

FIRST AMENDMENT RIGHTS TO PROTECTED EXPRESSION: WHAT ARE THE TRADITIONAL CONTOURS OF COPYRIGHT LAW?

By William McGinty[†]

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Because the judiciary has rendered toothless the Copyright Clause’s¹ limits on Congressional power, the First Amendment is the last hope for anyone arguing that the Constitution places substantive limits on Congress’s ability to pass copyright laws. This is because even if the Copyright Clause does not authorize a particular statute, the Commerce Clause² will.³ Furthermore, where the Copyright Clause demands that copyrights last for only “limited times,” Congress has broad discretion to determine what “limited” means.⁴ But the fact that Article 1, section 8 authorizes a copyright law does not mean that it is consistent with the First Amendment.⁵ The tensions between copyright law and the First Amendment are

1. U.S. CONST. art. I, § 8, cl. 8 has been called the “Patent Clause,” the “Copyright Clause,” the “Intellectual Property Clause,” and the “Progress Clause” by various authors. The Supreme Court in *Eldred v. Ashcroft*, which was the latest Supreme Court decision interpreting the clause in the context of copyright law, used the term “Copyright Clause” and this Comment will conform to that convention. *Eldred v. Ashcroft*, 537 U.S. 186 (2002).

2. The Commerce Clause reads, “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. 1, § 8, cl. 3.

3. See *United States v. Martignon*, 492 F.3d 140 (2d Cir. 2007); *KISS Catalog v. Passport Int’l Prods.*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005); cf. *United States v. Moghadam*, 175 F.3d 1269 (11th Cir. 1999) (holding that the criminal anti-bootlegging provision was not “fundamentally inconsistent” with the Copyright Clause and therefore Congress had the power to enact it under the Commerce Clause).

4. See *Eldred*, 537 U.S. 186.

5. See *id.* at 221; *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007).

particularly apparent upon examination of two amendments to the Copyright Act, enacted in 1994 as part of the Uruguay Round Agreements Act (“URAA”), the anti-bootlegging provisions and the copyright restoration provisions.⁶

In 1994, as part of the General Agreement on Tariffs and Trade (“GATT”), Congress passed the URAA. The URAA changed copyright law in the United States in two important ways. First, the act “restored” copyright to foreign works that, due to the formalities of the 1909 copyright regime,⁷ had either never entered into copyright protection in the United States or fell into the public domain because their authors failed to renew their copyright registrations.⁸ Second, the Act prohibited “bootlegging” by granting perpetual protection to live musical performances.⁹ Both the restoration and the anti-bootlegging provisions erode the public domain: the former reduces the size of the existing public domain by pulling works from it, while the latter impedes the expansion of the future public domain by granting perpetual protection.

In the past year, both the Second and the Eighth Circuits, when considering the amendments to copyright law made pursuant to the URAA, have affirmed Congress’s broad authorizations to enact laws under the Copyright and Commerce Clauses. In *United States v. Martignon*, the Second Circuit Court of Appeals held that the Commerce Clause authorized the anti-bootlegging provisions, which grant musical performers rights to prohibit unauthorized recordings of their performances.¹⁰ In *Golan v. Gonzales*, the Eleventh Circuit Court of Appeals held that the Copyright Clause grants Congress the power, at least under limited circumstances, to remove works from the public domain—as done by the copyright restoration provisions.¹¹ Both courts, however, recognized that the changes to copyright law implicate rights granted by the First Amendment

6. Uruguay Round Agreements Act §§ 512-14, 17 U.S.C. § 1101, 18 U.S.C. § 2319A, and 17 U.S.C. § 104A (2000).

7. See Copyright Act of 1909 §§ 8-24, 320 Stat. 1075, 1077-81 (repealed 1976) (requiring notice of copyright, a registration for a renewal term of copyright, the author to be a citizen of only certain countries, and that written works in the English language to be manufactured in the United States).

8. 17 U.S.C. § 104A. “The public domain” might refer to any valuable intellectual creation that is not protected by intellectual property rights. See generally Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L.J. 783 (2006).

9. 17 U.S.C. § 1101.

10. *Martignon*, 492 F.3d at 152.

11. *Golan v. Gonzales*, 501 F.3d 1179, 1186-87 (10th Cir. 2007).

and remanded the cases back to the district court level to fully examine those implications.¹²

This Comment argues that even if, as numerous courts have held, these provisions do not conflict with the Copyright Clause,¹³ they may still be unconstitutional for violating the First Amendment. Upon First Amendment review, the anti-bootlegging provisions should fail both for lack of a “fair use” exception and because they prohibit the distribution of bootleg recordings both perpetually and retroactively, thereby harming expressive interests without granting incentives for the creation of new works. The restoration provisions, however, should survive a First Amendment challenge because they do not impose substantial burdens above and beyond those generally imposed by copyright law.

Part II presents a brief explanation of Congress’s powers under the Copyright and Commerce Clauses, the doctrine of fair use, the basics of First Amendment review, and the traditional interaction between the First Amendment and copyright law. Part III examines possible definitions of “the traditional contours of copyright law” as used by the Supreme Court in *Eldred v. Ashcroft*.¹⁴ Part IV applies First Amendment review to both the anti-bootlegging provisions and the restoration provisions to find the former in violation of the First Amendment and the latter consistent with it.

I. BACKGROUND LAW

This Part will first introduce the copyright restoration and anti-bootlegging provisions of the URAA. It will then briefly explain the powers of the Federal Government to pass copyright laws under the Copyright and Commerce Clauses and will conclude by providing background of First Amendment review and explaining the relationship between the First Amendment and copyright law.

12. *Martignon*, 492 F.3d at 153; *Golan*, 501 F.3d at 1197.

13. *Golan*, 501 F.3d at 1179 (holding that the copyright renewal provisions did not violate the Copyright Clause); *Martignon*, 492 F.3d at 152 (holding that the Copyright Clause was irrelevant to the anti-bootlegging provisions); *Luck’s Music Library, Inc. v. Gonzales*, 407 F.3d 1262 (D.C. Cir. 2005) (holding that the copyright renewal provisions did not violate the Copyright Clause); *United States v. Moghadam*, 175 F.3d 1281 (11th Cir. 1999) (holding that the anti-bootlegging provisions were not “fundamentally inconsistent” with the Copyright Clause); *KISS Catalog v. Passport Int’l Prods.*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005) (same).

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

A. The Uruguay Round Agreements Act's Effect on Copyright Law

The URAA codified the agreements reached in the Uruguay Round of the GATT.¹⁵ Section 514 of the URAA restores copyright protection in the United States to foreign works that fell into the American public domain because of “noncompliance with formalities,”¹⁶ “lack of subject matter protection in the case of sound recordings fixed before February 15, 1972,”¹⁷ and “lack of national eligibility.”¹⁸ The restoration of copyright to works previously in the public domain poses a number of practical problems having to do with “reliance parties.” Reliance parties are those who have come to rely on, and possibly even build a business around, foreign works in the public domain staying in the public domain.¹⁹

The statute strikes a balance between the needs of these reliance parties and the protection afforded to foreign authors. First, in order for the remedies of the copyright act to be effective against reliance parties, the owner of the restored copyright has to provide notice to the alleged infringer: either constructively, by publishing a notice in the Federal Register, or actually, by contacting the alleged infringer directly.²⁰ Second, damages accrue only for acts of infringement occurring twelve months after notice has been served.²¹ Third, if a reliance party made a derivative work²² of a subsequently restored copyrighted work while it was in the

15. 19 U.S.C. § 3511 (2000).

16. The Act specifically mentions “failure of renewal,” “lack of proper notice,” and “failure to comply with any manufacturing requirements” as formalities. Uruguay Round Agreements Act § 514(h)(6)(C)(i), 17 U.S.C. § 104A(h)(6)(C)(i) (2000).

17. 17 U.S.C. § 104A(h)(6)(C)(ii). United States copyright law did not protect sound recordings until the Sound Recordings Act of 1971, Pub. L. 92-140, 85 Stat. 391 (amended 1976).

18. 17 U.S.C. § 104A(h)(6)(C)(iii). The United States does not automatically give copyright protection to the works of foreign authors, but today United States copyright protection extends to all members of the WTO. *See* 17 U.S.C. § 104 (2000); Copyright Act of 1976, Pub. L. 94-553, 90 Stat. 2541, 2545 (codified as amended in scattered sections of 17 U.S.C.); Berne Convention Implementation Act of 1988, Pub. L. 100-568, 102 Stat. 2853 (codified as amended in scattered sections of 17 U.S.C.); Digital Millennium Copyright Act of 1998, Pub. L. 105-304, 112 Stat. 2860 (codified as amended 17 U.S.C. §§ 512, 1201-05, 1301-22; 28 U.S.C. § 4001 (2000)).

19. *See* Brief for Plaintiffs-Appellants at 12-20, *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007) (No. 05-1259) (detailing the harms caused to the plaintiffs by the copyright restoration provision).

20. 17 U.S.C. § 104A(d)(2).

21. *Id.*

22. *See* 17 U.S.C. § 106 (2000 & Supp. II 2002). These are works that do not copy verbatim from the protected work, but take protected elements from it and incorporate them into a new work. *See Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor, Co.*, 900 F.

public domain, then the creator of the derivative work is immune from an injunction ordering cessation of the infringing activity, but must pay a “reasonable royalty” to continue to infringe the copyright.²³

In addition to the restoration provision, the URAA contained two provisions prohibiting “bootlegging,” which is the unauthorized fixation (e.g. by a videorecorder or audiorecorder) of a live musical performance.²⁴ Federal copyright law did not previously protect live performances because they are not “fixed” works under 17 U.S.C. § 101,²⁵ and fixation is a requirement of copyright protection.²⁶ Together, the URAA provisions provide for both criminal and civil penalties.²⁷ The act is retroactive in the sense that it prohibits the sale of bootlegs even if those bootlegs were made before the act was passed.²⁸ Furthermore, the Act contains no analogue to section 107 in the Copyright Act, which codifies the doctrine of “fair use.”²⁹ Thus, even a short clip of a musical performance for the purposes of news, commentary, or parody would be prohibited under the Act if that short clip were procured without the performer’s permission. Because, as discussed below,³⁰ the doctrine of fair use is a “free speech safe-

Supp. 1287, 1298 (1995) (holding that the defendant’s advertisement infringed on the James Bond series of movies because it used protected elements of the James Bond series in a new context).

23. The parties may either agree on a reasonable amount, or the copyright owner may sue the infringer to determine the amount. 17 U.S.C. § 104A(d)(3)(B).

24. Uruguay Round Agreements Act §§ 512-13, 17 U.S.C. § 1101 and 18 U.S.C. § 2319A (2000).

25. 17 U.S.C. § 101 (2000 & Supp. V 2005). The statute provides:

A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

Id.

26. *Id.* § 102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . .”).

27. 17 U.S.C. § 1101; 18 U.S.C. § 2319A.

28. *Id.*; see also *KISS Catalog v. Passport Int’l Prods.*, 350 F. Supp. 2d 823, 829 (C.D. Cal. 2004), *rev’d on other grounds*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005) (holding that the civil anti-bootlegging provision applies to works fixed before the enactment of the statute).

29. See 17 U.S.C. § 1101; 18 U.S.C. § 2319A.

30. See *infra* Section II.B.

guard,” the lack of a fair use exception brings the anti-bootlegging provisions into conflict with the First Amendment.

B. The Copyright Clause

The Copyright Clause reads, “The Congress shall have power to . . . promote the Progress of Science and the useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings.”³¹ The preamble, the “limited times” provision, and the restriction that rights can only be granted to “Authors” for their “Writings,” all limit Congress’s power to act under the Copyright Clause.

The preamble to the Copyright Clause requires that Congress only use copyright laws to “promote progress” in the arts and sciences.³² This is usually thought of as a bargain between the public and the author: the author receives exclusive rights to his or her works and the public benefits from an enriched public domain.³³ Courts defer substantially to Congress as to the manner in which copyright laws fulfill that goal.³⁴ The Court in *Eldred v. Ashcroft* noted “it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.”³⁵

The Copyright Clause also limits Congress by stipulating that Congress can only protect works for “limited times.” This provision ensures that after a period of exclusive ownership, during which the author can reap the benefits of monopoly pricing, the work will fall into the public domain.³⁶ The Supreme Court has strongly implied that perpetual copyright protection would be unconstitutional.³⁷ However, the *Eldred* Court gave Congress wide latitude to determine the proper duration of copyright protection.³⁸ Any length of time that Congress settles on fulfills the requirements of the Copyright Clause, so long as it rationally relates to the purpose of copyright, which is to promote progress in the arts.³⁹

31. U.S. CONST. art. I, § 8, cl. 8.

32. *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966).

33. See Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1154 (2000).

34. *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) (upholding the addition of twenty years to the duration of copyright for both works then protected and works to be created).

35. *Id.*

36. Heald & Sherry, *supra* note 33, at 1162-63, 1165-66.

37. See *Eldred*, 537 U.S. at 199 (citing a definition of the word “limited” meaning “restricted in extent, number, or duration”).

38. *Id.*

39. See *id.* at 213.

The Copyright Clause also requires that copyright laws only give exclusive rights to “authors” for their “writings.” This requirement manifests as two concrete limitations: works must (1) have a “modicum of originality” to be eligible for copyright protection,⁴⁰ and (2) be fixed in a tangible medium of expression.⁴¹

The originality requirement excludes any facts or previously produced expressions from copyright protection because they do not originate with the author.⁴² For example, copyright does not protect the telephone numbers in a phonebook.⁴³ Unfortunately, the line between protectable “original” works and unprotectable “facts” can be unclear.⁴⁴ Courts have extended copyright protection, for instance, to average price estimates published in appraisal manuals.⁴⁵ Average price estimates are fact-like because they describe the world: the average price that a 1995 Ford Taurus is selling for is a measurable fact about the world. They are also akin to original expression because such works necessarily involve the estimates and judgments of the authors and they do not reflect the world with 100% accuracy. Exactly how much uncertainty and judgment is required before a fact becomes expression is unclear.

Like facts, intangible works are not copyrightable. Congress has included a requirement in every copyright law that copyrighted works be fixed in some tangible medium.⁴⁶ Because of this requirement, no court has ever explicitly ruled on the issue of whether the word “Writings” in the Copyright Clause requires tangibility or “fixation” for works to be constitutionally eligible for copyright protection.⁴⁷

40. *Feist Publ'ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346, 348 (1991).

41. *See* 17 U.S.C. § 102 (2000) (requiring “fixation” for a work to be copyright eligible); *cf.* *Goldstein v. California*, 412 U.S. 546, 561 (1973) (“[A]lthough the word ‘writings’ might be limited to script or printed material, it may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor.”); *United States v. Moghadam*, 175 F.3d 1269, 1274 (11th Cir. 1999) (assuming *arguendo* that the Copyright Clause requires a copyrightable work to be tangible).

42. *See* *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

43. *Feist*, 499 U.S. at 348.

44. *See generally* Justin Hughes, *Created Facts and the Flawed Ontology of Copyright Law*, 83 NOTRE DAME L. REV. 43 (2007).

45. *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994); *see also* *CDN Inc. v. Kapes*, 197 F.3d 1256 (9th Cir. 1999).

46. *See* Copyright Act of 1790, ch. 15, 1 Stat. 124; Copyright Act of 1909, ch. 320, 35 Stat. 1075 (repealed 1976); Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.); 17 U.S.C. § 102 (2000).

47. *See* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.08(C)(2) (2007).

C. The Commerce Clause

Even where a copyright or “copyright-like”⁴⁸ law violates some limitation found in the Copyright Clause, there is the possibility that the Commerce Clause may nonetheless authorize the law. The Commerce Clause gives Congress the power to regulate the channels and instrumentalities of, and all activities that substantially affect, interstate commerce.⁴⁹ To uphold a law as authorized by the Commerce Clause, the government need only show that the challenged law rationally regulates activities classifiable as commerce, and that the means selected have a reasonable connection to the ends asserted.⁵⁰

If there were no Copyright Clause, the Commerce Clause would likely authorize all of modern copyright law. Ownership of expression, duration of protection, and exclusive rights granted substantially affect interstate commerce through industries such as publishing, recording, film, and video games. Moreover, the URAA regulates international trade, which is substantially affected by the copyright restoration law and anti-bootlegging provisions.⁵¹ The copyright restoration law, after all, only restores copyright to foreign works, and so directly regulates the trade with foreign nations authorized by the Commerce Clause.⁵² While the anti-bootlegging provisions do prohibit purely intrastate bootlegging, this regulation is permissible under the Commerce Clause because local bootlegging nevertheless affects interstate commerce though its impact on the na-

48. Some courts used the term “copyright-like” to describe the anti-bootlegging provisions. *See* *United States v. Martignon*, 492 F.3d 140, 145 (2d Cir. 2007); *United States v. Moghadam*, 175 F.3d 1269, 1280 (11th Cir. 1999); *KISS Catalog v. Passport Int’l Prods.*, 405 F. Supp. 2d 1169, 1175 (C.D. Cal. 2005). This stems from the facts that (1) the anti-bootlegging provisions do not protect all of the section 106 rights of copyright (e.g. the making of derivative works) and (2) the anti-bootlegging provisions only protect intangible works whereas a work must be fixed in a tangible medium of expression in order to be copyrighted. Some courts held that because the anti-bootlegging provisions were “copyright-like” they had to meet the requirements of the Copyright Clause, and other courts held that because the provisions were merely “copyright-like” they were immune from those requirements. *Compare* *United States v. Martignon*, 346 F. Supp. 2d 413, 422, 428 (S.D.N.Y. 2004) *with* *KISS Catalog v. Passport Int’l Prods.*, 405 F. Supp. 1169, 1175 (C.D. Cal. 2005). This Comment uses the word “copyright-like” to refer to a law that gives legal protection to expression, such as the anti-bootlegging provisions, but that is arguably immune from the requirements of the Copyright Clause.

49. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

50. *Fed. Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742, 754 (1982).

51. *See Moghadam*, 175 F.3d at 1276.

52. *See* 17 U.S.C. § 104A (2000); *see also* U.S. CONST. art. 1, § 8, cl. 3.

tional recording industry.⁵³ Thus, courts have upheld the anti-bootlegging provisions under the Commerce Clause.⁵⁴

It is an open question, however, whether the Copyright Clause impliedly limits the broad powers of the Commerce Clause. No court has held that when Congress enacts a copyright or “copyright-like” law that is authorized by the Commerce Clause it is bound by all of the limitations in the Copyright Clause. The Eleventh Circuit Court of Appeals has held that Congress may not pass a law that is “fundamentally inconsistent” with the limitations in the Copyright Clause.⁵⁵ Nevertheless, every time a court purports to apply this test, the constitutional challenge brought under the Copyright Clause has failed.⁵⁶ It appears, therefore, that the Copyright Clause is essentially toothless and Congress may circumvent many of its bans on copyright-like protections because it can authorize them under the Commerce Clause.

D. The First Amendment

Where the Copyright Clause and the Commerce Clause are positive grants of Congressional power to enact specific types of legislation, the First Amendment is a general limitation on the scope of Congress’s power. Unlike Copyright Clause and Commerce Clause jurisprudence, where the only standard of review is rationality review, in First Amendment jurisprudence courts utilize many different levels of review.

Courts apply a highly deferential standard of review to regulations that only incidentally burden speech. If speech is more than incidentally burdened, then courts apply varying standards of review depending on whether the regulation is content-based. If the regulation suppresses a particular kind of speech because of its viewpoint, courts apply a strict scrutiny standard. If the regulation is content-neutral, courts apply a more lenient standard.

53. See *Moghadam*, 175 F.3d at 1276-77.

54. See *id.*; *United States v. Martignon*, 492 F.3d 140, 152-53 (2d Cir. 2007); *KISS Catalog, Ltd. v. Passport Int’l Prods.*, 405 F. Supp. 2d 1169, 1173 (C.D. Cal. 2005), *rev’d*, 350 F. Supp. 2d 823 (C.D. Cal. 2004).

55. *Moghadam*, 175 F.3d at 1280.

56. See *Moghadam*, 175 F.3d at 1281; *KISS Catalog*, 405 F. Supp. 2d at 1173; *United States v. Elcom*, 203 F. Supp. 2d 1111, 1141 (N.D. Cal. 2002); *cf.* *United States v. Martignon*, 346 F. Supp. 2d 413 (S.D.N.Y. 2004), *rev’d*, 492 F.3d 140 (2d Cir. 2007); *KISS Catalog, Ltd. v. Passport Int’l Prods.*, 350 F. Supp. 2d 823 (C.D. Cal. 2004), *rev’d*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

1. *Rational Review*

Some regulations incidentally burden speech, or burden communicative activities that are not considered “speech” for the purposes of the First Amendment.⁵⁷ Incidental burdens of speech are those regulations that interfere with speech only minimally,⁵⁸ or as part of a general regulatory scheme, such as taxation.⁵⁹ Examples of communicative activities considered to be “non-speech” include: obscenity,⁶⁰ speech specifically calculated or designed to provoke a fight,⁶¹ and the advocacy of drug use in a secondary school by a student.⁶² To the extent they review them at all, courts review regulations incidentally burdening speech, or burdening “non-speech” activities, under a highly deferential rational basis standard.⁶³

2. *Strict Scrutiny*

When the government regulates speech based on its content, courts employ a strict scrutiny review.⁶⁴ Strict scrutiny presumes the statute at issue to be invalid and requires the government to prove that the law is necessary to serve a compelling government interest.⁶⁵ Courts employ the

57. *See, e.g., Morse v. Frederick*, 127 S. Ct. 2618 (2007) (holding that pro-drug messages delivered by students in public schools are not entitled to First Amendment protection); *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 581 (1983) (“It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems.”); *Miller v. California*, 413 U.S. 15, 23 (1973) (“[O]bscene material is unprotected by the First Amendment.”); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942) (holding that a statute banning “fighting words” did not harm First Amendment interests).

58. *See Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 64 (2006) (holding that incidental burdens, such as the mandatory posting of notice fliers for the purposes of military recruitment, did not affect a college’s speech).

59. *See Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) (holding newspapers are not immune from taxation schemes which do not target them uniquely).

60. *Miller*, 413 U.S. at 23.

61. *Chaplinsky*, 315 U.S. at 574.

62. *Morse*, 127 S. Ct. at 2629.

63. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 48-50 (1987).

64. *See R.A.V. v. St. Paul*, 505 U.S. 377, 395-96 (1992) (holding that an ordinance which banned a subclass of fighting words was invalid because it discriminated between fighting words on the basis of viewpoint).

65. *See id.* Even though the strict scrutiny standard is the highest bar set against statutes in constitutional law, between 1990 and 2003, 30 percent of all laws subjected to strict scrutiny survived the application. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV.

strict scrutiny standard to review laws that exempt some subjects or ideas from broadly applicable prohibitions⁶⁶ or single out certain subjects or ideas for especially burdensome treatment.⁶⁷ To pass strict First Amendment scrutiny, a law must not burden any more speech than necessary to serve the government interest.⁶⁸ That is, if there is any means to accomplish the same end while suppressing less speech, the government is obliged to use that least restrictive means.⁶⁹

3. *Intermediate Scrutiny*

Strict scrutiny does not apply to content neutral suppressions of speech.⁷⁰ The “intermediate scrutiny,”⁷¹ standard applicable in these cases requires that the challenged law be narrowly tailored to serve a substantial government interest.⁷² The precise formulation of this standard is variable. Courts have applied intermediate scrutiny with varying degrees of rigor and without a clear explanation of what determines the differences.⁷³

Content neutral regulations of speech are designed to regulate the conduct that is sometimes concomitant with a particular expression of an idea. The regulations must not serve a government interest in suppressing that idea as such.⁷⁴ For instance, a law attaching criminal penalties to a protest

793, 810, 814 (2006). Where religious liberty cases are removed from the data set, the survival rate drops to 24 percent. *Id.* at 813.

66. *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 101 (1972) (holding that the exclusion of labor picketing from an anti-picketing ordinance was impermissible content discrimination).

67. *R.A.V.*, 505 U.S. at 367, 395.

68. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (holding that to pass First Amendment strict scrutiny the chosen means of serving the government’s interest must be the “least restrictive means among available, effective alternatives”).

69. *Id.*

70. *See United States v. O’Brien*, 391 U.S. 367, 376-77 (1968) (holding that a law suppressing speech is justified as long as “it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged *First Amendment* freedoms is no greater than is essential to the furtherance of that interest.”).

71. *See Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 175 (2002) (Rehnquist, C.J., dissenting).

72. *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

73. *Stone*, *supra* note 63, at 48-50; *see also* Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 *STAN. L. REV.* 1, 35-36 (2001).

74. *Turner Broad. Sys. v. FCC (Turner II)*, 520 U.S. 180, 189 (1997) (“A content neutral regulation will be sustained under the First Amendment if it advances important government interests unrelated to the suppression of free speech . . .”); *see also O’Brien*, 391 U.S. at 376-77.

of the draft would be subject to strict scrutiny because the only government interest served would be the interest in silencing protests. A law prohibiting the burning of a draft card, however, even in the context of a protest, is subject to intermediate scrutiny, because such a law would be justified by the government interest in a smooth functioning draft system.⁷⁵

One common form of content neutral regulation that is subject to intermediate scrutiny is the “time, place, and manner” restriction.⁷⁶ These regulations erect administrative barriers to speech (such as requiring parade organizers to obtain a government permit to operate) while “leav[ing] open ample alternative channels for communication of the information.”⁷⁷ Despite the possibly trivial burden time, place, and manner restrictions place on speech, they still must “serve a significant government interest”⁷⁸ although they need not be the least restrictive means to serve that interest.⁷⁹

Content neutral regulations of speech subject to intermediate scrutiny do, however, need to avoid burdening substantially more speech than necessary to achieve the government’s goals.⁸⁰ In a First Amendment challenge, courts consider the law’s intended and unintended “chilling” of speech.⁸¹ Thus a law which is too vague for a reasonable person to anticipate whether her activities put her at risk of legal sanction would violate the First Amendment to the extent that protected speech might be discouraged through a desire to comply with the law.⁸²

Intermediate scrutiny also requires that Congress provide some factual basis for believing that the government interest is significant and that the chosen means substantially relates to it.⁸³ The factual basis should be evident from the record before Congress.⁸⁴

75. *See O’Brien*, 391 U.S. at 379-80.

76. *See Rock Against Racism*, 491 U.S. at 798-99 (holding that a city ordinance requiring performers in a public park to use publicly provided sound mixing equipment was constitutional).

77. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 (1976).

78. *Id.*

79. *Rock Against Racism*, 491 U.S. at 798-99.

80. *Id.*

81. *See Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965) (striking down a law requiring addressees to explicitly ask the post office to deliver communist propaganda); *see also Freedman v. Maryland*, 380 U.S. 51, 60-61 (1965).

82. *See Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) (striking down a law prohibiting “annoying” conduct).

83. *Turner Broad. Sys. v. FCC (Turner II)*, 520 U.S. 180, 211 (1997).

84. *Id.*

II. COPYRIGHT AND THE FIRST AMENDMENT

Courts have generally held that copyright law is consistent with the First Amendment and have even suggested that no First Amendment review of copyright laws is necessary.⁸⁵ This is despite the fact that copyright laws unquestionably suppress speech, because copyright explicitly prohibits the free expression of copyrighted materials. Furthermore, because it is the content of a work (its originality) that determines whether a work is copyrightable and it is the content of the challenged work (its similarity to the copyrighted work) that determines copyright infringement, this suppression is arguably content discriminatory.⁸⁶ The argument that copyright law does not require First Amendment review is that the copyright laws strike a “definitional balance” between the expressive interests of authors and those of prospective copiers.⁸⁷ The author needs financial incentives in order to create expressive works; if the law protects an infringer too liberally the author will be silenced. The balance predominantly manifests itself in the doctrine of “fair use” and in the “idea/expression dichotomy.”⁸⁸ This Section will briefly explain these First Amendment “safety valves” in order to explore the balance of expressive liberties versus protection found in the copyright laws. It will then examine the standard of First Amendment review applicable to copyright statutes.

A. The “Idea/Expression Dichotomy”

Section 102(b) of the Copyright Act provides that no “idea” is protectable under copyright law.⁸⁹ This means that copyright does not protect the general themes that a copyrighted work possesses, only the expression of those themes.⁹⁰ In addition, when a particular idea can only be expressed in a limited number of ways, the expression is “merged” with the idea, and the expression of that idea is not copyrightable.⁹¹ For example, there is no protection for a story about a Catholic family and a Jewish family that get into a fight, because that basic plot element is too abstract for copyright protection.⁹² Copyright does protect, however, the boxer named Rocky

85. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559-60 (1985).

86. See *infra* Section II.E.4.

87. See Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1192 (1970).

88. See *Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (2003).

89. 17 U.S.C. § 102(b) (2000).

90. *Baker v. Seldon*, 101 U.S. 99, 104 (1880); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121-22 (2d Cir. 1930).

91. *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678-79 (1st Cir. 1967).

92. *Nichols*, 45 F.2d at 121-22.

Balboa who has a girlfriend named Adrian, a trainer named Mitt, and who lost to another boxer named Apollo.⁹³

The idea/expression dichotomy is not explicitly required by the Constitution.⁹⁴ Rather, the Court has held that the “idea/expression dichotomy” is a “First Amendment accommodation”⁹⁵ that strikes a “definitional balance between the First Amendment and the Copyright Act.”⁹⁶ That is, there is a First Amendment right to express any particular idea even if someone else has said that idea first.

It should be noted, however, that classifying something as an “idea” or as “expression” is a difficult exercise.⁹⁷ Courts have extended copyright protection to a “suave hero” in a tuxedo fighting grotesque villains because of its resemblance to James Bond.⁹⁸ Copyright has also protected the line “Love is a Wonderful Thing” sung to a Rhythm and Blues style of music,⁹⁹ even though the idea that love is a wonderful thing is certainly unprotected by copyright and no individual could ever have a copyright on Rhythm and Blues. While copying verbatim the line “love is a wonderful thing” is arguably copyright infringement, it is difficult to say that love is a wonderful thing in any other way. “Love is a great thing” or “love is a marvelous thing” is not the same idea as “love is a wonderful thing.”

B. The Doctrine of Fair Use

Like the idea/expression dichotomy, the doctrine of fair use is not explicitly required by the Constitution. It is an equitable doctrine, first developed in the United States by Justice Story,¹⁰⁰ that has since been codified¹⁰¹ and elevated by the Court in *Eldred* to what appears to be a First

93. See *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at *1166-67 (C.D. Cal. Apr. 25, 1989).

94. In fact, Article 1, section 8, clause 8 authorizes patent law, which quite explicitly grants intellectual property rights to ideas. See 35 U.S.C. § 101 (2000) (defining the scope of patentable subject matter).

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

96. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) (citation omitted).

97. See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §13.03 (2007).

98. *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor, Co.*, 900 F. Supp. 1287 (C.D. Cal. 1995).

99. *Three Boys Music Corp. v. Michael Bolton*, 212 F.3d 477, 487 (9th Cir. 2000).

100. See *Folsom v. Marsh*, 9 F. Cas. 342 (D. Mass. 1841).

101. 17 U.S.C. § 107 (2000). The codification of fair use gives four nonexclusive factors that courts use to determine if a particular use is fair:

- (1) the purpose and character of the use . . . ;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in

Amendment requirement.¹⁰² Fair use is an affirmative defense; the alleged infringer bears the burden to prove that her use was fair.¹⁰³

Fair use “permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”¹⁰⁴ The statute codifying the doctrine specifically mentions “criticism, comment, news reporting, teaching . . . , scholarship [and] research” as uses encouraged by the doctrine.¹⁰⁵ The fair use doctrine has been criticized for its unpredictability¹⁰⁶ and some commentators contend that the doctrine does not necessarily protect uses of copyrighted material that minimally impact the copyright holder but are essential to the alleged infringer’s expression.¹⁰⁷

C. The Permanent Public Domain

While courts have cited the fair use doctrine and the idea/expression dichotomy as mechanisms that make copyright laws consistent with the First Amendment, the public domain’s relationship to the First Amendment has been relatively ignored.¹⁰⁸ It is logical to suppose that a permanent public domain protects free speech rights because it enables all people to freely make use of expression that has fallen into the public domain. There is some Supreme Court precedent emphasizing the importance of a large body of public domain works that the public can exploit.¹⁰⁹ A permanent public domain, however, has not been elevated, like

relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id.

102. Eldred v. Ashcroft, 537 U.S. 186, 220-21 (2003).

103. *Campbell*, 510 U.S. at 590 (citation omitted).

104. *Id.* at 577 (internal quotation marks and formatting omitted).

105. 17 U.S.C. § 107 (2000).

106. William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1694-95 (1988); Netanel, *supra* note 73, at 21.

107. See Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 166 (1998); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 544 (2004) (noting that the fair use doctrine is difficult to reconcile with the derivative works right).

108. Diane Leenheer Zimmerman, *Is There a Right to Have Something to Say? One View of the Public Domain*, 73 FORDHAM L. REV. 297, 299-300 (2004).

109. See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003); *Feist Publ’ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 354 (1991).

the fair use doctrine or the idea/expression dichotomy, to a place of constitutional significance.

D. The Appropriate Standard of First Amendment Scrutiny of Copyright Laws

In part because of the protections of the fair use doctrine and the idea/expression dichotomy, before *Eldred*, courts consistently held that copyright laws do not tread on free speech rights at all, and thus do not require First Amendment scrutiny.¹¹⁰ Courts and commentators have argued that copyright's unique position in encouraging the creation of new expression itself serves a First Amendment interest.¹¹¹ Courts, the logic goes, should therefore be deferential to the congressional "scheme" of copyright protection.¹¹²

A congressional balance struck between incentive and access, however, does not necessarily exempt suppression of speech from heightened scrutiny in other contexts. In *Turner II* the Court subjected the "must-carry" laws¹¹³ to intermediate scrutiny, despite the fact that they were a congressional attempt to balance incentives and access. The "must carry laws" required cable companies to carry local over-air broadcast stations in order to ensure that broadcast television would not be driven out of business by cable television.¹¹⁴ *Turner Broadcasting System* argued that its First Amendment rights were violated because it was being forced to carry stations it did not want to—in effect it was being forced to speak.¹¹⁵ Four of the five justices upholding the law relied on two independent ra-

110. *See* *New York Times Co. v. United States*, 403 U.S. 713, 726 n.* (1971) (Brennan, J., concurring) (arguing copyright laws are irrelevant to the First Amendment because copyright protects only the form of the expression and not the idea expressed); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (citing *New York Times*, 403 U.S. at 726 (Brennan, J., concurring)) ("Copyright laws are not restrictions on freedom of speech as copyright protects only form of expression and not the ideas expressed.").

111. *See* Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why the Copyright Term Extension Act is Unconstitutional*, 36 LOY. L.A. L. REV. 83, 83 (2002); Nimmer, *supra* note 87, at 1186-87; *see also* *Harper & Row*, 471 U.S. at 558 ("The copyright laws serve as the engine of free expression. . . .") (internal quotation marks omitted).

112. *Harper & Row*, 471 U.S. at 545-56.

113. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.).

114. *Turner Broad. Sys. v. FCC (Turner II)*, 520 U.S. 180, 187-88 (1997); *see also* *Turner Broad. System v. FCC (Turner I)*, 512 U.S. 622 (1994) (holding that the must-carry provisions were content-neutral regulations of speech and subject to intermediate scrutiny).

115. *Turner I*, 512 U.S. at 653.

tionales: (1) the must-carry provisions had a pro-competitive effect in that they prevented monopolization by the cable companies in the local broadcast markets¹¹⁶ and (2) the must-carry provisions assured access to information by the public since “[b]roadcast television is an important source of information to many Americans.”¹¹⁷ Justice Breyer, the fifth vote, did not join the opinion with respect to the pro-competitive rationale. Rather, Justice Breyer’s concurrence held that the must carry law’s pro-expression effects were sufficient to meet intermediate scrutiny.¹¹⁸

In *Turner II*, heightened First Amendment review applied even though Congress had balanced the cable companies’ First Amendment interests in editorial control against the public’s interest in access to information. Therefore, the mere fact that the copyright laws balance pro-expression incentives against suppressions of speech cannot immunize the copyright laws from heightened review.¹¹⁹

The Supreme Court’s latest major copyright decision, *Eldred v. Ashcroft*, seems to agree that the First Amendment is applicable to copyright laws,¹²⁰ with one important caveat: copyright laws are only subject to First Amendment review if they go outside of the “traditional contours” of copyright law.¹²¹ The Court did not explicitly define the “traditional contours” but held that the law at issue in *Eldred* did not breach them.¹²²

Supposing that a copyright law does breach the traditional contours of copyright law, what level of First Amendment scrutiny would be appropriate? At first blush, copyright laws would appear to be subject to either strict or intermediate scrutiny because they are more than “incidental” burdens on speech.¹²³ Since copyright law clearly burdens speech (in that the speech in a copyrighted work can only be utilized by the copyright owner or a licensee)¹²⁴ the next inquiry would focus on whether copyright law is content discriminatory or content neutral in order to determine whether intermediate scrutiny or strict scrutiny is appropriate.

116. *Turner II*, 520 U.S. at 191.

117. *Id.* at 194.

118. *Id.* at 226 (Breyer, J., concurring).

119. See Netenal, *supra* note 73, at 42.

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

121. *Id.*

122. *Id.* In *Eldred*, the Court upheld the Copyright Term Extension Act (“CTEA”), which added twenty years to the duration of copyright for all works then under copyright as well as all works to be created. Sonny Bono Copyright Term Extension Act, 17 U.S.C. §§ 108, 203, 301-304 (2000 & Supp. V 2005).

123. See generally Nimmer, *supra* note 87.

124. See 17 U.S.C. § 106 (2000 & Supp. II 2002).

While copyright laws in the aggregate, however, certainly impose more than incidental burdens on speech, individual amendments to the copyright laws may or may not cause substantial harm to expressive interests above and beyond that of copyright law in general. Because the First Amendment review contemplated by *Eldred* is narrow, copyright laws that go outside of the traditional contours of copyright law—but that do not suppress more speech than copyright law generally—should be judged on a rational basis standard.

1. *Strict Scrutiny*

It can be argued that copyright law ought to be subject to strict scrutiny because (1) it is the content of the challenged speech that determines whether copyright has been violated,¹²⁵ and (2) copyright discriminates in favor of new or original expression. Copyright first looks to the content of the speaker's speech to determine if it is substantially similar to any copyrighted work. If so, copyright suppresses that speech. Because this analysis is dependent on the content of speech suppressed, copyright arguably discriminates on the basis of content. Moreover, copyrights themselves are content discriminatory because copyright looks to the content of a work to determine its eligibility for copyright protection. Databases like phone-books are not copyrightable but appraisal manuals are; a blank canvas is not copyrightable but a Jackson Pollock¹²⁶ painting is. Whether the law burdens speech, therefore, is dependent on how the speaker wants to copy that speech (similar enough to be infringing in the copyright or not) and the content of the copied speech (copyrightable or not) so strict scrutiny should apply.¹²⁷

This argument, however, is specious because while copyright law does reference the content of both the protected speech and the allegedly infringing speech, copyright law does not give preferential treatment to any particular point of view or any particular subject matter.¹²⁸ All original expression is copyrightable regardless of the message, and all infringing works are suppressible, regardless of the point of view. Therefore, while copyright law is content *referential* it is not content *discriminatory*.

125. See Lemley & Volokh, *supra* note 107, at 186 (arguing that copyright law is a content discriminatory burden on speech).

126. Some of Pollock's paintings are characterized by chaotic spattering of paint on canvas. Charles Lachman, *The Image Made by Chance in China and the West: Ink Wang Meets Jackson Pollock's Mother*, 74 ART BULL. 499, 501 (1992).

127. Lemley & Volokh, *supra* note 107, at 186.

128. Chemerinsky, *supra* note 111, at 93-94.

2. *Intermediate Scrutiny*

Copyright laws that impose substantial burdens on speech, therefore, should be subject to intermediate scrutiny.¹²⁹ What copyright laws really get at is the conduct that is concomitant with the expression of a particular idea, but not the idea itself.¹³⁰ That is, copyright laws target the unfair competition that would necessarily accompany, for example, publishing *Lavender Mist: No. 1* without a license from Mr. Pollack's estate.¹³¹ Copyright does not, however, keep an individual from making her own distinct work using Pollack's unique method.¹³² The content of the speaker's speech is irrelevant to the purpose of copyright law. The government merely wants the system of incentives for authors to disseminate original works to function smoothly. Therefore, copyright is not content discriminatory and intermediate scrutiny is more appropriate.

3. *Rational Basis*

Copyright laws that breach the traditional contours of copyright law, but that cause no more harm, or only incidental harms, to expressive interests when compared with copyright laws generally, should be subject to rational basis review. While the significant harm to expressive interests caused by copyright law would suggest that strict or intermediate scrutiny should apply, it is important to keep in mind that the First Amendment review contemplated by *Eldred* is a limited one. That is, copyright laws are categorically immune from First Amendment review *unless* they go outside of the traditional contours of copyright law.¹³³ Therefore, *Eldred* establishes a baseline level of harm to expression that is acceptable to the First Amendment.

Copyright law, as it is now formulated, chills a substantial amount of speech. As discussed above,¹³⁴ the idea/expression dichotomy is a very fuzzy line and it is difficult to predict whether a particular use of an idea similar to an idea embodied in a copyrighted work will be infringing or not.¹³⁵ Similarly, the doctrine of fair use has unpredictable outcomes.¹³⁶

129. Netanel, *supra* note 73, at 47-54; *see also* Chemerinsky, *supra* note 111, at 93.

130. *But see* Lemley & Volokh, *supra* note 107, at 166 (conceding that copyright when applied properly does not protect ideas, but that preliminary injunctions in copyright cases nonetheless violate the First Amendment because of the risk of error).

131. *See* Netanel, *supra* note 73, at 49.

132. *See* 17 U.S.C. § 102(b) (2000).

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

134. *See supra* Section II.A.

135. Tushnet, *supra* note 107, at 554.

136. *Id.*; *see also* Netanel, *supra* note 73, at 21.

These doctrines are the supposed safety-valves that keep copyright law from infringing the First Amendment,¹³⁷ but because their application is so difficult to predict, and, according to some, incoherent,¹³⁸ it is almost certain that they discourage the creation of some speech that would be protected.¹³⁹ But the First Amendment does not recognize this harm, according to the *Eldred* Court.¹⁴⁰ Instead of examining whether this limitation to the First Amendment review of copyright is justifiable or desirable,¹⁴¹ this Comment will work within the *Eldred* framework to outline how the First Amendment should be applied to copyright laws going forward.

The *Eldred* framework would suggest that the level of review applied to a copyright law should be related to the extent the law deviates from the traditional contours of copyright. If a copyright law within the traditional contours does *no harm* to First Amendment interests, it is reasonable to suppose that slight breaches of the traditional contours might do *slight harm* to First Amendment interests. *Eldred* instructs courts not to consider harm caused by copyright law generally. For example, the copyright renewal provisions of the URAA renew the copyright in certain foreign works. They incorporate the harm caused by the ambiguity of the fair use doctrine and the idea/expression dichotomy, because all copyrights cause this harm. Even if, as the *Golan* court held, the renewal provisions are outside of the traditional contours¹⁴² it would be incorrect to consider the harm caused by all copyrights in the First Amendment calculus because under *Eldred* that harm is not cognizable by the First Amendment.

III. “TRADITIONAL CONTOURS OF COPYRIGHT LAW”

Because the traditional contours of copyright law control whether heightened First Amendment review applies, defining the traditional contours of copyright law is necessary. Three hypotheses that define the traditional contours have emerged: (A) that the powers given to Congress by

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

138. William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1694 (1988).

139. See Tushnet, *supra* note 135, at 545.

140. See *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

141. This ground has been covered extensively by others. See generally David E. Shipley, *Congressional Authority Over Intellectual Property Policy After Eldred v. Ashcroft: Deference, Empty Limitations, and Risks to the Public Domain*, 70 ALB. L. REV. 1255 (2007); Symposium, *Constitutional Challenges to Copyright*, 30 COLUM. J.L. & ARTS 337 (2007); Symposia, *The Constitutionality of the Copyright Extension: How Long is Too Long?*, 18 CARDOZO ARTS & ENT. L.J. 651 (2000).

142. *Golan v. Gonzales*, 501 F.3d 1179, 1189 (10th Cir. 2007).

the Copyright Clause define the traditional contours;¹⁴³ (B) that the doctrine of fair use and the idea/expression dichotomy was what the Court meant by “traditional contours”;¹⁴⁴ and (C) that the traditional contours are determined by the historical practice from the first copyright act in 1790, and perhaps earlier, to the present day.¹⁴⁵ Once these three hypotheses are explained, this Comment will argue that hypothesis (C), which defines the contours by traditional practice, is preferable. This part will then apply each hypothesis to the restoration provision and the anti-bootlegging provisions.

A. The Copyright Clause Defines The Contours

The simplest formulation of the traditional contours of copyright law is that the contours encompass the whole power given to Congress by the Copyright Clause. In other words, Copyright Clause review replaces First Amendment scrutiny. The First Amendment and the Copyright Clause are only set “at cross-purposes” when the bounds of the Copyright Clause are exceeded because the First Amendment and the Copyright Clause work together to promote free expression.¹⁴⁶ Despite the hypothesis’s logical simplicity, no court has so far explicitly adopted it.¹⁴⁷

The most glaring objection to this definition is that it contradicts the plain meaning of the Court’s language in *Eldred*, which stated that the First Amendment has relevance in copyright cases. If the traditional contours of copyright law encompassed the whole power given to Congress by the Copyright Clause, then any copyright law would necessarily pass First Amendment muster. But, the Court in *Eldred* rejected the proposition that copyright laws are categorically immune from heightened First Amendment scrutiny:¹⁴⁸ “We recognize that the D.C. Circuit spoke too broadly when it declared copyrights ‘categorically immune from chal-

143. See *Eldred*, 537 U.S. at 244-45 (Breyer, J., dissenting) (arguing that copyright laws are consistent with the First Amendment so long as they are within the bounds of the Copyright Clause); see also Posting of William Patry to Patry Copyright Blog, Golan’s Copyright Lows, [http:// williampatry.blogspot.com/2007/09/ golans-copyright-lows.html](http://williampatry.blogspot.com/2007/09/golans-copyright-lows.html) (Sept. 4, 2007).

144. Cf. *Kahle v. Gonzales*, 487 F.3d 697 (9th Cir. 2007) (holding that because neither fair use rights nor rights to ideas were narrowed First Amendment scrutiny need not be applied to an amendment to the Copyright Act).

145. *Golan*, 501 F.3d at 1189.

146. See *Eldred*, 537 U.S. at 244-245 (Breyer, J., dissenting); see also Posting of William Patry to Patry Copyright Blog, Golan’s Copyright Lows, [http:// williampatry.blogspot.com/2007/09/golans-copyright-lows.html](http://williampatry.blogspot.com/2007/09/golans-copyright-lows.html) (Sept. 4, 2007).

147. See *Golan*, 501 F.3d at 1186; *Kahle v. Gonzales*, 487 F.3d 697, 701 (9th Cir. 2007); *Luck’s Music Library v. Gonzales*, 407 F.3d 1262 (D.C. Cir. 2005).

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

lenges under the First Amendment.’ . . . But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.”¹⁴⁹ It is possible that the Court could have been speaking loosely. Just because a law gives copyright protection to a work, does not mean that the law is a valid exercise of the powers in the Copyright Clause.¹⁵⁰ The court could have merely meant that the First Amendment challenge to copyright is encompassed within the Copyright Clause challenge, identifying the Copyright Clause as the “traditional contours.” And because the *Eldred* Court held that the Copyright Term Extension Act was constitutional, both within the bounds of the Copyright Clause and the First Amendment, defining the traditional contours by the breadth of the Copyright Clause is at least consistent with the *Eldred* ruling.¹⁵¹ Nonetheless this is a strained reading of the *Eldred* opinion, which considered the Copyright Clause and First Amendment challenges to the CTEA separately.¹⁵²

A second objection to this line of reasoning is that it impermissibly collapses a highly deferential standard of review into a highly searching standard of review. That is, whether Congress has exceeded its powers under the Copyright Clause is judged according to the highly deferential rational basis standard.¹⁵³ Whether the Congress has impermissibly violated the First Amendment is judged on a potentially much more searching standard of review, depending on the character of the suppression.¹⁵⁴ Therefore, to hold that any copyright law within the bounds of the Copyright Clause is consistent with the First Amendment is to subject a whole slew of suppressions of speech to merely rational basis review. It would be akin to holding that because the must-carry provisions¹⁵⁵ substantially affect interstate commerce they are subject to only rational basis review.¹⁵⁶ In reality, they were subject to intermediate review in order to ensure that they did not burden substantially more speech than was necessary to achieve the government’s ends.¹⁵⁷ The rational basis standard of review gives congress deference where deference is appropriate—when Congress reaches for more power to combat a Great Depression, or other national

149. *Id.* (internal citations omitted).

150. *See supra* Section I.B.

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

152. *Id.* at 210-21.

153. *See supra* Section II.C.

154. *See supra* Section II.D.

155. *See supra* text accompanying note 113.

156. *Cf. Turner I*, 512 U.S. at 662 (holding that the must-carry provisions were subject to intermediate scrutiny).

157. *Id.*

crises, the rational basis standard keeps the courts from getting in the way.¹⁵⁸ The First Amendment is supposed to keep the government from infringing essential liberties.¹⁵⁹ Subjecting potential First Amendment violations caused by copyright laws merely to Copyright Clause review means upholding suppressions of speech upon a rational basis. Collapsing the First Amendment question into the Copyright Clause question impermissibly conflates the two standards.

B. Fair Use and The Idea/Expression Dichotomy Define the Contours

The second hypothesis to emerge in defining the “traditional contours of copyright law” is that the fair use doctrine and the idea/expression dichotomy are the whole of the contours. That is, as long as a copyright law does not protect “ideas” or “facts,” and it allows an affirmative defense for some mildly harmful yet socially beneficial uses, the law is not subject to First Amendment review.

The Ninth Circuit used this hypothesis in *Kahle v. Gonzales*.¹⁶⁰ In *Kahle*, the court upheld the CTEA, as well as the Copyright Renewal Act of 1992 (“CRA”) which made copyright renewal automatic.¹⁶¹ In refuting the plaintiff’s contention that the CTEA and the CRA altered the traditional contours of copyright law, the court explained, “[T]raditional First Amendment safeguards such as fair use and the idea/expression dichotomy are sufficient to vindicate the speech interests affected by the CRA and the CTEA,” and thus collapsed First Amendment review to checking for fair use and the exclusion of idea protection.¹⁶²

A close reading of the *Eldred* opinion bolsters this position. Immediately before holding that heightened First Amendment review was not appropriate in the case of the Copyright Term Extension Act (“CTEA”) the Court wrote, “To the extent [the CTEA] raise[s] First Amendment concerns, copyright’s built-in free speech safeguards are generally adequate to address them.”¹⁶³ The Court had previously identified those safeguards as exclusively the idea/expression dichotomy and the doctrine of

158. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 129 (1942) (holding that Congress had substantial powers to stabilize wheat prices).

159. See, e.g., *New York Times v. United States*, 403 U.S. 713, 727 (1971) (Breyer, J., concurring).

160. 487 F.3d 697 (9th Cir. 2007).

161. *Id.* Prior to 1992, copyright owners had to file a renewal registration and pay a fee to extend their copyright protection. See Copyright Renewal Act of 1992, Pub. L. 102-307, 106 Stat. 264 (codified as amended at 17 U.S.C. § 304 (2000 & Supp. II 2002)).

162. *Kahle*, 487 F.3d at 700 (citing *Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (2003)).

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

fair use.¹⁶⁴ The “free speech safeguards” and the “traditional contours of copyright protection” occupy the same logical place in the Court’s reasoning: the presence of either makes First Amendment review unnecessary. Because it is certain that “free speech safeguards” means the doctrine of fair use and the idea/expression dichotomy, it is possible that the “traditional contours” means the same thing.

This definition of traditional contours would allow nearly any property right in expression so long as the property right did not protect ideas and allowed for a fair use defense.¹⁶⁵ Whenever a speaker wants to copy expression from someone else, the only First Amendment protections that speaker has from a property right asserted by the owner of the expression is the idea/expression dichotomy and the doctrine of fair use. This is true even if the asserted property right is not a copyright. For example, suppose that Congress passes a law under the Commerce Clause granting a publisher intellectual property rights in a work too old for copyright protection, works like *Pride and Prejudice* by Jane Austen, *A Tale of Two Cities* by Charles Dickens, or even the King James version of the Bible.¹⁶⁶ Congress’s objective might be to encourage the republication of works that cannot be profitably exploited precisely because they are in the public domain.¹⁶⁷ Such a law would burden First Amendment interests in the same way that copyright does (by granting property rights to expression), and with the same justification (to ensure the public dissemination of expression). According to this definition of the traditional contours, the same First Amendment review would apply. As long as the law allowed for free use of ideas and for a fair use defense, the traditional contours of copyright law would not have been breached. This hypothesized “publication right” would, therefore, be identical to copyright law for the purposes of the First Amendment. Thus, consistent with the First Amendment, Congress could give the exclusive right to publish the Kings James version of the Bible to Simon and Schuster.¹⁶⁸ Furthermore, a court could not even measure the First Amendment interest in publishing the Bible against the government’s interest in ensuring the Bible’s dissemination. Because such a publication

164. *Id.* at 219-20.

165. This is true absent Copyright Clause concerns, but, as pointed out above, the Copyright Clause has been rendered nearly toothless. *See supra* Section I.C.

166. *Cf.* R. Anthony Reese, *Is the Public Domain Permanent?: Congress’s Power to Grant Exclusive Rights in Unpublished Public Domain Works*, 30 COLUM. J.L. & ARTS 531, 545-62 (2007) (arguing that a publication right to certain public domain works would be within Congress’s Commerce Clause power).

167. *Id.*

168. Again, ignoring Copyright Clause concerns. *See id.*

right would not breach the traditional contours of copyright law, First Amendment review would not apply.

The problem with this definition is that it devalues the First Amendment interest a speaker has in verbatim copying. The *Eldred* Court did hold that the First Amendment “bears less heavily when speakers assert the right to make other people’s speeches.”¹⁶⁹ Rebecca Tushnet points out, however, that this statement is difficult to reconcile with other parts of First Amendment doctrine and with common sense.¹⁷⁰ The First Amendment protects a newspaper’s right to publish even when they publish the works of others and even when that work was taken without the author’s permission.¹⁷¹ In some cases, such as when covering the songs of another musician or reproducing a play written and first staged by another, the speaker can only say what she wants to with other people’s words.¹⁷² For example, *Happy Birthday to You* is the traditional song to sing when celebrating a birthday.¹⁷³ No other song has the same cultural significance despite the relative simplicity of the tune and the words. There must be a First Amendment interest in singing that song. Writing a new song would not convey the same sense of tradition; singing merely the refrain in an effort to fit under fair use would not complete the birthday tradition. Granted, the interest in verbatim copying might be outweighed by the government’s interest in protecting the financial security of the author;¹⁷⁴ not counting the public’s interest in verbatim copying at all, however, misses a significant part of what humans use language to do. We communicate by copying. It cannot be, therefore, that copied speech is automatically less worthy of First Amendment protection than original expression. A definition of the traditional contours that reads a First Amendment interest in verbatim copying out of the First Amendment is not appropriate.

169. *Eldred*, 537 U.S. at 191.

170. See Tushnet, *supra* note 135, at 562-86.

171. *New York Times v. United States*, 403 U.S. 713 (1971) (holding that the New York Times had a First Amendment right to print leaked government papers); Tushnet, *supra* note 135, at 562-86.

172. See Tushnet, *supra* note 135, at 562-86.

173. The song “Happy Birthday to You” is still under copyright protection. “*Happy Birthday*” and *the Money it Makes*, NY TIMES, Dec. 26, 1989 at C26.

174. See *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 245 (1918) (holding that the Associated Press had a protectable property right in recently published news stories); see also *Harper & Row Pubs., Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985) (holding that the First Amendment did not give a publisher the right to quote liberally from President Ford’s memoirs before its publication).

C. Tradition Defines The Contours

The final hypothesis explaining the meaning of the Supreme Court's "traditional contours" language is much more permissive of First Amendment review. This third position contends that congressional practice, and possibly the history of Copyright Law from the Statute of Anne in England,¹⁷⁵ defines the contours. This approach necessitates a fine reading of the copyright acts, including the first American copyright act in 1790,¹⁷⁶ the substantial changes made in the 1909,¹⁷⁷ the 1976¹⁷⁸ Act, and modern practice.¹⁷⁹ The *Eldred* decision is consistent with this hypothesis because it spent much of its decision explaining that Congress had extended the copyright term, as it did with the CTEA, several times before.¹⁸⁰

The Court of Appeals for the Tenth Circuit, in *Golan v. Gonzales*, recently adopted this hypothesis.¹⁸¹ The *Golan* court held that the copyright restoration provision of the URAA was subject to heightened First Amendment review because it altered the traditional contours of copyright law by placing public domain works under copyright protection.¹⁸² The question of whether Congress was in the habit of pulling works from the public domain figured prominently in the court's decision.¹⁸³ The court ultimately held that congressional practice in granting protection to works in the public domain was at most an anomaly.¹⁸⁴ But if Congress had made a more consistent practice of passing copyright restoration acts, presumably the court would have reached a different conclusion.¹⁸⁵

175. The Statute of Anne was the precursor to the American copyright system and was passed in 1710. HARRY RANSOM, *THE FIRST COPYRIGHT STATUTE: AN ESSAY ON AN ACT FOR THE ENCOURAGEMENT OF LEARNING 1710* (1956).

176. Copyright Act of 1790, ch. 15, 1 Stat. 124.

177. Copyright Act of 1909, ch. 320, 35 Stat. 1075 (repealed 1976).

178. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.).

179. *See, e.g.*, Sonny Bono Copyright Term Extension Act, Pub. L. 105-298, 112 Stat. 2827 (17 U.S.C. §§ 108, 203, 301-304 (2000 & Supp. V 2005)); Copyright Renewal Act of 1992, Pub. L. 102-307, 106 Stat. 264 (codified as amended at 17 U.S.C. 304 (2000)); Berne Convention Implementation Act, Pub. L. 100-568, 102 Stat. 2853 (codified as amended in scattered sections of 17 U.S.C.).

180. *Eldred v. Ashcroft*, 537 U.S. 186, 200-05 (2003).

181. *Golan*, 501 F.3d at 1189 ("[T]he *Eldred* Court's use of the word 'traditional' to modify 'contours' suggests that Congress's historical practice with respect to copyright and the public domain must inform our inquiry.").

182. *Id.* at 1192.

183. *Id.* at 1191-92.

184. *Id.*

185. *See id.*

There are a number of deviations from traditional practice in copyright law that would arguably subject much of modern copyright law to First Amendment review. For instance, an argument could be constructed that copyright protection for audio recordings is subject to heightened First Amendment review because phonographs were not included in the copyright rights regime until the Sound Recordings Act in 1971.¹⁸⁶ Therefore, there is an argument that there is no traditional copyright protection given to audio recordings. A similar argument could be made that the current subject matter of copyright¹⁸⁷ is subject to heightened First Amendment review because until the Copyright Act of 1976 Congress specified the types of works that it wanted to protect via copyright.¹⁸⁸ The broader language in copyright law today that gives copyright to “all original works of authorship fixed in any tangible medium of expression”¹⁸⁹ is certainly a deviation from traditional practice. The Berne Convention Implementation Act of 1988¹⁹⁰ changed American copyright law in a number of ways. Notably, architectural plans became protectable under copyright for the first time¹⁹¹ and notice of copyright protection was no longer required to be placed on copyrighted materials.¹⁹² Similarly, the Visual Artists Rights Act of 1990 gave artists “moral rights” in their works, and, for the first time in the nation’s history, constrained what the buyer of a copyrighted work could do with the physical artifact that she bought.¹⁹³ Furthermore, until the Copyright Renewal Act of 1992, copyrights were subject to a renewal requirement whereby, without registration with the Library of Congress, the work would lapse into the public domain.¹⁹⁴ Presumably, the

186. *See* Sound Recordings Act of 1971, Pub. L. 92-140, 85 Stat. 391 (amended 1976).

187. *See* 17 U.S.C. § 102 (2000).

188. The Copyright Act of 1790 specified only “maps, charts, and books.” Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, 124. Examples from the Copyright Act of 1909 include “books,” “drawings or plastic works of a scientific or technical nature,” and “photographs.” Copyright Act of 1909, ch. 320, § 5, 35 Stat. 1075, 1076-77 (repealed 1976). Congress continued to explicitly list eligible works until 1976 when “copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression” became the criteria of protectable subject matter. Copyright Act of 1976, 17 U.S.C. § 102 (2000).

189. 17 U.S.C. § 102.

190. Pub. L. 100-568, 102 Stat. 2853 (codified as amended in scattered sections of 17 U.S.C. (2000)).

191. Berne Convention Implementation Act § 4.

192. Berne Convention Implementation Act § 7.

193. Visual Artists Rights Act of 1990, Pub. L. 101-650, 104 Stat. 5128 (codified as amended in scattered sections of 17 U.S.C.).

194. *See* Copyright Renewal Act of 1992, Pub. L. 102-307, 106 Stat. 264, 264 (codified as amended at 17 U.S.C. 304 (2000)).

Golan court's rationale would subject all of these acts to heightened First Amendment review because they are reversals of long standing American policy on copyright law.

This hypothesis is vulnerable, therefore, to the charge that it reads congressional practice into the Constitution, by subjecting more recent laws to heightened scrutiny and giving deference to traditional practice. Thus, simply by adhering to a particular legislative scheme for a long time, Congress is able to change the constitutional standard. It is important to remember, however, that this theory would only subject amendments to the copyright laws to First Amendment review and would not automatically render those amendments unconstitutional. All of the reasons why copyright law generally is consistent with the First Amendment would still be in force.¹⁹⁵ A court would need only to examine the additional harm that the amendments to the copyright law cause to First Amendment interests. If the government interest in the new copyright law cannot justify that harm, then that new copyright law should be struck down.

Furthermore, in light of the burdens that copyright law imposes on expression,¹⁹⁶ it is prudent to subject changes in the copyright law to First Amendment review.¹⁹⁷ Doing so will ensure that the changes do not burden substantially more speech than is necessary to meet the objectives of copyright. This is the advantage that this third approach has over the previous two. Defining the traditional contours by the Copyright Clause collapses the highly searching First Amendment review into the highly deferential Copyright Clause review and inadequately protects expressive freedoms. Defining the traditional contours as the fair use doctrine and the idea/expression dichotomy devalues exact copying. Only defining the traditional contours with reference to traditional practice ensures that First Amendment rights are adequately protected.

D. Application of the Hypotheses to Determine Whether the URAA Provisions are Within the Traditional Contours

The preferable approach to define the traditional contours of copyright law is to say that traditional practices define the contours. In the interest of completeness, this Section applies all three hypotheses to see whether the URAA's provisions on copyright restoration and anti-bootlegging would be subject to First Amendment review.

195. *See supra* Section II.E.

196. *See supra* Section II.E.

197. *See* Netanel, *supra* note 73, at 54.

1. *The URAA provisions analyzed under the hypothesis that the copyright clause defines the contours*

If First Amendment scrutiny were only to apply to copyright laws that exceed the bounds of the Copyright Clause, in accordance with the first hypothesis, the copyright restoration provision in the URAA would not be subject to heightened scrutiny. Every court to consider the question has held that the copyright restoration act is within the bounds of the Copyright Clause.¹⁹⁸

The anti-bootlegging provisions, on the other hand, would almost certainly be held to heightened First Amendment scrutiny under this hypothesis. Every court to uphold the constitutionality of the anti-bootlegging provisions has held that the law is authorized by the Commerce Clause and not by the Copyright Clause.¹⁹⁹ The fact that several courts have characterized the anti-bootlegging provisions as “copyright-like”²⁰⁰ is notwithstanding. Because the anti-bootlegging provisions are not copyright laws, they are not subject to the limitations in the Copyright Clause, which guarantee that the public gets something in return for the grant of copyright protection. The anti-bootlegging provisions cannot, therefore, claim the advantages that the copyright laws have in the First Amendment arena.

2. *The URAA provisions analyzed under the hypothesis that fair use and the idea/expression dichotomy define the contours*

The same result emerges when the fair use doctrine and the idea/expression dichotomy define the traditional contours of copyright law. The copyright restoration act simply puts foreign works that had fallen into the public domain under American copyright protection. The affirmative defense of fair use applies, and the act does not protect ideas. Therefore, if these two doctrines define the traditional contours of copyright law, then the copyright restoration act does not alter those contours and is not subject to heightened scrutiny.

198. See *Golan v. Gonzales*, 501 F.3d 1179, 1186 (10th Cir. 2007) (reading Eldred to give Congress broad authority under the Copyright Clause); *Kahle v. Gonzales*, 487 F.3d 697, 701 (9th Cir. 2007) (same); *Luck’s Music Library v. Gonzales*, 366 U.S. App. D.C. 66 (D.C. Cir. 2005) (same).

199. See *United States v. Martignon*, 492 F.3d 140 (2d Cir. 2007); *KISS Catalog v. Passport Int’l Prods.*, 405 F. Supp. 1169 (C.D. Cal. 2005); cf. *United States v. Moghadam*, 175 F.3d 1269 (11th Cir. 1999) (holding that the criminal anti-bootlegging provision was not “fundamentally inconsistent” with the Copyright Clause, and therefore Congress had the power to enact it under the Commerce Clause).

200. See *United States v. Martignon*, 492 F.3d 140, 141 (2d Cir. 2007); *KISS Catalog v. Passport Int’l Prods.*, 405 F. Supp. 2d 1169, 1174 (C.D. Cal. 2005); cf. *United States v. Moghadam*, 175 F.3d 1269, 1271 (11th Cir. 1999).

The anti-bootlegging provisions, on the other hand, have no allowance for the affirmative defense of fair use, or anything like fair use.²⁰¹ Therefore, the anti-bootlegging provisions fall outside of the traditional contours of copyright law and should be subject to heightened First Amendment scrutiny.²⁰²

3. *The URAA provisions analyzed under the hypothesis that traditional copyright law defines the contours*

The final hypothesis, and the one this Comment argues is correct, is that traditional practice defines the traditional contours of copyright law. This hypothesis would subject both the copyright restoration and the anti-bootlegging provisions to First Amendment scrutiny. The copyright restoration provisions alter traditional practice because they pull material from the public domain and put it back under copyright.²⁰³ The anti-bootlegging provisions alter traditional practice because they protect expression in perpetuity, retroactively (in essence also pulling works from the public domain), and without any benefit of a fair use defense. The fair use defense in particular has been a part of American copyright law since 1841²⁰⁴ and stems from an English doctrine from the eighteenth century.²⁰⁵ The denial of a fair use defense to the appropriate use of protected expression, therefore, is a significant departure from the historical traditions of copyright. Both of these statutory rights to expression, therefore, deviate from the historical traditions of copyright law.

IV. FIRST AMENDMENT SCRUTINY APPLIED TO THE ANTI-BOOTLEGGING PROVISIONS AND TO COPYRIGHT RESTORATION PROVISIONS AFTER FINDING THEM OUTSIDE THE TRADITIONAL CONTOURS

Because the best definition of traditional contours is the traditional practice of copyright law, and this test would subject both the anti-bootlegging provisions and the copyright restoration provision to First Amendment scrutiny, this Part applies that scrutiny to test the constitutionality of the two laws. This Part first argues that the anti-bootlegging pro-

201. See Uruguay Round Agreements Act §§ 512-13, 17 U.S.C. § 1101 (2000) and 18 U.S.C. § 2319A (2000); *Martignon*, 492 F.3d at 153.

202. See also Section IV.A.

203. See *Golan*, 501 F.3d at 1192.

204. *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841).

205. See Posting of William Patry to the Patry Copyright Blog, Fair Use and Fair Abridgment, <http://williampatry.blogspot.com/2005/10/fair-use-and-fair-abridgment.html> (Oct. 14, 2005).

visions are unconstitutional. It then contends that the copyright restoration provisions do not violate the First Amendment.

A. First Amendment Scrutiny of the Anti-Bootlegging Provisions

The anti-bootlegging provisions violate the First Amendment under intermediate scrutiny. As discussed above, copyright laws are arguably subject to strict scrutiny because they refer to content of the protected work and the allegedly infringing work.²⁰⁶ The anti-bootlegging provisions not only refer to content, but discriminate based on content: they single out musical performances for especially burdensome treatment.²⁰⁷ There is still no federal law prohibiting the unauthorized fixation of a magician's live performance, for example. If there is any copyright, or "copyright-like," law that deserves to be judged on the standards of strict scrutiny it is the anti-bootlegging provisions. However, because it is readily apparent that the anti-bootlegging provisions do not survive even intermediate scrutiny, which level of scrutiny is more appropriate need not be determined. Because they fail intermediate scrutiny they would fail the more demanding strict scrutiny as well.

The harm that the anti-bootlegging provisions cause to First Amendment interests is substantial as compared to copyright law generally. The property right is perpetual and retroactive: no one can ever distribute bootleg copies of musical performances for a profit no matter when they were made.²⁰⁸ No other federal protection of expression is so broad. Additionally, the anti-bootlegging provisions have no exceptions for what, in the copyright context, is called "intermediate copying."²⁰⁹ Intermediate copying, in the this context, occurs when someone fixes the sounds and images of a musical performance in order to later adapt that fixation into a mash-up, parody, or news report. This barrier to creating a news broadcast or a parody without the artist's permission poses a substantial limitation on speech.²¹⁰ For example, an artist may refuse to allow a camera to be focused fixed on them, especially during a controversial performance, but the performance may nonetheless be newsworthy. Because the anti-

206. See *supra* Section II.D.

207. 17 U.S.C. § 1101; 18 U.S.C. § 2319A.

208. 17 U.S.C. § 1101; 18 U.S.C. § 2319A, *KISS Catalog, Ltd. v. Passport Int'l Prods.*, 405 F. Supp. 2d 1169, 1176 (N.D. Cal. 2005).

209. Cf. *Sega Enters. v. Accolade*, 977 F.2d 1510 (9th Cir. 1992) (holding that defendant's verbatim copying of plaintiff's computer code for the purpose of finding non-protectable elements of that code was not copyright infringement).

210. See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994).

bootlegging provisions have no defense analogous to fair use, there is no safety valve protecting this kind of expression.²¹¹

By prohibiting all unauthorized fixations of live musical performances, the anti-bootlegging provisions suppress substantially more speech that is necessary to meet the government's interest in ensuring that performers have sufficient incentives to perform.²¹² The government has no interest in prohibiting a parody or news use of an unauthorized fixation. The demand for such a use is not traceable to the performer; the demand comes from its value as news or parody.²¹³ Such a mash-up would have no harmful effect to the government's interest of keeping live performances financially viable, and so that speech does not need to be suppressed to meet the government's goal. Because the anti-bootlegging provisions are significant burdens on free speech and do not substantially serve the government's interest, the anti-bootlegging provisions fail under intermediate scrutiny.

The anti-bootlegging provisions also fail intermediate scrutiny because they prohibit the distribution of unauthorized recordings of live performances perpetually and retroactively.²¹⁴ The government interest in the anti-bootlegging provisions is to grant incentives to performers to perform more often, but the term of protection is far longer than necessary to promote that interest.²¹⁵ Performers do not need to control the unauthorized recordings of their performances thousands of years after their deaths in order to recoup their investment costs. Furthermore, it is difficult to understand how an *ex post facto* grant of protection encourages the creation of new works. The congressional record does not answer this question.²¹⁶ The retroactivity of the law, therefore, cannot be justified with reference to the government interest. Because the government interest cannot justify suppressing parody or news uses of live performances, nor the retroactivity and perpetuity of the law, the statute suppresses substantially more speech than is necessary to meet the government interest. The anti-bootlegging provisions, therefore, fail intermediate First Amendment scrutiny.

211. 17 U.S.C. § 1101; 18 U.S.C. § 2319A.

212. See Heald & Sherry, *supra* note 33, at 1192; see also *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) (noting that the government interest in state rights of publicity is to grant the performer an economic incentive to perform).

213. See *Campbell*, 510 U.S. at 579.

214. 17 U.S.C. § 1101; 18 U.S.C. § 2319A; *KISS Catalog, Ltd. v. Passport Int'l Prods.*, 405 F. Supp. 2d 1169 (N.D. Cal. 2005).

215. Nimmer, *supra* note 87, at 1193.

216. S. REP. NO. 103-412, at 225-26 (1994); H.R. REP. NO. 103-826, pt. 1, at 166 (1994) (moving directly from an analysis of Title IV to Title VI skipping Title V where the intellectual property provisions of the URAA were located).

This conclusion is consistent with the closest analogues to the anti-bootlegging provisions with a deep First Amendment jurisprudence—state rights of publicity. The anti-bootlegging provisions could be characterized as a limited federal right of publicity. Rights of publicity protect the image of an individual from commercial exploitation.²¹⁷ The anti-bootlegging provisions protect the image and sounds of a live performer, albeit only during a musical performance.²¹⁸ Therefore, the First Amendment rules governing rights of publicity are relevant to the anti-bootlegging context.

The Supreme Court has addressed the First Amendment implications of rights of publicity only once in *Zacchini v. Scripps-Howard Broadcasting Co.*²¹⁹ In *Zacchini*, the local broadcast news ran a story about Mr. Zacchini, the human cannon-ball, and broadcast the entirety of his fifteen second performance.²²⁰ The Court held that the First Amendment did not bar Zacchini from recovery under a state right of publicity claim because broadcasting the entire performance put Mr. Zacchini at substantial risk of economic ruin.²²¹ Instead of paying to see his act in person, people could simply turn on their televisions during the news hour, and Zacchini would not see a dime of the profit. The Court also noted that rights of publicity serve similar ends as the copyright laws in that they also grant incentives for performers to perform more.²²² The Court further explained that rights of publicity do not protect ideas, similar to the idea/expression dichotomy in copyright law and, therefore, the news agency would be able to report on the bare occurrence of Mr. Zacchini's performance.²²³ The Court did not specify what level of scrutiny it used to determine complicity with the First Amendment.

While *Zacchini* would seem to give broad license to rights of publicity to suppress speech, different First Amendment rules governing rights of publicity have come out of state supreme courts and federal appeals courts that limit the scope of the protection. The California Supreme Court has held that there is a First Amendment right to “transformative” uses of celebrity images despite their rights of publicity.²²⁴ The Court even bor-

217. See, e.g., *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983).

218. 17 U.S.C. § 1101; 18 U.S.C. § 2319A.

219. 433 U.S. 562 (1977).

220. *Id.* at 564.

221. *Id.* at 565.

222. *Id.* at 576.

223. *Id.* at 578.

224. *Winter v. D.C. Comics*, 30 Cal. 4th 881, 887 (2003) (holding that D.C. Comics did not infringe plaintiffs' rights of publicity by drawing them into a bizarre comic book world); *Comedy III Prods. v. Gary Saderup*, 25 Cal. 4th 387, 406 (2001).

rowed aspects of the codification of fair use to determine the First Amendment question.²²⁵ This analysis has been fairly influential on other courts considering similar issues.²²⁶ There is a strong counterargument, however, in the cases that when “the use and identity of [a celebrity’s] name has become predominantly a ploy to sell . . . products rather than an artistic or literary expression . . . free speech must give way to the right of publicity” despite any “transformative” nature of the use or expressive content that the alleged infringer adds.²²⁷

The federal anti-bootlegging provisions contain no exceptions for any purpose, let alone the kinds of “transformative” use, such as parody,²²⁸ that the California Supreme Court was concerned about.²²⁹ Judge Kozinski wrote a spirited dissent from the denial of rehearing in *White v. Samsung Electronics America*, where previously the court had allowed Vanna White to enjoin a commercial that featured a robot facsimile of the actress.²³⁰ “I can’t see how giving [a celebrity] the power to keep others from evoking her image in the public’s mind can be squared with the First Amendment.”²³¹

By requiring the authorization of the artist to record a public performance, the federal anti-bootlegging statutes give far more power to musicians to control their images than is consistent with the First Amendment. The anti-bootlegging provisions could, by their terms, be used to keep the celebrity’s image from being evoked. Because there is no exception for news uses of unauthorized fixations, a musician could keep a particularly unflattering scene from being recorded and disseminated. The First Amendment does not allow this in the right of publicity context.²³² It would be unfortunate, for example, if Michael Richards had a federal right to enjoin those who filmed him during his racist tirade.²³³ Because the an-

225. *Comedy III Prods.*, 25 Cal. 4th at 404.

226. *See* *World Wrestling Fed’n Enter., Inc. v. Big Dog Holdings, Inc.*, 280 F. Supp. 2d 413, 425 (W.D. Penn. 2003); *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 936 (6th Cir. 2003); *Tyne v. Time Warner Entm’t Co.*, 901 So. 2d. 802, 809 (2005).

227. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (2003); *see also* *White v. Samsung Electronics Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992).

228. *Winter v. D.C. Comics*, 30 Cal. 4th 881, 887 (2003).

229. *See* *Uruguay Round Agreements Act* §§ 512-13, 17 U.S.C. § 1101 (2000) and 18 U.S.C. § 2319A (2000).

230. *White v. Samsung Electronics Am., Inc.*, 989 F.2d 1512 (9th Cir. 1993).

231. *Id.* at 1519.

232. *Comedy III Prods.*, 25 Cal. 4th at 406.

233. *Cf.* *Jessica Heslam, Nutty Neighbor Shocks Nation with Racist Rant*, BOSTON HERALD, November 21, 2006, at 3. Although, since Mr. Richards was not performing musically, he would not benefit from the anti-bootlegging provisions. 17 U.S.C. § 1101 (2006); 18 U.S.C. § 2319A (2000 & Supp. V 2005).

ti-bootlegging provisions contain no exception for parody uses of unauthorized recordings, the federal anti-bootlegging provisions allow musicians to enjoin surreptitious recorders who just want to make fun of the performer, which First Amendment law in the right of publicity context does not allow.²³⁴ Because the anti-bootlegging provisions contain no protections whatsoever for these kinds of uses, they violate the First Amendment.

B. First Amendment Scrutiny of the Copyright Restoration Provisions

The first step is deciding what level of review is appropriate for the copyright restoration provisions.²³⁵ Strict scrutiny is not appropriate because the copyright restoration provisions make no mention of the content of the works to which they are restoring copyright protection.²³⁶ Once we assume, as *Eldred* instructs, that copyright generally is consistent with the First Amendment,²³⁷ the restoration provisions are at most content-neutral regulations of speech, and therefore are subject to intermediate scrutiny. However, because the copyright restoration provisions burden speech in the exact same way as the bulk of copyright law (by giving works of authorship copyright protection) and for the same duration, they may only incidentally burden expressive interests when compared to copyright law generally. Rationality review would be applied in that case. This Section will first explore an intermediate scrutiny analysis and conclude by arguing that the copyright restoration provisions should be judged by rationality review.

1. Intermediate Scrutiny

The First Amendment interest harmed by the copyright renewal provisions is the interest in other people's copyrighted speech.²³⁸ That is, potential speakers who want to copy from the copyrighted works of others might only use works that had fallen into the public domain in order to avoid having to negotiate licenses. The copyright restoration provisions, by removing works from the public domain, frustrate those intentions. It is undisputed that, "whenever speech goods can be used only with permission, even merely with payment, some things that might be said or written or painted or otherwise given expressive form by individuals will not be

234. *Winter*, 30 Cal. 4th at 887.

235. *See supra* Section II.E.

236. Uruguay Round Agreement Act, § 514, 17 U.S.C. § 104A (2000).

237. *See Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

238. *See supra* text accompanying notes 169-172.

produced.”²³⁹ It is safe to say that copyright protection does prevent some individuals from speaking.²⁴⁰ By removing works from the public domain, thereby silencing those who would copy from them were they in the public domain, the copyright restoration provisions harm interests protected by the First Amendment.

Weighing against the First Amendment interest is the government’s interest in providing copyright protection to foreign works that have fallen into the public domain through the operation of formalities. This interest is a somewhat modified version of the standard government interest provided for in the Copyright Clause, which is to “Promote the Progress of Science and the Useful Arts.”²⁴¹ That is, by providing the incentive of copyright protection retroactively for foreign authors, Congress is hoping to encourage similar protection abroad for American authors.²⁴² The strengthened international copyright regime will give incentives for the importation of more works and the creation of more works. So the governmental interest asserted is a variant of the “engine of free expression” argument used in the Supreme Court decisions *Harper & Row Publishers v. Nation Enterprises*²⁴³ and *Turner II*.²⁴⁴

When Congress retroactively grants copyright protection to works that already exist, however, no incentive structure is necessary to encourage their creation. Melville Nimmer argued that a perpetual copyright would be contrary to the First Amendment because “the copyright interest in encouraging creativity largely vanishes” once a long time has passed since the author created the work while the “speech interest in expression remains constant.”²⁴⁵ This rationale easily extends to the restoration of copyright to works in the public domain. Once the works are in the public domain it does not make sense to talk about encouraging the work’s crea-

239. See Diane Leenheer Zimmerman, *Is There a Right to Have Something to Say?: One View of the Public Domain*, 73 *FORDHAM L. REV.* 297, 310 (2004).

240. See *supra* Section II.

241. See *Golan v. Gonzales*, 501 F.3d 1179, 1186-87 (10th Cir. 2007).

242. See Thomas Gordon Kennedy, *GATT-Out of the Public Domain: Constitutional Dimensions of Foreign Copyright Restoration*, 11 *ST. JOHN’S J. LEGAL COMMENT.* 545, 556 (1996) (arguing that due process and equal protection challenges to the copyright restoration provisions would most likely fail); see also Heald & Sherry, *supra* note 33, at 1179 (noting that the U.S. was under considerable international pressure to enact the copyright restoration provision).

243. 471 U.S. at 558.

244. *Turner Broad. Sys. v. FCC (Turner II)*, 520 U.S. 180, 226 (1997); see also *supra* Section II.E.

245. Nimmer, *supra* note 87, at 1193.

tion because the work already exists.²⁴⁶ Diane Leenheer Zimmerman argues that the public domain is a “one-way ratchet.”²⁴⁷ She contends that the First Amendment requires that once the public has notice that expression is available for use, it remain available forever.²⁴⁸

There is some case law to support this position. In *Dastar Corp. v. Twentieth Century Fox Film Corp.* the Court held that the owner of a trademark cannot use that trademark ownership to functionally extend copyright protection over a work in which the copyright had expired.²⁴⁹ In *Dastar*, the defendant published a videotape series copied from one produced by the plaintiff, which had fallen into the public domain due to a failure to renew the copyright.²⁵⁰ The plaintiff then sued the defendant on the theory that the defendant was passing off the plaintiff’s goods as its own, which is a violation of the Lanham Act.²⁵¹ The Court held that “the rights of a patentee or copyright holder are part of a carefully crafted bargain . . . under which, once the patent or copyright monopoly has expired, the public may use the invention or work at will.”²⁵² Thus, the Court denied the plaintiff’s claim and construed the Lanham Act to give no more protection than the Copyright Act over expressive works.²⁵³

Dastar is predominantly about statutory construction and can be explained without reference to the Constitution. There is still, however, an unmistakable notion in *Dastar* that the public domain is permanent²⁵⁴ and that after monopoly rights expire, the expression in a copyright should be dedicated to the public. If the Copyright Clause does not guarantee this permanence, then the only Constitutional basis for public domain permanence is the First Amendment. The court in *Golan v. Gonzales* made just this leap from *Dastar*’s statutory construction to the First Amendment.²⁵⁵

246. See Heald & Sherry, *supra* note 33, at 1180-81.

247. See Diane Leenheer Zimmerman, *Is There a Right to Have Something to Say?: One View of the Public Domain*, 73 *FORDHAM L. REV.* 297, 372 (2004).

248. *Id.*

249. 539 U.S. 23, 34 (2003).

250. *Id.* at 26-27.

251. *Id.* at 27; see also 15 U.S.C. 1125 (2000).

252. *Dastar*, 539 U.S. at 33-34 (citing *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150-51 (1989)) (internal quotation marks omitted).

253. *Id.* at 35-36 (construing the word “origin” in the Lanham Act to mean manufacturer instead of author).

254. See Zimmerman, *supra* note 247, at 320 (“So far, the clearest recognition by the Court that some absolute barrier against proliferating intellectual property rights may reside in the Copyright and Patent Clause can be found in the Court’s recent decision, *Dastar Corp. v. Twentieth Century Fox Film Corp.*”).

255. *Golan v. Gonzales*, 501 F.3d 1179, 1192 (10th Cir. 2007) (citing *Dastar*, 539 U.S. at 33-34) (“[W]orks in the public domain belong to the public.”).

Putting aside the permanence of the patent public domain,²⁵⁶ which *Dastar* also supports,²⁵⁷ it makes sense to suppose that the First Amendment would be part of the “carefully crafted bargain” in copyright law.²⁵⁸

Intermediate scrutiny requires that the government interest in suppressing speech be sufficiently significant to justify the suppression. The Court in *Turner II* held that the government interest in promoting expression is sufficiently significant to justify a suppression of speech.²⁵⁹ Therefore, the copyright restoration provisions, which arguably serve the government interest in promoting expression, fulfills the significance prong of intermediate scrutiny.

The copyright restoration provisions, however, also need to be substantially related to the interest of encouraging expression.²⁶⁰ Because no incentive is necessary to encourage authors to create works that already exist, it is difficult to argue that there is a substantial relationship between restoring copyright and encouraging the production of original works of authorship. Congress would need some factual basis for believing that an *ex post facto* grant of protection would encourage the creation of new works.²⁶¹ The Senate Report on the subject contains no discussion of how the restoration provisions achieve this goal.²⁶² The House Report skips the subject of the intellectual property provisions entirely.²⁶³ In light of that, and given the difficult logical task of linking a retroactive grant of protection to the encouragement of new works, the restoration provisions would fail intermediate scrutiny.

2. Rationality Review

To apply rationality review, it must be established that the provisions impose merely incidental burdens on speech. The URAA only restores those foreign works that fell outside of copyright protection because of the

256. U.S. CONST. art. 1, § 8, cl. 8 does protect the permanence of the public domain in expired patents. See *Graham v. John Deere, Co.*, 383 U.S. 1, 5-6 (1966).

257. *Dastar*, 539 U.S. at 33-34.

258. Cf. *Eldred v. Ashcroft*, 537 U.S. 186, 220-221 (2003) (holding that copyright laws are not categorically immune from First Amendment challenges).

259. *Turner Broad. Sys. v. FCC (Turner II)*, 520 U.S. 180, 226 (1997) (Breyer, J., concurring).

260. See *id.*

261. See *id.*

262. S. REP. NO. 103-412, at 225-26 (1994).

263. Cf. H.R. REP. NO. 103-826, pt. 1, at 166 (1994) (moving directly from an analysis of Title IV to Title VI skipping Title V where the intellectual property provisions of the URAA were located).

operation of formalities in the United States copyright regime.²⁶⁴ That is, but for the filing of the appropriate piece of paper, or manufacture of the work in the United States, or the author living in the right country, all of the works restored would be under copyright today.²⁶⁵ While it is difficult to deny that there is a general First Amendment interest in a public domain, the copyright restoration provisions do not harm that interest any more than copyright law generally. If there is a First Amendment interest for half of a copyright term to be conditioned upon the filing of a renewal registration, it is a very small one. While not requiring renewal registrations certainly shrinks the public domain, so too did extending the term of copyright by twenty-years, which the *Eldred* Court held did not implicate First Amendment interests.²⁶⁶ Likewise, any First Amendment interest for copyright to be conditioned upon the manufacture of the protected work in the United States or the author living in the United States or one of its allies or trading partners would be tiny. Any burden that the particular embodiment of copyright law imposes on a speaker is incidental, like general income or operations taxes being imposed on a newspaper,²⁶⁷ when compared to the burdens imposed on speech by copyright generally.

It is clear that speech is suppressed, because all of copyright law suppresses speech, but the copyright restoration provisions in particular do not suppress any more speech than copyright law itself. The copyright restoration provisions only marginally deviate from the traditional contours. Because *Eldred* held that copyright law generally does not harm First Amendment interests,²⁶⁸ slight additional harms should not carry with them the entire burden to speech caused by copyright law in general.

It might be objected, however, that the copyright restoration provisions substantially harm the reliance interests of the public who were put on notice that the restored work was available for use when it fell into the public domain.²⁶⁹ While the copyright restoration statute gives defenses to so-called “reliance parties,” the protections from copyright granted to them are not complete, and the statute does nothing for the public generally, only for those who began exploiting the restored work while it was in the

264. Uruguay Round Agreements Act § 514(h)(6), 17 U.S.C. 104A(h)(6) (2000).

265. *Id.*

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

267. *See Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) (“It is not intended . . . that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government.”).

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

269. *See* Brief for Plaintiffs-Appellants at 12-20, *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007) (No. 05-1259) (detailing the harms caused to the plaintiffs by the copyright restoration provision).

public domain.²⁷⁰ The *Eldred* Court, however, rejected this argument when it held that a twenty-year extension to copyright protections then in effect did not violate the First Amendment.²⁷¹ Indeed, the plaintiffs in that case purported to rely on public domain works for their livelihood and had been planning to use works then under copyright as soon as they expired.²⁷² There is one obvious difference between the reliance interests of the *Eldred* plaintiffs and those seeking to exploit the restored works—in the first case the copyright protection did not actually expire and the second case it did. This difference has no impact, however, on the First Amendment. The expressive interests of the *Eldred* plaintiffs are identical to the expressive interests of those who relied on the restored works. Both sets of plaintiffs wanted to use the speech of others and both sets of plaintiffs invested in their ability to do so. The government interest is the same as well: to encourage the creation of new works. If in *Eldred* term extension was not a First Amendment violation, it is not a First Amendment violation in the case of the restored works.

Because the harm to speech in this case is only incidental when compared with copyright law generally, Congress need only a rational reason to uphold the law. It is rational for Congress to conclude that giving an *ex post facto* grant of copyright protection would engender greater confidence in both foreign authors and foreign governments. It is rational for Congress to conclude that this would strengthen enforcement of copyright law around the world²⁷³ and generally encourage the creation of more works of authorship.

These conclusions are heartening for zealous advocates of both copyright and the First Amendment. The conclusions mean that if the government were to change copyright law to have no public domain or to pull works from the public that had a full bite at the apple or to protect Shakespeare then intermediate scrutiny would apply and Congress would need to fully back up its asserted interest with factual findings. If, on the other hand, Congress is merely tinkering with the form of copyright protection, then it gets much greater deference. In light of the Court's established rationale that copyright is the engine of expression this is the correct framework.

The seriousness of the First Amendment harm matters to the First Amendment analysis and the depth of intrusion that Congress makes into the public domain is proportional to the First Amendment harm. It is not

270. See 17 U.S.C. § 104A; see also *supra* Section II.A.

271. *Eldred v. Ashcroft*, 537 U.S. at 194.

272. *Id.* at 193.

273. See S. REP. NO. 103-412, at 225-26 (1994).

helpful, therefore, to simply maintain that the public domain has to be permanent. It should be mostly permanent, but amenable to intrusions around the periphery.

V. CONCLUSION

In *Eldred v. Ashcroft* the Court opened the door to First Amendment review of copyright laws.²⁷⁴ Now it is the law that if a copyright law goes outside of the traditional contours of copyright law, then First Amendment review will apply. It is still unsettled, however, what exactly those contours are. They could be the Copyright Clause itself, the fair use doctrine and the idea/expression dichotomy, or the history of copyright law up to the modern day. Equating the Copyright Clause question with the First Amendment question collapses the highly deferential review of the Copyright Clause into the highly searching First Amendment inquiry. This destroys the First Amendment's relevance to copyright cases, contrary to the holding of *Eldred*. Acknowledging only the First Amendment interests protected by the doctrine of fair use and idea/expression dichotomy unreasonably devalues the expressive interest in copying others. Only by subjecting each amendment made to the copyright laws to First Amendment review will First Amendment interests be protected, because only then will the government's interest in passing that law be weighed against the interest in the expression that it suppresses.

The First Amendment review, moreover, that is undertaken after a transgression from the traditional contours is found, should take into account the depth of the transgression. If a copyright law, like the restoration provisions, only changes the implications of filing a particular piece of paper, then that is a minor change in the copyright regime and does not merit a searching scrutiny. If however, like the anti-bootlegging provisions, a copyright law breaks important and substantive traditions then intermediate scrutiny should apply and Congress must provide a detailed explanation for why that transgression from tradition is justified. Doing so consistently will ensure that copyright laws will not suppress substantially more speech than is necessary to reward authors.

274. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985).