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ARTICLES

RETHINKING COPYRIGHT'S RELATIONSHIP TO THE FIRST AMENDMENT[†]

ALFRED C. YEN*

ABSTRACT

This Article offers a new account of copyright's relationship to the First Amendment. Until now, discourse about copyright and the First Amendment appears focused on applying a single standard of review. The Supreme Court has effectively taken the position that courts need only apply rational basis First Amendment scrutiny to copyright law. Some scholars have disagreed, arguing that intermediate scrutiny should be applied to all of copyright. By contrast, this Article argues that the proper level of First Amendment scrutiny depends on the type of copyright provision under review. In particular, courts should apply strict scrutiny to the few portions of the Copyright Act that embody viewpoint-based regulation of speech, intermediate scrutiny to the more numerous provisions that employ content-based regulation of speech, and rational basis scrutiny to the Copyright Act's content-neutral provisions.

This suggestion draws inspiration from recent Supreme Court decisions applying strict scrutiny to aspects of trademark law. These cases show that basic free speech principles apply to intellectual property, thereby raising doubt about the wisdom of applying only rational basis First Amendment scrutiny to copyright. The Article uses these principles and insights gained from copyright's historical relationship to the First Amendment to construct a framework that gives courts the ability to curb the use of copyright as censorship or naked economic giveaway while preserving Congress's ability to implement appropriately reasoned copyright policies that serve the public interest.

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INTRODUCTION

This Article offers a new account of the relationship between copyright and the First Amendment.¹ Existing orthodoxy as expressed by the Supreme Court maintains that conflicts between copyright and the First Amendment do not truly exist.² The Court has therefore applied only lenient rational basis First Amendment review to copyright.³ Leading cases state that higher levels of scrutiny would make sense only if Congress removed two specific doctrines—the idea/expression dichotomy and fair use—from the Copyright Act.⁴ This will probably never happen.

Reconsideration of this orthodoxy is worthwhile because two recent Supreme Court cases, *Matal v. Tam*⁵ and *Iancu v. Brunetti*,⁶ appear to expose parts of copyright to intermediate, and even strict, scrutiny by embracing what I call claimant-side First Amendment challenges to intellectual property laws. These challenges maintain that it is unconstitutional for Congress to vary intellectual property protection by referring to the content of speech because doing so violates the general principle that the government should remain neutral in

¹ This relationship has been the subject of regular scholarly attention since the publication of two articles by Professors Paul Goldstein and Melville Nimmer in 1970. See Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970). Other writings about the topic include 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 (1999); Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act is Unconstitutional*, 36 LOY. L.A. L. REV. 83 (2002); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CALIF. L. REV. 283 (1979); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998); Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057 (2001); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1 (1987); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004).

² See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556-60 (1985) (stating that doctrines like idea/expression dichotomy and fair use largely remove any tension between copyright and First Amendment); see also *Golan v. Holder*, 565 U.S. 302, 328-29 (2012); *Eldred v. Ashcroft*, 537 U.S. 186, 218-19 (2003); Arlen W. Langvardt & Tara E. Langvardt, *Caught in the Copyright Rye: Freeing First Amendment Interests from the Constraints of the Traditional View*, 2 HARV. J. SPORTS & ENT. L. 99, 119-20 (2011) (arguing that traditional views about copyright and First Amendment give relatively little weight to free speech concerns); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 3 (2002) (describing copyright as “a kind of giant First Amendment duty-free zone” that flouts basic free speech principles).

³ See *infra* Section IV.A; see also Neil Weinstock Netanel, *First Amendment Constraints on Copyright After Golan v. Holder*, 60 UCLA L. REV. 1082, 1084 (2013).

⁴ See *infra* note 184 and accompanying text.

⁵ 137 S. Ct. 1744 (2017).

⁶ 139 S. Ct. 2294 (2019).

matters of speech. This is significant because, up until now, First Amendment challenges to copyright have arisen in the context of defendants arguing that the enforcement of copyright violates their constitutional rights. By contrast, a claimant-side challenge maintains that it is the granting of copyright, not its enforcement, that raises constitutional trouble. This opens a largely unexplored perspective on copyright and the First Amendment.⁷

The Supreme Court's acceptance of claimant-side challenges upends the received orthodoxy about copyright and the First Amendment. In both *Tam* and *Brunetti*, the Court held that the First Amendment prohibits Congress from excluding certain trademarks from registration on the basis of viewpoints expressed by the marks.⁸ By so ruling, the Court invoked its long tradition of using strict First Amendment scrutiny to prevent government censorship. Indeed, the Supreme Court's commitment against censorship is so strong that it has applied strict scrutiny not only to viewpoint-based discrimination of the sort found in *Tam* and *Brunetti* but also to laws that simply use the content of speech to impose differential benefits and burdens without regard to viewpoint. Numerous cases establish that strict scrutiny renders these "content-based" regulations presumptively unconstitutional in a variety of contexts.⁹ The premise behind *Tam* and *Brunetti* is therefore, at least at first inspection, fully applicable to copyright.

Challenging questions for copyright arise because the Copyright Act employs numerous content-based distinctions to vary the rights granted to copyright claimants. Some of these distinctions animate copyright's basic concepts and policies. For example, copyright protects only original works that exhibit at least minimal creativity.¹⁰ Copyright therefore does not protect factual compilations that lack creative selection and arrangement,¹¹ nor does it protect pictorial

⁷ The most extensive treatment of this subject to date is Professor Ned Snow's *Content-Based Copyright Denial*, 90 IND. L.J. 1473 (2015). Snow argues that claimant-side challenges of the sort analyzed here would not succeed under the First Amendment and that the rational basis test is the primary limit on the use of content-based regulation in copyright. *Id.* at 1516-17. This means that Congress has effectively unfettered discretion to use copyright to discriminate against various types of speech as it sees fit. *See id.* at 1518-19, 1521-22. I reach a different conclusion and believe that the First Amendment requires intermediate scrutiny of any content-based regulation in copyright. Accordingly, I believe that some of copyright's content-based provisions are constitutional, but that others are not.

⁸ *See Brunetti*, 139 S. Ct. at 2297; *Tam*, 137 S. Ct. at 1751.

⁹ *See Reed v. Town of Gilbert*, 576 U.S. 155, 172 (2015) (holding that content-based regulation of signs violated First Amendment); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 580 (2011) (holding that content-based restriction on sale of prescription information violated First Amendment); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991) (holding that content-based sequestering of royalties for benefit of crime victims violated First Amendment); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987) (holding that content-based system of differential taxation violated First Amendment).

¹⁰ *See infra* Section I.A.

¹¹ *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 364 (1991) (holding that white pages were not entitled to copyright protection because they "lack[ed] the requisite

representations that are intended to faithfully depict existing objects.¹² Similarly, copyright gives factual works less protection than fictional ones, primarily by allowing more borrowing from factual works through the fair use doctrine.¹³ According to the Supreme Court, these distinctions are vital to achieving copyright's purpose of promoting the progress of science and the useful arts.¹⁴

Other content-based distinctions govern markets in copyright interests designed to achieve public goals. For example, copyright holders typically retain full control over whether anyone can make and sell recorded performances of their works.¹⁵ Thus, a book's copyright holder controls whether someone can record a reading of the book's text.¹⁶ However, those who own copyrights in songs do not enjoy similar rights. Instead, once the copyright holder of a song allows a person to make and sell a recording of her music, the law forces her to license others at no more than a statutorily prescribed rate.¹⁷ This means that composers enjoy less commercial control over their works than other copyright holders do, but this arrangement exists because Congress wanted to create conditions favorable to the development of mechanically reproduced music.¹⁸

Still other distinctions appear to be nothing more than naked preferences arbitrarily favoring certain speech interests over others. Perhaps the best known of these is the differential treatment given to composers and performers when recorded music is performed over AM or FM radio. Despite the fact that these performances require the exploitation of copyrights owned by both composers and performers, the Copyright Act only requires that royalties be paid to the composer.¹⁹ No good explanation for this exists other than the naked political power of the analog radio broadcasting industry.²⁰ Indeed, both composers and performers get royalty payments when similar performances take place over digital audio transmission,²¹ making this arrangement something that benefits an exceedingly narrow set of economic interests.

originality”).

¹² See *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1269 (10th Cir. 2008) (holding that digital wire models of Toyota's cars were not entitled to copyright protection because models did no more than depict vehicles); *Gracen v. Bradford Exch.*, 698 F.2d 300, 305 (7th Cir. 1983) (holding that painting of Dorothy from *The Wizard of Oz* was not entitled to copyright protection because it was not “substantially different from the underlying work”).

¹³ See 17 U.S.C. § 107 (2018); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985).

¹⁴ *Feist*, 499 U.S. at 349-50.

¹⁵ See 17 U.S.C. § 106(1), (3).

¹⁶ See *id.*

¹⁷ See *id.* § 115.

¹⁸ See *infra* notes 376-78 and accompanying text.

¹⁹ See 17 U.S.C. § 106(4), (6).

²⁰ See *infra* notes 387-94 and accompanying text.

²¹ See 17 U.S.C. § 106(6).

The ubiquity of content-based distinctions in copyright raises the possibility that significant portions of the existing Copyright Act violate the Constitution. After all, the First Amendment requires the application of strict scrutiny to content-based regulations of speech, copyright clearly regulates speech, and strict scrutiny almost always results in constitutional invalidation.²² At the same time, however, there are good, pragmatic reasons to be careful about jumping to such a conclusion. If all of copyright's content-based provisions are indeed unconstitutional, chaos would surely follow. Invalidating the portions of the Copyright Act that define which works get copyright protection, the scope of copyright's exclusive rights, and the amount that can be freely borrowed from copyrighted works would make it very difficult for copyright-based businesses as we know them to operate.

In short, *Tam* and *Brunetti* significantly challenge how we understand the relationship between copyright and the First Amendment. As noted above, the Supreme Court has until now explained copyright's constitutionality by effectively ignoring First Amendment principles considered important in other contexts.²³ However, *Tam* and *Brunetti* show that these principles really do matter in intellectual property, and there is no obvious reason to exclude copyright from this possibility. How then should copyright's First Amendment jurisprudence respond? To be sure, courts could continue to avoid applying the First Amendment to copyright, but *Tam* and *Brunetti* have weakened the justification for doing so. Accordingly, I believe that it is time to rethink copyright's relationship to the First Amendment in light of the principles raised in *Tam* and *Brunetti*.

In the pages that follow, I make such an effort. I conclude that it is possible to heed general First Amendment principles without destroying copyright as we know it. This conclusion rests upon the chronological enactment of Article I of the Constitution, the first U.S. copyright statute, and the First Amendment.

Article I explicitly authorizes Congress to enact copyright legislation, and it necessarily predated the adoption of any such legislation.²⁴ Pursuant to that authority, Congress passed the first copyright statute, which became effective in 1790.²⁵ Then, in 1791, the United States ratified the First Amendment.²⁶

This sequencing matters because Congress employed content-based regulation in the first copyright statute by granting copyright protection only to "any map, chart, book or books."²⁷ If subsequent ratification of the First Amendment made all forms of content-based regulation presumptively unconstitutional under strict scrutiny, then Congress probably exceeded its authority in passing the first copyright statute. Of course, that statute continued

²² See *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

²³ See *supra* note 2 and accompanying text.

²⁴ U.S. CONST. art. I, § 8, cl. 8.

²⁵ Copyright Act of 1790, Pub. L. No. 1-15, 1 Stat. 124.

²⁶ See *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019).

²⁷ 1 Stat. at 124.

in full force and effect, and the Supreme Court has noted this when applying the First Amendment to copyright.²⁸

This implies that the First Amendment does not require application of strict scrutiny to all forms of content-based regulation in copyright. Instead, it makes more sense to reserve presumptive unconstitutionality for only the forms of content-based regulation that carry the greatest risk of censorship, namely viewpoint-based regulation. Other content-based copyright provisions may be properly analyzed under intermediate scrutiny,²⁹ with rational basis scrutiny applied to content-neutral portions of the Copyright Act. This three-tiered application of the First Amendment to copyright has the pragmatic advantage of avoiding chaos because copyright's most important provisions are not viewpoint-based and will survive intermediate or rational basis scrutiny. However, this framework also applies meaningful First Amendment scrutiny to portions of copyright that discriminate against speech on the basis of viewpoint or content. This scrutiny will lead to the probable invalidation of content-based copyright provisions that function primarily as arbitrary or unjustified subsidies on behalf of some speakers over others. I contend that such constitutional invalidation will improve copyright.

I make this case in five Parts. Part I describes the aspects of the Copyright Act that claimant-side challenges might target, namely copyright's content-based provisions. Part II illustrates how claimant-side challenges would work by analyzing recent Supreme Court cases applying such challenges to trademark law. Part III provides background about First Amendment law that would be applied to copyright. Part IV uses this law to determine the proper amount of First Amendment scrutiny for various aspects of copyright law. Part V then applies this framework of scrutiny to copyright. It shows that copyright's viewpoint-based provisions and some of its content-based subsidies probably fail First Amendment scrutiny, but that practically all of copyright's core provisions would survive. This Article concludes with some observations about how First Amendment scrutiny improves copyright law.

²⁸ See *Halleck*, 139 S. Ct. at 1928.

²⁹ Others have argued that intermediate First Amendment scrutiny should apply to copyright. These proposals generally argue that such scrutiny should apply to all of copyright. See Netanel, *supra* note 1, at 37; see also Chemerinsky, *supra* note 1, at 93. Such a position has much to recommend it, but it also conflicts with existing Supreme Court doctrine applying rational basis scrutiny to content-neutral portions of the Copyright Act. See *infra* notes 179-96 and accompanying text. This creates a significant obstacle to its adoption by the courts. By contrast, my proposal applies different levels of scrutiny to copyright depending on the kind of regulation that Congress has used. And, by arguing for the application of intermediate scrutiny only to content-based aspects of the Copyright Act, it avoids conflict with existing case law. See *infra* notes 346-52 and accompanying text.

I. COPYRIGHT'S CONTENT-BASED PROVISIONS

Copyright regulates speech. It grants statutorily enumerated exclusive rights to authors,³⁰ and the prospect of commercially exploiting those rights encourages the creation of speech by making it profitable to create copyrighted works.³¹ If copyright encouraged all speakers equally by granting the same protection to all speech, it would raise few, if any, First Amendment problems. After all, who could object to a statute that granted equal incentives to all creators of speech?

Unfortunately, copyright does not operate with this degree of neutrality. Instead, copyright selectively extends its benefits only to those whose speech meets the definition of copyrightable subject matter,³² and it denies copyright to those whose works borrow too much from existing works.³³ This means that copyright picks speech winners and losers, promoting the speech that the statute prefers over the speech that it does not. More importantly, copyright selects its winners and losers by referring to the content of speech. Such content-based regulation is of great First Amendment significance because the Supreme Court generally applies strict scrutiny to such regulation, making it presumptively unconstitutional.³⁴ I will discuss this significance at considerable length below. For now, however, it suffices to describe how thoroughly content-based regulation runs through copyright. Although it is not possible to analyze every instance of copyright's content-based regulation, a survey of illustrations drawn from Chapter 1 of the Copyright Act will demonstrate the point.

A. *Content-Based Regulation in the Definition of Copyrightable Subject Matter*

Section 102(a) of the Copyright Act extends copyright to "original works of authorship."³⁵ This definition means that copyright separates works into two groups and extends the benefits of copyright to only one of them, namely original ones. This division depends on the content of a given work.

In *Feist Publications, Inc. v. Rural Telephone Service Co.*,³⁶ the Supreme Court established that a factual compilation receives copyright protection if its

³⁰ See 17 U.S.C. § 106 (2018).

³¹ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" (quoting U.S. CONST. art. I, § 8, cl. 8)).

³² See 17 U.S.C. § 102(a).

³³ See *id.* § 103(a); *Schrock v. Learning Curve Int'l, Inc.*, 586 F.3d 513, 518 (7th Cir. 2009).

³⁴ See *infra* note 132 and accompanying text.

³⁵ 17 U.S.C. § 102(a).

³⁶ 499 U.S. 340 (1991).

selection and arrangement of facts is at least minimally creative.³⁷ In that case, the Court considered a claim by Rural Telephone that Feist had committed copyright infringement by appropriating the contents of Rural Telephone's white pages directory.³⁸ The Court ruled for the defendant on the ground that the white pages contained insufficient originality to support copyright.³⁹ The quantum of originality exhibited by a work need not be large, but the requirement is real.⁴⁰ Thus, although many factual compilations exhibit enough originality to support copyright, the white pages did not.⁴¹ Accordingly, under *Feist*, federal courts award copyright to a factual compilation only after determining that its content is original.⁴² Similar distinctions are made for other types of works as well.

For example, courts measure whether the content of drawings, paintings, and other visual art is original. In *Gracen v. Bradford Exchange*,⁴³ the Seventh Circuit denied copyright to a painting based on film images of Judy Garland from *The Wizard of Oz* on the ground that such a work lacked sufficient originality.⁴⁴ By contrast, in *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*,⁴⁵ the Second Circuit found that hand-engraved reproductions of existing masterworks contained sufficient originality to support copyright.⁴⁶ And, in *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*,⁴⁷ the Tenth Circuit found that hand-finished drawings of Toyota cars lacked sufficient originality to garner copyright protection because they were intended to faithfully depict the appearance of those cars.⁴⁸

Similarly, courts justify granting copyright to blank forms by describing their content as original. In *Bibbero Systems, Inc. v. Colwell Systems, Inc.*,⁴⁹ the Ninth Circuit explained that the plaintiff's forms for recording medical billing

³⁷ *Id.* at 347-48.

³⁸ *Id.* at 343-44.

³⁹ *Id.* at 362-64.

⁴⁰ *Id.* at 362.

⁴¹ *Id.* at 344, 364.

⁴² *See, e.g.*, *Experian Info. Sols., Inc. v. Nationwide Mktg. Servs. Inc.*, 893 F.3d 1176, 1184-85 (9th Cir. 2018) (applying *Feist* and holding that Experian's compilation of names and addresses was entitled to limited copyright protection); *Matthew Bender & Co. v. W. Publ'g Co.*, 158 F.3d 674, 681-82 (2d Cir. 1998) (applying *Feist* and holding that West's compilation of court opinions was not copyrightable); *Banxcorp v. Costco Wholesale Corp.*, 978 F. Supp. 2d 280, 305-08 (S.D.N.Y. 2013) (applying *Feist* and holding that Costco's compilation of weekly averages was not copyrightable).

⁴³ 698 F.2d 300 (7th Cir. 1983).

⁴⁴ *Id.* at 305.

⁴⁵ 191 F.2d 99 (2d Cir. 1951).

⁴⁶ *Id.* at 104-05.

⁴⁷ 528 F.3d 1258 (10th Cir. 2008).

⁴⁸ *Id.* at 1266-68.

⁴⁹ 893 F.2d 1104 (9th Cir. 1990).

information lacked sufficient originality to gain copyright.⁵⁰ This holding reflected a controversial rule denying copyright to “blank forms.”⁵¹ However, the court recognized that blank forms become copyrightable when appropriately original text is integrated with the form.⁵² In short, courts determine whether blank forms are copyrightable by determining if they contain material that courts deem original.⁵³

B. *Content-Based Regulation and Exclusive Rights*

The content-based regulation of copyright extends well beyond granting copyright on the basis of a work’s originality. The precise rights given to a work also depend on its content. This content-based discrimination begins in § 106 of the Copyright Act, which defines the exclusive rights granted to copyright holders.⁵⁴ Some of the exclusive rights enumerated in § 106 apply to all copyrighted works. Others, however, are only available to some.

For example, the general right of public performance conspicuously does not protect sound recordings, extending only to “literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works.”⁵⁵ This omission is no oversight. The right of public performance does protect sound recordings, but only when the performance occurs by “digital audio transmission.”⁵⁶ This means that when recorded music is performed live by a DJ or over conventional analog radio, only the composer of the work being performed is entitled to copyright royalties. The performer, who may deserve considerable credit for the recording’s popularity, receives nothing.⁵⁷

Additional content-based discrimination occurs in various provisions that give users special rights to use certain copyrighted works. The most well-known of these exceptions is the fair use doctrine, codified in § 107 of the Copyright Act.⁵⁸ Fair use excuses copying or other use of a copyrighted work that would otherwise constitute infringement on the basis of four factors: the purpose of the

⁵⁰ *Id.* at 1108.

⁵¹ *See id.* at 1106-07; *see also* *Kregos v. Associated Press*, 937 F.2d 700, 708 (2d Cir. 1991); *Advanz Behavioral Mgmt. Res., Inc. v. Mirafior*, 21 F. Supp. 2d 1179, 1186 (C.D. Cal. 1998); 37 C.F.R. § 202.1(c) (2019) (denying registration to “blank forms”).

⁵² *Bibbero*, 893 F.2d at 1106-07.

⁵³ *See, e.g., Utopia Provider Sys., Inc. v. Pro-Med Clinical Sys., L.L.C.*, 596 F.3d 1313, 1319-24 (11th Cir. 2010) (finding that medical forms were not copyrightable for lack of originality); *Kregos*, 937 F.2d at 704-05.

⁵⁴ 17 U.S.C. § 106 (2018).

⁵⁵ *Id.* § 106(4).

⁵⁶ *See id.* § 106(6).

⁵⁷ *See Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, 487-88 (3d Cir. 2003) (describing how copyright protects musical compositions from unauthorized public performances while denying such protection to sound recordings).

⁵⁸ 17 U.S.C. § 107.

borrowing, the nature of the copyrighted work, the amount of the borrowing, and the effect on the potential market for the copyrighted work.⁵⁹

Note that the second of these factors—the nature of the copyrighted work—refers explicitly to the content of the work and varies the amount of free borrowing that users enjoy accordingly. The most common way in which this occurs is a distinction between factually based works and fictional ones. Users generally may borrow more freely from factually based works on the rationale that the public benefits from the broad dissemination of facts. By contrast, there is less need to disseminate pure fiction, making the justification for free borrowing weaker. Thus, fair use effectively weakens the amount of protection that a work gets if its content is factual in nature.⁶⁰

More content-based discrimination exists in the preamble of § 107, which identifies various purposes that are considered good candidates for fair use treatment. They include criticism, comment, news reporting, scholarship, and research.⁶¹ This affects the interests of potential copyright claimants by making it more likely that courts will declare certain forms of authorship illegal as copyright infringement. For example, consider an author who wants to change the words to a famous song for humorous effect. The creation of this new work might be copyright infringement, but our hypothetical author would surely respond to an infringement suit by claiming that her work is fair use.⁶² If the author successfully asserts fair use, then her work becomes a noninfringing derivative work, and the author may claim copyright in it.⁶³ If the assertion is unsuccessful, then her work would be declared infringing, and the copyright holder of the original song would probably get an injunction against any distribution or other exploitation of the humorous derivative.⁶⁴ Because the Copyright Act makes fair use more likely for works containing specific forms of content, it engages in content-based discrimination which advantages some speakers over others in the granting of copyright rights.

⁵⁹ *See id.*

⁶⁰ *See* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985) (“[Fair use] generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.”).

⁶¹ *See* 17 U.S.C. § 107.

⁶² *See Campbell*, 510 U.S. at 573 (describing defendants’ claims that fair use protected their use and adaptation of Roy Orbison’s “Oh, Pretty Woman”).

⁶³ *See* 17 U.S.C. § 103(a).

⁶⁴ *See id.* § 502(a) (permitting injunctive relief in favor of successful copyright plaintiffs); Jiarui Liu, *Copyright Injunctions After eBay: An Empirical Study*, 16 LEWIS & CLARK L. REV. 215, 227-41 (2012) (showing that plaintiffs establishing copyright infringement get injunctive relief over ninety percent of time); *see also* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.06[B][1][b][i] (Matthew Bender rev. ed. 2020) (ebook); Richard Dannay, *Copyright Injunctions and Fair Use: Enter eBay — Four-Factor Fatigue or Four-Factor Freedom?*, 55 J. COPYRIGHT SOC’Y U.S.A. 449, 456 (2008).

Perhaps even more striking are licensing schemes found in, among other provisions, § 115 of the Copyright Act.⁶⁵ Section 115(a) creates a compulsory license that applies only to nondramatic musical works, thereby limiting the ability of copyright holders to control the creation and distribution of recordings of those works.⁶⁶

Typically, the owner of a work has complete control over whether someone can make a recording of it. For example, § 106(1) gives copyright holders the right “to reproduce the copyrighted work in copies or phonorecords,” and § 106(3) reserves for them the right “to distribute copies or phonorecords of the copyrighted work to the public.”⁶⁷ This means that the copyright holder of a play or a book completely controls whether someone can make a recording of the work and sell it. She can allow one person to make a recording of the work while refusing permission to another, or she can refuse permission to everyone.

Section 115(a) partially deprives those owning nondramatic musical works of this right. It specifically states that, as to nondramatic musical works, “the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.”⁶⁸ The section goes on to outline a procedure that forces copyright owners of nondramatic musical works who have authorized the making of one commercial recording to license others to make similar recordings of their works at statutorily prescribed rates.⁶⁹ This license includes the privilege of arranging the work to conform to the style and interpretation of the recording artist.⁷⁰ Thus, the owner of a nondramatic musical work can prevent her work from being altered and commercially distributed only by not allowing anyone to do so, even herself. For those who wish to control how and when the public gets recorded versions of their music, this would be a significant loss of economic rights.

This Article’s final examples of content-based discrimination in the Copyright Act exist in § 110.⁷¹ This section contains a number of minor exceptions excusing behavior that would otherwise constitute infringement. Such exceptions might not be problematic but for the fact that they apply only to certain kinds of copyrighted works identified by their content. As such, they subject the speech expressed in those works to disfavored treatment that other copyrighted works do not experience. A few examples will make the point.

⁶⁵ See 17 U.S.C. § 115.

⁶⁶ See *id.* § 115(a).

⁶⁷ See *id.* § 106(1), (3).

⁶⁸ See *id.* § 115. This provision effectively codifies a similar provision found in § 1(e) of the 1909 Copyright Act, which governed immediately before the present 1976 Act. See Copyright Act of 1909, Pub. L. No. 60-349, § 1(e), 35 Stat. 1075, *repealed by* Copyright Act of 1976, 17 U.S.C. §§ 101-810.

⁶⁹ 17 U.S.C. § 115.

⁷⁰ See *id.* § 115(a)(2).

⁷¹ *Id.* § 110.

Subsection (3) excuses the performance of nondramatic literary, musical, or dramatico-musical work of a religious nature in the course of religious services as noninfringing.⁷² Subsection (4) exempts certain nonprofit performances of nondramatic literary or musical works.⁷³ Subsection (6) excuses performances of nondramatic musical works “by a governmental body or a nonprofit agricultural or horticultural organization, in the course of an annual agricultural or horticultural fair or exhibition.”⁷⁴ Subsection (10) exempts performance of a “nondramatic literary or musical work” during private social functions conducted by a nonprofit veterans’ organization or a nonprofit fraternal organization if the proceeds from the performance go to charitable purposes.⁷⁵

Each of these exemptions may subsidize perfectly deserving organizations and uses, but they do so by depriving works with certain content of royalties enjoyed by works containing other content. Subsection (3) disfavors nondramatic literary, musical, and dramatico-musical work of a religious nature because they do not earn royalties while all other works performed in this context do.⁷⁶ Similarly, subsection (4) disfavors nondramatic literary and musical works by depriving only those works of royalties for nonprofit performances.⁷⁷ Subsection (6) harms the interests of those creating nondramatic musical works,⁷⁸ and subsection (10) does likewise to nondramatic literary or musical works.⁷⁹

II. CLAIMANT-SIDE CHALLENGES TO COPYRIGHT

Tam and *Brunetti* illustrate how claimant-side challenges could be used to mount First Amendment attacks on copyright’s content-based provisions. In *Tam*, the plaintiff challenged § 2(a) of the Lanham Act,⁸⁰ which denies registration to marks that “may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.”⁸¹ *Tam* sued because the Patent and Trademark Office (“PTO”) relied on this provision when it refused to register the mark “The Slants” for his rock band.⁸² The PTO did so on the ground that the word “slants” is often used as a derogatory term for people of Asian descent.⁸³ *Tam* wanted to “reclaim” the term

⁷² *Id.* § 110(3).

⁷³ *Id.* § 110(4).

⁷⁴ *Id.* § 110(6).

⁷⁵ *Id.* § 110(10).

⁷⁶ *See id.* § 110(3).

⁷⁷ *See id.* § 110(4).

⁷⁸ *See id.* § 110(6).

⁷⁹ *See id.* § 110(10).

⁸⁰ Pub. L. No. 79-489, § 2(a), 60 Stat. 427, 428 (1946) (codified as amended at 15 U.S.C. § 1052(a)).

⁸¹ *Id.*; *Matal v. Tam*, 137 S. Ct. 1744, 1751, 1754-55 (2017).

⁸² *Tam*, 137 S. Ct. at 1754.

⁸³ *Id.*

and give it a positive meaning by using it for his band, whose members were of Asian descent.⁸⁴ The PTO disregarded this, and Tam sued. He won in the Federal Circuit, and the federal government appealed.⁸⁵

The Supreme Court affirmed.⁸⁶ The Court explained that the challenged provision violated the First Amendment by offending a “bedrock” principle against banning speech because it offends.⁸⁷ Here, the Lanham Act violated that principle by depriving Tam’s supposedly offensive mark of benefits granted to nondisparaging marks. Although registration is not a prerequisite for ownership and enforcement of trademark rights,⁸⁸ registration confers important benefits.⁸⁹ Refusing to register Tam’s mark therefore disadvantaged his speech, giving rise to his successful First Amendment claim.

Tam is a difficult case to read because the Court split over exactly how Tam’s claim should be analyzed. All eight justices agreed on the result,⁹⁰ but they diverged over the proper standard of review. Because the Lanham Act provision in question was clearly a content-based regulation, strict scrutiny would ordinarily apply, making the law presumptively unconstitutional. However, the government argued that trademarks were a form of commercial speech and thus subject only to intermediate scrutiny.⁹¹ The government’s argument was plausible. After all, trademarks identify the source of a good or service being sold. Nevertheless, the plaintiff countered with an equally plausible argument, namely that trademarks often serve purposes beyond mere source designation.⁹² For example, the use of “slants” in this particular context communicated a particular view about social issues.⁹³

Justice Alito spoke for himself and Chief Justice Roberts, Justice Breyer, and Justice Thomas.⁹⁴ They elected not to decide whether strict or intermediate scrutiny applied because the antidisparagement provision could not survive even intermediate scrutiny. Thus, they did not have to choose between intermediate and strict levels of scrutiny to decide the case.⁹⁵

⁸⁴ *Id.*

⁸⁵ *Id.* at 1754-55.

⁸⁶ *Id.* at 1765.

⁸⁷ *Id.* at 1750.

⁸⁸ *Id.* at 1752.

⁸⁹ *Id.* at 1753 (explaining that registration confers benefits including constructive notice about ownership claims, prima facie evidence of validity, and control importation of articles bearing infringing mark).

⁹⁰ Justice Gorsuch did not participate. *Id.* at 1765.

⁹¹ *Id.* at 1764.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 1751.

⁹⁵ *Id.* at 1764.

Justice Kennedy wrote a concurrence joined by Justices Ginsburg, Sotomayor, and Kagan.⁹⁶ For them, strict scrutiny had to be applied because “[a] law found to discriminate based on viewpoint is an ‘egregious form of content discrimination,’ which is ‘presumptively unconstitutional.’”⁹⁷ His opinion considered viewpoint discrimination so inimical to the First Amendment that such “heightened scrutiny” would apply even if the law regulated only commercial speech.⁹⁸

Finally, Justice Thomas wrote a brief concurring opinion in which he explained that strict scrutiny applies whenever the government tries to restrict truthful speech for the purpose of suppressing ideas, regardless of whether the speech in question is commercial or noncommercial.⁹⁹

In 2019, *Brunetti* elaborated on *Tam* to clarify the basis for the Supreme Court’s hostility to viewpoint-based discrimination. That case involved a First Amendment challenge to another portion of § 2 of the Lanham Act, which refused registration to immoral or scandalous marks.¹⁰⁰ Once again, the Court invalidated the statutory provision in question, but this time it produced a clear majority opinion written by Justice Kagan and joined by Justices Thomas, Ginsburg, Alito, Gorsuch, and Kavanaugh.¹⁰¹ Justice Kagan described the many opinions from *Tam* as united by the core principle that “government may not discriminate against speech based on the ideas or opinions it conveys.”¹⁰² Although this language appears to state a categorical rule against viewpoint-based discrimination, Justice Kagan cited *Rosenberger v. Rector & Visitors of University of Virginia*,¹⁰³ which explained viewpoint-based discrimination as an “egregious form of content discrimination” that is “presumptively unconstitutional.”¹⁰⁴ This implies that the Lanham Act provisions challenged in *Tam* and *Brunetti* failed because they could not survive strict scrutiny.

So what do *Tam* and *Brunetti* imply for copyright? At the very least, they demonstrate that claimant-side challenges to viewpoint-based regulation in copyright would probably succeed. It is hard to imagine that the Supreme Court

⁹⁶ *Id.* at 1765 (Kennedy, J., concurring in part and concurring in the judgment).

⁹⁷ *Id.* at 1766 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995)).

⁹⁸ *Id.* at 1767 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011)).

⁹⁹ *Id.* at 1769 (Thomas, J., concurring).

¹⁰⁰ *Iancu v. Brunetti*, 139 S. Ct. 2294, 2297 (2019).

¹⁰¹ *Id.*

¹⁰² *Id.* at 2299. Chief Justice Roberts, Justice Breyer, and Justice Sotomayor each concurred in part and dissented in part. *Id.* at 2294. All of them accepted the proposition that viewpoint-based discrimination is unacceptable, but they also thought that portions of the statutory provision in question did not constitute viewpoint discrimination. *See id.* at 2303 (Roberts, C.J., concurring in part and dissenting in part); *id.* at 2304 (Breyer, J., concurring in part and dissenting in part); *id.* at 2308 (Sotomayor, J., concurring in part and dissenting in part).

¹⁰³ 515 U.S. 819 (1995).

¹⁰⁴ *Brunetti*, 139 S. Ct. at 2299 (quoting *Rosenberger*, 515 U.S. at 829-30).

would let stand, for example, a statutory provision denying copyright to any work that criticized the federal government. Beyond this, however, the result of claimant-side challenges to copyright's content-based provisions is less clear. Considerable Supreme Court precedent stands for the proposition that content-based regulation receives strict First Amendment scrutiny and that viewpoint-based regulation is merely a form (albeit a particularly troubling one) of content-based regulation. This case law implies that claimant-side challenges could succeed against not only viewpoint-based copyright provisions but also those that are merely content based. At the same time, however, the Supreme Court has never applied more than the highly deferential rational basis test when considering First Amendment challenges to copyright.¹⁰⁵ This suggests that a proper reading of *Tam* and *Brunetti* limits strict scrutiny to copyright's viewpoint-based provisions. Reconciling these possibilities begins with the exposition of some basic First Amendment principles.

III. SOME FIRST AMENDMENT BACKGROUND

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . ."¹⁰⁶ Although this language sounds absolute, First Amendment jurisprudence actually embodies a complex (and sometimes incoherent) mosaic of doctrinal concepts and distinctions that control whether the First Amendment protects an alleged speech interest and, if so, what level of constitutional scrutiny follows. Of these, three are of particular interest to our inquiry: the distinction between speech and conduct, the level of constitutional scrutiny applied to content-based regulation of speech, and the extent of weaker First Amendment protection for commercial speech. A brief exposition of each and their consequences follows.

By protecting only "freedom of speech," the First Amendment implies that nonexpressive conduct receives no constitutional protection.¹⁰⁷ Although it may be difficult to determine when conduct becomes sufficiently expressive to claim First Amendment protection,¹⁰⁸ one common understanding of the distinction between speech and conduct is that government has a relatively free hand to pass

¹⁰⁵ See *infra* Section IV.A.

¹⁰⁶ U.S. CONST. amend. I.

¹⁰⁷ See *NIFLA v. Becerra*, 138 S. Ct. 2361, 2373 (2018) (stating that First Amendment permits regulation of conduct even if such regulation imposes incidental burdens on speech); *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 300 (2007) (holding that state high school sports association rule prohibiting recruiting did not violate First Amendment because rule discouraged conduct, not speech).

¹⁰⁸ See Wesley J. Campbell, *Speech-Facilitating Conduct*, 68 STAN. L. REV. 1, 3, 10-11 (2016) (describing "nebulous" distinction between expression and nonexpressive conduct); Peter Meijes Tiersma, *Nonverbal Communication and the Freedom of "Speech,"* 1993 WIS. L. REV. 1525, 1527; Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1346 (2005).

commercial regulation, even when that regulation of commercial conduct incidentally affects speech.¹⁰⁹

For example, in the seminal case of *Giboney v. Empire Storage & Ice Co.*,¹¹⁰ the Supreme Court considered whether an injunction against labor picketing obtained under Missouri antitrust law was valid under the First Amendment.¹¹¹ Among other things, the picketers claimed that the First Amendment gave them the right to picket because they were “attempting peacefully to publicize truthful facts about a labor dispute.”¹¹² The Supreme Court rejected this contention and upheld the injunction.¹¹³ The Court characterized the picketers’ speech as part of a concerted effort to force the target of the picketing to accept economic arrangements demanded by the picketers.¹¹⁴ According to the Court, Missouri was free to govern trade through its antitrust law pretty much as it saw fit.¹¹⁵ If the Court used the First Amendment to excuse the picketers’ behavior, Missouri would lose this power because picketers would be free to ignore Missouri law.¹¹⁶ The Court therefore concluded that the First Amendment does not protect speech that is “an integral part of conduct in violation of a valid criminal statute.”¹¹⁷

As one might expect, courts apply a permissive rational basis test to laws affecting the verbal components of conduct when First Amendment concerns are minimal.¹¹⁸ This means that courts will find the law constitutional as long as

¹⁰⁹ See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (“It is true that restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct.”); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65-67 (2006) (holding that universities refusing military recruiters access to placement offices because of military’s discriminatory recruitment policy engage in conduct, not speech); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 477 (1997) (holding that constitutionality of financial assessments imposed on fruit producers to support generic advertising is economic regulation not subject to special First Amendment scrutiny); *Spence v. Washington*, 418 U.S. 405, 409 (1974) (per curiam) (stating that conduct sufficiently “imbued with elements of communication” becomes speech protected by First Amendment); *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”).

¹¹⁰ 336 U.S. 490 (1949).

¹¹¹ *Id.* at 491-92.

¹¹² *Id.* at 498.

¹¹³ *Id.* at 498-504.

¹¹⁴ *Id.* at 492.

¹¹⁵ *Id.* at 497.

¹¹⁶ *Id.* at 504.

¹¹⁷ *Id.* at 498; see also *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 425-27 (1990) (holding boycott by lawyers seeking to raise pay of those representing indigent criminal defendants not insulated by First Amendment from antitrust scrutiny).

¹¹⁸ See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 693 (6th Cir. 2014) (“[W]here a regulatory scheme neither implicates a fundamental right nor creates a suspect classification, rational basis review applies.”); cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)

there is a rational basis for the law related to a legitimate government interest.¹¹⁹ It is exceedingly rare for a law to fail rational basis scrutiny.¹²⁰

Of course, if communicative behavior rises to the level of speech, and if the speech does not fall into a specifically enumerated category excluded from protection,¹²¹ then the First Amendment generally subjects laws affecting speech to meaningful constitutional review.¹²² Such review can take the form of strict scrutiny or intermediate scrutiny.¹²³

Strict scrutiny is the most searching form of constitutional review. In order for a law to pass strict scrutiny, it must advance a compelling state interest and be narrowly tailored to that interest.¹²⁴ The application of strict scrutiny nearly always results in a finding of unconstitutionality.¹²⁵

Intermediate scrutiny offers less searching review of a law by allowing the law to serve a less important government interest in a less precise manner. Courts typically state that intermediate scrutiny requires only that the law serve an important (as opposed to compelling) government interest and does so in a manner substantially related to the interest.¹²⁶ Thus, the application of

(“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”).

¹¹⁹ See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985); *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976) (per curiam).

¹²⁰ See *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313-15 (1993) (explaining that rational basis test accepts legislation based on rational speculation unsupported by evidence or empirical data); see also Maria Ponomarenko, *Administrative Rationality Review*, 104 VA. L. REV. 1399, 1401 (2018); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 760 (2011) (construing rational basis review as “a free pass” that is effectively meaningless).

¹²¹ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam) (excluding incitement from First Amendment protection); *Roth v. United States*, 354 U.S. 476, 492 (1957) (excluding obscenity from First Amendment protection); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (excluding fighting words from First Amendment protection).

¹²² See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) (holding law prohibiting sale of prescription information regulates speech and is subject to strict scrutiny); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (holding law prohibiting picketing regulates speech and is subject to strict scrutiny); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980) (holding ban of promotional advertising regulates commercial speech and is subject to intermediate scrutiny).

¹²³ Compare *Sorrell*, 564 U.S. at 571 (applying strict scrutiny), with *Cent. Hudson Gas*, 447 U.S. at 564 (applying intermediate scrutiny).

¹²⁴ See *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015).

¹²⁵ See, e.g., *id.* at 2224 (applying strict scrutiny and holding law regulating only certain categories of signs unconstitutional).

¹²⁶ See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017); *McCullen v. Coakley*, 573 U.S. 464, 477 (2014).

intermediate scrutiny does not ordinarily result in invalidation, although such a result remains a real possibility.¹²⁷

The level of First Amendment scrutiny applied to government regulation of speech (as opposed to conduct) depends on two factors: whether the law is content based and whether the speech being affected is ordinary or commercial speech. If a law is content based, then courts apply strict scrutiny unless the burdened speech is commercial speech.¹²⁸ Content-based regulations affecting only commercial speech receive intermediate scrutiny, as do regulations that are not content based (i.e., are content neutral).¹²⁹

Content-based regulations are those that impose differing burdens on speech depending on its content.¹³⁰ Examples of content-based regulations include those that criminalize depictions of animal cruelty¹³¹ or those that impose different restrictions on political, religious, directional, and commercial street signs.¹³² To understand why content-based regulation receives strict scrutiny, let us begin by considering the starkest example of content-based regulation, namely viewpoint-based regulation.

Examples of viewpoint-based regulation include the prohibition of picketing near a foreign embassy when the picketers criticize the embassy's government¹³³ or the denial of funding to student groups that promote "a particular belie[f] in or about a deity or an ultimate reality."¹³⁴ Laws like this differ from ordinary content-based regulation because they refer to the intellectual position of the speaker as opposed to the subject matter or general nature of her speech. Viewpoint-based regulation generally imposes a form of censorship because it implies governmental suppression of certain ideas in favor of others, and this is

¹²⁷ See, e.g., *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 430 (2002) (plurality opinion); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54-55 (1986).

¹²⁸ See *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018); *Reed*, 576 U.S. at 163; *Sorrell*, 564 U.S. at 571 ("[I]t is all but dispositive to conclude that a law is content based . . ."); see also *infra* notes 143-65 and accompanying text (discussing regulation of commercial speech).

¹²⁹ Laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral. See, e.g., *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981).

¹³⁰ See *Reed*, 576 U.S. at 163.

¹³¹ See *United States v. Stevens*, 559 U.S. 460, 468 (2010).

¹³² *Reed*, 576 U.S. at 169-72 (holding Town code that restricted posting of temporary directional signs was content based and impermissible); see also *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 805 (2011) (holding restriction against violent video games was content based and impermissible); *Carey v. Brown*, 447 U.S. 455, 471 (1980) (holding bans on residential picketing unless for labor were content based and impermissible).

¹³³ *Boos v. Barry*, 485 U.S. 312, 331 (1988).

¹³⁴ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 823 (1995) (alteration in original).

why the Supreme Court has stated that viewpoint-based discrimination clearly violates the First Amendment.¹³⁵

This link between censorship and certain forms of content-based regulation has led the Supreme Court to apply strict scrutiny to more than viewpoint-based regulation. Because censorship constitutes a particularly odious form of government behavior, the Court has not considered the prohibition of only viewpoint-based regulation sufficient to ensure that censorship will not occur. This is because government can easily use ordinary content-based regulation to accomplish censorship even if censorship did not necessarily motivate enactment of the regulation in question. Consider, for example, a law that prohibits picketing unless conducted for purposes of a labor dispute. Such a law might not have been passed for the purpose of favoring one type of speech over others, but it clearly has that effect.¹³⁶ Accordingly, First Amendment doctrine generally lumps ordinary content-based regulation with viewpoint-based discrimination by applying strict scrutiny to both.¹³⁷ As the Supreme Court has explained:

Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—*i.e.*, the “abridg[ement] of speech”—rather than merely the motives of those who enacted them. “The vice of content-based legislation . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.”¹³⁸

The major exception to the application of strict scrutiny to content-based regulation is the so-called commercial speech doctrine, which provides that content-based regulation of commercial speech receives only intermediate scrutiny.¹³⁹ According to the Supreme Court, commercial speech is “speech proposing a commercial transaction”¹⁴⁰ or “expression related solely to the economic interests of the speaker and its audience.”¹⁴¹ However, courts have found it challenging to clearly identify commercial speech because apparent commercial speech often contains artistic, political, or informative components

¹³⁵ See *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019); *Rosenberger*, 515 U.S. at 829.

¹³⁶ See *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 94 (1972) (holding that law prohibiting picketing near schools unless connected to labor dispute involving schools violates First Amendment).

¹³⁷ See *id.* at 95. For further discussion of cases applying strict scrutiny to ordinary content-based regulation not motivated by censorship, see *infra* Section IV.B.

¹³⁸ *Reed v. Town of Gilbert*, 576 U.S. 155, 167 (2015) (alterations in original) (citation omitted) (first quoting U.S. CONST. amend. I; and then quoting *Hill v. Colorado*, 530 U.S. 703, 743 (2000) (Scalia, J., dissenting)).

¹³⁹ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980).

¹⁴⁰ *Id.* at 562 (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978)).

¹⁴¹ *Id.* at 561.

that would appear to merit full First Amendment protection.¹⁴² It therefore makes sense to review some leading cases to get a better sense of why this doctrine exists.

In *Valentine v. Chrestensen*,¹⁴³ plaintiff Chrestensen owned a submarine that he exhibited for profit.¹⁴⁴ He brought the vessel to New York City, docked it, and attempted to distribute flyers advertising the attraction on the streets.¹⁴⁵ The Police Commissioner of New York City told Chrestensen that distributing his flyers violated a city ordinance that prohibited street distribution of advertisements.¹⁴⁶ Chrestensen responded by creating a double-sided handbill that had an advertisement for the submarine on one side and a protest about the City's behavior on the other.¹⁴⁷ The City advised Chrestensen that he could distribute his protest but that he could not do so with the advertisement printed on the other side of the handbill.¹⁴⁸ Chrestensen refused to comply and was restrained by the police.¹⁴⁹ Chrestensen then sued and received an injunction allowing him to distribute the handbills.¹⁵⁰ The Circuit Court affirmed, but the Supreme Court granted certiorari and reversed.¹⁵¹

In so ruling, the Court found that the First Amendment restricted government's power to regulate speech expressed in the streets. However, the Court made an exception for "purely commercial advertising,"¹⁵² stating that the First Amendment did not protect that type of speech.¹⁵³ Importantly, the Court refused to give weight to the protests contained on one side of Chrestensen's handbills because doing so would make it impossible for government to regulate advertisements. As the Court wrote: "If that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only

¹⁴² See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) (describing how case about forbidding use of newsracks to distribute commercial publications "illustrates the difficulty of drawing bright lines that will clearly cabin commercial speech"); see also Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 5 (2000) (describing "blurred" boundaries of commercial speech); Kathryn E. Gilbert, Note, *Commercial Speech in Crisis: Crisis Pregnancy Center Regulations and Definitions of Commercial Speech*, 111 MICH. L. REV. 591, 595-97 (2013) ("Commercial speech doctrine is a mess.").

¹⁴³ 316 U.S. 52 (1942).

¹⁴⁴ *Id.* at 52.

¹⁴⁵ *Id.* at 52-53.

¹⁴⁶ *Id.* at 53.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 54.

¹⁵¹ *Id.* at 54-55.

¹⁵² *Id.*

¹⁵³ *Id.*

append a civic appeal, or a moral platitude, to achieve immunity from the law's command."¹⁵⁴

Chrestensen illustrates a problem that has defied clear solution. The government has and needs the ability to regulate commerce without undue judicial interference. However, commerce frequently involves speech. If the First Amendment prohibits government regulation of commerce whenever that regulation affects speech, then clever businesses can evade government regulation by deliberately conducting business intermingled with speech. Thus, if government is to retain its ability to regulate commerce, courts must limit application of ordinary First Amendment protection when speech involves commerce.¹⁵⁵

Chrestensen's complete denial of First Amendment protection for commercial speech did not last forever. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,¹⁵⁶ the Virginia Citizens Consumer Council sued to invalidate a law preventing pharmacists from advertising prescription drug prices.¹⁵⁷ Not surprisingly, the defendants cited *Chrestensen* for the proposition that commercial advertisement received no First Amendment protection.¹⁵⁸ The Court rejected this argument and extended First Amendment protection to commercial speech, including speech that does "no more than propose a commercial transaction."¹⁵⁹ The Court made it clear that such protection did not prevent regulation, or even prohibition, of some forms of commercial speech, such as false speech.¹⁶⁰ In this case, however, Virginia did not have adequate reasons for completely suppressing truthful information about lawful activity to pass First Amendment scrutiny.¹⁶¹

The Court further clarified this approach to commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.¹⁶² In that case, Central Hudson challenged a state regulatory decree forbidding promotional advertising by electric utilities.¹⁶³ The Court struck down the regulation and affirmed its position that the First Amendment protects commercial speech.

¹⁵⁴ *Id.* at 55.

¹⁵⁵ See Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 148 (recognizing debate around whether subordination of commercial speech to other speech was sufficient "to ensure that the First Amendment would not paralyze the operation of the modern state").

¹⁵⁶ 425 U.S. 748 (1976).

¹⁵⁷ *Id.* at 752.

¹⁵⁸ *Id.* at 758.

¹⁵⁹ *Id.* at 762 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)).

¹⁶⁰ *Id.* at 770-73 (listing time, place, and manner restrictions, restrictions against false and misleading advertising, and restrictions on electronic broadcast media as likely permissible restrictions).

¹⁶¹ *Id.* at 773.

¹⁶² 447 U.S. 557 (1980).

¹⁶³ *Id.* at 558-59.

However, the Court clearly stated that commercial speech receives lower First Amendment protection than other types of speech.¹⁶⁴ This meant that the First Amendment accepts government regulation of lawful, nonmisleading commercial speech if: (1) the government asserts a substantial interest; (2) the regulation directly advances the government interest; and (3) the regulation is not more extensive than necessary to serve that interest.¹⁶⁵

Together, *Virginia Board of Pharmacy* and *Central Hudson* establish an approach to commercial speech that is radically different from the one taken in *Chrestensen*. Instead of giving government a free hand to regulate commerce, even when speech is involved, the Court established the First Amendment as a meaningful source of reviewing—and potentially invalidating—commercial regulation. Granted, content-based regulations of commercial speech are not presumptively invalid. Nevertheless, the government can no longer rely on lenient rational basis review to uphold restrictions on commercial speech.

IV. FIRST AMENDMENT REVIEW OF COPYRIGHT'S CONTENT-BASED PROVISIONS

First Amendment doctrine plausibly supports using rational basis scrutiny, intermediate scrutiny, or strict scrutiny for First Amendment review of copyright's regulation of speech. Each possibility corresponds to a different characterization of copyright's relationship to speech. If courts consider copyright a form of commercial regulation affecting conduct, then rational basis review makes sense for most (if not all) of copyright. If courts view copyright as the direct regulation of speech, then strict scrutiny would apply to copyright's content-based provisions and intermediate scrutiny to copyright's content-neutral ones. Finally, if courts think of copyright as both commercial regulation and speech regulation, applying intermediate scrutiny to all of copyright would follow.

This Part examines the law supporting each of these possibilities in more detail in hopes of figuring out how the First Amendment should affect copyright. Not surprisingly, support exists for each possibility but not enough to create a seamless regime of review. Indeed, all three methods of review have roles to play in the proper First Amendment review of copyright.

A. *The Case for Rational Basis Review*

The Supreme Court has consistently applied rational basis First Amendment review to copyright. The relevant cases involve First Amendment challenges by copyright users as opposed to claimants, and the Court has offered two reasons for using the rational basis test. First, although copyright may restrict people from making use of copyrighted works, any effect on speech is minimized

¹⁶⁴ *Id.* at 562-63 (“The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”).

¹⁶⁵ *Id.* at 566.

because copyright contains doctrines—like the idea/expression dichotomy and fair use—that give individuals the right to make appropriate use of copyrighted works. Second, any remaining speech losses are outweighed by the creation of new works that copyright makes possible.¹⁶⁶

The underpinnings for this position come from *Harper & Row, Publishers, Inc. v. Nation Enterprises*.¹⁶⁷ In that case, defendant Nation Enterprises clandestinely received a pre-publication copy of President Gerald Ford's memoir *A Time to Heal*.¹⁶⁸ *The Nation Magazine* wrote and published an article that summarized the memoir and quoted some of its passages.¹⁶⁹ Harper & Row sued, alleging that this article infringed copyright in President Ford's memoir.¹⁷⁰ Nation Enterprises defended on the basis of fair use.¹⁷¹

In asserting this defense, Nation Enterprises did not ask the Court to review the constitutionality of any Copyright Act provisions. Instead, it argued that the First Amendment required generous, pro-defendant fair use treatment because President Ford's unique public position gave his memoirs unusual importance as a matter of public interest.¹⁷² The Court rejected this idea, declining to “create what amounts to a public figure exception to copyright.”¹⁷³

In so ruling, the Court asserted that the idea/expression dichotomy strikes an appropriate balance between guarantees of free speech and incentives for the creation of new speech.¹⁷⁴ Copyright leaves ideas and facts unprotected so that people can borrow and communicate them freely.¹⁷⁵ Yet, at the same time, copyright encourages the creation of new speech by protecting the expression of

¹⁶⁶ For purposes of this Article, I accept these justifications as valid. However, it is important to note that both assertions are problematic and may not support the Court's reasoning well. This is because neither the idea/expression dichotomy nor the fair use doctrine necessarily provide firm guarantees of any particular level of free borrowing from copyrighted works. Seminal cases invoking both doctrines candidly admit that the doctrines are murky. The idea/expression dichotomy may allow free borrowing of a work's ideas, but it is impossible to define whether any given portion of a work is idea or expression. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930). The fair use doctrine excuses certain borrowings on the basis of a four-factor test, but consistent interpretation of those factors eludes the courts. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994). Accordingly, as a descriptive matter, courts have interpreted both doctrines to permit generous levels of borrowing or very little borrowing. Such ambiguity implies that neither doctrine truly provides an adequate guarantee of free speech. See Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 WASH. & LEE L. REV. 831, 847-61 (2010); Rubinfeld, *supra* note 2, at 13-21; Tushnet, *supra* note 1, at 548.

¹⁶⁷ 471 U.S. 539 (1985).

¹⁶⁸ *Id.* at 543.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 544.

¹⁷² *Id.* at 555-56.

¹⁷³ *Id.* at 560.

¹⁷⁴ *Id.* at 556; see also 17 U.S.C. § 102(b) (2018) (denying copyright protection for ideas).

¹⁷⁵ See *Harper & Row*, 471 U.S. at 556.

authors and allowing them to reap economic rewards from the exploitation of their works.¹⁷⁶ Indeed, without such protection, authors might not create new works at all, thereby reducing speech.¹⁷⁷ This led to the conclusion that the case at hand did not merit a specific interpretation of fair use for First Amendment reasons, and the Court ruled against the defendant.¹⁷⁸

*Eldred v. Ashcroft*¹⁷⁹ elaborated on *Harper* to apply rational basis First Amendment scrutiny to copyright legislation.¹⁸⁰ In *Eldred*, the plaintiff argued (among other things) that the First Amendment required heightened scrutiny of new copyright legislation that added twenty years to the term of already existing copyrights.¹⁸¹ The Court disagreed. Justice Ginsburg's majority opinion cited *Harper* for the proposition that copyright's role as "the engine of free expression" rendered it basically compatible with the First Amendment.¹⁸² Granted, copyright made it illegal for some people to engage in their desired speech activities. However, these restrictions had relatively little significance because the idea/expression dichotomy and fair use guaranteed users considerable ability to borrow from copyrighted works.¹⁸³ Thus, copyright's pro-speech incentives outweighed its anti-speech restrictions, so intermediate scrutiny was unnecessary. The Court could review copyright under the rational basis test as long as Congress did not alter "the traditional contours of copyright protection."¹⁸⁴

Eldred's elaboration of *Harper* implies that First Amendment review of new copyright legislation depends on how the legislation affects copyright as a whole. If new legislation maintains copyright's traditional contours, then the rational basis test applies. If new legislation changes those contours, then intermediate or strict scrutiny becomes possible. This obviously places great importance on the meaning of copyright's "traditional contours," but the *Eldred* Court did not identify them. However, the Supreme Court did further elaborate in *Golan v. Holder*.¹⁸⁵

In *Golan*, the plaintiffs were conductors, musicians, and publishers who challenged legislation that removed certain works that had never gained or had

¹⁷⁶ See *id.* at 556-57.

¹⁷⁷ See *id.* at 559.

¹⁷⁸ *Id.* at 560.

¹⁷⁹ 537 U.S. 186 (2003).

¹⁸⁰ *Id.* at 204-05.

¹⁸¹ *Id.* at 217-18. The plaintiff also made other arguments about the extent of congressional power under Article I, but they are not relevant to this Article's investigation.

¹⁸² *Id.* at 219 (quoting *Harper & Row*, 471 U.S. at 558).

¹⁸³ *Id.* at 219-20.

¹⁸⁴ *Id.* at 221; see also *Harper & Row*, 471 U.S. at 560 (explaining that idea/expression dichotomy and fair use doctrine obviate the need for First Amendment-based de facto exceptions to copyright).

¹⁸⁵ 565 U.S. 302 (2012).

lost American copyright protection from the public domain.¹⁸⁶ The plaintiffs argued that, among other things, the First Amendment prohibited Congress from removing works from the public domain.¹⁸⁷ The District Court summarily rejected this argument on the ground that enforcement of copyright does not implicate First Amendment concerns.¹⁸⁸ However, the Tenth Circuit disagreed because, according to the court, the legislation altered the traditional contours of copyright.¹⁸⁹ This made meaningful constitutional scrutiny necessary, and the Tenth Circuit remanded to the District Court.¹⁹⁰

On remand, the District Court found that the legislation was content-neutral regulation of speech and applied intermediate scrutiny.¹⁹¹ The court concluded that the statute could not survive this scrutiny because it was not justified by any asserted federal interests.¹⁹² The Tenth Circuit once again disagreed, finding that the law was narrowly tailored to fit the purpose of protecting U.S. copyright holders' interests abroad.¹⁹³ The plaintiffs appealed to the Supreme Court, which granted certiorari and affirmed, citing *Eldred*.¹⁹⁴ In so doing, the Court identified copyright's traditional contours as the idea/expression dichotomy and the fair use doctrine.¹⁹⁵ Because the law in question left those two doctrines undisturbed, no elevated scrutiny was necessary or appropriate.¹⁹⁶

It is possible to read *Harper*, *Eldred*, and *Golan* as a definitive statement effectively limiting all First Amendment review of copyright to the rational basis test. This rests on the Supreme Court's apparent belief that rational basis review applies to any piece of copyright legislation as long as it does not weaken the idea/expression dichotomy or the fair use doctrine.¹⁹⁷ However, such a conclusion is overbroad and unwarranted.

As an initial matter, *Eldred* and *Golan* applied the First Amendment only to content-neutral aspects of the Copyright Act. The Court did not have to rule on copyright's general obligation of content neutrality, leaving the proper standard for reviewing content-based portions of copyright technically undecided.

Additionally, the rationale of *Eldred* and *Golan* works only when applied to traditional First Amendment claims about copyright—namely, claims brought

¹⁸⁶ *Id.* at 307-08, 313-14.

¹⁸⁷ *Golan v. Gonzales*, No. 01-cv-01854, 2005 WL 914754, at *2 (D. Colo. Apr. 20, 2005).

¹⁸⁸ *Id.* at *14.

¹⁸⁹ *Golan v. Gonzales*, 501 F.3d 1179, 1187-89 (10th Cir. 2007).

¹⁹⁰ *Id.* at 1196-97.

¹⁹¹ *Golan v. Holder*, 611 F. Supp. 2d 1165, 1170-71, 1177 (D. Colo. 2009).

¹⁹² *Id.* at 1177.

¹⁹³ *Golan v. Holder*, 609 F.3d 1076, 1083-84 (10th Cir. 2010).

¹⁹⁴ *Golan v. Holder*, 565 U.S. 302, 319 (2012).

¹⁹⁵ *Id.* at 328-29.

¹⁹⁶ *Id.*

¹⁹⁷ See Lackland H. Bloom, Jr., *Copyright Under Siege: The First Amendment Front*, 9 COMPUTER L. REV. & TECH. J. 41, 42 (2004) (taking position that *Eldred* correctly rejects practically all First Amendment challenges to copyright).

by users. In those cases, the Supreme Court implied that without copyright, society would have far fewer creative works to enjoy. Because doctrines like the idea/expression dichotomy and fair use keep the free speech losses suffered by users relatively low,¹⁹⁸ the benefits of new works incentivized by copyright outweigh any First Amendment losses copyright imposes.¹⁹⁹ In short, the Court seems to believe that, although copyright takes away some free use of copyrighted materials, users and society are still better off because they have (albeit slightly lower) access to a larger number of works.

By contrast, when a copyright claimant brings a First Amendment claim, she will argue that she is entitled to more protection than the copyright statute gives.²⁰⁰ The idea/expression dichotomy and fair use may minimize free speech losses suffered by copyright users, but they do not have the same effect on copyright claimants. Indeed, because those doctrines give users the right to borrow parts of copyrighted works, they appear to harm the speech interests of copyright claimants by curtailing rights that copyright holders might otherwise enjoy. Moreover, to the extent that copyright incentives for new works compensate society and users for speech losses that copyright inflicts, those incentives do not meaningfully alleviate losses experienced by copyright claimants. A plaintiff claiming that she has been unconstitutionally deprived of a copyright right gains no solace from the fact that others enjoy those incentives to create copyrightable works.²⁰¹

The foregoing shows that at most one should read *Eldred* and *Golan* as establishing rational basis review only for First Amendment claims brought by users of copyrighted works against content-neutral provisions of the Copyright Act. This further implies that other cases applying the First Amendment to content-based regulation have much to say about the proper review of copyright's content-based provisions.

B. *The Case for Strict Scrutiny*

No case has applied strict First Amendment scrutiny to copyright. However, as shown below, the Supreme Court has used such scrutiny to strike down laws that selectively diminished the value of some copyrights on the basis of content. Together, these cases suggest that strict scrutiny should be applied to copyright's content-based provisions.²⁰²

¹⁹⁸ See *Golan*, 565 U.S. at 327-28 (describing First Amendment protection offered by idea/expression dichotomy and fair use as critically important); *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (rejecting elevated scrutiny “on a copyright scheme that incorporates its own speech-protective purposes and safeguards”).

¹⁹⁹ *Golan*, 565 U.S. at 328; *Eldred*, 537 U.S. at 219.

²⁰⁰ See *supra* Part II.

²⁰¹ See *Snow*, *supra* note 7, at 1502 (arguing that denial of copyright rights does not prevent speech from occurring and instead only denies the derivation of profit benefit to the claimant).

²⁰² See *Rubinfeld*, *supra* note 2, at 5 (characterizing copyright as content-based regulation

In *Arkansas Writers' Project, Inc. v. Ragland*,²⁰³ the publisher of a general interest magazine sued over Arkansas's sales tax scheme, which imposed a tax on general interest magazines while exempting newspapers and religious, professional, trade, and sports journals.²⁰⁴ Not surprisingly, the state defended on the ground that a sales tax constitutes ordinary commercial regulation that the state could shape as it saw fit.²⁰⁵ The Supreme Court disagreed because the taxing scheme varied tax rates on the basis of the magazines' content.²⁰⁶ The Court understood that the tax did not constitute viewpoint discrimination and that the state lacked censorial motives.²⁰⁷ Nevertheless, the content-based nature of the tax required strict scrutiny because selective taxation of the press could easily be abused.²⁰⁸ The state argued that its differential tax could survive strict scrutiny on the ground that it was designed to help encourage "fledgling" publishers.²⁰⁹ However, the Court expressed skepticism that such a justification would be compelling.²¹⁰ Furthermore, even if this proposed interest were compelling, the differential tax was not narrowly drawn by reason of being both over- and underinclusive.²¹¹

In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*,²¹² a book publisher sued to invalidate New York's so-called "Son of Sam" law.²¹³ That law required the deposit of income from works describing a convicted criminal's crime into an escrow account for the benefit of the criminal's victims and creditors.²¹⁴ The Court struck the law down, writing: "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."²¹⁵ Because the Son of Sam law applied only to certain types of works, it was a content-based regulation that had to pass strict scrutiny.²¹⁶ New York asserted, among other things, that the law served the compelling state interest of compensating victims

that should be, at least as a matter of basic principle, subject to strict scrutiny); Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 *Liquormart, and Bartnicki*, 40 *HOUS. L. REV.* 697, 703-10 (2003) (arguing that certain copyright provisions should be treated as content based).

²⁰³ 481 U.S. 221 (1987).

²⁰⁴ *Id.* at 223.

²⁰⁵ *Id.* at 228-29.

²⁰⁶ *Id.* at 229.

²⁰⁷ *Id.* at 230.

²⁰⁸ *Id.* at 228 ("[S]elective taxation of the press . . . poses a particular danger of abuse by the State.").

²⁰⁹ *Id.* at 232.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² 502 U.S. 105 (1991).

²¹³ *Id.* at 108.

²¹⁴ *Id.*

²¹⁵ *Id.* at 115.

²¹⁶ *Id.* at 116.

of crime.²¹⁷ The Court accepted that interest as compelling but still found the law unconstitutional because it was both over- and underinclusive.²¹⁸

In *Sorrell v. IMS Health Inc.*,²¹⁹ the Court considered claims by data miners and pharmaceutical companies that a Vermont law prohibiting the sale for marketing purposes of data about prescriptions written by physicians violated the First Amendment.²²⁰ This information had value because pharmaceutical companies that knew the prescriptions written by a particular physician could use that knowledge to market their drugs to that physician.²²¹ Pharmacies had this information because they processed prescriptions written by physicians.²²² Pharmacies then sold their information to data miners, who in turn leased it to pharmaceutical companies.²²³ Vermont decided to prohibit this practice in order to protect medical privacy and the integrity of the doctor-patient relationship, and it justified the law as commercial regulation with minimal speech effects.²²⁴ The Court disagreed, finding that the law burdened speech on the basis of its content.²²⁵ The Court explained that the statute in question facially singled out marketing for suppression while exempting other speech from regulation.²²⁶ It likened this result to laws banning the sale of “cookbooks, laboratory results, or train schedules.”²²⁷ This exposed the law to strict scrutiny and ultimate invalidation.²²⁸

Arkansas Writers' Project, *Simon & Schuster*, and *Sorrell* show that the Supreme Court will apply strict scrutiny to invalidate content-based regulation that differentially affects copyright-related interests. Because *Eldred* and *Golan*'s application of the rational basis test is truly established only for copyright's content-neutral provisions, *Arkansas Writers' Project*, *Simon & Schuster*, and *Sorrell* strongly imply that strict scrutiny should apply to copyright's content-based provisions. There are, of course, some wrinkles that need to be further considered before accepting this conclusion.

²¹⁷ *Id.* 115-16 (“A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.”).

²¹⁸ *Id.* at 118-23.

²¹⁹ 564 U.S. 552 (2011).

²²⁰ *Id.* at 557.

²²¹ *Id.* at 557-58.

²²² *Id.* at 558.

²²³ *Id.*

²²⁴ *Id.* at 566, 572.

²²⁵ *Id.* at 563-66.

²²⁶ *Id.* at 563-64.

²²⁷ *Id.* at 570.

²²⁸ *Id.* at 571.

1. Copyright Does Not Really Employ Content-Based Regulation

It is possible to argue that some of copyright's disparate treatment of speech is not content-based regulation.²²⁹ Those taking this position might contend that copyright has the benign purpose of encouraging speech and therefore does not pose a significant risk to free speech values.²³⁰ However, I believe that such an argument pays insufficient attention to case law stating that a benign purpose neither converts a facially content-based statute into a content-neutral one nor sufficiently appreciates the threats copyright can pose to free speech.

The argument against treating copyright as content-based regulation draws support from cases implying that laws are content based only when the government adopts them for the explicit purpose of preventing the dissemination of the speech in question. Perhaps the most prominent of these cases is *City of Renton v. Playtime Theatres, Inc.*²³¹ In that case, the Supreme Court chose not to treat as content based a city ordinance subjecting adult entertainment to less favorable zoning than other forms of entertainment.²³² The Court explained that although the ordinance did refer to the content of the entertainment in question, the city did not adopt the ordinance for the purpose of preventing the dissemination of adult entertainment.²³³ Instead, the city hoped to alleviate problems like crime or litter that were associated with adult entertainment.²³⁴ This implied that apparently content-based regulation could escape strict scrutiny if government adopted the regulation for reasons other than preventing dissemination of the speech in question.

Additionally, in *Ward v. Rock Against Racism*,²³⁵ the Supreme Court considered whether a New York City regulation that required rock bands to use a city-provided sound system and technician violated the First Amendment.²³⁶ The Court held that the law was constitutional, rejecting the plaintiff's claim that the law gave control of aesthetic decisions to city officials.²³⁷ In so ruling, the

²²⁹ This question is, not surprisingly, a matter of academic debate. For a sample of those arguing that copyright is not content-based regulation, see Chemerinsky, *supra* note 1, at 93-94; David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281, 294-96 (2004); Netanel, *supra* note 1, at 6. It should be noted, however, that the conclusion that copyright is content neutral does not lead all of these scholars to argue for rational basis First Amendment scrutiny. Instead, some argue that copyright should be generally subject to intermediate scrutiny. *See, e.g.*, Netanel, *supra* note 1, at 6. For those who see copyright as content-based regulation, see Rubinfeld, *supra* note 2, at 5; Volokh, *supra* note 202, at 703-10; see also C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 939 (2002); Lemley & Volokh, *supra* note 1, at 165-69.

²³⁰ *See* Netanel, *supra* note 1, at 47-49; *see also* McGowan, *supra* note 229, at 295.

²³¹ 475 U.S. 41 (1986).

²³² *Id.* at 46-49.

²³³ *Id.* at 47-48.

²³⁴ *Id.*

²³⁵ 491 U.S. 781 (1989).

²³⁶ *Id.* at 784.

²³⁷ *Id.* at 790-91.

Court wrote that identifying content-based laws revolved around determining “whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”²³⁸

Finally, in *Texas v. Johnson*,²³⁹ the Court struck down a Texas statute that criminalized desecration of “a venerated object.”²⁴⁰ The state prosecuted Johnson under this law for burning an American flag, and Johnson defended on free speech grounds.²⁴¹ In ruling for Johnson, the Court chose to treat the statute as a content-based regulation of speech, even though the statute did not specify the content of speech to be regulated.²⁴² The Court explained that Johnson’s conviction “depended on the likely communicative impact of his expressive conduct,” effectively making his prosecution depend on the content of his speech.²⁴³

Although *Renton*, *Ward*, and *Johnson* indicate that content neutrality exists when government lacks censorial motives, their invocation does not make copyright a content-neutral regulation. As an initial matter, neither *Ward* nor *Johnson* used this rationale to explain why a facially content-based regulation was actually content neutral. Instead, those cases considered whether a facially content-neutral regulation might become content based because the government had improper motives.²⁴⁴ And, although *Renton* characterized a facially content-based statute as content neutral, its reasoning has never been applied other than in the context of sexually explicit entertainment.²⁴⁵ Even if one were to apply *Renton* outside the context of sexually explicit entertainment, the reasons for copyright’s content-based provisions differ considerably from the reasons identified for *Renton*’s zoning of adult entertainment.

In *Renton*, the city adopted the law in question in order to minimize social ills unrelated to sexually explicit entertainment. The Court explained that “the *Renton* ordinance is aimed not at the *content* of the films shown at ‘adult motion picture theatres,’ but rather at the *secondary effects* of such theaters on the surrounding community.”²⁴⁶ The *Renton* law could therefore be justified “without reference to the content of the regulated speech.”²⁴⁷ This

²³⁸ *Id.* at 791.

²³⁹ 491 U.S. 397 (1989).

²⁴⁰ *Id.* at 400.

²⁴¹ *Id.* at 399-400.

²⁴² *Id.* at 412.

²⁴³ *Id.* at 411-12.

²⁴⁴ *Ward v. Rock Against Racism*, 491 U.S. 781, 791-92 (1989); *Johnson*, 491 U.S. at 406-08.

²⁴⁵ See *Free Speech Coal., Inc. v. Att’y Gen.*, 825 F.3d 149, 163 (3d Cir. 2016) (“[T]he Supreme Court has never actually *applied* the secondary effects doctrine outside the realm of brick-and-mortar purveyors of adult sexually explicit content.”).

²⁴⁶ *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986).

²⁴⁷ *Id.* at 48 (quoting *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

characterization does not apply to copyright's content-based provisions; instead, the content of the speech being regulated explains why the law discriminates between different types of speech. Copyright protects only original works because that is the kind of speech government wants to promote.²⁴⁸ Copyright permits more generous borrowing from factual works than fictional works in the belief that such borrowing is of particular importance to future authors.²⁴⁹ Compulsory licenses for the production of recorded music exist because Congress worried about monopolization in one area of expression but not others.²⁵⁰ It is therefore impossible to describe copyright as regulation of something other than speech; it is the direct regulation of speech.²⁵¹

Most importantly of all, the Supreme Court has regularly and clearly stated that simply referring to the content of speech in order to impose differential regulation is enough to trigger strict scrutiny, even when government motives are benign.²⁵² *Reed v. Town of Gilbert*²⁵³ offers a recent and strong example. In *Reed*, the town of Gilbert, Arizona enacted a code regulating the types of signs that could be displayed outdoors.²⁵⁴ That code prohibited the display of outdoor signs without a permit, but it gave exemptions to twenty-three categories of signs.²⁵⁵ "Ideological Sign[s]" received the most favorable treatment because

²⁴⁸ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345-49 (1991) (describing originality as a constitutional requirement that promotes copyright's primary objective of promoting progress of science and art).

²⁴⁹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (finding some works more subject to fair use treatment, such as factual works over fictional stories); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985) ("The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.").

²⁵⁰ See *infra* notes 376-78 and accompanying text.

²⁵¹ For other scholarly expressions of doubt about using *Renton* and its secondary effects reasoning to insulate copyright from First Amendment review, see Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 59-61 (2000) (criticizing *Renton* as "objectionable" because it allows courts to characterize content-based laws as content neutral); Rubinfeld, *supra* note 2, at 6 n.18 (expressing opinion that *Renton*'s logic does not apply to copyright and that *Renton* is, "in any event, an analytical embarrassment"); Volokh, *supra* note 202, at 705-06 (stating that *Renton* test has been "heavily" and "aptly" criticized, and expressing hope that it is not extended beyond zoning of adult businesses).

²⁵² For cases stating that motive does not matter to a determination that a law is content based, see *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429-30 (1993) (rejecting application of *Renton* and holding that city prohibition against distribution of "commercial handbills" on public property is content-based regulation regardless of city's motive); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (holding that no evidence of improper censorial motive is needed to establish content-based regulation and justify application of strict scrutiny); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983) (holding that "illicit legislative intent" not required for finding of First Amendment violation).

²⁵³ 576 U.S. 155 (2015).

²⁵⁴ *Id.* at 159.

²⁵⁵ *Id.*

they could be placed anywhere in town and could be as large as twenty square feet.²⁵⁶ “Political Sign[s]” received somewhat less favorable treatment. They could be displayed only during a period from sixty days before to fifteen days after a general election and could not be larger than thirty-two square feet.²⁵⁷ “Temporary Directional Signs Relating to a Qualifying Event” received even less favorable treatment. They could be no larger than six square feet and could be displayed no more than twelve hours before and one hour after the event in question.²⁵⁸

Reed was the pastor of a church whose temporary directional signs were sometimes left on display beyond the relevant time limits.²⁵⁹ When Reed and his church were unable to reach accommodation with Gilbert, they sued, claiming violation of their First Amendment rights.²⁶⁰ They lost in the District Court and the Ninth Circuit on the ground that the town did not engage in content-based discrimination.²⁶¹ This determination rested in part on a finding that Gilbert did not adopt its regulation to disadvantage speech with which it did not agree.²⁶²

The Supreme Court unanimously reversed.²⁶³ The Court held that the sign law was indeed content based because it applied different regulations to signs depending on the messages conveyed.²⁶⁴ Importantly, the Court rejected the argument that benign motives could transform laws that are facially content based into content-neutral ones.²⁶⁵ Justice Thomas’s opinion emphasized the concern that seemingly benign content-based laws could easily be subverted into censorship. He wrote that “[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech.”²⁶⁶ Accordingly, “[a] law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.”²⁶⁷

²⁵⁶ *Id.* (alteration in original).

²⁵⁷ *Id.* at 160.

²⁵⁸ *Id.* at 160-61.

²⁵⁹ *Id.* at 161.

²⁶⁰ *Id.* at 162.

²⁶¹ *Reed v. Town of Gilbert*, 707 F.3d 1057, 1070-72 (9th Cir. 2013); *Reed v. Town of Gilbert*, 832 F. Supp. 2d 1070, 1077-78 (D. Ariz. 2011).

²⁶² *Reed*, 707 F.3d at 1072.

²⁶³ Justice Thomas wrote for the Court, with Justices Kagan, Ginsburg, and Breyer concurring only in the judgment. *Reed*, 576 U.S. at 174. Justice Alito wrote a concurring opinion joined by Justices Kennedy and Sotomayor, in which all three Justices joined the Court’s opinion. *Id.*

²⁶⁴ *Id.* at 164.

²⁶⁵ *Id.* at 163-66.

²⁶⁶ *Id.* at 167.

²⁶⁷ *Id.* at 165 (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)).

Cases like *Reed* make it very difficult to treat copyright as benign regulation subject only to rational basis review. Granted, *Eldred* did find that copyright has speech protective doctrines that minimize its effect on speech, making copyright commercial regulation subject to the rational basis test. However, it is the possibility that government could misuse seemingly benign laws that makes facially content-based laws presumptively unconstitutional. And indeed, government could easily turn copyright towards censorial purposes.

For example, consider the argument that copyright is not content based because distinctions between music and literature do not implicate the content of works, but merely the form of expression. Although it may be true that government presently has no particular reason to favor written expression over musical expression, this state of affairs does not have to persist.

Music, dance, and other unwritten forms of art communicate differently, and sometimes more effectively, than the written or spoken word. Ideas and feelings not captured well in words often find effective expression in music or dance. A government therefore might discourage or prohibit music or dance because it effectively communicates certain ideas that writing and speech do not capture well. And indeed, oppressive governments have done precisely this to control the populations they ruled.²⁶⁸

For example, the United States prohibited Indigenous People in the southern plains from dancing as part of an effort to transform Indigenous culture so it could be assimilated into broader American culture.²⁶⁹ Federal officials understood that dance was “profoundly important in the construction and negotiation of cultural institutions and the values they represented.”²⁷⁰ Banning dance was therefore crucial to the project of erasing Indigenous culture and assimilating Indigenous People into mainstream America. The federal government targeted dance for suppression because it was a particularly effective method of Indigenous self-expression. If Indigenous People could not dance, then over time they might forget who they were.²⁷¹

In pre-revolution Iran, the Ayatollah Khomeini strongly criticized the influence of Western culture on Iranian radio and television, which broadcast Western-influenced music and Western pop.²⁷² When Khomeini took power

²⁶⁸ Edward Rothstein, *Musical Freedom and Why Dictators Fear It*, N.Y. TIMES, Aug. 23, 1981, § 2, at 1.

²⁶⁹ Clyde Ellis, “*There Is No Doubt . . . the Dances Should Be Curtailed*”: *Indian Dances and Federal Policy on the Southern Plains, 1880-1930*, 70 PAC. HIST. REV. 543, 544 (2001); Gabriella Treglia, *The Consistency and Inconsistency of Cultural Oppression: American Indian Dance Bans, 1900-1933*, 44 W. HIST. Q. 145, 146 (2013).

²⁷⁰ Ellis, *supra* note 269, at 546.

²⁷¹ *Id.* (“Policymakers intended to use the dance bans as part of a far-reaching campaign to reconceptualize tribal identities so that they reflected cultural models based on white, middle-class, Protestant America.”).

²⁷² Ameneh Youssefzadeh, *The Situation of Music in Iran Since the Revolution: The Role of Official Organizations*, 9 BRIT. J. ETHNOMUSICOLOGY 35, 36-37 (2000).

after the revolution, he imposed a ban on music.²⁷³ Although the government relaxed this ban after Khomeini's death,²⁷⁴ the logic behind the ban seems clear. The revolutionary government wanted to erase Western influence in order to promote what Khomeini considered authentic Iranian culture. Banning music would help because the population's affinity for music would open it to the West.

It is therefore clear that government could use copyright for censorial purposes by denying or restricting copyright protection for art forms like music or dance. That copyright does not presently embody deliberate censorship is beside the point. Content-based regulation receives strict scrutiny not because it is censorship but because such regulation could be misused for censorial purposes.²⁷⁵ Copyright therefore embodies content-based regulation.

2. The First Amendment Accepts Copyright's Content-Based Discrimination as Either Government Speech or Government-Subsidized Speech

The First Amendment's hostility towards content-based regulation recognizes that, in some cases, government must have the ability to choose between speech on the basis of content.²⁷⁶ For example, when government speaks for itself, it obviously chooses which speech to promote on the basis of content. Similarly, when government funds or subsidizes speech activities, it often chooses which speech it subsidizes on the basis of content.

If ordinary First Amendment rules about content-based regulation applied to these situations, the possibility of constitutional paralysis would arise. When the U.S. government decided to discourage smoking,²⁷⁷ it clearly adopted a viewpoint about the dangers of that activity and spoke accordingly. Requiring content neutrality in such endeavors would make no sense because requiring government neutrality about pro- and anti-smoking speech would make it impossible for government to spread its anti-smoking message effectively.

First Amendment doctrine therefore exempts government from having to abide by ordinary free speech rules in two situations. First, government may

²⁷³ *Id.* at 38 (describing how Khomeini banned concerts, music broadcasts, payment of musicians, and music playing; ordered destruction of musical instruments; and declared signing any document mentioning music to be a sin).

²⁷⁴ *Id.* at 39.

²⁷⁵ See *supra* note 138 and accompanying text. Tellingly, copyright has its roots in censorship by the British Crown. Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 524-26 (1990).

²⁷⁶ See Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199, 204-07 (1994).

²⁷⁷ See Arlen W. Langvardt, *Tobacco Advertising and the First Amendment: Striking the Right Balance*, 5 WM. & MARY BUS. L. REV. 331, 337-54 (2014); see also Danielle Weatherby & Terri R. Day, *The Butt Stops Here: The Tobacco Control Act's Anti-Smoking Regulations Run Afoul of the First Amendment*, 76 ALB. L. REV. 121, 126-34 (2013).

engage in content-based—or even viewpoint-based—discrimination when it speaks for itself.²⁷⁸ Second, government has limited authority to engage in content-based, but not viewpoint-based, discrimination when it subsidizes the speech of others.²⁷⁹

Of these possibilities, the first offers a poor basis on which to exempt copyright from meaningful First Amendment review. The granting of copyright does not convert an author's speech into the government's speech. However, the second offers a plausible rationale for removing copyright from First Amendment review because the Supreme Court has allowed the government to give financial awards to speakers after examining the content of their speech.

For our purposes, the most salient case is *National Endowment for the Arts v. Finley*,²⁸⁰ in which the Supreme Court upheld legislation that required the National Endowment for the Arts (“NEA”) to consider the “general standards of decency and respect for the diverse beliefs and values of the American public” when making grant decisions.²⁸¹ In so ruling, the Court found that the legislation was merely hortatory and did not require the NEA to deny grants to particular works.²⁸² This lowered the chance that the legislation would have significant speech effects.²⁸³ Additionally, the Court placed weight on the competitive nature of the NEA's grant-making process.²⁸⁴ The NEA had to examine the content of various art projects in order to make funding decisions.²⁸⁵ Thus, in the context of competitive grant-making, the government had the authority to make funding decisions on the basis of criteria that would be unconstitutional in other contexts.

Finley could be used to exempt copyright from strict First Amendment scrutiny. Perhaps giving grant money to artists is the same thing as giving copyright incentives to authors, and the government has to make content-based choices in order to achieve the objectives behind the subsidy. In copyright's case, that means reserving copyright protection only for works determined by Congress to promote the progress of art and, in some cases, limiting protection enjoyed by works to ensure such progress.²⁸⁶ This argument has appeal, but it ultimately fails because important differences separate the grant program in

²⁷⁸ See Chemerinsky, *supra* note 276, at 204-06 (noting government must make content-based decisions about speech when it speaks for itself).

²⁷⁹ See *id.* at 206-07 (arguing that government must make content-based choices when awarding subsidies).

²⁸⁰ 524 U.S. 569 (1998).

²⁸¹ *Id.* at 572 (quoting 20 U.S.C. § 954(d)(1) (2018)).

²⁸² *Id.* at 580-81.

²⁸³ *Id.*

²⁸⁴ *Id.* at 585 (describing NEA's finite resources, high volume of applicants, and limited number of grants).

²⁸⁵ *Id.* at 573-74.

²⁸⁶ See Snow, *supra* note 7, at 1490-92 (arguing that *Finley*'s rationale permits Congress to “selectively copyright expression” to promote artistic and scientific progress).

Finley from copyright. Ignoring those differences would raise unacceptable risks of censorship through copyright and other forms of government regulation.

The *Finley* Court accepted the NEA's grant program in part because the hortatory nature of the requirement muted the likelihood of serious speech effects.²⁸⁷ Additionally, the context of competitive grant-making implied that the government would necessarily make decisions based on the merit of artistic content.²⁸⁸ Decency was therefore simply one of many components informing the vision of excellence behind the grants.²⁸⁹ This reasoning does not apply well to copyright, for copyright's potential for censorship is significantly larger than the NEA's grant program.

As an initial matter, copyright's content-based distinctions are not hortatory. They are mandatory. Any censoring potential embodied in those distinctions will therefore definitely affect whether copyright claimants get rights and, if they do, the shape of those rights. Indeed, the *Finley* Court strongly suggested that it would have ruled differently if the legislation in question expressed mandatory requirements for NEA grant-making.²⁹⁰

Additionally, copyright is not part of a competitive grant-making process in which government choices about the merits of art are implied. Copyright instead is supposed to encourage all speech, regardless of its merits.²⁹¹ Applying *Finley* to copyright would give Congress the authority to deny copyright to entire classes of works, like violent video games or pornography, for the purpose of making them less profitable to produce.²⁹² This would represent the realization of copyright's potential for censorship because every one of these works would be at an economic disadvantage to other works that are eligible for copyright protection.

Finally, copyright does not involve a cash subsidy of the sort handed out by the NEA. This matters for two reasons. First, the use of cash subsidies means that resources are limited. Government must make choices about where to direct funding. In some cases, as in *Finley*, those choices might have to be made on the basis of content. By contrast, copyright involves the granting of a marketable right, and government can hand out an infinite number of copyrights. This eliminates scarcity and weakens the justification for content-based choices.

²⁸⁷ *Finley*, 524 U.S. at 580-81.

²⁸⁸ *Id.* at 586.

²⁸⁹ *Id.* at 581-82.

²⁹⁰ *Id.* at 581.

²⁹¹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582-83 (1994) (stating that quality of purported parody is irrelevant to copyright law); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903) (holding that judges should not apply copyright to assess aesthetic merits of works "outside of the narrowest and most obvious limits").

²⁹² See Snow, *supra* note 7, at 1522 (contending that Congress should have power to deny selectively copyright to things like violent video games and pornography).

Second, extending the government subsidy exception beyond cash or cash-equivalent grants opens an end run around the general prohibition against content-based regulation. Almost any content-based regulation can be recast as a subsidy for favored forms of speech. For example, Arkansas claimed that its differential taxation for media was a conscious effort to subsidize certain types of magazines over others.²⁹³ Similarly, the town of Gilbert could have called its content-based sign law a conscious subsidy for certain forms of speech that the town considered most valuable.²⁹⁴ If any form of subsidy is enough to avoid meaningful First Amendment scrutiny, then any government that wants to impose content-based regulation will simply draft its law as a non-cash subsidy on behalf of favored speech. However, if the government subsidy exception is possible only when government actually gives cash to the subsidized speaker, abuse of the exception becomes far less likely because government will be forced to (literally) put its money where its mouth is.

3. Government May Employ Content-Based Discrimination in Copyright Under the Limited Public Forum Doctrine

The limited public forum doctrine offers another exception to normal First Amendment rules that might allow copyright to escape strict scrutiny. Under this doctrine, government may employ reasonable content-based, but not viewpoint-based, discrimination in forums created by the government for use by certain speakers or for discussion of particular subjects.²⁹⁵ Limited public forums differ from traditional or designated public forums such as streets or other places where the public typically engages in broad speech activity.²⁹⁶ When it comes to public forums, ordinary First Amendment principles apply and content-based regulation is subject to strict scrutiny.²⁹⁷ With limited public forums, however, the government has more leeway.

Limited public forums typically arise when the government wishes to limit use of a facility or a source of funding to a particular purpose.²⁹⁸ Thus, a school

²⁹³ See *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 232 (1987).

²⁹⁴ See *Reed v. Town of Gilbert*, 576 U.S. 155, 159 (2015).

²⁹⁵ See *Christian Legal Soc'y Chapter of Univ. of Cal. v. Martinez*, 561 U.S. 661, 679 (2010); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (plurality opinion); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

²⁹⁶ See *infra* notes 306-19 and accompanying text.

²⁹⁷ See *Perry*, 460 U.S. at 45.

²⁹⁸ See, e.g., *Christian Legal Soc'y*, 561 U.S. at 662 (access to law school funding and facilities); *Good News Club*, 533 U.S. at 103 (after hours use of school property); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 822-23 (1995) (funding of student groups); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387-89 (1993) (use of school property to show religious films); *Cornelius*, 473 U.S. at 790 (restricted participation in charity drive aimed at federal employees); *Perry*, 460 U.S. at 46 (access to school teachers' mailboxes).

district may have a policy limiting who can use school buildings after hours;²⁹⁹ a university may set eligibility guidelines for access to student funding;³⁰⁰ or a room may be set aside for discussions about a particular topic, such as physics.³⁰¹ In all of these cases, the First Amendment allows government to prohibit certain speakers from gaining access to the relevant forum on the basis of what the speakers will say, as long as the restriction is reasonably related to the forum's purpose. If this were not the case, any speaker could participate in the forum and compromise the forum's utility. This is why content-based discrimination reasonably related to the forum's purpose becomes permissible when the government administers a limited public forum.³⁰²

Some have argued that copyright is a limited public forum to which government may limit access by engaging in content-based distinction about speech.³⁰³ The claim portrays copyright's incentive as a forum-like support available only to speech that advances the purpose of the forum—namely the creation of more speech. Congress is therefore entitled to exclude non-original speech from copyright protection because such speech does not advance copyright's purpose.³⁰⁴ Thus, the rational basis test applies to content-based choices that Congress makes about copyrightable subject matter and the scope of copyright rights.³⁰⁵ This argument has some appeal, but it stretches the limited public forum doctrine in ways that do not make sense.

*Perry Education Ass'n v. Perry Local Educators' Ass'n*³⁰⁶ offers an early and important explanation of the principles underlying the limited public forum doctrine. In that case, the school district of Perry, Indiana granted access to the interschool mail system only to the official collective bargaining representative of its teachers, the Perry Education Association (“PEA”).³⁰⁷ All other unions, including the Perry Local Educators' Association (“PLEA”), did not have access and therefore could not communicate directly with the teachers.³⁰⁸ PLEA sued the school district on the theory that PEA's preferential access violated the First

²⁹⁹ See *Good News Club*, 533 U.S. at 106-08 (holding that school could limit speakers on basis of content of speech, but not on basis of viewpoint); *Lamb's Chapel*, 508 U.S. at 392.

³⁰⁰ See *Rosenberger*, 515 U.S. at 830-31.

³⁰¹ See *id.* at 829 (“The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.”); see also *Good News Club*, 533 U.S. at 106.

³⁰² See *supra* notes 295, 301; see also *Cornelius*, 473 U.S. at 800 (recognizing government power to preserve property for lawfully dedicated uses).

³⁰³ See, e.g., Snow, *supra* note 7, at 1488.

³⁰⁴ See *id.* at 1489.

³⁰⁵ *Id.*

³⁰⁶ 460 U.S. 37 (1983).

³⁰⁷ *Id.* at 40.

³⁰⁸ *Id.*

Amendment.³⁰⁹ PLEA lost in the District Court, succeeded before the Seventh Circuit, and ultimately lost in the Supreme Court.³¹⁰

In ruling for the defendants, the Court recognized that ordinary First Amendment principles might not apply because PLEA sought access to government property (i.e., teachers' mailboxes). The Court wrote:

The First Amendment's guarantee of free speech applies to teacher's mailboxes as surely as it does elsewhere within the school and on sidewalks outside. But this is not to say that the First Amendment requires equivalent access to all parts of a school building in which some form of communicative activity occurs. "[N]owhere [have we] suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for . . . unlimited expressive purposes."³¹¹

The recognition that government could withhold access to some of its property implied that the nature of government property would determine the extent to which government could limit access for speech purposes. The Court then identified three different forms of government property to consider: traditional public forums like sidewalks, designated public forums that government opens to the public for expressive activity, and all other government property.³¹² For traditional and designated public forums, ordinary First Amendment rules would apply.³¹³ This meant that strict scrutiny would apply to content-based regulation concerning public forums. However, for all other property, different rules would apply.³¹⁴ In the context of this case, the nonpublic nature of the school mailboxes meant that the school district could restrict access "on the basis of subject matter and speaker identity" as long as the relevant distinctions were "reasonable in light of the purpose which the forum at issue serves."³¹⁵

Over time, the Supreme Court refined the reasoning of *Perry* to recognize two kinds of forums in which government would be able to engage in content-based restriction of speech: limited public forums and nonpublic forums. Limited public forums are those opened by the government exclusively for certain speakers or topics.³¹⁶ Nonpublic forums are those not generally regarded as a

³⁰⁹ *Id.* at 41.

³¹⁰ *Id.* at 41, 55.

³¹¹ *Id.* at 44 (alterations in original) (citations omitted) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 117-18 (1972)).

³¹² *Id.* at 45-46.

³¹³ *Id.* at 45.

³¹⁴ *Id.* at 46.

³¹⁵ *Id.* at 49.

³¹⁶ *See supra* note 295 (listing cases holding that government may engage in reasonable content-based discrimination in government-created forums used by specified speakers or for specific subjects).

forum for public communication.³¹⁷ For both, the government may engage in content-based, but not viewpoint-based, discrimination to preserve the forum for its designated purpose as long as the restriction is reasonably related to the forum's purpose.³¹⁸ Thus, a school may restrict forums to student speakers, and a public body can restrict its public meetings to discussion of official business.³¹⁹

The typical limited public forum case involves a claim of access to a government building or other physical facility for speech purposes.³²⁰ However, in *Rosenberger*, the Supreme Court held that the limited public forum doctrine also applied to a "metaphysical" forum that lacked a spatial or geographic presence.³²¹ In that case, the University of Virginia had created a Student Activities Fund ("SAF") that subsidized, among other things, expenses for "student news, information, opinion, entertainment, or academic communications media groups."³²² The SAF guidelines also prevented subsidies for, among other things, "religious activities."³²³ Controversy erupted when Wide Awake Productions ("WAP"), a student organization founded by Rosenberger, asked the SAF to cover printing fees for WAP's newspaper *Wide Awake: A Christian Perspective at the University of Virginia*.³²⁴ The University refused, citing its policy against funding religious activity.³²⁵ Rosenberger took exception and sued, ultimately prevailing before the Supreme Court.³²⁶ The Court's decision characterized the SAF as a "metaphysical" forum to which limited public forum rules applied.³²⁷ The Court then held that the prohibition against funding religious activity was not mere content-based regulation, but unconstitutional viewpoint-based discrimination.³²⁸

Rosenberger arguably supports the proposition that limited public forum rules apply whenever government creates a program to support speech and

³¹⁷ See *Perry*, 460 U.S. at 46 (finding public property not traditionally a forum for public communication distinguished from other public forums); see also *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 189 (2007); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677-78 (1998) (holding that government may restrict access to nonpublic forum as long as restrictions are reasonable and not viewpoint based).

³¹⁸ See *supra* notes 295, 299, 317 and accompanying text (discussing permissible government restrictions in public and nonpublic forums).

³¹⁹ See *City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175 n.8 (1976).

³²⁰ See *supra* note 298 (describing types of places to which plaintiffs sought access in limited public forum cases).

³²¹ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995).

³²² *Id.* at 824 (quoting Petition for Writ of Certiorari app. at 61a, *Rosenberger*, 515 U.S. 819 (No. 94-329)).

³²³ *Id.*

³²⁴ *Id.* at 825.

³²⁵ *Id.* at 827.

³²⁶ *Id.* at 827, 845-46.

³²⁷ *Id.* at 830.

³²⁸ *Id.* at 830-32.

promulgates rules to identify those who get to benefit from that support. Thus, as suggested earlier, copyright could be a limited public forum, and government may use content-based discrimination to preserve copyright's purpose of promoting art. This argument may be appealing, but there are good reasons to reject it.

As an initial matter, if copyright is a forum at all, it seems better characterized as a public forum, not a limited public forum. Under *Perry*'s framework, two kinds of public forums exist: the traditional public forum and the designated public forum.³²⁹ Traditional public forums are places that have been devoted "by long tradition or by government fiat" to assembly and debate.³³⁰ These are places to which the general public has free access for speech purposes. Designated public forums are places opened by the state for public expressive activity.³³¹ Copyright fits both of these descriptions. Anyone can access the copyright system. This distinguishes copyright from the mailboxes of *Perry* or the student activity fund of *Rosenberger*. In both of those cases, the relevant forums were not public, in large part because the state had reserved them for only a very small subset of the general population.

Additionally, the limit that supposedly makes copyright a limited public forum does not fit the relevant definition. Under *Perry* and its progeny, a limited public forum exists for use by certain groups or for the discussion of certain subjects.³³² Copyright's content-based distinctions are not made on the basis of identity or the subject discussed. Original speech does not identify a person or group, nor is originality a subject. Instead, originality describes the quality of a work. As such, originality cannot be analogized to a subject-matter limit like physics or official business. It makes sense to say that a forum is limited to discussions of physics or official business. However, that is not how copyright works. Copyright does not limit protection to original works so that people who get copyright will discuss only original works. Indeed, in some cases, copyright reduces protection selectively to some original works, but not others.³³³

Finally, it is important to heed the foregoing distinctions to keep the limited public forum doctrine within proper boundaries. The basic orientation of the First Amendment is the application of strict scrutiny to content-based regulation. The limited public forum doctrine is an exception to this practice that recognizes the government's need to manage its own property and operations. If courts begin to characterize general legislation that selectively subsidizes speech as a limited public forum, the result will be invalidation of many precedents applying strict scrutiny to content-based regulation. After all, the differential tax system

³²⁹ See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

³³⁰ *Id.* at 45.

³³¹ *Id.* at 45-46.

³³² See *supra* notes 295-319 and accompanying text (explaining characteristics of and restrictions on speech in limited public forums).

³³³ See *supra* Part I (describing how copyright makes distinctions between original works on the basis of their content).

in *Arkansas Writers' Project* could become a limited public forum created for the purpose of improving the diversity of print publications. Perhaps the town of Gilbert created a new limited public forum designed to promote certain signs because they contribute more to an informed citizenry. Granted, these content-based regulations were viewpoint neutral. The government passed them with no desire to help one viewpoint over others. But the Supreme Court struck these laws down because content-based regulation carries a generally unacceptable risk of censorship.³³⁴ It therefore makes little sense to have a basic rule against content-based regulation only to have it easily circumvented. Indeed, in copyright's case, it is important to remember that copyright itself was once used as a form of censorship in England³³⁵ and that it would be only too easy to amend copyright law to hinder a disfavored form of expression under the guise of promoting the progress of art. For example, Congress might define copyrightable subject matter to exclude sexually explicit (but not obscene) works on the theory that they do not contribute to the progress of art.³³⁶ Or perhaps a future Congress might conclude that film depictions of teen drug use retard the progress of art. If, as application of the limited public forum doctrine would imply, the rational basis test were used to review such enactments, they would almost certainly be found constitutional. Such a result permits the state to impose censorship, and this is exactly what elevated First Amendment scrutiny is meant to forestall.

C. *The Case for Intermediate Scrutiny*

So far, we have seen that case law does not neatly prescribe the level of scrutiny to be applied by the First Amendment to copyright's content-based provisions. Under *Eldred* and *Golan*, content-neutral portions of the Copyright Act seem likely to receive rational basis scrutiny.³³⁷ *Tam* and *Brunetti* surely establish that any viewpoint-based aspects of copyright will be presumptively unconstitutional under some form of strict scrutiny.³³⁸ The treatment of copyright's content-based provisions is, however, much less clear. *Eldred* and *Golan* could be extended to cover these laws, but the logic of those cases does not fit well.³³⁹ Other cases strongly suggest that copyright's content-based provisions should receive strict scrutiny,³⁴⁰ but accepting this would probably

³³⁴ See *supra* note 138 and accompanying text (arguing that "the vice" of content-based restriction lies in its censorship potential).

³³⁵ See Yen, *supra* note 275, at 524-26.

³³⁶ See Ann Bartow, *Copyright Law and Pornography*, 91 OR. L. REV. 1, 34-47 (2012) (advocating for denial of copyright to non-progressive and non-useful pornographic works in order to decrease their economic viability).

³³⁷ See *supra* Section IV.A.

³³⁸ See *supra* Part II (discussing *Tam*, *Brunetti*, and claimant-side challenges to copyright in depth).

³³⁹ See *supra* notes 197-201 and accompanying text.

³⁴⁰ See *supra* Section IV.B.

cause mass invalidation of basic copyright provisions and upset the stability of creative industries that depend on copyright.³⁴¹

This problem bears resemblance to the one that has given rise to the commercial speech doctrine and the concomitant application of intermediate scrutiny to the content-based regulation of commercial speech. On one hand, First Amendment law rightly treats content-based regulation with suspicion in order to prevent censorship. On the other hand, legislatures need flexibility to regulate commerce, and commerce frequently involves speech. The commercial speech doctrine strikes a compromise position between the poles of strict and rational basis scrutiny. Intermediate scrutiny gives courts the ability to make sure that there are good reasons for content-based regulation of commercial speech without destroying legislative power to regulate commerce.

The same can be said for copyright. On one hand, copyright regulates speech, so content-based regulation in copyright is cause for some concern about censorship. On the other hand, copyright is also commercial regulation that creates markets for the sale of copyright rights. Congress may need to make distinctions between different types of works or speech in order to fine tune copyright's incentives. Using intermediate scrutiny to review copyright's content-based provisions would therefore strike a compromise position similar to the one held by the commercial speech doctrine.

The relationship between Article I of the U.S. Constitution and the First Amendment supports this possibility. Article I specifically authorizes Congress to enact copyright legislation,³⁴² while the First Amendment limits the powers given to Congress in Article I by depriving Congress of the ability to enact laws abridging the freedom of speech.³⁴³ It is of course possible to interpret the First Amendment as applying strict scrutiny to all content-based regulation, including copyright. But there is reason to doubt whether this makes sense because Article I's specific authorization to pass copyright legislation, the enactment of the first copyright act, and the subsequent ratification of the First Amendment say something about how the Constitution balances the tension between copyright and freedom of speech.

When Congress enacted the first copyright act in 1790, it extended copyright only to any "map, chart, book or books."³⁴⁴ A year later, in 1791, the United States ratified the First Amendment.³⁴⁵ One could read the ratification of the First Amendment as the presumptive invalidation of the first copyright act because the first copyright act implemented content-based regulation with its limitation to maps, charts, and books. However, such a conclusion seems shaky

³⁴¹ See *supra* note 22 and accompanying text.

³⁴² U.S. CONST. art. I, § 8, cl. 8 (authorizing Congress "[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").

³⁴³ U.S. CONST. amend. I.

³⁴⁴ Copyright Act of 1790, Pub. L. No. 1-15, 1 Stat. 124.

³⁴⁵ See *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019).

because the act continued in full force and effect without constitutional challenge. This does not mean that the Constitution permits Congress to use copyright as a tool of censorship. However, it implies that the Constitution accepts some risk of restricted free speech in exchange for copyright's benefits.

The Supreme Court endorsed this line of thinking in *Eldred*. In that case, Justice Ginsburg wrote: "The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles."³⁴⁶ Thus, if the First Amendment accepts copyright because the Constitution had already authorized a copyright statute containing content-based regulation, that acceptance must include tolerance for some level of content-based discrimination within copyright. This does not necessarily mean that courts should apply the rational basis test to content-based regulation in copyright. It means only that the level of First Amendment scrutiny needs to be lenient enough to allow content-based discrimination at the level of "maps, charts, book or books" while also being rigorous enough to prevent inadvertent censorship. The use of intermediate scrutiny accomplishes this.

To see this, consider how a three-tiered approach to the First Amendment review of copyright implements an appropriate balance between copyright's benefits and the risk of censorship. The highest level of review applies to portions of copyright that carry the greatest and most immediate threat of censorship. Accordingly, any viewpoint-based portions of the Copyright Act would be presumptively unconstitutional because such regulation effectively constitutes censorship. Such a result would be consistent with *Tam* and *Brunetti*.

A moderate level of review applies to copyright legislation that risks, but does not immediately create, censorship. This would be the case with most content-based copyright legislation because such legislation varies the protection given to works based upon content, but not for the purpose of favoring one set of ideas over another. These portions of the Copyright Act bear resemblance to the sign restrictions found in *Reed*, where the town treated signs differently on the basis of content but not because the town wanted to help or discourage particular messages. In *Reed*, the Supreme Court expressed great worry about the possibility of censorship and therefore applied strict scrutiny.³⁴⁷ By contrast, such worry would be muted for copyright given its constitutional compatibility with the First Amendment. This implies that courts should use intermediate scrutiny to examine content-based copyright legislation.

Finally, as long as Congress and the courts maintain the "traditional contours" of copyright, rational basis review makes sense for copyright's content-neutral provisions. These laws pose little risk of censorship, and the appropriate implementation of doctrines like the idea/expression dichotomy and fair use generally keep copyright from becoming an unduly burdensome drag on speech.

³⁴⁶ *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

³⁴⁷ *See supra* note 138 and accompanying text.

Rational basis review therefore applies to things like the duration of copyright;³⁴⁸ termination and transfer;³⁴⁹ damages recoverable in copyright;³⁵⁰ and existing rights of reproduction, derivative works, and distribution currently enjoyed by copyright holders.³⁵¹ However, if copyright's traditional contours should change, whether by legislative enactment or judicial interpretation, then intermediate scrutiny should apply to copyright's content-neutral provisions. This is consistent with *Eldred* and *Golan*.³⁵²

V. THE CONSEQUENCES

We are now in a position to see how the suggested multi-tier system for First Amendment copyright review might work.

A. Provisions Subject to Strict Scrutiny as Viewpoint-Based Discrimination

A few provisions of the existing Copyright Act engage in viewpoint-based discrimination. Courts should therefore apply strict scrutiny, rendering them presumptively unconstitutional.

1. Section 110(3) and Works “of a [R]eligious [N]ature”

Section 110(3) provides our first example of viewpoint-based discrimination in copyright. That provision singles out nondramatic literary, musical, and dramatico-musical works “of a religious nature” for disfavored treatment by denying them performance royalties at religious services.³⁵³ One might initially think that such singling out is ordinary content-based discrimination. However, the Supreme Court has taken the view that disfavoring speech because of its religious nature is viewpoint discrimination subject to strict scrutiny.³⁵⁴

2. Fair Use and Discrimination in Favor of Works Expressing Critical Viewpoints

Section 107 of the Copyright Act provides a second example of viewpoint-based discrimination in copyright. That section codifies the fair use doctrine, excusing what would otherwise be infringement if the alleged infringing work meets the codified test.³⁵⁵ A considerable amount of the fair use provision

³⁴⁸ See 17 U.S.C. §§ 302-305 (2018).

³⁴⁹ See *id.* §§ 203-205, 304(c).

³⁵⁰ See *id.* §§ 502-505.

³⁵¹ See *id.* § 106(1)-(3).

³⁵² See *supra* notes 179-99 and accompanying text.

³⁵³ 17 U.S.C. § 110(3).

³⁵⁴ See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 832 (1995) (holding that university's refusal to pay expenses of religious newspaper is viewpoint discrimination).

³⁵⁵ 17 U.S.C. § 107 (prescribing test for fair use of copyrighted material that requires considering: (1) purpose and character of use; (2) nature of copyrighted materials; (3) portion

embodies ordinary content-based regulation, and those provisions would not be subject to strict scrutiny. However, one part of the fair use test clearly applies viewpoint-based discrimination.

The preamble of § 107 identifies a number of favored uses that are particularly good candidates for fair use. One of these uses is criticism, and courts have used this language to give works embodying critical perspectives more generous fair use treatment than those that do not.³⁵⁶ The principal subjects of this distinction are new works that incorporate or use a prior copyrighted work in recognizable form. Examples include adaptations of songs for comic effect,³⁵⁷ the work of appropriation artists,³⁵⁸ and derivative adaptations of copyrighted novels.³⁵⁹ Courts are generally much more likely to give these works fair use treatment if they criticize the copyrighted original. For example, in *Campbell v. Acuff-Rose Music, Inc.*,³⁶⁰ the Supreme Court considered whether the rap group 2 Live Crew's humorous adaptation of Roy Orbison's "Pretty Woman" was an infringing derivative work or was a non-infringing fair use.³⁶¹ The Sixth Circuit had found the work infringing,³⁶² but the Supreme Court reversed, in large part because it perceived that 2 Live Crew's work criticized the Orbison original.³⁶³

This aspect of the fair use doctrine has implications for free speech. Those who humorously adapt a work get better treatment if their work adopts a critical viewpoint on the copyrighted original.³⁶⁴ This means that creation and distribution of a humorous work that does not clearly criticize the original runs a particularly high risk of being declared illegal.³⁶⁵ Those creating it may

of copyrighted material used as compared to its whole; and (4) effect of use upon market for or value of copyrighted material).

³⁵⁶ *See id.*

³⁵⁷ *See Fisher v. Dees*, 794 F.2d 432, 437-38 (9th Cir. 1986).

³⁵⁸ *See Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992) (weighing lack of criticism of copyrighted material heavily in rejecting fair use defense).

³⁵⁹ *See Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1270-71 (11th Cir. 2001) (finding fair use because of critical aspects of defendant's retelling of novel *Gone with the Wind*).

³⁶⁰ 510 U.S. 569 (1994).

³⁶¹ *Id.* at 571-72.

³⁶² *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1439 (6th Cir. 1992).

³⁶³ *Campbell*, 510 U.S. at 581-83. Numerous lower court cases follow *Campbell's* analysis. *See Castle Rock Entm't, Inc., v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 142-43 (2d Cir. 1998) ("[W]e find scant reason to conclude that this trivia quiz book seeks to educate, criticize, parody, comment, report upon, or research *Seinfeld* . . ."); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 114-15 (2d Cir. 1998) (weighing critical elements of parody heavily in finding work worthy of fair use treatment); *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1400-01 (9th Cir. 1997) (finding defendant's work not entitled to fair use because it was insufficiently critical of plaintiff's work to be parody).

³⁶⁴ *See supra* note 363.

³⁶⁵ *See* 17 U.S.C. § 502(a) (2018). The Copyright Act permits courts to grant injunctions against the distribution or sale of infringing works. *Id.* Thus, as a practical matter, the author of a derivative work deemed infringing owns nothing of value. *See id.*

become subject to injunctions against their work and would be unable to claim copyright for it, even if their work is highly creative.³⁶⁶ Copyright literally prefers one kind of humorous derivative work over another, incentivizing the creation of critical ones while outlawing the merely humorous ones.

Under the framework suggested here, this distinction in fair use should be unconstitutional. If, subject to other fair use requirements, critical works get fair use treatment, it seems that there is no compelling reason for government to exclude non-critical works from being treated the same way. One might argue that government must treat non-critical works as infringing in order to preserve copyright incentives. However, it is unlikely that the elimination of criticism as a factor in fair use determinations will significantly undermine copyright incentives because courts are free to interpret viewpoint-neutral and content-neutral aspects of the Copyright Act to create appropriate limits for fair use. For example, the statute mentions commentary, news reporting, teaching, scholarship, and research as good candidates for fair use.³⁶⁷ Courts could (and do) give less generous fair use treatment to works that do not reflect these purposes, making sure that fair use does not unduly undermine copyright incentives. Similarly, to the extent that fair use treatment depends on the amount and significance of any borrowing from the copyrighted work,³⁶⁸ courts could appropriately limit fair use by scrutinizing whether a defendant's legitimate purposes justify the amount borrowed.³⁶⁹

³⁶⁶ See *id.* § 103(b). This provision extends copyright only to the portions of derivative works contributed by the author. *Id.* By implication, a work deemed infringing is not original to its author and cannot be protected by copyright. See *id.*

³⁶⁷ See *id.* § 107.

³⁶⁸ See *id.* § 107(3).

³⁶⁹ Other commentators have advocated for giving works that do not criticize the copyrighted original more generous fair use treatment than they presently receive. See Harriette K. Dorsen, *Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies Without Wrongs*, 65 B.U. L. REV. 923, 924 (1985) (arguing for use of traditional tort developed under First Amendment doctrine and for rejection of “disguised tort of ‘satiric appropriation’”); Tyler T. Ochoa, *Dr. Seuss, the Juice and Fair Use: How the Grinch Silenced a Parody*, 45 J. COPYRIGHT SOC’Y U.S.A. 546, 547-48 (1998) (arguing against result in *Dr. Seuss Enterprises*, claiming that publication should have been held to be parody meriting fair use treatment); Roger L. Zissu, *Expanding Fair Use: The Trouble with Parody, the Case for Satire*, 64 J. COPYRIGHT SOC’Y U.S.A. 165, 167 (2017) (arguing for each copyright infringement case to be taken on its own facts without consideration of any overarching rule); Annemarie Bridy, Note, *Sheep in Goats’ Clothing: Satire and Fair Use After Campbell v. Acuff-Rose Music, Inc.*, 51 J. COPYRIGHT SOC’Y U.S.A. 257, 258-59 (2004) (arguing for distinction between satirical parody, which would not merit fair use protection, and indirectly satirical parody, which would merit fair use protection).

B. *Provisions of the Copyright Act Subject to Intermediate Scrutiny as Ordinary Content-Based Regulation*

Some, but not all, of copyright's content-based (but not viewpoint-based) provisions would survive intermediate scrutiny. To see this, let us classify copyright's content-based provisions into three groups. The first contains doctrines closely associated with copyright's fundamental concepts. These will pass First Amendment scrutiny fairly easily. The second represents legislation crafted to achieve government objectives. These will often be found constitutional, but the outcome will not always be clear. The third embodies simple economic preferences enacted to favor one group over others. These will rarely be found constitutional because they do not serve an important governmental purpose.

1. *Content-Based Provisions Closely Related to Copyright's Fundamental Concepts*

Content-based provisions closely related to copyright's fundamental concepts are highly likely to survive intermediate scrutiny because the Supreme Court has already recognized how these doctrines serve an important governmental purpose. For example, consider § 102(a), which grants copyright only to "original works of authorship."³⁷⁰ A statute fails intermediate scrutiny unless it furthers an important government interest and does so by means substantially related to that interest.³⁷¹ The § 102(a) restriction to original works passes this test comfortably. As an initial matter, the purpose served by the originality requirement is the promotion of art. This is an important government interest enshrined in the Constitution as the justification for copyright's existence.³⁷² Moreover, the Supreme Court has explained that originality is precisely how copyright advances its constitutional purpose. For example, in *Feist*, the Court recognized that it might seem unfair to deny protection to unoriginal features of works that still required great labor to create, but it affirmed that denial by explaining that such unfairness advanced copyright's constitutional purpose.³⁷³ The Court wrote:

It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not "some unforeseen byproduct of a statutory scheme." It is, rather, "the essence of copyright," and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts." To this end, copyright assures authors the right to their original expression, but

³⁷⁰ 17 U.S.C. § 102(a).

³⁷¹ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (defining intermediate scrutiny test in First Amendment context).

³⁷² See U.S. CONST. art. I, § 8, cl. 8.

³⁷³ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991).

encourages others to build freely upon the ideas and information conveyed by a work. This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. As applied to a factual compilation, assuming the absence of original written expression, only the compiler's selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.³⁷⁴

The foregoing shows that § 102(a) furthers an important government interest by means substantially related to that interest. A similar conclusion would follow with respect to the fair use doctrine's differential treatment for factually based works. The *Eldred* Court identified fair use as one of copyright's traditional contours that makes copyright compatible with the First Amendment.³⁷⁵ Liberal borrowing from factually based works promotes the dissemination of facts, which is an important government interest. The means for furthering that interest are substantially related to the interest itself. Facts are most often found in publications, and the government may want certain facts to be known broadly. This implies that those disseminating facts must be allowed to borrow relatively liberally from works that contain facts. To do otherwise would force people to duplicate efforts made by those who collect facts or create factually based works. This would be wasteful and inefficient.

2. Provisions that Serve Important Government Objectives

Compulsory licensing offers a good example of a Copyright Act provision that probably withstands intermediate scrutiny, even though it does not embody a basic copyright concept. The § 115(a) compulsory license for the making of phonorecords exists because government wanted to promote the development of technology that mechanically reproduced music, which is (especially in hindsight) an important government interest. Section 115(a) originally appeared as part of the Copyright Act of 1909.³⁷⁶ At the time, Congress confronted the issue of how copyright applied to player piano rolls, which enabled music to be mechanically "played" on a piano. Congress specifically worried that copyright

³⁷⁴ *Id.* (citations omitted) (first quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 589 (1985) (Brennan, J., dissenting); then quoting *id.*; and then quoting U.S. CONST. art. I, § 8, cl. 8).

³⁷⁵ See *Eldred v. Ashcroft*, 537 U.S. 186, 196-97 (2003).

³⁷⁶ See *Section 115 of the Copyright Act: In Need of an Update?: Hearing Before the Subcomm. on Courts, the Internet & Intellectual Prop. of the H. Comm. on the Judiciary*, 108th Cong. 5-6 (2004) (statement of Hon. Marybeth Peters, Register of Copyrights, Copyright Office of the United States, Library of Congress) (recounting history of compulsory license in 1909 Act); see also Howard B. Abrams, *Copyright's First Compulsory License*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 215, 215-17 (2010).

holders might combine to create a monopoly over recorded music.³⁷⁷ Congress therefore used the compulsory license to forestall the monopoly.³⁷⁸

Over time, the importance of piano player rolls faded as phonograph technology rose. Nevertheless, the compulsory license has had the effect that Congress intended by guaranteeing the recording industry an ample supply of raw material (i.e., musical works) to record. The relative vibrancy of America's recorded music industry³⁷⁹ and its great contributions to the progress of art since the enactment of the compulsory license support the importance and value of this provision, making it well matched to promotion of the governmental objective.

One might further argue that the original justification for the law no longer exists. Perhaps the recording industry benefitted from special government action to flourish in its infancy. Now, nearly one hundred years later, it is doubtful that the industry still needs a government-imposed compulsory license in order to flourish.³⁸⁰ Indeed, most recorded music licenses are now obtained through the Harry Fox Agency,³⁸¹ a privately held corporation that offers a more streamlined licensing process than the one prescribed by the Copyright Act.³⁸² This might persuade a court that the § 115 compulsory license no longer directly serves an important government interest, placing the compulsory license in mild constitutional jeopardy. That having been said, it is probably more likely that courts will not upset the compulsory license because the music industry has worked with and around it for so long that its removal would introduce significant commercial uncertainty.³⁸³

³⁷⁷ See Abrams, *supra* note 376, at 217-21; see also Shapiro, Bernstein & Co. v. Remington Records, Inc., 265 F.2d 263, 269 (2d Cir. 1959).

³⁷⁸ See Abrams, *supra* note 376, at 220-21.

³⁷⁹ See generally RECORDING INDUS. ASS'N OF AM., RIAA 2018 YEAR-END MUSIC INDUSTRY REVENUE REPORT (2018), <https://www.riaa.com/wp-content/uploads/2019/02/RIAA-2018-Year-End-Music-Industry-Revenue-Report.pdf> [<https://perma.cc/H9SA-2B74>] (reporting retail revenues for U.S. recorded music industry of \$9.8 billion and streaming revenues of \$7.4 billion in 2018).

³⁸⁰ See Abrams, *supra* note 376, at 221-25.

³⁸¹ See THE HARRY FOX AGENCY, <https://www.harryfox.com/#/> [<https://perma.cc/VWU2-3ZMT>] (last visited August 12, 2020).

³⁸² See Abrams, *supra* note 376, at 238-39 (reporting that Harry Fox Agency issued over 2.44 million licenses in 2008 as compared to 274 attempts to invoke compulsory license).

³⁸³ See REGISTER OF COPYRIGHTS, SECOND SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1975 REVISION BILL OCTOBER–DECEMBER 1975 ch. IX, at 36 (1975). Despite good arguments in favor of repealing the compulsory license, Congress decided not to do so in large part because sentiment in the recording industry towards repeal was moderate at best. See *id.* at 6-8. Record companies obviously wanted to see the license continued, but some copyright owners also did not favor repeal. See *id.* (describing controversy about proposed repeal of compulsory license and support for license from surprisingly broad cross section of music industry).

3. Copyright Provisions Embodying Giveaways

Content-based copyright provisions that act as naked preferences favoring some over others should be declared unconstitutional fairly quickly. This is because such provisions do not serve important governmental interests of the sort sufficient to withstand intermediate constitutional scrutiny. Indeed, when content-based regulation exists without strong and apparent justification, it becomes quite possible—if not likely—that the associated discrimination exists because a politically powerful interest has successfully lobbied Congress for a special privilege. In ordinary contexts, political horse trading may be perfectly normal and acceptable. And indeed, application of the rational basis test generally upholds the constitutionality of such provisions. When such favors require constitutionally suspect discrimination on the basis of speech, however, such easy acceptance no longer makes sense. Congress should not be permitted to trade away constitutional rights as political favors, and intermediate scrutiny prevents the most troubling of such abuses.

The § 106 limitation of public performance rights that discriminates against recording artists offers a good example of the kind of copyright content-based discrimination that should fail intermediate scrutiny.³⁸⁴ Unlike songwriters or composers, who receive a royalty for over-the-air broadcasts of their songs, recording artists receive nothing for broadcasts of their recorded performances.³⁸⁵ One might hypothesize that this distinction exists to subsidize AM and FM radio broadcasters who would otherwise go out of business, thereby harming the public interest. However, accepting this hypothesis does not explain why only recording artists bear the costs of the subsidy. Indeed, recording artists do not have to subsidize digital broadcasters in the same way, making questions about the justification for this distinction even more urgent.³⁸⁶

The history behind this provision suggests that the real explanation for this seeming anomaly is the simple exercise of naked political power. When radio stations first began broadcasting live music in the early part of the twentieth century, it was not clear that the stations infringed copyright in songs by doing so.³⁸⁷ Over time, copyright holders in songs prevailed in court, paving the way for the payment of performance royalties to music copyright holders by radio stations.³⁸⁸ However, when radio stations began broadcasting recorded (as opposed to live) music, the recording industry did not have the same success in forcing radio stations to pay, in part because the Copyright Act did not protect

³⁸⁴ See *supra* notes 54-57 and accompanying text.

³⁸⁵ See *supra* notes 54-57 and accompanying text.

³⁸⁶ See 17 U.S.C. § 106(6) (2018).

³⁸⁷ See Bruce H. Phillips & Carl R. Moore, *Digital Performance Royalties: Should Radio Pay?*, 3 VAND. J. ENT. L. & PRAC. 169, 170 (2001).

³⁸⁸ See *id.* at 170-71 (describing litigation success of American Society of Composers, Authors, and Publishers in defending rights of music copyright holders against radio broadcasters).

sound recordings at the time.³⁸⁹ The enactment of the 1976 Copyright Act changed the law, but not entirely in favor of the recording industry. In particular, the 1976 Act protected sound recordings, but it conspicuously omitted any right of public performance for sound recordings.³⁹⁰ This meant that radio broadcasters still owed no royalties to those whose performances were broadcast.

Tellingly, the original draft of the 1976 Act granted public performance rights to sound recordings, but vigorous lobbying by the broadcasting industry blocked the provision from becoming law.³⁹¹ And, to add salt to the wound, the Copyright Office soon issued a report criticizing this denial of performance rights as indefensible.³⁹² Despite this, the National Association of Broadcasters has continued to block attempts to end discrimination against copyright holders in recorded music.³⁹³ Indeed, one analysis suggests that the outsized influence of broadcasters stems from “the political reality . . . that all members of Congress have radio stations in their district, and all members of Congress seek the goodwill of many of those radio stations, especially when they run for re-election.”³⁹⁴

A similar conclusion should apply to the § 110(4), (6), and (10) provisions that subsidize nonprofits, religious organizations, agricultural and horticultural fairs, and veterans' or fraternal organizations by excusing them from paying royalties to copyright holders of certain musical and nondramatic literary works.³⁹⁵ Such distinctions would probably pass rational basis scrutiny, as nearly all legislation does. However, the likelihood of their surviving intermediate scrutiny is rather low. It is unclear why it is important for government to subsidize these groups and not others who might be equally deserving. And even

³⁸⁹ See *id.* at 171.

³⁹⁰ See *id.* Technically, sound recordings gained copyright protection in the Sound Recording Act of 1971, with that protection codified in the 1976 Act. See Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (codified as amended at 17 U.S.C. § 114); Steven J. D'Onofrio, *In Support of Performance Rights in Sound Recordings*, 29 UCLA L. REV. 168, 169 (1981).

³⁹¹ See S. 1111, 94th Cong. § 2(3) (1975); Steve Gordon & Anjana Puri, *The Current State of Pre-1972 Sound Recordings: Recent Federal Court Decisions in California and New York Against Sirius XM Have Broader Implications Than Just Whether Satellite and Internet Radio Stations Must Pay for Pre-1972 Sound Recordings*, 4 N.Y.U. J. INTELL. PROP. & ENT. L. 336, 341 (2015).

³⁹² See REGISTER OF COPYRIGHTS, PERFORMANCE RIGHTS IN SOUND RECORDINGS, H.R. DOC. NO. 22-046, at 24-26 (2d Sess. 1978).

³⁹³ See Matthew S. DelNero, *Long Overdue? An Exploration of the Status and Merit of a General Public Performance Right in Sound Recordings*, 6 VAND. J. ENT. L. & PRAC. 181, 181-82 (2004) (documenting over twenty-five bills unsuccessfully presented since 1926 to grant performance rights in sound recordings).

³⁹⁴ Gordon & Puri, *supra* note 391, at 341; see also D'Onofrio, *supra* note 390, at 169 (attributing lack of performance rights in sound recordings in part to the “tremendous lobbying efforts” of powerful interests).

³⁹⁵ See 17 U.S.C. § 110(4), (6), (10) (2018).

once one identifies an important governmental interest being served, there is no rationale that justifies placing the entire burden of the subsidy on certain enumerated categories of speech while allowing other forms of expression to escape. This does not mean that Congress cannot subsidize certain users or uses of copyrighted works. As an example, Congress could, as a matter of the First Amendment, exempt agricultural and horticultural fairs from paying public performance licenses, but the legislation probably needs to be content neutral.

C. *Content-Neutral Provisions Subject to Rational Basis Scrutiny*

Consistent with *Eldred* and *Golan*, copyright's content-neutral provisions receive only rational basis scrutiny. These provisions include many of copyright's most important features. For example, the Copyright Act defines exclusive rights concerning reproduction, creation of derivative works, and distribution without relying upon the content of speech.³⁹⁶ The rules governing duration of copyright apply equally to all types of copyrighted works.³⁹⁷ And the statutory provisions governing infringement and remedies do not refer to the content of the copyright holder's work.³⁹⁸ Because rational basis scrutiny almost never results in a finding of unconstitutionality, copyright's content-neutral provisions will surely remain unchanged if made subject to a First Amendment challenge.

CONCLUSION

Copyright's effects on speech imply that the First Amendment should limit the kind of copyright legislation that Congress can pass. However, courts have largely refrained from articulating those limits, treating copyright more as commercial regulation that requires only rational basis scrutiny. Although some commentators have decried this, rational basis First Amendment review of copyright has largely become the accepted state of affairs.

Cases like *Tam* and *Brunetti* constructively disrupt this status quo. By drawing attention to the various types of speech regulations found in copyright, they help us see how intermediate and strict First Amendment scrutiny should apply to some of copyright's existing features. Although few in number, copyright's viewpoint-based features should receive strict First Amendment scrutiny and would likely be found unconstitutional.

Courts should apply intermediate scrutiny to copyright's content-based provisions. This would result in the invalidation of only parts of the current Copyright Act. Basic doctrines like originality and fair use pass constitutional muster because they play a central role in copyright's encouragement of speech. The Constitution recognizes this as the justification for copyright, and the Supreme Court has stated that these doctrines are precisely how copyright accomplishes its constitutional purpose.

³⁹⁶ See *id.* § 106(1)-(3).

³⁹⁷ See *id.* §§ 302-305.

³⁹⁸ See *id.* §§ 501-505.

Other doctrines, like the compulsory license for recorded music, do not pass intermediate scrutiny because they closely serve copyright's constitutional purposes. Instead, they survive because they directly advance important public objectives, like the promotion of recording technologies. To the extent that the initial justification for such provisions has diminished, they may stand on shakier constitutional footing today than they did when initially passed. However, I doubt that a court would strike them down on First Amendment grounds at this time.

Finally, a number of copyright provisions would not pass intermediate scrutiny, largely because they do not advance important governmental interests. Instead, these provisions function as naked preferences that favor one set of economic interests over others. Indeed, some of these provisions persist in the Copyright Act simply because influential parties lobbied for them and oppose attempts at reform.

Some may object that these constitutional limits unduly hamper Congress's ability to strike legislative bargains within copyright law. There is some merit to this concern. Legislation generally embodies tradeoffs, and copyright is no different. Constraining Congress's ability to strike bargains could make it harder for Congress to pass copyright legislation. However, First Amendment scrutiny exists to make sure that Congress has genuinely good reasons to pass legislation affecting speech, especially when such legislation risks censorship. Giveaways and tradeoffs may facilitate legislative compromise, but they should not be implemented with no regard for important constitutional values. Constitutional constraints associated with meaningful First Amendment review will therefore improve copyright by eliminating unjustified content-based distinctions that improperly advantage some speakers over others. Results like these may be controversial to some, but they should be regarded as salutary for a statute whose purpose is the evenhanded promotion of speech.