See generally Deazley, supra note 90, at 1-29 (discussing various legislation and proposed legislation leading up to Statute of Anne).

97 Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

98 Id.

99 Locke, supra note 83, at 331.

100 See Rose, supra note 33, at 47-48 (suggesting that authors were included in Statute of Anne in order to prevent monopolies). Patterson notes that the switch from publishers to authors being entitled to copyrights did not pose any threat of press control because “even the most prolific author would produce a fraction of press output.” Patterson, Free Speech, supra note 26, at 18.

101 See Rose, supra note 33, at 47 (“Parliament . . . was concerned about stationers’ monopolies, and so the statutory copyright was limited in term.”).

102 Id. at 4.

103 See Statute of Anne, 1710, 8 Ann., c. 19 (Eng.). The reasons for Parliament’s inability to enact continued printing controls were probably several, including division within Parliament and the ineffectiveness of the old regime. See Siebert, supra note 5, at 260, 300-01, 306 (noting some reasons for failure to enact printing controls). The demise of the Printing Acts was also precipitated by antipathy for them and the growing calls for the freedom of the press; by the 1700s, it was no longer politically tenable for the
government to openly oppose the freedom of the press. See id. at 305 (“The rhetoric of the times called for tactical expressions of political belief in the freedom of the press.”).

104 See Rose, supra note 33, at 32 (describing history of expiration of final Printing Act).

105 See Deazley, supra note 90, at 28-29 (“This concluded the thirteenth attempt in just under ten years to provide some form of statutory regulation for the press . . . .”).

106 See Statute of Anne, 1710, 8 Ann., c. 19 (Eng.). Even with the lapse of the Printing Acts, the freedom of the press was not necessarily guaranteed or complete. Those who advocated for a freedom of the press were willing to allow some limitations, such as liability for certain printed material under the common law. See Deazley, supra note 90, at 4 (noting that writers of treasonous and seditious books still could be punished under common law). Prosecutions for seditious libel continued into the 1800s in England. See William H. Wickwar, The Struggle for the Freedom of the Press, 1819-1832, at 102 (1928) (“In 1819 prosecutions for seditions and blasphemous libel were set going all over the country . . . .”). The same question over seditious libel and its relationship to the freedom of the press would recur in the United States with the Sedition Act of 1798, which expired in 1801 and was never renewed. See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 n.16 (1964) (“The [Sedition] Act expired by its terms in 1801.”).

107 Rose, supra note 33, at 3-4.

108 Wickwar, supra note 106, at 13-14 (“The Freedom of the Press must be held to embrace the whole practice of printing, and to refer as much to the printing-press as to its products.”).


111 Id.


113 William Blackstone, 4 Commentaries 151 (Robert Bell ed., 1771) (emphasis added).

114 Id. at *152 n.a.

115 Id.

116 Id.
Two years after the Statute of Anne was passed, Parliament enacted the Stamp Act of 1712, which imposed a duty on all paper used for printed materials. See Deazley, supra note 90, at 43-44 (discussing taxes relevant to “book trade”). Although the Stamp Act may have been enacted in part to restrict the amount of material published by the press, the penalty for failure to pay the duty on paper was the loss of copyright (“all Property therein”) in the underlying work—a result that was arguably consistent with the freedom of the press in that it immediately allowed everyone to “freely print and publish” the work. Id. at 44 (quoting Stamp Act, 1712, 10 Ann., c. 18 (Eng.)). The Stamp Act remained controversial in England, however, with critics attacking it as a form of censorship. See Eric Neisser, Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas, 74 Geo. L.J. 257, 263 (1985) (“[D]uties proved highly successful in squelching the more inexpensive and popular publications.”). The Act was finally repealed in 1861. Id. In 1765, Parliament enacted a similar Stamp Act for the American colonies, in order to help recover the costs of the Seven Years War, but the Act was repealed within a year due to the vocal protests of the colonists against “taxation without representation.” Id. at 263-64.


See Patterson & Joyce, supra note 26, at 944 (examining Founders’ views on relationship between Free Press and Copyright Clauses).

Id. at 946.

U.S. Const. art. I, § 8, cl. 8.

Patterson & Joyce, supra note 26, at 944.


See Ochoa & Rose, supra note 38, at 909, 909-13, 925-27 (discussing abuse of monopoly grants in England and Framers’ aversion to monopolies).

Id.

132 Bugbee, supra note 122, at 1.

133 Patterson & Joyce, supra note 26, at 910.

134 Id. The Free Speech Clause was also relevant to copyright, but much less discussed during the Framing compared to the Free Press Clause.


136 Id.


139 Id. at 467-68.


141 Id. at 144 n.27.


143 Id.

144 Id.

145 See Black’s Law Dictionary 361 (8th ed. 2004) (defining copyright as “property right in an original work of authorship . . . giving the holder the exclusive right to reproduce . . . [and] distribute . . . the work”).

See supra notes 50-96 and accompanying text. The Antifederalists also pointed to Congress’s powers to tax and to define offenses against the law of nations, as well as the Supremacy Clause, as potentially giving Congress the power to curb the freedom of the press. See A Plebeian, Spring 1788, reprinted in The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins 111 (Neil H. Cogan ed., 1997) (arguing tax power and Supremacy Clause can be used to limit speech); Cincinnatus, Nov. 1, 1787, reprinted in The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins, supra, at 106 (arguing powers to make treaties can be used to restrict speech); The Federal Farmer, Jan. 20, 1788, reprinted in The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins, supra, at 109 (arguing tax power can be used to limit speech); Timoleon, Nov. 1, 1787, reprinted in The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins, supra, at 104-05 (arguing tax power and Supremacy Clause can be used to limit speech).


Id.

Hugh Williamson, Remarks on the New Plan of Government (1788), reprinted in 1 Schwartz, supra note 142, at 551.

See supra note 148 and accompanying text.

Iredell, supra note 149, at 361 (emphasis added).

See supra notes 146-47, 149-50 and accompanying text.

See supra notes 146-47, 149-50 and accompanying text.

See Schwartz, supra note 142, at 932 (noting Iredell’s position as Supreme Court justice).

Iredell, supra note 149, at 361.

Id.

Id.

Id.

Id. (emphasis added).
162 Id.

163 U.S. Const. amend. I.


166 See supra notes 126-56 and accompanying text.

167 See supra notes 126-56 and accompanying text.

168 See supra notes 148, 151 and accompanying text.

169 Blackstone, supra note 113, at 152 n.a.

170 See supra notes 126-69 and accompanying text.


172 Linda L. Berger, Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication, 39 Hous. L. Rev. 1371, 1401-02 (2003) (“When the First Amendment was written, the ‘press’ was literally the same as the printing press, merely a tool that any citizen could use to speak.”); see also William E. Berry et al., Last Rights: Revisiting Four Theories of the Press 156-57 (John C. Nerone ed., 1995) (arguing that “the press” referred to printing press, not newspaper press).

173 See supra notes 126-69, 148, 151 and accompanying text.


175 Noah Webster’s first American dictionary published in 1828 did include the additional definition of “press” to include “[t]he art or business of printing and publishing,” with the following example: “A free press is a great blessing to a free people; a licentious press is a curse to society.” Noah Webster, An American Dictionary of the English Language (Johnson Reprint ed. 1970). The definition was third in the order, following (i) “An instrument or machine by which any body is squeezed” and (ii) “A machine for printing; a printing-press.”

176 Compare infra note 177 and accompanying text, with Siebert, supra note 5, at 22 (noting that first printing press in England dates
to 1476).

177 See Anderson, supra note 171, at 446 (“When the First Amendment was written, journalism as we know it did not exist.”).


179 Id.


181 Id. at 4.

182 Id. at 13-14.

183 See Palsey, supra note 171, at 21 (noting that editors valued “partisanship and party organization”).

184 See id. at 41 (“American political leaders expected that newspapers that had once been instruments of resistance would now be tools of governance.”). Earlier, the history of newspapers in England had followed a similar partisanship. See Deazley, supra note 90, at 11-12 (discussing party biases of English newspapers).

185 Dicken-Garcia, supra note 178, at 32.

186 Id. at 36.


188 See id. at 28 (discussing how many influential papers were “rabidly partisan”).

189 See Dicken-Garcia, supra note 178, at 52-55, 60 (discussing how public demand for facts about Civil War deemphasized opinion function of press).

190 See id. at 98 (noting that full embodiment of objectivity did not emerge until late nineteenth or early twentieth century).

191 See Rose, supra note 33, at 9, 12 (discussing historical regulations on printing books).

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193  Id. at 31.

194  4 Elliot’s Debates on the Federal Constitution 569-70 (1901).


196  See infra notes 197-201 and accompanying text.


198  Address to the Inhabitants of Quebec (1774), reprinted in 1 Schwartz, supra note 142, at 223 (emphasis added).


200  Id. at 465.

201  1 Schwartz, supra note 142, at 266 (emphasis added). The Pennsylvania state constitution referred to the printing press in another clause: “The printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of government.” Id. at 273.


203  Ochoa & Rose, supra note 38, at 922-23.

204  See Andersen, supra note 138, at 471 n.97 (“[Virginia, New York, and North Carolina] demanded the adoption of an amendment guaranteeing freedom of the press.”).

205  Id. at 473.

206  Id. at 478.

207  See generally id. at 475-86 (discussing drafting of and revisions to First Amendment). I recount the changes to the language of the Free Press Clause in the next Part.

208  Holt, supra note 112, at 18-19; see also Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Powers of the States of the American Union 518 (1868) (“[W]e understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords.”).
Anderson, supra note 171, at 446 n.90.

U.S. Const. amend. I.

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

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

My interpretation of “press” is consistent with the Supreme Court’s broad understanding of the term. The Court has never adopted the position that only members of the press can invoke the Free Press Clause. See Pennekamp v. Florida, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring) (“[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it.”).


See infra notes 218-32 and accompanying text.

See infra notes 218-32 and accompanying text.

See infra note 227 and accompanying text.

See infra note 228 and accompanying text.

2 Schwartz, supra note 142, at 1050.

Id. at 1122; see also infra note 229 and accompanying text.

See 2 Schwartz, supra note 142, at 1026 (discussing Madison’s proposals); id. at 1122 (discussing House’s tentative agreed proposals in August 1789).

2 Schwartz, supra note 142, at 842.

Id.

See id. at 1122 (providing House language).
225 Id. at 1153; see also infra note 231 and accompanying text.

226 See infra note 232 and accompanying text.

227 2 Schwartz, supra note 142, at 842.

228 Id. at 1026.

229 Id. at 1122.

230 Id. at 1149.

231 Id. at 1153.

232 Id. at 1160. The Senate agreed to the change. Id. at 1163.

233 2 Schwartz, supra note 142, at 1149 (emphasis added); see also supra note 230 and accompanying text.

234 2 Schwartz, supra note 142, at 1160 (emphasis added); see also supra note 232 and accompanying text.

235 2 Schwartz, supra note 142, at 1160 (emphasis added); see also supra note 232 and accompanying text.


237 The drafters of the First Amendment did use “and” in the last set of clauses involving the right of assembly and the right to petition for redress of grievances. See U.S. Const. amend. I. It is not clear why the drafters chose to use “and” with these last two rights, even though a parallel construction with the rest of the Amendment might suggest that “or” should have been used in this context.

238 Levy and Anderson both conclude that the freedom of the press originated before the freedom of speech. See Leonard Levy, Legacy of Suppression 5-6 (1960) (stating that freedom of speech developed as offshoot of freedom of press); Anderson, supra note 138, at 487 (concurring with Levy). Most state constitutions recognized the freedom of the press, but only one (Pennsylvania) recognized the freedom of speech. Anderson, supra note 138, at 487.

239 Holt, supra note 112, at 19.

240 Id. at 19 (emphasis added).
241 See supra notes 215-40 and accompanying text.

242 See supra notes 238-40 and accompanying text.

243 See Fred Fisher Music Co. v. M. Whitmark & Sons, 318 U.S. 643, 650 (1943) (“As might have been expected, [the copyright statute] reflected its historical antecedents.”).

244 Compare Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831), with supra note 98 and accompanying text. Patterson argued that the Copyright Clause’s specification of “authors” for the exclusive rights to their writings “most likely reflect[s] an intent not to give Congress the power to make a law regulating the press.” Patterson, Free Speech, supra note 26, at 33.

245 See Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831) (indicating no regulation of printing presses).

246 Id.


248 Id.

249 Thomas B. Nachbar, Constructing Copyright’s Mythology, 6 Green Bag 37, 45 (2002).

250 See infra note 251 and accompanying text.

251 See Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831) (including no regulation of mass copying machines); Act of Apr. 29, 1802, ch. 36, 2 Stat. 171 (repealed 1831) (same); Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (repealed 1909) (same); Act of March 3, 1891, ch. 565, 26 Stat. 1106 (repealed 1909) (same); Act of March 4, 1909, ch. 320, 35 Stat. 1075 (repealed 1976) (same); Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (same); see also Patterson, Free Speech, supra note 26, at 35 (noting how U.S. copyright law in nineteenth century did not allow control over printing press).


254 17 U.S.C. §§ 1001-1010 (2000); see also Joseph D. Liu, Regulatory Copyright, 83 N.C. L. Rev. 87, 118 (2004) (“[P]erhaps most significantly, the AHRA for the first time expressly regulated technology within a particular market.”).
See Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 Colum. L. Rev. 1613, 1622-26 (2001) (“The Supreme Court has been more reluctant to [give full protection] when it has perceived that groups of copyright owners . . . were seeking to prohibit a new form of reproduction and distribution . . . .”).

Id. at 1623.

See supra note 251 and accompanying text.

See *Eldred v. Ashcroft*, 537 U.S. 186, 200 (2003) (“[T]he First Congress accorded the protections of the Nation’s first federal copyright statute to existing and future works alike.”).

See generally Michael Bhargava, Comment, The *First Congress Canon and the Supreme Court’s Use of History*, 94 Cal. L. Rev. 1745 (2006) (arguing Supreme Court has consistently used actions of First Congress as proof of Constitution’s meaning).


Eldred, 537 U.S. at 200 (quoting N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)).


See infra notes 266-75 and accompanying text.

See infra note 266 and accompanying text.


See Siebert, supra note 5, at 238 (discussing Act of 1662).

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

See infra notes 270-72 and accompanying text.

See infra note 272 and accompanying text.


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

See, e.g., Red Lion Broad., Co. v. FCC, 395 U.S. 367, 394 (1969) (discussing regulation of broadcast radio licenses under First Amendment). Whether the Supreme Court should rely on the Free Press Clause separate from the Free Speech Clause is a question that I leave for future inquiry. One could argue that as long as the Free Speech Clause is understood to cover whatever the Free Press Clause would cover, the Court’s current approach is acceptable. Cf. Amar, supra note 214, at 18 (“I suspect that we would pretty much use the First Amendment in the same way, using the speech clause to pick up whatever slack was created by the absence of a press clause.”).

Within the scholarship related to the freedom of the press, much of the focus has been on the prepublication licensing requirement under the British Crown, a classic prior restraint under First Amendment jurisprudence. See, e.g., Anderson, supra note 138, at 494-99 (discussing and critiquing “prior restraint” interpretation). This focus has led to the Printing Acts sometimes being referred to as “Licensing Acts.” See Astbury, supra note 59, at 296 (“This Printing Act was a comprehensive measure for the control of the press, but it is often referred to as the Licensing Act because of its provisions for the prepublication, or, more correctly, the preprinting censorship of all forms of printed materials.”). The Printing Acts required more than just licensing, however. See supra notes 40-70 and accompanying text. Very little attention has been devoted to the Crown’s limit on the total number of presses under the Printing Acts.

Patterson & Joyce, supra note 26, at 942-43.

See id. (discussing generally history of Copyright Clause and Free Press Clause).

See infra notes 283-338 and accompanying text.

See supra notes 126-69 and accompanying text.

See infra notes 361-78 and accompanying text.

See Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (noting that proximity of adoption of Copyright Clause and First Amendment indicates Framers thought they were compatible).


Id. at 542-43.

See infra notes 288-90 and accompanying text.

See Harper & Row, 471 U.S. at 557 (noting that copyright protection incentivizes creation and financing of public figures’ memoirs and protects public’s right to this information).

Id. at 558 (emphasis added).

See supra note 150 and accompanying text.

See supra note 150 and accompanying text.

Harper & Row, 471 U.S. at 556.

Id. (emphasis added) (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 723 F.2d 195, 203 (2d Cir. 1983)).

Id. at 560.

Id.

Paul Goldstein, Copyright and the First Amendment, 70 Colum. L. Rev. 983, 989, 1018 (1970).

Nimmer, Copyright, supra note 26, at 1192 (emphasis added).

Id. at 1185.


balancing").

Sullivan, 376 U.S. at 283-84.


Sullivan, 376 U.S. at 271, 272 (quoting 4 Elliot’s Debates on the Federal Constitution 571 (1876) and NAACP v. Button, 371 U.S. 415, 433 (1963)).

See infra notes 304-07 and accompanying text.


See id. at 577 (noting that fair use allows courts to avoid rigid application of copyright statute where it would stifle creativity that law is designed to foster).

Id. at 591-92.


Eldred, 537 U.S. at 221.
Id. (citation omitted).

Id.

Id. at 221.

Id.

Id. at 219-20.


See id. at 661-62 (“[T]he appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny . . . .”).

Eldred, 537 U.S. at 220-21.

See Turner Broad. Sys., 512 U.S. at 642 (“Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.”).

See Eldred, 537 U.S. at 221 (“But when . . . Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.”).

Id.

Id.

Id.

Id. at 219.

Cf. Lawrence Lessig, Creative Economies, 2006 Mich. St. L. Rev. 33, 41 (2006) (arguing that one traditional contour of copyright was requirement of “opt-in” system of copyright under which authors had to satisfy formalities to obtain and maintain copyrights); Christopher Sprigman, Reform(ali)zing Copyright, 57 Stan. L. Rev. 485, 491-500 (2004) (arguing that prior formalities of U.S. copyright law dating back to first Copyright Act constitute traditional contours of copyright protection). The Ninth Circuit rejected a First Amendment challenge based on this argument. See Kahle v. Gonzales, 487 F.3d 697, 699-700 (9th Cir. 2007) (rejecting
claim that change from “opt-in” to “opt-out” copyright system triggered First Amendment scrutiny), cert. denied, 76 U.S.L.W. 3344 (Jan. 7, 2008) (No. 07-189).

Eldred, 537 U.S. at 220-21.

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

See infra notes 333-41 and accompanying text.

Eldred, 537 U.S. at 221.


Eldred, 537 U.S. at 219 (citing Harper & Row, 471 U.S. at 558).

See id. at 219-21 (characterizing fair use and idea-expression dichotomy as “traditional First Amendment safeguards”).


Id. at 530.

Id. at 541.

Id. at 530 (emphasis added).

Id. (emphasis added).

Golan v. Gonzales, 501 F.3d 1179, 1184 (10th Cir. 2007). In the interest of full disclosure, I should inform the reader that I worked as a part of the legal team advocating the position ultimately adopted by the court of appeals.

Id. at 1181-83; see also 17 U.S.C. § 104A (2000) (titled Copyright in restored works).

Golan, 501 F.3d at 1194-95 (“We conclude that the idea/expression dichotomy and the fair use defense are not designed to combat the threat to free expression posed by § 514’s removal of works from the public domain.”).
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346    Id. at 1192.

347    See id. at 1194 (finding such “interference with plaintiffs’ rights is subject to First Amendment scrutiny”).

348    See id. at 1197 (holding that statute “altered the traditional contours of copyright protection in a manner that implicates plaintiffs’ right to free expression” such that First Amendment review is required upon remand).

349    See id. at 1184 (defining “one of these traditional contours”).

350    See supra note 348 and accompanying text.

351    See supra notes 283-342 and accompanying text.

352    See supra notes 126-209 and accompanying text.

353    See supra notes 283-311 and accompanying text.

354    See infra notes 356-78 and accompanying text.

355    This Article leaves for another day whether the Sony safe harbor is constitutionally required.


357    Id.

358    See supra notes 241-51 and accompanying text.

359    Sony, 464 U.S. at 420 (noting that plaintiffs sought “an injunction against the manufacture and marketing of Betamax VTR’s”).


361    Sony, 464 U.S. at 442.

362    Id.

363    Id.
In Sony the Supreme Court appeared to suggest, if not to hold, that the Sony safe harbor applies to vicarious liability (in addition to contributory liability). See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 n.17 (1984) (“[R]easoned analysis of respondents’ unprecedented . . . claim necessarily entails consideration of arguments and case law which may also be forwarded under other labels . . . .’’); see also *Grokster*, 545 U.S. at 930 n.9 (quoting Sony). The Ninth Circuit, however, has held that Sony does not shield a defendant against vicarious liability. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001) (Sony “provides a defense only to contributory infringement, not to vicarious infringement”). The Seventh Circuit has taken the opposite view. See *In re Aimster Copyright Litig.*, 334 F.3d 643, 654 (7th Cir. 2003) (“[T]he Court, treating vicarious and contributory infringement interchangeably, . . . held that Sony was not a vicarious infringer either.”).


See Harper & Row, 471 U.S. at 560 (characterizing “idea/expression” and fair use doctrine as “First Amendment protections”).


See Sony, 464 U.S. at 442 (recognizing rule for technology capable of substantial noninfringing uses).

Id.

See infra note 387 and accompanying text.

As noted by the Supreme Court, the district court found that the video recorder “served the public interest in increasing access to television programming, an interest that ‘is consistent with the First Amendment policy of providing the fullest possible access to information through the public airwaves.’ ” Sony, 464 U.S. at 425 (quoting Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm., 412 U.S. 94, 102 (1973)). The Supreme Court relied on this view in its decision. See id. at 421 (noting that time shifting “enlarges the television viewing audience”); see also id. at 454 (acknowledging “public interest in making television broadcasting more available”).

Sony, 464 U.S. at 454-55.

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

Id. at 442.

Id.

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


Sony, 464 U.S. at 430.


396  Sony, 464 U.S. 417.

397  Id. at 421.

398  See supra notes 243-62 and accompanying text.

399  See Sony, 464 U.S. at 421 (describing copyright holders’ “attempt to impose copyright liability upon the distributors of copying equipment” “unprecedented”).

400  Id.

401  See supra notes 73-121 and accompanying text.


403  See Siebert, supra note 5, at 221, 228, 238 (describing Printing Acts of 1649, 1653, and 1662); see also supra notes 33-70 and accompanying text.

404  See supra notes 33-70 and accompanying text.

405  See supra notes 73-121 and accompanying text.

406  See supra notes 73-121 and accompanying text.


411  See supra notes 33-70 and accompanying text.

412  101 U.S. 99 (1879).

See infra notes 418-21 and accompanying text.

The Court has attempted to justify the deferential standard for broadcasting based on (i) the premise that the spectrum available for broadcasting is scarce, thus justifying governmental intervention; and (ii) the perception that the “pervasiveness” of broadcast reception in the privacy of homes does not allow viewers to readily screen out content before viewing. See FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (plurality) (noting “pervasive presence” of broadcast media); Red Lion, 395 U.S. at 390 (making scarcity argument). Both rationales have been roundly criticized as no longer, if ever, true. See, e.g., Yoo, supra note 18, at 266-306 (discussing rise and demise of scarcity doctrine and critiquing pervasiveness rationale).

423 Turner Broad. Sys., 512 U.S. at 637.

services, surcharges on non-locally produced cable programming, municipalities’ grants of exclusive local cable franchises, open access requirements for cable Internet service provision, limits on cable channel allocation to affiliated programmers (vertical ownership rules), limits on the total number of subscribers that can be served by a single cable provider (horizontal ownership rules), and ‘must carry’ requirements as applied to satellite television providers”).

425 Kovacs, 336 U.S. at 87.

426 Id. at 85.

427 Saia, 334 U.S. at 558 n.1.

428 Id. at 560.


431 Id. (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)). Robert Post describes the scope of the First Amendment as extending not only to speech and any “medium” through which the speech—e.g., a projector displaying a movie—occurs, but also to the entire social interaction itself. Robert Post, Encryption Source Code and the First Amendment, 15 Berkeley Tech. L.J. 713, 716-17 (2000). Post defines “medium” as “a set of social conventions and practices shared by speakers and audience.” Robert Post, Recuperating First Amendment Doctrine, 47 Stan. L. Rev. 1249, 1253 (1995).

432 Sullivan, 376 U.S. at 264.

433 See supra notes 418-21 and accompanying text.

434 See supra notes 284-311 and accompanying text.


437 Even if a court had found secondary liability against Sony and ordered the payment of damages, First Amendment scrutiny still would be required. Cf. Sullivan, 376 U.S. at 256 (addressing First Amendment standards of liability for award of damages in libel action). See generally Mark A. Lemley & Eugene Volokh, Freedom of Speech and Injunctions in Intellectual Property Cases, 48 Duke L.J. 147 (1998) (explaining that injunctions to enforce intellectual property rights are form of content-based speech restriction by government and should not be exempt from First Amendment scrutiny).

See Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189, 198 (1983) (noting that First Amendment is especially concerned with extent to which laws distort public debate, perhaps even more so than extent to which total quantity of communication is reduced).


Just think of Lincoln’s Gettysburg Address, or Martin Luther King Jr.’s “I Have a Dream” speech.


Kathleen Sullivan, Free Speech and Unfree Markets, 42 UCLA L. Rev. 949, 963 (1995) (“Whether the exchange of ideas is valued for its connection to truth, self-government, or individual autonomy, the point in each setting is that speech is valuable independent of people’s willingness to pay for it.”).
See Schneider v. State, 308 U.S. 147, 162 (1939) (“Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press.”).

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

See Peter S. Menell & David Nimmer, Unwinding Sony, 95 Cal. L. Rev. 941, 980-81 (arguing that Sony Court engaged in flawed statutory interpretation).

See Peter S. Menell & David Nimmer, Legal Realism in Action: Indirect Copyright Liability’s Continuing Tort Framework and Sony’s De Facto Demise, 55 UCLA L. Rev. 143, 145-47 (2007) (arguing that judicial, legislative, and market responses after Sony reflect products liability standard of “reasonable alternative design” more than Sony safe harbor). So much do Menell and Nimmer dislike the Sony doctrine they even have a third article attacking Sony in publication. See id. at 185 n.221 (citing to third article against Sony doctrine as forthcoming).


Id. at 944, 980-82.

Id. at 996; see also id. at 994 (“Yet it is not a kinship with patent law, as Sony contends, but rather a common wellspring nourishing both copyright and patent law: tort law. For nearly two centuries, courts have looked to tort principles in determining the contours of copyright liability.”) (citation omitted)).

Id. at 982.

Id. at 980.

Id. at 1017-19.

Id. at 995 (pointing to references in legislative history of 1976 Copyright Act to joint liability, secondary liability, and remedies as basis for concluding “tort doctrine furnishes the background law for determining what circumstances render someone liable for infringement and, if liable, the scope of remedies”).


Id.

See Jean Macchiaroli Eggen & John G. Culhane, Gun Torts: Defining a Cause of Action for Victims in Suits Against Gun Manufacturers, 81 N.C. L. Rev. 115, 142 (2002) (“As a public policy matter, courts and commentators who espouse the majority view accept the result that manufacturers of guns that are foreseeably used for illegal purposes may escape liability for the injuries caused by their products.”); see also Alfred C. Yen, Sony, Tort Doctrines, and the Puzzle of Peer-to-Peer, 55 Case W. Res. L. Rev. 815, 860 (2005) (“Courts have . . . generally refused to extend respondeat superior to its logical limit because it seems either
inefficient or unfair to extend liability beyond situations in which defendants have a fairly close unity of purpose and interest with underlying tortfeasors.

Cf. Midlantic Nat’l Bank v. N.J. Dep’t of Envtl. Prot., 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.").


See Menell & Nimmer, supra note 451, at 995-96 (discussing legislative history).


Id. at 996.


See Menell & Nimmer, supra note 452, at 145 (discussing reasonably available alternative design).

See supra note 469 and accompanying text.

See Carl T. Bogus, The Third Revolution in Products Liability, 72 Chi.-Kent L. Rev. 3, 16 (1996) (“But some of the most prominent products liability scholars have been strongly critical of the new Restatement—and of the alternative design requirement in particular—and it is not likely that the forthcoming Restatement will command the same degree of respect and acceptance as did section 402A.” (citation omitted)).


See Restatement (Second) of Torts § 402A (1965) (products liability limited to “physical harm” to user or consumer, or their property); Restatement (Third) of Torts § 21 & cmt. d (2007) (“[A] defective product may destroy a commercial business establishment, whose employees patronize a particular restaurant, resulting in economic loss to the restaurant. The loss suffered by the restaurant generally is not recoverable in tort and in any event is not cognizable under products liability law.”).

U.S. Const. art. I, § 8, cl. 8.

See Patterson, supra note 26, at 84 (“Thus, under Elizabeth, letters patent became merely monopolistic grants, and there was little distinction made between industrial and printing patents.”); see also Kaplan, supra note 26, at 3 (discussing Mary’s chartering of Stationers by “letters patent of 4 May 1557”).

See Patterson, supra note 26, at 85-87 (showing “first printing patent was apparently granted in 1518, for a book”).

Rose, supra note 33, at 45.

Id. at 88.

Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 439 n.19 (1984) (“The two areas of the law, naturally, are not identical twins, and we exercise the caution which we have expressed in the past in applying doctrine formulated in one area to the other.”).

U.S. Const. art. I, § 8, cl. 8.

See Menell & Nimmer, supra note 451, at 987-88 (dismissing other Supreme Court cases).

222 U.S. 55 (1911).

See id. at 63 (applying principles of contributory liability and citing Rupp & Wittgenfeld Co. v. Elliott, 131 Fed. 730, 732 (6th Cir. 1904) and Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co., 152 U.S. 425, 433 (1894)). Harper v. Shoppell, 28 F. 613 (C.C.N.Y. 1886), was the other case cited by the Kalem Court. Harper was a copyright case that itself relied on a patent case for principles of contributory infringement. 28 F. at 615 (citing Wallace v. Holmes, 29 F. Cas. 74, 80 (1871)).

See, e.g., eBay Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837, 1840 (2006) (“Like a patent owner, a copyright holder possesses the right to exclude others from using his property.” (internal quotation omitted)); Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 33 (2003) (“The right to copy, and to copy without attribution, once a copyright has expired, like ‘the right to make [an article whose patent has expired]-including the right to make it in precisely the shape it carried when patented-passes to the public.’” (quoting Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 230 (1964))); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 237 (1964) (“To forbid copying would interfere with the federal policy, found in Art. I, § 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.”); Fox Film Corp. v. Doyal, 286 U.S. 123, 127-28 (1932) (“A copyright, like a patent, is ‘at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals and the incentive to further efforts for the same important objects.’” (quoting Kendall v. Winsor, 62 U.S. 322, 328 (1858))); Bauer & Cie v. O’Donnell, 229 U.S. 1, 12-13 (1913) (“While that [copyright] statute differs from the patent statute in terms and in the subject-matter intended to be protected, it is apparent that in the respect involved in the present inquiry there is a strong similarity between and identity of purpose in the two statutes.”).

488 See Folsom v. Marsh, 9 F. Cas. 342, 348 (1841) (establishing fair use doctrine).

489 See Baker v. Selden, 101 U.S. 99, 102 (1880) (establishing idea-expression dichotomy); see also supra note 306 and accompanying text.


492 Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”); see also Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985) (asserting courts should not try to determine “what is and what is not news” for fair use analysis) (internal quotation omitted); Ty, Inc. v. Publ’ns Int’l Ltd., 292 F.3d 512, 523 (7th Cir. 2002) (describing Bleistein rationale as way to avoid First Amendment problem).

493 Menell & Nimmer, supra note 452, at 143.

494 See id. at 146-48 (explaining “the broad gulf between the idealized (and idolized) Sony safe harbor and the practical reality”).


496 Menell & Nimmer, supra note 452, at 204.

497 Id. at 201.


499 See Menell & Nimmer, supra note 452, at 148-49 (“The Sony safe harbor has spawned an environment in which some technologists design software and products based not on what is socially optimal-in terms of balancing functionality against adverse impacts-but rather on how to avoid liability for clearly foreseeable and manageable harms.”).

500 See id. at 188-89 (discussing audiocassettes).

501 See id. at 189-90 (discussing digital audio tape).

502 See id. at 190-92 (discussing computers and related devices).
503 See id. at 192-93 (discussing portable digital music devices).

504 See id. at 193 (discussing digital encoding technology).

505 See id. at 193-96 (discussing digital video recorders).

506 See id. at 197-201 (discussing peer-to-peer technology).

507 See, e.g., id. at 188 (“Several factors weighed against direct litigation [in the case of audiocassettes], including . . . that cassette recording devices had substantial noninfringing uses . . . .”); id. at 191 (“[L]itigation against computer manufacturers was hardly an option, with or without the Sony safe harbor.”); id. at 193 (recognizing that RIAA avoided raising contributory infringement claim against maker of mp3 device because of “its considered judgment that the Sony staple article of commerce doctrine barred such an allegation”); id. at 193 (“Hollywood recognized that camcorders have predominantly noninfringing uses-such as for making home movies.”); id. at 200-01 (acknowledging that Google relied in part on Sony safe harbor in its defense to copyright infringement claims).

508 Id. at 187-88.

509 Examples of the many amicus briefs filed in Grokster include the following: Brief of Amici Curiae Emerging Technology Cos. in Support of Respondents, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (No. 04-480); Brief of Amici Curiae The Consumer Electronics Ass’n et al. in Support of Affirmance, Grokster, 545 U.S. 913 (No. 04-480); Brief of Amici Curiae AltNet, Inc. in Support of Respondents, Grokster, 545 U.S. 913 (No. 04-480); Brief of Amici Curiae Distributed Computing Industry Ass’n in Support of Respondents, Grokster, 545 U.S. 913 (No. 04-480); Brief of Intel Corp. as Amicus Curiae Supporting Affirmance, Grokster, 545 U.S. 913 (No. 04-480); Brief of Internet Amici: Cellular Telecommunications & Internet Ass’n et al. in Support of Affirmance, Grokster, 545 U.S. 913 (No. 04-480).

510 In re Aimster Copyright Litig., 334 F.3d 643, 653 (7th Cir. 2003) (“Even when there are noninfringing uses of an Internet file-sharing service, moreover, if the infringing uses are substantial then to avoid liability as a contributory infringer the provider of the service must show that it would have been disproportionately costly for him to eliminate or at least reduce substantially the infringing uses.”).


513 See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 936 (2005) (“For the same reasons that Sony took the staple-article doctrine of patent law as a model for its copyright safe-harbor rule, the inducement rule, too, is a sensible one for copyright.”).

514 Each of the post-Sony cases finding secondary liability that Menell and Nimmer discuss involved some act of the defendant that went beyond merely designing and distributing a technology. See Menell & Nimmer, supra note 452, at 175-85 (discussing examples); see also In re Aimster Copyright Litig., 334 F.3d 643, 651 (7th Cir. 2003) (“In explaining how to use the Aimster software, the tutorial gives as its only examples of file sharing the sharing of copyrighted music, including copyrighted music that the recording industry had notified Aimster was being infringed by Aimster’s users. The tutorial is the invitation to infringement..."
that the Supreme Court found was missing in *Sony*); *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 903-04 (N.D. Cal. 2000) (citing internal corporate documents of Napster indicating that its executives desired not only to make “pirated music available but also [to] push [ ] demand”), aff’d in part and rev’d in part, 239 F.3d 1004 (9th Cir. 2001); *Cable/Home Commc’n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 846 (11th Cir. 1990) (holding that defendant “utilized and advertised these devices primarily as infringement aids and not for legitimate, noninfringing uses”); *A & M Records, Inc. v. Abdallah*, 948 F. Supp. 1449, 1457 (C.D. Cal. 1996) (holding that defendant “acted as a contact between his customers and suppliers of other material necessary for counterfeiting, such as counterfeit insert cards; he sold duplicating machines to help his customers start up a counterfeiting operation or expand an existing one; he timed legitimate cassettes for his customers to assist them in ordering time-loaded cassettes; and he helped to finance some of his customers when they were starting out or needed assistance after a police raid”).

See, e.g., *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 795 n.3 (9th Cir. 2007) (recognizing that credit card services are capable of substantial noninfringing uses); *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 727 (9th Cir. 2007) (“Nor can Google be held liable solely because it did not develop technology that would enable its search engine to automatically avoid infringing images.”).

See *Menell & Nimmer*, supra note 452, at 160-68 (discussing AHRA and DMCA).

Id. at 169 (“The experience debunks any notion that Congress, regardless of its prior intent, after the Sony decision hitched its star to the staple article of commerce bandwagon. To the contrary, the various amendments canvassed above betray the opposite sensibility.”).

See Edward Lee, *The Ethics of Innovation: p2p Software Developers and Designing Substantial Noninfringing Uses Under the Sony Doctrine*, 62 J. Bus. Ethics 147, 153 (2005) (“Aimster would seem to expose every such designer to the charge of being ‘willfully blind’ to copyright infringement for not designing its technology to stop infringement-and thus subject to costly litigation in which they must attempt to justify their design features.”); R. Anthony Reese, *The Problems of Judging Young Technologies: A Comment on Sony, Tort Doctrines, and the Puzzle of Peer-to-Peer*, 55 Case W. Res. L. Rev. 877, 897-98 (2005) (“As a result, if the technology supplier’s liability turns on whether it reasonably designed the technology to reduce infringement, rational developers may be inclined to design their technology to limit activities that might infringe, but that might instead turn out to be found noninfringing.”).


See *Menell & Nimmer*, supra note 452, at 148 (“In little more than a decade after the Court ruled, the sale and rental of videotapes eclipsed box office revenues.”).

See id. at 145 (arguing it “would have yielded the same result”); *Menell & Nimmer*, supra note 451, at 1018-22 (discussing reasonable alternative design theory).

See Lee, supra note 518, at 148 (“Indeed, in the 1980s, the movie industry had its own preferred technology of choice: the videodisc player, which did not have recording capability. In fact, MCA, a developer of the videodisc player, even owned Universal Studios, one of the plaintiffs in the Sony case seeking to bar the competing betamax.” (citation omitted)); id. at 150 (“The movie industry had in fact attempted to present an expert to testify that the betamax could be equipped with a jamming device that would stop unauthorized copying at a cost of $15 per machine, but the district court rejected this line of testimony.”).

See *In re Aimster Copyright Litig.*, 334 F.3d 643, 648 (7th Cir. 2003) (“Sony could have engineered its video recorder in a way that would have reduced the likelihood of infringement, as by eliminating the fast-forward capability, or, as suggested by the
dissent, by enabling broadcasters by scrambling their signal to disable the Betamax from recording their programs (for that matter, it could have been engineered to have only a play, not a recording, capability).” (citation omitted)). Although Menell and Nimmer doubt that filtering would have proven to be feasible, their view is colored by how the technology now looks “in retrospect.” Menell & Nimmer, supra note 451, at 1020. And, in any event, they would have permitted the movie studios to present an expert to prove such filtering technology—which inevitably would have made the question for the fact-finder to decide. Id.


See Reese, supra note 518, at 894 (providing example of alternative design to prevent copyright infringement).


See Lee, supra note 518, at 151 (“What Aimster appears to imagine is a court sitting as a Technology Review Board to evaluate the costs and benefits of particular design features. This kind of inquiry, however, is inherently speculative and indeterminate.”); Reese, supra note 518, at 878 (“[A products liability or alternative reasonable design standard] . . . will likely result in many instances in imposing liability on suppliers of technologies that produce a net social benefit, because it will generally require courts (and technology developers) to evaluate the reasonableness of a technology’s design, and its costs and benefits, at a relatively early stage in the evolution of the technology, when important information (particularly about the technology’s potential beneficial uses) is likely to be poor.”).

See United States v. Microsoft Corp., 253 F.3d 34, 49-50 (D.C. Cir. 2001) (discussing challenges faced by courts in dealing with rapidly developing technologies); Name Space, Inc. v. Network Solutions, Inc., 202 F.3d 573, 584 & n.11 (2d Cir. 2000) (“Mindful of the often unforeseeable impact of rapid technological change, we are wary of making legal pronouncements based on highly fluid circumstances, which almost certainly will give way to tomorrow’s new realities.”).

Adler & Posner, supra note 447, at 154-62 (conceding that cost-benefit analysis cannot make judgments based on rights or nonwelfare values).

See Sunstein, supra note 440, at 829-31 (discussing whether speech can be commodity).

See supra note 448 and accompanying text.

Sunstein, supra note 440, at 829-31. Cost-benefit analysis, however, requires a price tag or “money measure”: “it seeks to monetize the welfare effect of policy on a given individual by asking how much she is willing to pay/accept in return for that policy.” Adler & Posner, supra note 447, at 157.
Lee, supra note 518, at 151; see also Reese, supra note 518, at 887 (“But when we are unlikely to be able to quantify a technology’s actual costs and benefits, or perhaps even their relative magnitudes, with any degree of certainty, Sony’s prophylactic rule generally shielding against liability seems far less ridiculous than the firm numbers in the hypothetical might suggest.”).


537 See supra notes 449-50 and accompanying text.

538 376 U.S. 254, 269 (1964) (“It must be measured by standards that satisfy the First Amendment.”).


42 GALR 309