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Articles

FREEDOM OF THE PRESS 2.0

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***312 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.¹ The printing press itself was left off-limits from monopoly and government control,² 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.³ That limitation on the number of printing presses, along with the requirement of licensing and registration before any work could be published,⁴ effectively served the dual ends of censorship and monopoly. Limiting the number of presses was intended to limit publications deemed heretical or piratical.⁵ 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,⁶ which did not regulate any aspect of the printing press or the machines of mass publication.⁷ 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.⁸

***313** 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.⁹ The Supreme Court rejected what it characterized as an “unprecedented” attempt by copyright holders to stop production of a technology.¹⁰ 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.”¹¹

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.¹² 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.¹³ Although the Sony safe harbor offers some immunity to technology developers, it is not blanket immunity.¹⁴

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.¹⁵ Although ***314** these circumventing technologies may be

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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 litigation¹⁶ and all digital receivers for radio and television under the controversial “broadcast flag” proposal in Congress.¹⁷

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, *315 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.¹⁸ 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 *316 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.¹⁹ 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.²⁰ 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)²¹ and Congress’s power to grant copyrights.²²

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 *317 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.²³

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.²⁴ 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.²⁵ 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.²⁶ It is perhaps even more of a mystery that the *318 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.²⁷ The freedom of the press encapsulated that skepticism, and the Free Press Clause codified it into law.²⁸ 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,²⁹ including severe limits on the total number of presses that were allowed.³⁰ 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 *319 were viewed as suspect.³¹ 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.³² 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.³³ The Statute of Anne, the first English copyright act enacted in 1710,³⁴ was a part of the eventual dismantling of the old regime under the Crown that regulated virtually all aspects of the printing press.³⁵ This dismantling of the old system was brought about by a growing recognition of the concept of the freedom of the press.³⁶ Copyright law reflected this new freedom by granting no authority to the government, publishers, or authors to limit the technology of the printing press.³⁷ 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.

*320 1. The Old System of Press Regulation. The protection for an individual's use of the printing press-free of intrusive governmental regulation-was a response to the repressive regime of strict regulation of the press that enabled the Crown and later Parliament to control the production of all printed materials in England from the 1500s until the early 1700s.³⁸

Indeed, the Crown controlled the printing presses in virtually all aspects. The Crown instituted (1) a system of monopolies

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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,³⁹ and (2) a system of licensing under which all materials had to be approved for publication.⁴⁰ 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.⁴¹

Spurred by the religious schism from the Catholic Church, Henry VIII imposed the first prepublication licensing requirement under the Proclamation of 1538.⁴² 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).⁴³ Although Henry and Mary were on opposite sides of the *321 religious schism, both saw the importance of regulating the presses as a way to control the content of publications, particularly, religious views.⁴⁴

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."⁴⁵ 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).⁴⁶ 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.⁴⁷ 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.⁴⁸ 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,⁴⁹ a requirement mirrored in the Stationers' Company's own ordinance that required its member printers to obtain prepublication licenses from its officers.⁵⁰

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.⁵¹ 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 *322 commonly discussed in legal scholarship⁵²), but also the direct regulation of the technology of the printing press itself.⁵³ Starting with Elizabeth, the Crown limited the total number of printing presses in England and who could operate them.⁵⁴ Indeed, the express goal of the Decree was to reduce the total number of printing presses in England from the status quo.⁵⁵ If used without authorization from the Crown, the printing press effectively became contraband.⁵⁶ Throughout this period, "unauthorized" presses arose.⁵⁷ Such presses were illegal and, if found, were subject to seizure and destruction by the Stationers.⁵⁸ The Stationers had the power to conduct (effectively warrantless) searches in order to confiscate illegal presses and materials.⁵⁹ 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.⁶⁰ In Professor Patterson's apt phrase, the Stationers were the "policemen of the press."⁶¹

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.⁶² The Printing Acts of 1649, 1653, and 1662 carried forward the repressive printing controls, including the restrictive limits on the number of printing presses.⁶³ 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, *323 and by ordering and settling the said Art or Mystery of Printing by Act of Parliament, in manner as herein after is expressed."⁶⁴ 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.⁶⁵ The goal was to reduce, by "death or otherwise," the number of master printers to twenty.⁶⁶

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."⁶⁷ The Stationers' Company effectively held a perpetual monopoly over all book printing in England.⁶⁸ 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.⁶⁹ 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 *324 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 maleficent,” 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 Presse 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

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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 1788.¹²² 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.¹²³ At the center of both copyright and the freedom of the press in the early Republic was the technology of the printing *331 press.¹²⁴ 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.¹²⁵

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."¹²⁶ 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.¹²⁷ 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),¹²⁸ it is fairly well accepted that the Framers drafted the Clause in reaction to the abuses of monopoly grants under the Crown in England.¹²⁹ 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."¹³⁰ Accordingly, the Clause acts as both "a grant of power and a limitation."¹³¹ 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.¹³²

But the history of the Copyright Clause did not end with the Constitution's ratification in 1788.¹³³ Another important element *332 came when the Free Press Clause in the Bill of Rights was proposed, debated, and ratified.¹³⁴ 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.¹³⁵ 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."¹³⁶ 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."¹³⁷ The Antifederalists feared that, without a Bill of Rights, Congress could "restrain the printers, and put them under regulation."¹³⁸ Among the Antifederalists' concerns about the lack of a Bill of Rights, the need for a free press clause was paramount.¹³⁹

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.¹⁴⁰ 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.¹⁴¹ 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.¹⁵² 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.¹⁵³

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.¹⁵⁴ 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 Framers on either side of the debate over copyright or the freedom of the press suggested that the restrictions under the Printing Acts *337 should be adopted under the new Constitution.¹⁵⁵ For example, Iredell, who would later become an original Supreme Court justice,¹⁵⁶ 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.¹⁵⁷

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.”¹⁵⁸ 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.”¹⁵⁹

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.”¹⁶⁰ Congress cannot “exercise any other power over the press than this.”¹⁶¹ 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.¹⁶²

*338 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”¹⁶³ 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.”¹⁶⁴ 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.¹⁶⁵ Individuals on both sides of the debate over the Free Press Clause drew explicit connections between the scope of *339 copyright and the freedom of the press.¹⁶⁶ 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.¹⁶⁷ As quoted above, Whitehall and Williamson both expressly described the “licensing” system in England as odious and unconstitutional under the new Constitution.¹⁶⁸ 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 printing 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.¹⁶⁹ 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.¹⁷⁰ 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.¹⁷¹ In fact, it was common to refer to the printing press simply as “the press.”¹⁷² Thomas Sheridan's dictionary defined *340 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.¹⁷³ 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.”¹⁷⁴

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.¹⁷⁵

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.¹⁷⁶ Journalism as an occupation or profession had yet to fully develop by the late 1700s.¹⁷⁷ In early America, printing presses were small-time operations, which consisted of one or two people and required much labor.¹⁷⁸ Printers did not typically *341 investigate news on their own; instead, they usually reported the news by copying it from other sources.¹⁷⁹ 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.¹⁸⁰ 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.”¹⁸¹ The pamphlets were written by amateur writers who held other occupations as “lawyers, ministers, merchants, or planters.”¹⁸²

Early newspapers were also highly partisan, at times even tied to a political party.¹⁸³ This politicization reflected the earlier enlistment of newspapers for the political cause against Great Britain.¹⁸⁴ Historians have even gone so far as to describe this early period of American newspapers as “the era of the party press.”¹⁸⁵ The description is hardly an exaggeration given that the Federalists and Antifederalists both had their own newspapers.¹⁸⁶ To the extent that news was reported without a slant, the information tended to consist of recounts of foreign news from foreign papers.¹⁸⁷ Domestically, news had a much more political slant.¹⁸⁸ 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 *342 telegraph).¹⁸⁹ It took several decades more for “objectivity” to be recognized as the standard for news reporting.¹⁹⁰

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.¹⁹¹

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.”¹⁹² 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.”¹⁹³ 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.”¹⁹⁴ 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.”¹⁹⁵

***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.¹⁹⁶ 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.¹⁹⁷ Even before the American Revolution, the Continental Congress declared in an address to Quebec in 1774:

The importance of this [freedom of the press] consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, 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.¹⁹⁸

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.¹⁹⁹ 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.²⁰⁰ The original state constitution of Pennsylvania recognized: “That the people have a right to freedom of speech, and of writing, and ***344** publishing their sentiments; therefore the freedom of the press ought not to be restrained.”²⁰¹

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.²⁰² (It is noteworthy that Pinckney was also responsible for several Copyright Clause proposals.²⁰³) The movement for a free press clause later resurfaced in the ratifying debates.²⁰⁴ 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.”²⁰⁵ Madison, who was eventually persuaded of the need for a Bill of Rights, adopted the Virginia language in his proposed Free Press Clause.²⁰⁶ Eventually, the language was modified to what is now contained in the First Amendment.²⁰⁷

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 . . .

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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.”²⁰⁸ 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

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the freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated.”²²⁷

*348 (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.”²²⁸

(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.”²²⁹

(4) Senate first change: “That Congress shall make no law abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances.”²³⁰

(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 to the government for the redress of grievances.”²³¹

(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.”²³²

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 *349 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 the press.”²³³ 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.²³⁴ 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.”²³⁵ Under the Court’s precedents, the Establishment Clause and the Free Exercise Clause protect two separate but related rights.²³⁶ 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.”²³⁷ 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”²³⁸ 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.’”²⁶¹

Second, as this canon reflects, the Court places importance on the Framers’ intent to identify the outer parameters of Congress’ 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.²⁷⁶ Patterson and Joyce's 2003 essay appears to be the first piece of legal scholarship that attempts to draw this direct connection.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.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,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.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.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.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.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*.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.²⁸⁵ The Court, however, did not see a First Amendment problem in enforcing copyright law against The Nation magazine for violating Ford's copyright.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.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."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.²⁸⁹ For example, as quoted above, Federalist James Iredell defended the Copyright Clause power on similar incentive grounds.²⁹⁰

Second, the Harper Court explained that copyright law can avoid further First Amendment problems by incorporating doctrines that protect First Amendment interests.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.'" ²⁹² Also, the fair use doctrine accommodates free speech interests by allowing "latitude for scholarship and comment" for fair uses of copyrighted works.²⁹³ These two copyright doctrines operate as "First Amendment protections already embodied in the Copyright Act[.]"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 ***360** Amendment safeguard" in the context of copyright law.²⁹⁵ Similarly, Nimmer contended that the idea-expression dichotomy, for the most part, "represents an acceptable definitional balance as between copyright and free speech interests."²⁹⁶ 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."²⁹⁷ Both Goldstein and Nimmer analogized to the actual malice standard created in *New York Times v. Sullivan*,²⁹⁸ which provides a First Amendment safeguard for libel law by setting forth a higher standard of tort liability to accommodate First Amendment concerns.²⁹⁹

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).³⁰⁰ 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.³⁰¹ 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."³⁰²

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.³⁰³ 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.³⁰⁴ 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,³⁰⁵ 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.³⁰⁶ 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.³⁰⁷ These doctrines carve out breathing room for the free ***362** 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.³⁰⁸ 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.'" ³⁰⁹ In furtherance of free speech and other interests, fair use allows what otherwise would be considered copyright infringement.³¹⁰ 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.³¹¹

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."³¹² In *Eldred*, the Court rejected that notion.³¹³ 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 ***363** 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.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.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*.³¹⁶ In these cases, as long as “Congress has not altered the traditional contours of copyright protection,” no First Amendment scrutiny is required.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.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.³¹⁹

In Category 2 cases, the government burdens or compels an individual’s right to make her own speech without any unauthorized *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.³²⁰ In a Category 2 case, some level of First Amendment scrutiny applies; in *Turner*, it was intermediate scrutiny.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).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.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.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.³²⁵ If Congress has “altered the traditional contours of copyright protection,” further *365 First Amendment scrutiny is necessary.³²⁶ Unfortunately, the Eldred Court said little about the meaning of traditional contours of copyright protection or its relationship to the First Amendment safeguards,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.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.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

***366** safeguards and traditional contours of copyright protection is different.³³⁰ 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 holder³³¹ 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.³³² Immediately after introducing the concept of traditional contours of copyright protection, the Court cited two cases:³³³ (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”;³³⁴ 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.³³⁵

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.³³⁶ Indeed, the entire discussion of fair use and ***367** idea-expression in that section, leading up to the introduction of the concept of traditional contours, leaves practically no doubt about this point.³³⁷

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.³³⁸ 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.³³⁹ The Supreme Court upheld the statute, but only after applying First Amendment scrutiny.³⁴⁰ 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.”³⁴¹

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.”³⁴² 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.³⁴³ The case ***368** 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.³⁴⁴ 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.³⁴⁵ Applying a historical and functional approach, the court found a “time-honored tradition of allowing works in the public domain to stay there”³⁴⁶ 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.³⁴⁷

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,³⁴⁸ and clarifies the doctrine of traditional contours of copyright, following the Eldred decision.³⁴⁹ 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.³⁵⁰ 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 II 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 to protect speech technologies. 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 ***370** 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."³⁸³ 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.³⁸⁴

***375** 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."³⁸⁵ Those other areas of commerce involve the development of speech-facilitating technologies. Sony itself recognized the First Amendment interests at stake.³⁸⁶ 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.³⁸⁷ 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.³⁸⁸ 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.³⁸⁹

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 ***376** noninfringing use.³⁹⁰ 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.³⁹¹ 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,³⁹² 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."³⁹³ The Sony Court itself even noted the role the printing press had in the development of copyright.³⁹⁴

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,³⁹⁵ the Court did not formally recognize the Sony doctrine until the late twentieth century.³⁹⁶ 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."³⁹⁷ Before Sony, U.S. copyright holders had not tried to stop the manufacture of a technology under copyright ***377** 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.³⁹⁸

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

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to regulate technologies such as copying devices.³⁹⁹ 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.”⁴⁰⁰

The reason for this historical limit to copyright’s scope traces back to the freedom of the press, as discussed above.⁴⁰¹ 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.”⁴⁰² 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.⁴⁰³ That monopoly included power not only over what could be published, but also over the technology of mass publication itself.⁴⁰⁴ 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.⁴⁰⁵ 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.⁴⁰⁶ 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,”⁴⁰⁷ 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.⁴⁰⁸ 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.⁴⁰⁹ 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.”⁴¹⁰ This is the same type of extraordinary action the Stationers were able to accomplish when ***379** unregistered printing presses were declared contraband and destroyed.⁴¹¹

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*.⁴¹² In *Baker*, the Supreme Court held that certain accounting forms were not copyrightable because they embodied an unpatented system of accounting.⁴¹³ 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.”⁴¹⁴ 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.”⁴¹⁵

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.

***380 IV. Applying the Freedom of the Press 2.0**

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—with particular recognition of the Framers’ view of the Free Press Clause. Second, in applying the Sony safe harbor, courts must consider its First Amendment goal of providing breathing room for the development of speech technologies. I propose four free press principles for courts to consider when applying Sony.

A. COPYRIGHT 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 broadcast ***381** radio⁴¹⁹ to cable television⁴²⁰ to the Internet,⁴²¹ 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 Court ***382** 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.”⁴²⁵ 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 may ***383** 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.”⁴³⁵ 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.”⁴³⁶

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.⁴³⁷ 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.”⁴³⁸ 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.⁴³⁹ After all, the value of speech is much more than just a number or head count.⁴⁴⁰ The speech of one individual can be just as substantial as the speech of an entire nation.⁴⁴¹ In other contexts, such as fair use and infringement, substantiality is determined in both a qualitative and quantitative sense.⁴⁴²

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.⁴⁴³ 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.’”⁴⁴⁴ The fair use doctrine is applied on a case-by-case basis to “afford[] considerable ‘latitude for scholarship and comment,’ and even for parody.”⁴⁴⁵

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 predicating liability on a brief snapshot of a new technology’s uses in the market.

Fourth, cost-benefit and products liability analyses cannot replace the Sony safe harbor, as some scholars propose,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.⁴⁴⁷ Under the Court's precedents, speech is valued as an end in itself,⁴⁴⁸ and society must bear the costs of protecting *387 speech.⁴⁴⁹ In the end, economic efficiency is not the measuring stick of the First Amendment.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.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.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.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."⁴⁵⁴ Indeed, Menell *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."⁴⁵⁵

Based on their "tort wellspring" theory of copyright law, Menell and Nimmer conclude that the Supreme Court was wrong-indeed, even "intrepid"⁴⁵⁶ and "cavalier"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.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.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 *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."⁴⁶⁰ The primary concern "lie[s] in the general benefits derived by the public from the labors of authors."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.⁴⁶² It is hard to imagine that when Congress passed the Copyright Act in 1976, it

intended to incorporate more expansive concepts of secondary liability than traditional tort law allows.⁴⁶³

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.⁴⁶⁴ 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.⁴⁶⁵ But this is an uncontroversial point; no one seriously disputes that copyright law recognizes joint or secondary liability.⁴⁶⁶ 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.⁴⁶⁷ 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.⁴⁶⁸ 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.⁴⁶⁹ Indeed, according to Vargo's study, the very test that ***391** Menell and Nimmer place so much stock in⁴⁷⁰—analysis of a reasonable alternative design—has not been adopted by the majority of states as a requirement for products liability.⁴⁷¹ 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.⁴⁷² 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 states⁴⁷³ and is recognized in both the Second and Third Restatements of Torts.⁴⁷⁴ 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 ***392** 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.⁴⁷⁵

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.”⁴⁷⁶ 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.⁴⁷⁷ 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 a 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

liability, not Sony.⁴⁹⁴

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.⁴⁹⁵ It seems hard to believe that such a recent Supreme Court decision somehow could be rendered defunct by "practical reality"⁴⁹⁶ 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."⁴⁹⁷ Even further, they admit that Sony has affected "the incentives of technology developers by holding out a broad safe harbor."⁴⁹⁸ They also acknowledge that their own standard of products liability is not the standard used by some technology developers.⁴⁹⁹ 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,⁵⁰⁰ the digital audio tape,⁵⁰¹ computers,⁵⁰² mp3 players,⁵⁰³ digital cameras,⁵⁰⁴ *397 DVRs,⁵⁰⁵ and online video sharing⁵⁰⁶—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.⁵⁰⁷

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.⁵⁰⁸ 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,⁵⁰⁹ 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 *398 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*⁵¹⁰ (and one district court case from the Seventh Circuit applying *Aimster*),⁵¹¹ 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,"⁵¹² 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.⁵¹³ 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).⁵¹⁴ Following *Grokster*, the lower courts have *399 continued to recognize the Sony safe harbor (apart from inducement claims) in the few cases in which the issue arose indirectly.⁵¹⁵ 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).⁵¹⁶ Menell and Nimmer point to these two copyright amendments as indication that Congress might prefer a standard of liability different from Sony.⁵¹⁷ 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

scrutiny applies.

4. The First Amendment Is Always in Play. The biggest flaw in adopting a products liability analysis in place of Sony is that it *400 ignores the First Amendment. Indeed, nearly all of the critics of Sony, including Menell and Nimmer, fail to mention the First Amendment in their analysis. But without Sony, copyright law would effectively be imposing “press” controls on technology, restricting the ability of individuals to produce and disseminate speech through speech technologies. Under Menell and Nimmer’s approach, copyright law would be extremely vulnerable to a First Amendment challenge. Even if tort law is relevant to interpreting the Copyright Act, it cannot trump the First Amendment.

From a First Amendment perspective, the “reasonable alternative design” standard is entirely inadequate to protect speech technologies from excessive government intermeddling. 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.⁵¹⁸ 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.⁵¹⁹

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 *401 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.⁵²⁰ Although Menell and Nimmer assert that the VCR would have passed muster under their alternative standard,⁵²¹ 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 disc player) or that was equipped with a filtering device (as the movie studios sought to prove in the district court).⁵²² Indeed, that is precisely the suggestion of Judge Posner in the *Aimster* case, who adopted a cost-benefit analysis that Menell and Nimmer favor.⁵²³ 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 *402 though they might not have been reasonable or even feasible at the time the new technology was first developed.⁵²⁴ 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.”⁵²⁵ 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.⁵²⁶

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.⁵²⁷ 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 *403 than one gigantic copying machine.’”⁵²⁸ 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. Miring courts in reasonable alternative design analysis for speech technologies would take them beyond their judicial competence.⁵²⁹ The problem for courts is multiplied exponentially for new technologies that develop or change rapidly in today's Internet Age.⁵³⁰

In the end, products liability or cost-benefit analysis is doomed to failure in this context.⁵³¹ It asks a question that cannot be *404 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.⁵³² 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.⁵³³ 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."⁵³⁴

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.⁵³⁵ 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."⁵³⁶ Protecting the First Amendment rights of individuals to develop and use the printing press and other speech technologies creates costs that society must bear.⁵³⁷

Thus, even if we adopt products liability as the standard for secondary liability under copyright law as Professors Menell and *405 Nimmer propose, tort law must always answer to the First Amendment. That is the core teaching of *New York Times Co. v. Sullivan*⁵³⁸ 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,⁵³⁹ 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

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- 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.
- ⁵ See Frederick Seaton Siebert, *Freedom of the Press in England 1476-1776*, at 51-52 (1952) (describing sixteenth century efforts by British Crown to control religious content of publications).
- 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.
- ⁹ [Sony Corp. of Am. v. Universal City Studios, Inc.](#), 464 U.S. 417, 421 (1984).
- ¹⁰ Id.
- ¹¹ Id. at 442.
- ¹² [Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.](#), 545 U.S. 913 (2005).
- 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 . . .”).
- ¹⁶ See, e.g., [Complaint, Metro-Goldwyn-Mayer Studios Inc. v. ReplayTV, Inc.](#), No. 01-09801 (C.D. Cal. Nov. 15, 2001), available at [http:// www.mpa.org/legal_cases/replaytv/ReplayTV_MGM.pdf](http://www.mpa.org/legal_cases/replaytv/ReplayTV_MGM.pdf) (demonstrating attempt at such litigation); [Complaint, Metro-Goldwyn-Mayer Studios Inc. v. RecordTV.com](#), No. 00-06443 (C.D. Cal. June 15, 2000), available at 2000 WL 35449007

(same); [Complaint, Twentieth Century Fox Film Corp. v. Scour, Inc.](#), No. 00-5385 (S.D.N.Y. July 20, 2000), available at 2000 WL 34016408 (same); see also Jessica Litman, [The Sony Paradox](#), 55 *Case W. Res. L. Rev.* 917, 919-20 (2005) (discussing lawsuits filed against DVRs and other devices).

- 17 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).
- 18 Literature on the First Amendment and government regulation of speech-facilitating technologies outside of copyright law, such as technologies regulated under telecommunications law, is extensive. See, e.g., C. Edwin Baker, [Turner Broadcasting: Content-Based Regulation of Persons and Presses](#), 1994 *Sup. Ct. Rev.* 57 (critiquing Turner Broadcasting decision and arguing that concern for local content in broadcasting is appropriate); Jim Chen, [Conduit-Based Regulation of Speech](#), 54 *Duke L.J.* 1359 (2005) (discussing free speech jurisprudence involving communicative conduits); Glen O. Robinson, [The Electronic First Amendment: An Essay for the New Age](#), 47 *Duke L.J.* 899 (1998) (discussing effects of electronic media on understanding of First Amendment); Christopher S. Yoo, [The Rise and Demise of the Technology-Specific Approach to the First Amendment](#), 91 *Geo. L.J.* 245 (2003) (discussing broadcast model of regulation). Literature analyzing the same issue within copyright law is sparse. While some attention has been given to First Amendment concerns about the Digital Millennium Copyright Act (DMCA) or potential liability of Internet service providers, see, e.g., Yochai Benkler, [Free As the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain](#), 74 *N.Y.U. L. Rev.* 354, 414-29 (1999) (discussing DMCA and problem of circumvention of technological protection measures); Alfred C. Yen, [Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment](#), 88 *Geo. L.J.* 1833, 1881-85 (2000) (discussing law of ISP liability and DMCA), no sustained attention has been devoted to the First Amendment or free press implications of copyright law’s attempted regulation of speech-facilitating technologies under secondary liability. Ernest Miller provides a helpful start to the discussion in a recent essay. See generally Ernest Miller, [First Amendment Scrutiny of Expanded Secondary Liability in Copyright](#), 32 *N. Ky. L. Rev.* 507 (2005) (identifying need for First Amendment scrutiny of expansive applications of secondary liability in copyright law).
- 19 See *infra* note 175 and accompanying text.
- 20 See *infra* notes 191-95 and accompanying text.
- 21 [U.S. Const. art. I, § 8, cl. 8.](#)
- 22 See *infra* notes 133-51 and accompanying text.
- 23 See *infra* notes 379-410 and accompanying text.
- 24 See *infra* notes 416-37 and accompanying text.
- 25 See *infra* notes 438-50 and accompanying text.

- ²⁶ 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”).
- The most extensive discussion on the connection between copyright and the freedom of the press is provided in a short essay by L. Ray Patterson and Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders’ View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 *Emory L.J.* 909 (2003). In other scholarship, only passing reference is made. See, e.g., Benjamin Kaplan, *An Unhurried View of Copyright* 6 (1967) (referring to freedom of press in recounting demise of Stationers’ Company); Lyman Ray Patterson, *Copyright in Historical Perspective* 20-27 (1968) (describing press control in England); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 *Vand. L. Rev.* 1, 17-18 (1987) [hereinafter *Free Speech*] (noting historical relationship of copyright, free speech, and press); Lior Zemer, *The Making of a New Copyright Lockean*, 29 *Harv. J.L. & Pub. Pol’y* 891, 898-905 (2006) (describing connection between Locke’s understanding of freedom of press and his view of copyright as right for authors).
- ²⁷ See *infra* notes 33-43 and accompanying text.
- ²⁸ See *infra* notes 121-262 and accompanying text.
- ²⁹ See *infra* notes 33-42 and accompanying text.
- ³⁰ See *infra* note 54 and accompanying text.
- ³¹ See *infra* notes 69-106 and accompanying text.
- ³² See *infra* notes 241-54 and accompanying text; see also [U.S. Const. amend. I](#).
- ³³ 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).
- ³⁴ Statute of Anne, 1710, 8 Ann., c. 19 (Eng.); see also Anuj Desai, [Big Entertainment Needs a Sequel to the Highly Anticipated Flop: MGM v. Grokster](#), 41 *Ga. L. Rev.* 579, 584 (explaining term copyright may be attributed to Statute of Anne).
- ³⁵ See *infra* notes 60-67 and accompanying text.
- ³⁶ See *infra* notes 73-97 and accompanying text.
- ³⁷ See Act of May 31, 1790, ch. 15, 1 Stat. 124 (1790) (repealed 1831) (containing no direct regulation of printing press).

- ³⁸ See Rose, *supra* note 33, at 30-33. I discuss the English history of copyright, given its clear influence on the Framers and the early American development of copyright law. See Tyler T. Ochoa & Mark Rose, The [Anti-Monopoly Origins of the Patent and Copyright Clause](#), 84 *J. Pat. & Trademark Off. Soc'y* 909, 911-12 (2002) (discussing colonial and constitutional ties to English copyright law). Copyright can be traced back even earlier to patent privileges in Venice and Rome. See Christopher L.C.E. Witcombe, *Copyright in the Renaissance* 21-52 (2004) (discussing development of “the privilegio,” a type of copyright legislation in fifteenth century Venice and Rome).
- ³⁹ 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).
- ⁴⁰ See Siebert, *supra* note 5, at 47-63 (chronicling licensing system in England from time of Henry VIII).
- ⁴¹ See *id.* at 28 (noting that what Henry VIII began, his daughter Elizabeth completed).
- ⁴² *Id.* at 49.
- ⁴³ *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.*
- ⁴⁴ See Siebert, *supra* note 5, at 51-52 (comparing goals of Henry VIII and Mary in controlling presses).
- ⁴⁵ *Id.* at 61.
- ⁴⁶ Star Chamber Decree for Orders in Printing, 1586, 28 *Eliz.*, §§ 1-2; Siebert, *supra* note 5, at 69.
- ⁴⁷ Star Chamber Decree for Orders in Printing § 2.
- ⁴⁸ *Id.* § 3.
- ⁴⁹ *Id.* § 4; see also Siebert, *supra* note 5, at 69 (providing regulation requiring ecclesiastical authorities to approve new master printers).
- ⁵⁰ Siebert, *supra* note 5, at 71.
- ⁵¹ *Id.* at 107-12.
- ⁵² E.g., Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 *Cal. L. Rev.* 283, 284-85 (1979).

- 53 See infra notes 110-17 and accompanying text.
- 54 Siebert, supra note 5, at 61-62. In 1560, there were eight or ten master printers; by 1600, there were thirty. *Id.* at 56.
- 55 Star Chamber Decree for Orders in Printing, 1586, 28 Eliz., § 3.
- 56 *Id.* § 2.
- 57 See, e.g., Siebert, supra note 5, at 99 (describing Kingston press and attempts to keep it out of authorities' hands).
- 58 *Id.* at 85.
- 59 See Raymond Astbury, *The Renewal of the Licensing Act in 1693 and Its Lapse in 1695*, 32 *Library* 296, 296 (1978).
- 60 See Patterson, supra note 26, at 6 (describing censorship efforts).
- 61 *Id.*
- 62 See Siebert, supra note 5, at 221 (listing several press control regulations).
- 63 See, e.g., *id.* at 221, 228, 238 (describing authorization of Council of State to determine number of presses).
- 64 Licensing of the Press Act, 1662, 14 Car. 2., c. 33 (Eng.) (emphasis added).
- 65 *Id.* §§ 11-12.
- 66 *Id.* § 11.
- 67 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.”).
- 68 See *id.* at 15 (noting Stationers’ Company monopoly).
- 69 See *id.* at 22 (describing Parliamentary edict of 1642, one of few acts that gave authors any rights).
- 70 See Siebert, supra note 5, at 68 (discussing Stationers’ Company).

- 71 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.
- 74 John Milton, *Areopagitica* 394 (Encyclopedia Britannica 1952) (1644). The work, in fact, was published without the required license. William E. Hocking, *Freedom of the Press: A Framework of Principle 4* (Leonard W. Levy ed., Da Capo Press 1972) (1947).
- 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 Siebert, *supra* note 5, 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.
- 83 John Locke, *Locke: Political Essays* 329-38 (Mark Goldie ed., Cambridge University Press 1997).
- 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.

89 See John Feather, *Publishing, Piracy and Politics* 56 (1994) (describing Defoe's views); Locke, *supra* note 83, at 330-34 (criticizing Licensing Act of 1662).

90 Ronan Deazley, *On the Origin of the Right to Copy* 7 (2004).

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

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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 seditious 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.”).

¹⁰⁹ See *id.* (stating that application of “The Press” to journalism began in early nineteenth century). In early 1695, only one newspaper existed: the official government newspaper, *London Gazette*. Deazley, *supra* note 90, at 11.

¹¹⁰ Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1778).

¹¹¹ *Id.*

¹¹² Francis Ludlow Holt, *Of the Liberty of the Press* (Anthony Blecker ed., Stephen Gould 1818) (1812), excerpted in *Freedom of the Press from Hamilton to the Warren Court 18-19* (Harold L. Nelson ed., 1967).

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

¹¹⁴ *Id.* at *152 n.a.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

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- 117 Id.
- 118 See supra notes 73-89 and accompanying text.
- 119 See supra notes 97-100 and accompanying text.
- 120 See supra notes 97-100 and accompanying text.
- 121 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.
- 122 See, e.g., Bruce W. Bugbee, *Genesis of American Patent and Copyright Law 1-2* (1967) (discussing adoption of Copyright Clause at Constitutional Convention).
- 123 See Patterson & Joyce, supra note 26, at 944 (examining Founders’ views on relationship between Free Press and Copyright Clauses).
- 124 Id. at 910.
- 125 Id. at 946.
- 126 U.S. Const. art. I, § 8, cl. 8.
- 127 Patterson & Joyce, supra note 26, at 944.
- 128 See Dotan Oliar, [Making Sense of the Intellectual Property Clause: Promotion of Progress of Science as a Limitation on Congress’s Intellectual Property Power](#), 94 *Geo. L.J.* 1771, 1775 (2006) (analyzing Copyright Clause based on several related proposals).
- 129 See Ochoa & Rose, supra note 38, at 909, 909-13, 925-27 (discussing abuse of monopoly grants in England and Framers’ aversion to monopolies).
- 130 [Graham v. John Deere Co.](#), 383 U.S. 1, 5 (1966).

131 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.

135 See George Mason, *Objections to the Constitution of Government Formed by the Convention (1787)*, reprinted in 2 *The Complete Anti-Federalist* 13 (Herbert J. Storing ed., 1981) (objecting to lack of protection for liberty of press).

136 Id.

137 Letter from the Federal Farmer XVI (Jan. 20, 1788), reprinted in 2 *The Complete Anti-Federalist* 329 (Herbert J. Storing ed., 1981).

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

139 *Id.* at 467-68.

140 See William T. Mayton, *From a Legacy of Suppression to the “Metaphor of the Fourth Estate,”* 39 *Stan. L. Rev.* 139, 143 (1986) (discussing history of Framers’ debate on free press).

141 *Id.* at 144 n.27.

142 James Wilson, *An Address to a Meeting of the Citizens of Philadelphia*, reprinted in 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 529 (1971) (emphasis added).

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”).

146 Leonard W. Levy, *On the Origins of the Free Press Clause*, 32 *UCLA L. Rev.* 177, 209-10 (1984).

- ¹⁴⁷ 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).
- ¹⁴⁸ 2 Ratification of the Constitution by the States: Pennsylvania, *The Documentary History of the Ratification of the Constitution* 454 (Merrill Jensen ed., 1976) (first emphasis added).
- ¹⁴⁹ James Iredell, Observations on George Mason's obligations to the Federal Constitution (1788), reprinted in *Pamphlets on the Constitution of the United States 1788-1788*, at 360-61 (Paul L. Ford ed., De Capo Press 1968) (1888).
- ¹⁵⁰ Id.
- ¹⁵¹ Hugh Williamson, Remarks on the New Plan of Government (1788), reprinted in 1 Schwartz, supra note 142, at 551.
- ¹⁵² See supra note 148 and accompanying text.
- ¹⁵³ Iredell, supra note 149, at 361 (emphasis added).
- ¹⁵⁴ See supra notes 146-47, 149-50 and accompanying text.
- ¹⁵⁵ See supra notes 146-47, 149-50 and accompanying text.
- ¹⁵⁶ See Schwartz, supra note 142, at 932 (noting Iredell's position as Supreme Court justice).
- ¹⁵⁷ Iredell, supra note 149, at 361.
- ¹⁵⁸ Id.
- ¹⁵⁹ Id.
- ¹⁶⁰ Id.
- ¹⁶¹ Id. (emphasis added).

- ¹⁶² Id.
- ¹⁶³ U.S. Const. amend. I.
- ¹⁶⁴ James Madison, Report on the Virginia Resolutions (Jan. 1800), reprinted in 5 *The Founders' Constitution* 143 (Philip B. Kurland & Ralph Lerner eds., 1987).
- ¹⁶⁵ See *Eldred v. Ashcroft*, 537 U.S. 186, 199 (2003) (discussing “limited Times” requirement); *Feist Publ’ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (defining originality requirement under Copyright Clause).
- 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.
- ¹⁷¹ David A. Anderson, *Freedom of the Press*, 80 *Tex. L. Rev.* 429, 446 (2002); see also Jeffrey L. Palsey, *The Tyranny of Printers: Newspaper Politics in the Early American Republic* 25-26 (2001) (describing technology of printing press in early America).
- 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 2 Thomas Sheridan, *A General Dictionary of the English Language* 1780 (Scolar Press Limited 1967) (defining “press” without reference to journalists or reporters).
- ¹⁷⁴ Letter from Thomas Jefferson to C.W.F. Dumas (Feb. 12, 1788), in *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*, supra note 147, at 116 (emphasis added).
- 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.”).

¹⁷⁸ Hazel Dicken-Garcia, *Journalistic Standards in Nineteenth-Century America* 18-19 (1989).

¹⁷⁹ *Id.*

¹⁸⁰ See Bernard Bailyn, *The Ideological Origins of the American Revolution* 2-4 (1967) (discussing prevalence of pamphlet as form of political discourse).

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.

¹⁸⁷ See Donald H. Stewart, *The Opposition Press of the Federalist Period* 21-22 (1969) (noting prevalence of foreign news in American press).

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).

¹⁹² Leonard W. Levy, *Freedom of the Press from Zenger to Jefferson* 41 (1966).

¹⁹³ Id. at 31.

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

¹⁹⁵ Letter from Thomas Jefferson to James Madison (June 7, 1798), in 8 The Works of Thomas Jefferson 434 (P. Ford ed. 1904) (emphasis added).

¹⁹⁶ See infra notes 197-201 and accompanying text.

¹⁹⁷ See generally Anderson, supra note 138, at 455-94 (examining history of Free Press Clause).

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

¹⁹⁹ Anderson, supra note 138, at 464-65.

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.

²⁰² Anderson, supra note 138, at 467.

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.").

- 209 Anderson, *supra* note 171, at 446 n.90.
- 210 U.S. Const. amend. I.
- 211 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.”).
- 212 Potter Stewart, *Or of the Press*, 26 *Hastings L.J.* 631, 633 (1975) (“[T]he Free Press Clause extends protection to an institution.”).
- 213 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.”).
- 214 See *Marbury v. Madison*, 5 U.S. 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect.”); *Myers v. United States*, 272 U.S. 52, 229 (1926) (McReynolds, J., dissenting) (noting same principle). See generally Akhil Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 *Val. U. L. Rev.* 1 (1998) (providing further discussion of this interpretive principle).
- 215 See *infra* notes 218-32 and accompanying text.
- 216 See *infra* notes 218-32 and accompanying text.
- 217 See *infra* note 227 and accompanying text.
- 218 See *infra* note 228 and accompanying text.
- 219 2 Schwartz, *supra* note 142, at 1050.
- 220 *Id.* at 1122; see also *infra* note 229 and accompanying text.
- 221 See 2 Schwartz, *supra* note 142, at 1026 (discussing Madison’s proposals); *id.* at 1122 (discussing House’s tentative agreed proposals in August 1789).
- 222 2 Schwartz, *supra* note 142, at 842.
- 223 *Id.*
- 224 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.

236 See *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (noting Establishment Clause requires separation of church and state, while Free Exercise Clause requires noninterference with religious practices).

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).

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- 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.*
- 247 See Stewart, supra note 187, at 16 (noting proliferation of American newspapers in 1790).
- 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).
- 252 Act of March 3, 1891, ch. 565, 26 Stat. 1106 (repealed 1909); Act of March 4, 1909, ch. 320, 35 Stat. 1075 (repealed 1976); Copyright Act of 1976, [Pub. L. No. 94-553, 90 Stat. 2541](#).
- 253 See Act of March 3, 1891, ch. 565, 26 Stat. 1106, 1107 (repealed 1909) (“[T]he two copies . . . shall be printed from type set within the limits of the United States”); Act of March 4, 1909, ch. 320, 35 Stat. 1075, 1078 (repealed 1976) (“That of the printed book . . . shall be printed from type set within the limits of the United States”); Copyright Act of 1976, [Pub. L. No. 94-553, 90 Stat. 2541](#) (“[T]he importation into or public distribution in the United States of copies of a work . . . is prohibited unless . . . manufactured in the United States or Canada.”).
- 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.”).

- 255 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 . . .”).
- 256 *Id.* at 1623.
- 257 See *supra* note 251 and accompanying text.
- 258 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.”).
- 259 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).
- 260 [Burrow-Giles Lithographic Co. v. Sarony](#), 111 U.S. 53, 57 (1884).
- 261 [Eldred](#), 537 U.S. at 200 (quoting [N.Y. Trust Co. v. Eisner](#), 256 U.S. 345, 349 (1921)).
- 262 [McIntyre v. Ohio Elections Comm’n](#), 514 U.S. 334, 372 (1995) (Scalia, J., dissenting).
- 263 See *infra* notes 266-75 and accompanying text. The most extensive historical discussion can be found in two concurring opinions, one by Justice Thomas and the other by the late Chief Justice Burger. See [McIntyre v. Ohio Elections Comm’n](#), 514 U.S. 334, 358-60 (1995) (Thomas, J., concurring) (discussing history of the freedom of press); [First Nat’l Bank of Boston v. Bellotti](#), 435 U.S. 765, 795 (1978) (Burger, C.J., concurring) (discussing history of Press Clause and its application to institutional presses).
- 264 See *infra* notes 266-75 and accompanying text.
- 265 See *infra* note 266 and accompanying text.
- 266 [Thomas v. Chi. Park Dist.](#), 534 U.S. 316, 320 (2002).
- 267 See Siebert, *supra* note 5, at 238 (discussing Act of 1662).
- 268 [Schneider v. State](#), 308 U.S. 147, 161 (1939) (emphasis added).
- 269 See *infra* notes 270-72 and accompanying text.
- 270 See, e.g., [Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue](#), 460 U.S. 575, 581 (1983) (referring to newspapers in context of press); [Miami Herald Publ’g Co. v. Tornillo](#), 418 U.S. 241, 251-52 (1974) (referring to newspapers in context of First Amendment right of access to press); [Branzburg v. Hayes](#), 408 U.S. 665, 698-99 (1972) (referring to reporters as part of press).

271 See *infra* note 272 and accompanying text.

272 *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (emphasis added). Cf. Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 Harv. L. Rev. 124, 134 (1992) (“[T]he First Amendment yokes the freedom of speech to the freedom of the press and thereby signals an intent to embrace all communication, regardless of the precise medium of transmission.”); Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 Utah L. Rev. 889, 905 (“[T]he enumerated rights of ‘speech’ and ‘press’ and the broader structural logic of the Constitution’s scheme of republican self-government imply that this nonenumerated form of political expression must likewise be a right retained by members of the self-governing citizenry.” (citation omitted)).

273 *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948).

274 *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”).

275 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.”).

276 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.

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

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

279 See *infra* notes 283-338 and accompanying text.

280 See *supra* notes 126-69 and accompanying text.

281 See *infra* notes 361-78 and accompanying text.

282 See 17 U.S.C. § 106 (2000 & Supp. 2002) (setting forth statutory rights of copyright owners).

283 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).

284 [471 U.S. 539](#) (1985).

285 [Id.](#) at 542-43.

286 See *infra* notes 288-90 and accompanying text.

287 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).

288 [Id.](#) at 558 (emphasis added).

289 See *supra* note 150 and accompanying text.

290 See *supra* note 150 and accompanying text.

291 [Harper & Row](#), 471 U.S. at 556.

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

293 [Id.](#) at 560.

294 [Id.](#)

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

296 Nimmer, [Copyright](#), *supra* note 26, at 1192 (emphasis added).

297 [Id.](#) at 1185.

298 [376 U.S. 254](#) (1964).

299 See Goldstein, *supra* note 295, at 992, 1000 (citing [New York Times v. Sullivan](#) as analogy for First Amendment safeguard in copyright law); Nimmer, [Copyright](#), *supra* note 26, at 1184-85 (citing [New York Times v. Sullivan](#) as example of "definitional

balancing”).

300 [Sullivan](#), 376 U.S. at 283-84.

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

302 [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)).

303 See *infra* notes 304-07 and accompanying text.

304 [Baker v. Selden](#), 101 U.S. 99, 100 (1880).

305 Cf. [Kregos v. Assoc. Press](#), 937 F.2d 700, 708 (2d Cir. 1991) (stating pitching form potentially copyrightable).

306 [Baker](#), 101 U.S. at 104. Professor Samuelson persuasively explains why [Baker v. Selden](#)’s holding more properly rests on the principle that useful systems (as embodied in accounting forms) cannot be copyrighted, instead of on the idea-expression dichotomy later attributed to the case. Pamela Samuelson, [Why Copyright Law Excludes Systems and Processes from the Scope of Its Protection](#), 85 *Tex. L. Rev.* 1921 (2007). Because the Supreme Court has later relied on [Baker](#) in discussing the idea-expression dichotomy, I use the example in the same way. See [Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.](#), 499 U.S. 340, 350 (1991) (discussing [Baker v. Selden](#) for idea-expression dichotomy).

307 See [Morrissey v. Procter & Gamble Co.](#), 379 F.2d 675, 678-79 (1st Cir. 1967) (explaining merger doctrine).

308 See [Harper & Row, Publishers, Inc. v. Nation Enters.](#), 471 U.S. 539, 546-47 (1985) (describing fair use doctrine).

309 [Campbell v. Acuff-Rose Music, Inc.](#), 510 U.S. 569, 575 (1994) (quoting U.S. Const. art. I, § 8, cl. 8).

310 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).

311 *Id.* at 591-92.

312 See [Eldred v. Reno](#), 239 F.3d 372, 375 (D.C. Cir. 2001) (referring to [United Video, Inc. v. FCC](#), 890 F.2d 1173 (D.C. Cir. 1989)), *aff’d sub nom.* [Eldred v. Ashcroft](#), 537 U.S. 186 (2002).

313 [Eldred](#), 537 U.S. at 221.

314 Id. (citation omitted).

315 Id.

316 Id. at 221.

317 Id.

318 Id. at 219-20.

319 See Daniel A. Farber, [Conflicting Visions and Contested Baselines: Intellectual Property and Free Speech in the “Digital Millennium,”](#) 89 *Minn. L. Rev.* 1318, 1349 (2005) (concluding that further First Amendment scrutiny is required when Congress has altered traditional contours).

320 See [Turner Broad. Sys., Inc. v. FCC](#), 512 U.S. 622 (1994).

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

322 [Eldred](#), 537 U.S. at 220-21.

323 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.”).

324 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.”).

325 Id.

326 Id.

327 Id.

328 Id. at 219.

329 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\(alizing\) Copyright](#), 57 *Stan. L. Rev.* 485, 491-500 (2004) (arguing that prior formalities of U.S. copyright law dating back to first Copyright Act constituted 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).

330 [Eldred, 537 U.S. at 220-21.](#)

331 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.”).

332 See *infra* notes 333-41 and accompanying text.

333 [Eldred, 537 U.S. at 221.](#)

334 [Harper & Row, Publishers, Inc. v. Nation Enters.](#), 471 U.S. 539, 560 (1985) (emphasis added).

335 [483 U.S. 522 \(1987\).](#)

336 [Eldred, 537 U.S. at 219 \(citing Harper & Row, 471 U.S. at 558\).](#)

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

338 [U.S. Olympic Comm.](#), 483 U.S. at 526.

339 [Id.](#) at 530.

340 [Id.](#) at 541.

341 [Id.](#) at 530 (emphasis added).

342 [Id.](#) (emphasis added).

343 [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.

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

345 [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.”).

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.

356 [Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 421 \(1984\).](#)

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”).

360 [Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 461 \(C.D. Cal. 1979\).](#)

361 [Sony, 464 U.S. at 442.](#)

362 [Id.](#)

363 [Id.](#)

364 Id.

365 Id. at 445.

366 Id. at 447-49.

367 Id. at 454-55.

368 [Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.](#), 545 U.S. 913 (2005).

369 Id. at 931-35.

370 Id. at 939 n.12.

371 Id. at 919.

372 Id. at 935.

373 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.”).

374 [Grokster](#), 545 U.S. at 936-37.

375 Id.

376 Id.

377 Id. at 935.

378 Id. at 937.

379 See [Sony Corp. of Am. v. Universal City Studios, Inc.](#), 464 U.S. 417, 440 (1984) (discussing 35 U.S.C. § 271(c)).

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380 Harper & Row was decided in 1985, [Harper & Row, Publishers, Inc. v. Nation Enters.](#), 471 U.S. 539 (1985), a year after [Sony](#), 464 U.S. 417 (1984).

381 Brief of Professors Edward Lee, Peter Shane, & Peter Swire as Amici Curiae in Support of Respondents, [Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.](#), 545 U.S. 913 (2005) (No. 04-480).

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

383 [Eldred v. Ashcroft](#), 537 U.S. 186, 221 n.24 (2002).

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

385 *Id.*

386 See *infra* note 387 and accompanying text.

387 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”).

388 [Sony](#), 464 U.S. at 454-55.

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

390 *Id.* at 442.

391 *Id.*

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

393 [N.Y. Times Co. v. Sullivan](#), 376 U.S. 254, 271 (1964) (quoting 4 Elliot’s Debates on the Federal Constitution 571 (1867)).

394 [Sony](#), 464 U.S. at 430.

395 See Michael J. Madison, [A Pattern-Oriented Approach to Fair Use](#), 45 *Wm. & Mary L. Rev.* 1525, 1589 (2004) (“[F]air use dates to a pair of lower federal court decisions written in the middle of the nineteenth century”); Samuelson, *supra* note 306, at 1925 (tracing origin of unprotectability of ideas in copyright law).

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.

402 [Thomas v. Chi. Park Dist., 534 U.S. 316, 320 \(2002\).](#)

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.

407 [Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 933 \(2005\).](#)

408 [Randall Picker, From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the Propertization of Copyright, 70 U. Chi. L. Rev. 281, 290 \(2003\).](#)

409 [James Lardner, Fast Forward: Hollywood, the Japanese, and the Onslaught of the VCR 26-30, 119 \(1st ed. 1987\)](#) (discussing MCA's development of videodisc and lawsuit against Sony).

410 [Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 441 n.21 \(1984\).](#)

411 See supra notes 33-70 and accompanying text.

412 [101 U.S. 99 \(1879\).](#)

- 413 [Id. at 105](#) (“The description of the art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself.”).
- 414 [Id. at 103](#).
- 415 [Sony, 464 U.S. at 417 n.21](#).
- 416 The Digital Millennium Copyright Act (DMCA), [Pub. L. No. 105-304, 112 Stat. 2860 \(1998\)](#) (codified in scattered sections of 17 U.S.C.), is one such example. It goes beyond the scope of this Article to analyze how the DMCA would fare under First Amendment scrutiny. The few courts that have considered various First Amendment challenges to the DMCA all have upheld the statute as constitutional. See [Universal City Studios, Inc. v. Corley, 273 F.3d 429, 453-59 \(2d Cir. 2001\)](#) (applying intermediate scrutiny); [321 Studios v. Metro Goldwyn Mayer Studios, Inc., 307 F. Supp. 2d 1085, 1099-1103 \(N.D. Cal. 2004\)](#) (same); [United States v. Elcom Ltd., 203 F. Supp. 2d 1111 \(N.D. Cal. 2002\)](#) (same). L. Ray Patterson compared the DMCA to the Licensing Act of 1662 in England. L. Ray Patterson, [The DMCA: A Modern Version of the Licensing Act of 1662, 10 J. Intell. Prop. L. 33 \(2002\)](#). I reserve judgment.
- 417 See [infra notes 418-21](#) and accompanying text.
- 418 See [Miami Herald Publ’g Co. v. Tornillo, 418 U.S. 241, 252-53 n.18 \(1974\)](#) (“Constitutional adjudication must take into account the individual’s interest in access to the press as well as the individual’s interest in preserving his reputation . . .”).
- 419 See [Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 \(1969\)](#) (noting importance of public’s right of access to ideas); [Nat’l Broad. Co. v. United States, 319 U.S. 190, 226-27 \(1943\)](#) (analyzing validity of regulations of radio under Free Speech Clause).
- 420 See [Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 639 \(1994\)](#) (plurality) (considering “settled principles of [Court’s] First Amendment jurisprudence” in cable regulations).
- 421 See [Ashcroft v. ACLU, 535 U.S. 564, 566 \(2002\)](#) (considering constitutionality of Child Online Protection Act); [Reno v. ACLU, 521 U.S. 844, 870 \(1997\)](#) (applying First Amendment scrutiny to Internet regulation).
- 422 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](#).
- 424 See [Kovacs v. Cooper, 336 U.S. 77, 78-79 \(1949\)](#) (addressing free speech challenge to ordinance); [Saia v. New York, 334 U.S. 558, 559-60 \(1948\)](#) (holding ordinance unconstitutional as violation of free speech); see also Michael J. Burstein, Note, [Towards a New Standard for First Amendment Review of Structural Media Regulation, 79 N.Y.U. L. Rev. 1030, 1037-38 & nn.42-49 \(2004\)](#) (cataloguing cases in which First Amendment scrutiny applied to “limits on local telephone companies’ provision of video

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

425 [Kovacs](#), 336 U.S. at 87.

426 [Id.](#) at 85.

427 [Saia](#), 334 U.S. at 558 n.1.

428 [Id.](#) at 560.

429 See [Turner Broad. Sys. Inc. v. FCC](#), 512 U.S. 622, 657 (1994) (noting that government may prevent private interests from restricting free flow of ideas); [Watchtower Bible and Tract Society of N.Y., Inc. v. Stratton](#), 536 U.S. 150, 162 (2002) (recognizing "the historical importance of door-to-door canvassing and pamphleteering as vehicles for the dissemination of ideas").

430 376 U.S. 254, 266 (1964).

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.

435 [Frisby v. Schultz](#), 487 U.S. 474, 485 (1988) (emphasis added).

436 [Sony Corp. of Am. v. Universal City Studios, Inc.](#), 464 U.S. 441, 421 (1984).

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).

- 438 [Eldred v. Ashcroft](#), 537 U.S. 186, 221 n.24 (2003) (citing [United States v. X-Citement Video, Inc.](#), 513 U.S. 64, 78 (1994)).
- 439 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).
- 440 See Cass R. Sunstein, [Incommensurability and Valuation in Law](#), 92 Mich. L. Rev. 779, 831-32 (1994) (arguing that “free speech values are plural and diverse rather than unitary”).
- 441 Just think of Lincoln’s Gettysburg Address, or Martin Luther King Jr.’s “I Have a Dream” speech.
- 442 See 17 U.S.C. § 107 (2000) (setting forth fair use factors); [Harper & Row Publishers, Inc. v. Nation Enter.](#), 471 U.S. 539, 564-65 (1985) (holding that magazine’s publication of quotes was not fair use due to qualitative nature of words taken); [Ringgold v. Black Entm’t Television, Inc.](#), 126 F.3d 70, 75 (2d Cir. 1997) (discussing relationship between quantitative and qualitative copying in copyright infringement action). In patent law, under the staple article of commerce doctrine, the Federal Circuit has not taken a strict quantitative or proportionality approach. See, e.g., [Alloc, Inc. v. Int’l Trade Comm’n](#), 342 F.3d 1361, 1374 (Fed. Cir. 2003) (making no determination of proportion of uses); [C.R. Bard, Inc. v. Advanced Cardiovascular Sys.](#), 911 F.2d 670, 674 (Fed. Cir. 1990) (noting evidence of forty to sixty percent noninfringing use would allow reasonable jury to find substantial noninfringing use). Judicial analysis of the substantiality of noninfringing uses of an invention under patent law includes both quantitative and qualitative evidence of substantiality. See, e.g., [Pickholtz v. Rainbow Techs.](#), 260 F. Supp. 2d 980, 989 (N.D. Cal. 2003) (noting both aspects).
- 443 See Edward Lee, [Rules and Standards for Cyberspace](#), 77 Notre Dame L. Rev. 1275, 1307-08 (2002) (noting that rules may become obsolete due to rapid changes in technology).
- 444 [Universal City Studios, Inc. v. Sony Corp. of Am.](#), 480 F. Supp. 429, 456 (C.D. Cal. 1979) (quoting H.R. Rep. No. 1476, 5679 (1976)).
- 445 [Eldred v. Ashcroft](#), 537 U.S. 186, 220 (2003) (quoting [Harper & Row](#), 471 U.S. at 560).
- 446 See, e.g., Brief of Professors Peter S. Menell, David Nimmer, Robert P. Merges, and Justin Hughes, as Amici Curiae in Support of Petitioners, [Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.](#), 545 U.S. 913 (2005) (No. 04-480), 2005 WL 176675; Douglas Lichtman & William Landes, [Indirect Liability for Copyright Infringement: An Economic Perspective](#), 16 Harv. J.L. & Tech. 395 (2003) (arguing for cost-benefit analysis to replace Sony doctrine); Randal C. Picker, [Rewinding Sony: The Evolving Product, Phoning Home and the Duty of Ongoing Design](#), 55 Case W. Res. L. Rev. 749 (2005) (proposing that duty of ongoing design to reduce noninfringing uses should be added to Sony test).
- 447 See Sunstein, *supra* note 440, at 829-31 (arguing that speech cannot be regulated as commodity). See generally Matthew D. Adler & Eric A. Posner, [New Foundations of Cost-Benefit Analysis](#) 154-62 (2006) (conceding that cost-benefit analysis cannot make judgments based on rights or nonwelfare values).
- 448 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.”).

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- 449 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.”).
- 450 *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.”).
- 451 See Peter S. Menell & David Nimmer, [Unwinding Sony](#), 95 Cal. L. Rev. 941, 980-81 (arguing that Sony Court engaged in flawed statutory interpretation).
- 452 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).
- 453 Menell & Nimmer, *supra* note 451, at 993-94.
- 454 *Id.* at 944, 980-82.
- 455 *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)).
- 456 *Id.* at 982.
- 457 *Id.* at 980.
- 458 *Id.* at 1017-19.
- 459 *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”).
- 460 [United States v. Paramount Pictures](#), 334 U.S. 131, 158 (1948).
- 461 *Id.*
- 462 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.”).

⁴⁶³ Cf. *Midlantic Nat’l Bank v. N.J. Dep’t of Env’tl. 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.”).

⁴⁶⁴ 17 U.S.C. § 106 (2000).

⁴⁶⁵ See Menell & Nimmer, *supra* note 451, at 995-96 (discussing legislative history).

⁴⁶⁶ See David G. Post et al., “Nice Questions” Unanswered: Grokster, Sony’s Staple Article of Commerce Doctrine, and the Deferred Verdict on Internet File Sharing, 2005 *Cato Sup. Ct. Rev.* 235, 239 (discussing how copyright law developed secondary liability applying principles of third party liability from tort law).

⁴⁶⁷ See Menell & Nimmer, *supra* note 451, at 995-96 (quoting relevant House Report).

⁴⁶⁸ *Id.* at 996.

⁴⁶⁹ See John F. Vargo, The Emperor’s New Clothes: The American Law Institute Adorns a “New Cloth” for Section 402A Products Liability Design Defects-A Survey of the States Reveals a Different Weave, 26 *U. Mem. L. Rev.* 493, 536-38 (1996) (study concluding that only eight or nine states require proof of alternative design for products liability while vast majority do not); see also *Halliday v. Sturm, Ruger & Co., Inc.*, 792 A.2d 1145, 1154-55 (Md. 2002) (relying on Vargo study); Jerry J. Phillips, The Unreasonably Unsafe Product and Strict Liability, 72 *Tenn. L. Rev.* 833, 834 (2005) (concluding that design defect standard under Restatement (Third) of Torts does not reflect majority view among states).

⁴⁷⁰ See Menell & Nimmer, *supra* note 452, at 145 (discussing reasonably available alternative design).

⁴⁷¹ See *supra* note 469 and accompanying text.

⁴⁷² 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)).

⁴⁷³ See *Casa Clara Condo. Ass’n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1246 n.2 (Fla. 1993) (“The economic loss rule has been adopted in a majority of jurisdictions.”); see also William K. Jones, Product Defects Causing Commercial Loss: The Ascendancy of Contract Over Tort, 44 *U. Miami L. Rev.* 731, 799-806 (1990) (appendix analyzing cases recognizing economic loss rule).

⁴⁷⁴ 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.”).

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475 [Seely v. White Motor Co.](#), 403 P.2d 145, 151 (Cal. 1965).

476 U.S. Const. art. I, § 8, cl. 8.

477 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”).

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

479 [Rose](#), *supra* note 33, at 45.

480 *Id.* at 88.

481 [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.”).

482 U.S. Const. art. I, § 8, cl. 8.

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

484 222 U.S. 55 (1911).

485 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)).

486 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.”).

- 487 [Eldred v. Ashcroft](#), 537 U.S. 186, 188 (2003) (quoting [N.Y. Trust Co. v. Eisner](#), 256 U.S. 345, 349 (1921)).
- 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.
- 490 See [Bobbs-Merrill Co. v. Straus](#), 210 U.S. 339, 350 (1908) (establishing first sale doctrine).
- 491 See [Wheaton v. Peters](#), 33 U.S. (8 Pet.) 591, 668 (1834) (holding for noncopyrightability of judicial opinions).
- 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”).
- 495 See [Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.](#), 545 U.S. 913, 936, 939 n.12 (2005) (mentioning “the Sony safe harbor”).
- 496 Menell & Nimmer, *supra* note 452, at 204.
- 497 *Id.* at 201.
- 498 Menell & Nimmer, *supra* note 451, at 1022.
- 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).

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- 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 Amicus 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.”).
- 511 See [Monotype Imaging, Inc. v. Bitstream, Inc.](#), 376 F. Supp. 2d 877, 887-89 (N.D. Ill. 2005) (applying Aimster approach along with *Grokster* approach).
- 512 Menell & Nimmer, *supra* note 452, at 187.
- 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").

515 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.").

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

517 *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.").

518 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.").

519 See Lawrence Lessig, *The Path of Cyberlaw*, 104 Yale L.J. 1743, 1747 n.13 (1995) (discussing Alexander Graham Bell's vision for telephone); see also Lewis Coe, *The Telephone and Its Several Inventors: A History* 78 (1995) (same).

520 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.").

521 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).

522 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.").

523 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.*

- 524 See Gregory Mandel, [Patently Non-Obvious II: Experimental Study on the Hindsight Issue Before the Supreme Court in *KSR v. Teleflex*](#), 9 *Yale J.L. & Tech.* 1, 1 (2007) (discussing problem of hindsight bias in determining obviousness of invention).
- 525 Transcript of Oral Argument at 12, [Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.](#), 545 U.S. 913 (2005) (No. 04-480), available at http://www.supremecourt.us/oral_arguments/argument_transcripts/04-480.pdf.
- 526 See Mark A. Lemley & R. Anthony Reese, [Reducing Digital Copyright Infringement Without Restricting Innovation](#), 56 *Stan. L. Rev.* 1345, 1388 n.165 (2004) (discussing chilling effect on investment in new technologies); see also Benjamin H. Glatstein, [Tertiary Copyright Liability](#), 71 *U. Chi. L. Rev.* 1605, 1605 (2004) (discussing liability of those who provide investment in entities later found to have committed copyright infringement).
- 527 See Reese, *supra* note 518, at 894 (providing example of alternative design to prevent copyright infringement).
- 528 3 Melville B. Nimmer & David Nimmer, [Nimmer on Copyright § 12A.01 \[C\]](#), at 12A-10 (2007) (quoting David Nimmer, [A Tale of Two Treaties](#), 22 *Colum.-VLA J.L. & Arts* 1, 17 (1997)).
- 529 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.”).
- 530 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.”).
- 531 Adler & Posner, *supra* note 447, at 154-62 (conceding that cost-benefit analysis cannot make judgments based on rights or nonwelfare values).
- 532 See Sunstein, *supra* note 440, at 829-31 (discussing whether speech can be commodity).
- 533 See *supra* note 448 and accompanying text.
- 534 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.

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- ⁵³⁵ 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.”).
- ⁵³⁶ [Ashcroft v. Free Speech Coal.](#), 535 U.S. 234, 255 (2002) (internal quotations omitted).
- 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.”).
- ⁵³⁹ Cf. Menell & Nimmer, *supra* note 451, at 941 (arguing for “unwinding” Sony).

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