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# REHABILITATING THE PROPERTY THEORY OF COPYRIGHT'S FIRST AMENDMENT EXEMPTION

*Tun-Jen Chiang*<sup>†</sup>

## ABSTRACT

*A continuing controversy in copyright law is the exemption of copyright from First Amendment scrutiny. The Supreme Court has justified the exemption based on history and the intentions of the Framers, but this explanation is unpersuasive on the historical facts.*

*There is an alternative explanation: copyright is property, and private property is generally exempt from scrutiny under standard First Amendment doctrine. Many scholars have noted this theory, but they have been harshly dismissive towards it. For example, Mark Lemley and Eugene Volokh view the property theory as so clearly wrong as to be a “non sequitur,” because it supposedly implies that Congress can declare anything to be property and thereby circumvent the First Amendment.*

*This Article aims to rehabilitate the property theory. Contrary to its critics, the property theory does not say that anything labeled “property” is exempt, but rather contains two internal limits. First, the government-created rules of the property system must be content and viewpoint neutral, though the private enforcement of those rules can be viewpoint motivated. Second, even within the context of private enforcement, there must still be some protection against excessive ownership power. Understanding the property theory, including its internal limits, then provides a powerful legal justification for the Court’s treatment of copyright law—one that is far better than what the Court has itself articulated.*

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## INTRODUCTION

A longstanding issue in the copyright literature is the relationship between copyright law and the First Amendment. Copyright inherently restricts speech in the sense of prohibiting infringers from printing copyrighted books, selling copyrighted albums, or publicly performing copyrighted plays.<sup>1</sup> Notwithstanding this speech-restricting effect, however, the Supreme Court has repeatedly held that copyright is generally exempt from First Amendment scrutiny.<sup>2</sup> Many scholars have criticized this exemption as an unprincipled and unwise carve-out from ordinary First Amendment jurisprudence.<sup>3</sup> This Article seeks to defend the Court's doctrine against these criticisms, though it does so on grounds that are quite different from what the Court has itself articulated. As I shall explain, copyright is and should be generally exempt from First Amendment scrutiny because copyrights are a form of personal property, and the private enforcement of a property right is generally not subject to First Amendment limits.

This claim might seem obvious, but it runs against the scholarly consensus.<sup>4</sup> For example, Mark Lemley and Eugene Volokh call the

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1 See 17 U.S.C. § 106 (2006) (granting the copyright holder the exclusive right to reproduce, distribute, and publicly perform or display a copyrighted work).

2 See *Golan v. Holder*, 132 S. Ct. 873, 889–91 (2012); *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003). Although *Golan* and *Eldred* are relatively recent cases, they merely solidify a de facto exemption that has long existed. See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (stating that the First Amendment does not give newspapers a right to commit copyright infringement); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 577 n.13 (1977) (citing lower court cases approvingly that rejected First Amendment challenges to copyright law); see also Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 3 (2002) (arguing that “[c]opyright law is a kind of giant First Amendment duty-free zone”).

3 See, e.g., Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 182, 197–98 (1998) (arguing against “[s]pecial [p]leading” for copyright); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 37 (2001) (arguing “[c]opyright [d]oes [n]ot [m]erit [s]ui [g]eneris [t]reatment”); Rubenfeld, *supra* note 2, at 3 (arguing that copyright “flouts basic free speech obligations”).

4 An important exception is John McGinnis, who has argued that “there is no fundamental tension between the First Amendment and Congress’s constitutional authority to provide the security of copyright protection to some information producers” because the grant of copyright merely ratifies authors’ preexisting natural property rights. John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 79 (1996). My analysis here will differ from his in focusing on reconciling copyright and the First Amendment on the level of doctrine, rather than as a matter of high-level theory. The advantage is that a reader does not need to share McGinnis’s Lockean view of copyright—a distinctly minority view—in order to accept my conclusions.

property theory a “non sequitur,”<sup>5</sup> while Jed Rubenfeld calls it an “unthinking defense” of copyright’s constitutionality.<sup>6</sup> The unpopularity of the property theory is also reflected in the fact that, although the Supreme Court has rejected the challenge to copyright’s constitutionality, it has done so entirely without reference to copyright’s status as property.<sup>7</sup> Instead, the Court’s rationale is based on the supposed intent of the Framers of the First Amendment.<sup>8</sup>

My goal in this Article is to explain why the property theory is far superior to the Framers’ intent theory in providing a coherent framework to explain the Court’s doctrine.<sup>9</sup> And I argue that the scholarly criticisms of the Court’s doctrine in this area are mistaken. Before proceeding further, however, it is important to clarify what my argument is *not* about:

First, I make no claim about whether, as a matter of first principles, copyright should be considered property. My claim is only that, as a matter of constitutional law doctrine, the status of copyright as property is well settled, and I therefore take this status as a given for purposes of my analysis. On the deeper theoretical question I am agnostic.

Second, my claim does not endorse a Blackstonian view of property or of copyright. I am not saying that copyright’s status as property means that it is subject to no First Amendment limits. Instead, a key

5 Lemley & Volokh, *supra* note 3, at 182 (“The argument that copyright law should be exempted from standard First Amendment procedural rules because it protects property rights strikes us as a non sequitur.”); Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2445 (1998) (same).

6 Rubenfeld, *supra* note 2, at 27; *see also* Netanel, *supra* note 3, at 39 & n.158; Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 34 (2000) (explaining that “any interest can be reconceptualized as a property interest to defeat a speech claim”).

7 Lower courts have sometimes suggested the rationale. *See, e.g.*, *Dall. Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979) (“The [F]irst [A]mendment is not a license to trammel on legally recognized rights in intellectual property.”).

8 *See Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (“The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles.”); *id.* at 200 (relying on the Copyright Act of 1790 to define the scope of congressional power under the Copyright Clause).

9 To put it in legal theory jargon, my argument is primarily about fit and justification. *See* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1094 (1975) (arguing that the goal is to “construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents”).

part of my argument is that the property theory *provides* limits on copyright that critics of the theory have overlooked.

Third, my normative claim is limited. My argument is that, as a matter of doctrinal fit and coherence, the current copyright system complies with the general doctrinal principles of the First Amendment as they have been applied by the Supreme Court in other contexts. I am seeking to refute criticisms of copyright's First Amendment treatment *that are based on a claim of doctrinal inconsistency*; I do not seek to refute all such arguments categorically. In other words, I make no claim that current doctrine is the "best" interpretation of the First Amendment as a matter of first principles. Nor do I make any claim that, as a matter of fundamental copyright theory, the existing protections within copyright law best promote the progress of science or the balance of incentives and free speech. Those who wish to argue for weaker copyright protection as a normative matter—including those who wish to make this argument based on free speech values—will find no opposition from me.

Now that I have clarified the scope of my claim, here is a roadmap. In Part I, I first lay out the existing doctrine and explain the inadequacies of the Framers' intent theory. The existing doctrine is that copyright is generally—but conditionally—exempt from First Amendment scrutiny so long as it has a fair use defense and an idea/expression dichotomy. The Framers' intent theory neither explains the general exemption nor the specific conditions. The theory cannot explain why modern copyright law, which is far broader and has a much longer term than anything the Framers could have imagined, is exempt. Nor can the theory explain why the exemption is conditioned on two legal doctrines that did not become part of American copyright law until after the Framers were all dead.

In Part II, I lay out the property theory, which says that enforcement of private property rights is generally—but not automatically—exempt from First Amendment scrutiny. I will place particular emphasis on explaining why the property theory does *not* mean that anything labeled "property" is automatically excluded from the First Amendment. The property theory has two important internal conditions that must be satisfied before it exempts the enforcement of a private property right from First Amendment scrutiny. The first is that the legal rules of the property *system* at issue must be content and viewpoint neutral, even if individual private enforcement might

depend on the viewpoint of a defendant's speech.<sup>10</sup> Thus, the fact that Goldman Sachs might file a trespass suit against Occupy Wall Street protestors would not endanger the exemption of real property from the First Amendment, because the real property system as a whole is neutral in allowing all landowners to broadcast whatever message they like on their own property. But libel—often mentioned by the critics as an analogy to copyright<sup>11</sup>—is not exempt from First Amendment scrutiny, because the libel *system* itself is not viewpoint neutral: libel law punishes only criticism and not praise, and thus has a tendency to mute debate in favor of the status quo and those already in power.<sup>12</sup> For this reason, defamation law is not exempt from the First Amendment.

Second, even with regard to private case-by-case enforcement, there must be some protection of free speech in cases of overwhelming private economic power. This is most aptly demonstrated by the Supreme Court's decision in *Marsh v. Alabama*,<sup>13</sup> which held that First Amendment scrutiny applied to the private exercise of property rights when a company owned the entire town and exercised such pervasive ownership power that there was no reasonable alternative forum of expression for the town's residents.<sup>14</sup> As this example demonstrates, the property theory is neither formalistic nor inflexible: it does not automatically exempt something from the First Amendment merely because it is labeled "property."

In Part III, I apply the property theory to the specific context of copyright law. As this Part will discuss, the property theory explains both the general exemption of copyright law from the First Amendment (because copyright is mostly content neutral at the systemic level), and the specific conditions that qualify this exemption (the fair use defense and idea/expression dichotomy serve to guard against

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10 See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (noting that the focus is on the "state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms" (emphasis added)).

11 See C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 905 (2002) ("[T]he First Amendment critique of copyright invokes *New York Times Co. v. Sullivan* as the most relevant analogy." (footnote omitted)); Lemley & Volokh, *supra* note 3, at 149 (leading off with the libel analogy); Rubinfeld, *supra* note 2, at 59 ("Copyright is today in the same position, vis-à-vis the First Amendment, as libel was before *New York Times v. Sullivan*.").

12 See *Sullivan*, 376 U.S. at 268–78 (discussing the tendency of libel law to suppress criticism of those in power).

13 326 U.S. 501 (1946).

14 See *id.* at 505 ("Our question then narrows down to this: Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town?").

overwhelming ownership power). The payoff here is twofold. First, the property theory provides a coherent framework to understand the relationship between copyright and the First Amendment. Second, it refutes the common argument that copyright's First Amendment exemption is unprincipled and aberrational.

In Part IV, I consider and refute some remaining arguments against the exemption of copyright from the First Amendment. In particular, I address the arguments that copyright is a content discriminatory restriction on speech, that copyright is distinct from other property because it is non-rivalrous, that Congress can game the exemption to grant property rights over disfavored speech, and that, even under the property theory's own terms, a First Amendment privilege is required because current protection for free speech is inadequate. This Part explains why each of these objections is misguided.

In Part V, I discuss some of the limitations of the property theory. The property theory does not provide a complete defense of all of copyright law. Perhaps most importantly, it applies only to private enforcement of property rights, and thus it cannot defend copyright law's criminal provisions. I also briefly explore the implications and fit of the property theory as applied to other areas of intellectual property. A brief conclusion then follows.

## I. THE COPYRIGHT EXEMPTION AND THE FRAMERS' INTENT THEORY

### A. *Copyright's Exemption from the First Amendment*

Although formal recognition of the copyright exemption from the First Amendment did not occur until the Supreme Court's 2003 decision in *Eldred v. Ashcroft*,<sup>15</sup> the de facto existence of such an exemption has long been recognized in the academic literature. As Jed Rubenfeld remarked in 2002: "Copyright law is a kind of giant First Amendment duty-free zone. It flouts basic free speech obligations and standards of review. It routinely produces results that, outside copyright's domain, would be viewed as gross First Amendment violations."<sup>16</sup>

More concretely, Rubenfeld posits a simple hypothetical to illustrate the tension between copyright and the First Amendment: a law-

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15 537 U.S. 186, 221 (2003) (holding that "when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary"). Previously, in a footnote, the Court had cited, without explicitly endorsing, a district court decision rejecting a First Amendment challenge to copyright law. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 577 n.13 (1977) (citing *United States v. Bodin*, 375 F. Supp. 1265, 1267 (W.D. Okla. 1974)).

16 Rubenfeld, *supra* note 2, at 3 (footnote omitted).

suit for copyright infringement based on the defendant's recital of a poem in public.<sup>17</sup> Quite obviously, a statute that banned the recital of a poem in public would be viewed as an open-and-shut First Amendment violation.<sup>18</sup> Rubinfeld's implicit question is why copyright enforcement is any different.

The scholarly literature that considers the tension between this copyright exemption and the standard principles of the First Amendment begins with Melville Nimmer in 1970.<sup>19</sup> Nimmer asked:

The [F]irst [A]mendment tells us that "Congress shall make no law . . . abridging the freedom of speech, or of the press." Does not the Copyright Act fly directly in the face of that command? Is it not precisely a "law" made by Congress which abridges the "freedom of speech" and "of the press" in that it punishes expressions by speech and press when such expressions consist of the unauthorized use of material protected by copyright?<sup>20</sup>

After identifying this apparent contradiction, Nimmer then attempted to reconcile it. Nimmer argued that copyright law did not *really* abridge free speech, because the fundamental purpose of copyright law is to incentivize the production of more speech than it restricts.<sup>21</sup> According to Nimmer, copyright law achieves its speech-promoting purpose through the idea/expression dichotomy, which holds that copyright only protects an author's expression while leaving the underlying idea for other people to copy and use.<sup>22</sup> Although copyright law "encroaches upon freedom of speech in that it abridges the right to reproduce the 'expression' of others," this encroachment "is justified *by the greater public good* in the copyright encouragement of creative works."<sup>23</sup>

Nimmer's article proved to be enormously influential, but probably not in the manner that he intended. Subsequent scholars have generally agreed with Nimmer that there is a tension between copyright law and the First Amendment, but they have strongly disagreed with him that the tension can be reconciled or that copyright should

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17 *Id.* at n.1.

18 Rebecca Tushnet makes a similar argument, that "[c]opyright gives the government authority to seize books and enjoin their sale, award damages against booksellers, or even send them to jail." Tushnet, *supra* note 6, at 4.

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

20 *Id.* at 1181.

21 *See id.* at 1189–93.

22 *See id.*

23 *Id.* at 1192 (emphasis added).



be exempt from First Amendment scrutiny.<sup>24</sup> The basic problem with Nimmer's reconciliation is that it makes no attempt to engage with the First Amendment at a doctrinal level. Nimmer's argument boils down to saying that the entire body of First Amendment doctrine—the elaborate set of general rules and principles that courts have built up over decades—can be tossed aside whenever an encroachment on free speech is deemed by some decision-maker to be “justified by the greater public good.”<sup>25</sup> Such ends-justifies-the-means reasoning is extremely dangerous and opens the door to eviscerating the First Amendment in numerous areas, as Lemley and Volokh explain:

Many kinds of speech restrictions may be seen as furthering free speech values in some way. Justice White argued that libel law furthers free speech: libel law, he claimed, was needed in part because “virtually unrestrained defamatory remarks about private citizens [may] discourage them from speaking out and concerning themselves with social problems.” Some have argued that pornography tends to “silence” women, which might suggest that obscenity law may serve First Amendment values. Similarly, some have argued in favor of banning racist speech on the grounds that it silences minorities. Others have claimed that restrictions on the speech of the wealthy further free speech values by preventing well-funded speech from “drowning out” other speech.<sup>26</sup>

The scholarly consensus that has emerged after Nimmer is therefore one that argues against “[c]opyright [e]xceptionalism”<sup>27</sup>—i.e., carving out copyright from standard First Amendment doctrinal prin-

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24 For just some articles in this gigantic literature, in addition to those that have been cited throughout this Article, see, for example, Mark Bartholomew & John Tehranian, *An Intersystemic View of Intellectual Property and Free Speech*, 81 GEO. WASH. L. REV. 1 (2013); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act Is Unconstitutional*, 36 LOY. L.A. L. REV. 83 (2002); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283 (1979); Alan E. Garfield, *The First Amendment as a Check on Copyright Rights*, 23 HASTINGS COMM. & ENT. L.J. 587 (2001); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1 (1987); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's “Total Concept and Feel,”* 38 EMORY L.J. 393 (1989); Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833 (2000).

25 Nimmer, *supra* note 19, at 1192.

26 Lemley & Volokh, *supra* note 3, at 188–89 (alteration in original) (footnotes omitted).

27 Christina Bohannon, *Copyright Infringement and Harmless Speech*, 61 HASTINGS L.J. 1083, 1115 (2010) (arguing for First Amendment scrutiny of copyright).

ciples just because doing so achieves good outcomes at a policy level.<sup>28</sup> And because scholars have not found a coherent theory that reconciles the copyright exemption with standard First Amendment principles at a doctrinal level, they have “felled many trees” arguing that courts should overrule the copyright exemption and apply First Amendment scrutiny to copyright cases.<sup>29</sup>

Courts, however, have never adopted this scholarly consensus, and have in fact gone in the opposite direction by cementing the copyright exemption into Supreme Court case law. The Court has now expressly held that, so long as copyright law contains an idea/expression dichotomy and a fair use defense, it receives no First Amendment scrutiny.<sup>30</sup> In explaining how this holding comports with ordinary First Amendment doctrinal principles—and presumably why the decision will not open the floodgates to every interest group seeking its own carve-out—the Court relied on the Framers’ intent theory. Section B will summarize the Court’s articulation of the Framers’ intent theory. Section C will then explain why the Framers’ intent theory fails to reconcile copyright law with the First Amendment.

### B. *The Framers’ Intent Theory*

The Supreme Court began delineating the Framers’ intent theory in *Eldred v. Ashcroft*,<sup>31</sup> which dealt with the constitutionality of the retroactive extension of copyright terms by Congress in the Sonny Bono

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28 See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1537 (1993) (“Lawyers, law professors, and even judges are on record pleading for the law to subject intellectual property to the same free speech principles that limit other assertions of governmental power.”); Lemley & Volokh, *supra* note 3, at 197 (arguing “[a]gainst [s]pecial [p]leading for [c]opyright”); Netanel, *supra* note 3, at 37 (arguing against “sui generis” treatment for copyright); Rubinfeld, *supra* note 2, at 3 (criticizing copyright as producing “results that, outside copyright’s domain, would be viewed as gross First Amendment violations”). Somewhat surprisingly, Eugene Volokh seems to have changed his mind and now accepts a copyright exception that is grounded in history and economic policy rather than ordinary First Amendment doctrine. See Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 LIQUORMART, and BARTNICKI, 40 Hous. L. Rev. 697, 725 (2003) (“The text and the original meaning, coupled with the economic incentive argument, do indeed justify the copyright exception.” (footnote omitted)). The scholarly consensus against a copyright carve-out, however, remains strong.

29 Alan E. Garfield, *The Case for First Amendment Limits on Copyright Law*, 35 HOFSTRA L. Rev. 1169, 1169 (2007); see *supra* note 24 (collecting citations).

30 See *Golan v. Holder*, 132 S. Ct. 873, 889–91 (2012).

31 537 U.S. 186 (2003).

Copyright Term Extension Act (the “Sonny Bono Act”).<sup>32</sup> In addition to making arguments based on the constitutional purpose of copyright (i.e., to promote progress), the petitioner in *Eldred* explicitly argued that the extension of copyright terms violated the First Amendment.<sup>33</sup> Prior to this case, the question of the constitutionality of copyright law under the First Amendment does not seem to have been squarely presented to the Supreme Court.<sup>34</sup>

The Court rejected the First Amendment argument and upheld the Sonny Bono Act in its entirety.<sup>35</sup> In explaining its decision, the Court first observed: “The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles.”<sup>36</sup> Based on this bit of originalist history, the Court went on to hold: “We recognize that the [D.C.] Circuit spoke too broadly when it declared copyrights ‘categorically immune from challenges under the First Amendment.’ But when, as in this case, Congress has not altered the *traditional contours* of copyright protection, further First Amendment scrutiny is unnecessary.”<sup>37</sup>

The bottom line of *Eldred* was that, although not everything labeled “copyright” would be categorically exempt from First Amendment scrutiny, copyright within its traditional contours would be.<sup>38</sup> This, however, immediately raises the question of what constitutes “the traditional contours of copyright,” a standard that the Court did not explain beyond saying that, whatever that standard meant, the Sonny Bono Act did not exceed it.

The Court’s initial invocation of the Framers’ intent theory and its cursory articulation of the traditional contours test then invited a raft of law review articles and lawsuits to explore the boundaries of

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32 Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. §§ 302–304 (2006)).

33 Petition for Writ of Certiorari at i, *Eldred*, 537 U.S. 186 (No. 01-618) (asking whether copyright law is “categorically immune from challenge under the First Amendment” (alterations omitted) (internal quotation marks omitted)).

34 See Michael D. Birnhack, *Copyright Law and Free Speech After Eldred v. Ashcroft*, 76 S. CAL. L. REV. 1275, 1276 (2003) (“Surprisingly, *Eldred* is the first facial constitutional challenge to copyright law in 213 years.”); Lawrence B. Solum, *Congress’s Power to Promote the Progress of Science: Eldred v. Ashcroft*, 36 LOY. L.A. L. REV. 1, 80 (2002) (“Copyright provisions are rarely challenged on First Amendment grounds . . .”).

35 See *Eldred*, 537 U.S. at 222.

36 *Id.* at 219.

37 *Id.* at 221 (emphasis added) (citation omitted).

38 See *id.*

“the traditional contours of copyright.”<sup>39</sup> If the Sonny Bono Act’s retroactive extension of copyright terms to author-life-plus-seventy-years did not breach the traditional contours of copyright (when the historical copyright term was fourteen years from publication, renewable once for a total of twenty-eight years), what did? After much debate and conflict in the lower courts,<sup>40</sup> the Supreme Court confronted the issue in the case of *Golan v. Holder*.<sup>41</sup>

*Golan* dealt with the issue of whether section 514 of the Uruguay Round Agreements Act,<sup>42</sup> which retroactively granted copyright protection to some foreign works and thereby took them out of the public domain in the United States, was unconstitutional under the First Amendment. The Tenth Circuit had held that section 514 exceeded the traditional contours of copyright because it took works out of the public domain.<sup>43</sup> In other words, the lower court held that one traditional contour of copyright protection was the principle that “works in the public domain remain there.”<sup>44</sup> Perhaps surprisingly, the lower court proceeded to uphold section 514; but it did so only after subjecting it to heightened First Amendment scrutiny.<sup>45</sup>

The Supreme Court disagreed with this analysis, holding that no First Amendment scrutiny should have been applied at all. As an ini-

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39 See, e.g., *Kahle v. Gonzales*, 487 F.3d 697, 700 (9th Cir. 2007) (discussing whether Copyright Renewal Act of 1992 exceeded the traditional contours of copyright); *Golan v. Gonzales* (*Golan I*), 501 F.3d 1179, 1187 (10th Cir. 2007) (discussing whether 17 U.S.C. § 104A exceeded the traditional contours of copyright); *Luck’s Music Library, Inc. v. Gonzales*, 407 F.3d 1262, 1262–63 (D.C. Cir. 2005) (same); W. Ron Gard & Elizabeth Townsend Gard, *Marked by Modernism: Reconfiguring the “Traditional Contours of Copyright Protection” for the Twenty-First Century*, in MODERNISM AND COPYRIGHT 155 (Paul K. Saint-Amour ed., 2011) (claiming that copyright’s digital-age crisis should be seen as an extension of a modernist crisis); Robert Kasunic, *Preserving the Traditional Contours of Copyright*, 30 COLUM. J.L. & ARTS 397, 398–401 (2007) (detailing the traditional contours); Marshall Leaffer, *Life After Eldred: The Supreme Court and the Future of Copyright*, 30 WM. MITCHELL L. REV. 1597, 1605–06 (2004) (examining *Eldred*’s First Amendment arguments); David S. Olson, *First Amendment Interests and Copyright Accommodations*, 50 B.C. L. REV. 1393, 1397 (2009) (arguing that “the elimination of registration requirements and other formalities has significantly altered the traditional contours of copyright”).

40 Compare *Golan I*, 501 F.3d at 1187–92 (holding 17 U.S.C. § 104A exceeded the traditional contours of copyright), with *Luck’s Music Library*, 407 F.3d at 1265–66 (holding it did not).

41 132 S. Ct. 873 (2012).

42 Pub. L. No. 103-465, § 514, 108 Stat. 4809, 4976–80 (1994) (current version at 17 U.S.C. § 104A (2006)).

43 See *Golan I*, 501 F.3d at 1187–92.

44 *Id.* at 1189.

45 See *Golan v. Holder* (*Golan II*), 609 F.3d 1076, 1083–84 (10th Cir. 2010) (upholding § 514 under intermediate scrutiny).

tial matter, the Court observed that Congress has in fact had a long history of removing works from the public domain, tracing all the way back to the First Congress and the first Copyright Act of 1790.<sup>46</sup> The lower court's invocation of a traditional principle that copyright protection could not take works out of the public domain was simply bad history.

The Supreme Court was not, however, prepared to leave its reasoning there. Instead, the Court went far further to offer a specific definition of what constituted the "traditional contours of copyright protection." In purporting to summarize its holding in *Eldred*, the *Golan* Court stated, "Concerning the First Amendment, we recognized [in *Eldred*] that some restriction on expression is the inherent and intended effect of every grant of copyright . . . . We then described the 'traditional contours' of copyright protection, *i.e.*, the 'idea/expression dichotomy' and the 'fair use' defense."<sup>47</sup>

The "i.e." is crucial. In this short passage, the Court *defines* the traditional contours of copyright as comprising an idea/expression dichotomy and a fair use defense—and nothing else. At a bottom line level, the doctrine concerning the interaction between copyright law and the First Amendment is now reasonably clear: so long as copyright law retains an idea/expression dichotomy and a fair use defense, it is exempt from the First Amendment. Purportedly, this is all because the Framers intended such an exemption. As the next Section will explain, however, the historical facts simply do not fit the theory.

### C. *The Inadequacies of the Framers' Intent Theory*

If we take the Framers' intent theory seriously, then the fundamental question of copyright's exemption from the First Amendment is whether modern copyright law conforms to the Framers' expectations in 1791, when the First Amendment was enacted.<sup>48</sup> The best evidence we have in this respect is the Copyright Act of 1790,<sup>49</sup> which

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46 *Golan*, 132 S. Ct. at 885–86 ("Notably, the Copyright Act of 1790 granted protection to many works previously in the public domain.").

47 *Id.* at 889–90 (emphasis added).

48 One might argue that, as a matter of plain language, "tradition" need not be understood as limited to the Framers but instead could encompass copyright practice as it evolved throughout the nineteenth century. But this understanding of the "traditional contours" test—as a non-originalist theory that is based on a pragmatic concern for stability and not on fidelity to original intentions—would make the *Eldred* Court's invocation of the Framers' intentions a non-sequitur. I therefore view the test as being about original intent.

49 Act of May 31, 1790, ch. 15, 1 Stat. 124 [hereinafter Copyright Act of 1790] (repealed 1831).

was enacted by virtually the same group of people at virtually the same time as the First Amendment. And if we compare modern copyright law to the Copyright Act of 1790, it quickly becomes extremely evident that modern copyright law has vastly exceeded anything that the Framers would have expected, and has a much stronger speech-suppressing effect than what the Framers allowed.<sup>50</sup> A few important examples will suffice to illustrate this point:

*Copyrightable subject-matter*—The Copyright Act of 1790 allowed copyright protection over only three types of things: maps, charts, and books.<sup>51</sup> Modern copyright law allows protection over any work that is “fixed in any tangible medium of expression,” including visual works such as paintings and sculptures, movies, sound recordings, architecture, and computer software.<sup>52</sup>

*Copyright term*—The Copyright Act of 1790 had a copyright term of fourteen years (renewable once for a total of twenty-eight years).<sup>53</sup> Modern copyright has a copyright term of the life of the author plus seventy years.<sup>54</sup>

*Infringing activities*—The Copyright Act of 1790 prohibited only the printing, reprinting, publishing, and selling of a protected work.<sup>55</sup> It was not an infringement of traditional copyright to *perform* a work, such as by reading it out loud in the street. Modern copyright law makes public performance of a work an infringing act,<sup>56</sup> in addition to prohibiting the reproduction and selling of a protected work.<sup>57</sup> In this way, the most pure form of “speech”—i.e., reading something out loud in the street—was simply not an activity that was covered by traditional copyright law at all.

Thus, based on the Framers’ enactment of the Copyright Act of 1790, one could very well argue that a copyright regime that prohibited the printing and selling of copyrighted maps, charts, and books for fourteen years—while still allowing everyone to make public speeches that quote from those copyrighted books and make public displays of those copyrighted maps—would not offend the Framers’

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50 See Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1061–62 (2001) (comparing modern copyright to the copyright regime enacted by the Framers).

51 See Copyright Act of 1790, § 1. An 1802 amendment expanded this to include pictures and engravings. See Act of Apr. 29, 1802, ch. 36, 2 Stat. 171, 171 (repealed 1831).

52 17 U.S.C. § 102(a) (2006).

53 Copyright Act of 1790, § 1.

54 17 U.S.C. § 302(a).

55 See Copyright Act of 1790, § 1.

56 17 U.S.C. § 106.

57 *Id.*

conception of freedom of speech, and therefore would not offend the First Amendment under an originalist framework. But it simply does not follow that the Framers would regard modern copyright law as similarly benign.<sup>58</sup>

The Court in *Golan* dodged these problems only by a rhetorical trick. Instead of fairly comparing the Copyright Act of 1790 to modern copyright law, and considering all the relevant differences between the two regimes, the *Golan* Court reduced the “traditional contours of copyright protection” to two features: the idea/expression dichotomy and the fair use defense.<sup>59</sup> Implicitly, the Court is saying that, because modern copyright law has these two features, it is irrelevant that there have been numerous other changes to copyright law that make it far more speech-suppressive than anything the Framers allowed.

There are at least two problems with this rhetorical trick. The first is that it doesn’t pass the laugh test once we state its reasoning explicitly. If the theory that the Court is going to rely on is Framers’ intent, then we should be really trying to discern the Framers’ actual intentions, which is best demonstrated by considering *all* the features of the Copyright Act of 1790 that they enacted and not a cherry-picked version.

The second problem is that, even if one were to cherry pick, one could not pick two worse features of copyright law to ascribe to the Framers. This is because the Copyright Act of 1790 *did not have* an idea/expression dichotomy or a fair use defense.<sup>60</sup> The idea/expression dichotomy is generally traced to *Baker v. Selden*<sup>61</sup> in 1879.<sup>62</sup> The fair use defense is generally traced to *Folsom v. Marsh*<sup>63</sup> in 1841.<sup>64</sup> Neither concept had been articulated in American law at the time of the ratification of the First Amendment.

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58 See Lessig, *supra* note 50, at 1061–62.

59 *Golan v. Holder*, 132 S. Ct. 873, 890 (2012).

60 Rudimentary versions of these concepts had been developed by that time in British law. See Robert Yale Libott, *Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World*, 14 UCLA L. REV. 735, 737–38 (1967) (discussing eighteenth-century British cases that articulated the notion that ideas should be free); Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1372–73 (2011) (discussing the British “fair abridgement” defense). But there is little evidence that the Framers were even aware of these nascent doctrines, much less that they intended to incorporate these British doctrines—and only these doctrines—into the First Amendment or into the Copyright Act of 1790.

61 101 U.S. 99, 105 (1879).

62 Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321, 326 (1989).

63 9 F. Cas. 342, 344 (C.C.D. Mass. 1841).

In short, if we take the Framers' intent theory seriously and are really looking for the actual intent of the Framers, then one would be hard-pressed to defend modern copyright law as something that they intended to be exempt from the First Amendment. At least, one could not come to this conclusion based on their enactment of the Copyright Act of 1790, which is the only piece of evidence cited by the Supreme Court.<sup>65</sup> Moreover, one certainly cannot say that the Framers intended a rule that says copyright law is exempt from the First Amendment on condition of it having an idea/expression dichotomy and a fair use defense, concepts that the Framers did not even know about. In all these respects, the Framers' intent theory fails to reconcile modern copyright law with the First Amendment.<sup>66</sup>

#### D. *Does the Lack of a Theory Matter?*

Does it matter that the Framers' intent theory fails? Pragmatists will likely say "no." From the perspective of certainty, there is no problem with the status quo. The bottom line of what the existing doctrine says is fairly clear: copyright is exempt from the First Amendment, subject to the continued existence of a fair use defense and an idea/expression dichotomy. Practicing lawyers and their clients know what "the law" is.

Moreover, from the perspective of policy, there is at least a plausible argument that the existing doctrine achieves good outcomes. As Nimmer explained, copyright law is a balance: we restrict some speech in order to incentivize even more speech.<sup>67</sup> The idea/expression dichotomy and the fair use defense together function to calibrate this policy balance within copyright law and ensure that copyrights do not restrict more speech than is necessary (i.e., to ensure that copyright

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64 See *Integra Lifesciences I, Ltd. v. Merck KGaA*, 331 F.3d 860, 876 (Fed. Cir. 2003) (crediting *Folsom* with creating the fair use doctrine), *vacated*, 545 U.S. 193 (2005); *Rubin v. Bos. Magazine Co.*, 645 F.2d 80, 83 (1st Cir. 1981) (same).

65 See *Golan v. Holder*, 132 S. Ct. 873, 885–86 (2012); *Eldred v. Ashcroft*, 537 U.S. 186, 200–01 (2003).

66 To be clear, I am not saying that originalism, broadly defined, cannot possibly provide a coherent defense of the copyright exemption. I am saying that the sloppy *Golan/Eldred* version of originalism does not do so. Among other things, a sophisticated originalist analysis of the copyright exemption would likely eschew reliance on Framers' intent. See Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 721–22 (2011) (discussing the shift away from relying on Framers' intent in modern originalist theory).

67 Nimmer, *supra* note 19, at 1189; see Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 990–92 (1970) (explaining the balancing of First Amendment principles with those underlying copyright law).



covers only “expression” and also does not restrict “fair” uses).<sup>68</sup> As long as copyright law retains these two policy levers and they function properly, then it will achieve good policy outcomes.<sup>69</sup> Therefore, the Court’s decision to create an exemption for copyright, as well as its decision to condition the exemption on the continued existence of an idea/expression dichotomy and a fair use defense, are all defensible on a policy level.

That said, it should obviously matter that the Framers’ intent theory fails, even if the outcome can be justified as a matter of policy. If the Framers’ intent theory served no purpose—if it did not matter whether the theory works or not—then the Court presumably would not have bothered to invoke it in the first place. If Nimmer’s policy argument were enough, one would not see a forest’s worth of law review articles criticizing copyright’s exemption from the First Amendment.<sup>70</sup> And the reason comes back to the “carve-out problem”<sup>71</sup>: if copyright is exempt from the First Amendment merely because giving it a carve-out achieves good policy, then every interest group will argue that its pet cause should likewise be exempt from the First Amendment because such an exemption will achieve good policy.<sup>72</sup> Saying that a First Amendment carve-out can be justified *merely* by a good policy result opens the door to courts engaging in free-floating policy balancing in every case.<sup>73</sup>

What the Court needs is some objective legal principle, beyond policy balancing, that differentiates situations where it finds a First Amendment exemption (such as copyright) and where it does not. This search for neutral principles is a fundamental goal of constitu-

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68 *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556–60 (1985) (arguing that copyright achieves definitional balance through the idea/expression dichotomy and the fair use defense).

69 Of course, this leaves the argument that the idea/expression dichotomy and the fair use defense *do not* function properly, in being insufficiently protective of free speech. See Netanel, *supra* note 3, at 41–42 (arguing that “[a]t the very least,” we should “insist that copyright’s beleaguered internal safety valves actually afford adequate protection for free speech”). On why this argument does not undermine the property theory, see *infra* Section IV.F.

70 See *supra* note 24.

71 See *supra* Section I.A.

72 See *supra* text accompanying notes 24–29.

73 See Stephen Fraser, *The Conflict Between the First Amendment and Copyright Law and Its Impact on the Internet*, 16 CARDOZO ARTS & ENT. L.J. 1, 51 (1998) (arguing that the existing regime “leaves the impression that the interests found in the *Bill of Rights* can be balanced away every time the price to copyright holders is too high”).

tional law.<sup>74</sup> The Framers' intent theory was an attempt to provide such an objective principle—look to what the Framers had intended—but it fails to explain the copyright exemption because modern copyright law, including the idea/expression dichotomy and the fair use defense, looks nothing like what the Framers actually enacted or could have imagined. In the rest of this Article, I provide a different principle to explain the copyright exemption; one that does not share the defects of the Framers' intent theory.

## II. PRIVATE PROPERTY AND THE FIRST AMENDMENT

Outside of copyright law, the idea that the enforcement of private property rights is generally not subject to First Amendment constraints is well accepted. The protestors affiliated with the Occupy Wall Street movement would surely like to conduct their protests inside Goldman Sachs' headquarters. And such a protest would likely be more effective in communicating their political message than a protest at some other forum. But the protestors cannot protest inside Goldman Sachs' headquarters because there is—at least as a general matter—no First Amendment right to trespass on private property.<sup>75</sup>

This is not only a descriptive point but is backed by strong normative considerations. Most people think it is a very good thing that their property is not taken for the benefit of communicating other people's speech. At a fundamental level, a decent respect for private property rights is essential to secure meaningful free speech opportunities for everybody.<sup>76</sup> If Adam were allowed to take Bob's loudspeaker (or use Bob's front lawn, or expropriate any other type of property) whenever it was helpful to broadcasting Adam's message, then *Bob's* message would be correspondingly diluted. This would be true even if Bob were not using the loudspeaker at the particular time,

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<sup>74</sup> See generally Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 16–20 (1959) (arguing that the legitimacy of judicial review depends on following neutral principles).

<sup>75</sup> See *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568 (1972). A case in some conceptual tension with this principle is *Robins v. Pruneyard Shopping Center*, which held that the free speech protection of the California Constitution created a right to trespass on private property. 592 P.2d 341, 346 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980). But *Pruneyard* has no strong relevance to my argument because it is not a First Amendment case. To the extent that a state constitution attempted to create a right to infringe federal copyrights, it would be trumped by the Supremacy Clause. See U.S. CONST. art. VI, cl. 2.

<sup>76</sup> See *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) (“The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.”).

because an audience's attention span and information processing capabilities are limited.<sup>77</sup> Adam would therefore always take Bob's loudspeaker, while Bob would always protest on Adam's front lawn, and the tit-for-tat would go on forever. The result would be utter chaos, which is no way to set up a democracy or a free speech system.

Doctrinally speaking, this normative policy goal is implemented under the auspices of the "state action" doctrine.<sup>78</sup> What courts hold is that the private enforcement of property rights against protestors and other unwanted speakers is not state action and is thus not subject to First Amendment scrutiny.<sup>79</sup> This is true even if the private property right must ultimately be enforced through the mechanism of a judicially issued injunction.<sup>80</sup> The result is that Goldman Sachs may use its headquarters to broadcast favored messages ("banks are good") while excluding disfavored messages ("banks are bad"). The doctrinal outcome therefore reflects the main principle of the property theory, which is that the enjoyment and enforcement of private property rights are generally not subject to First Amendment constraints.

Yet this is only a general principle, not an absolute one.<sup>81</sup> The property theory does not say that anything labeled "property" is always and automatically exempt from all First Amendment scrutiny. As the remainder of this Part will explain, under the property theory, the exemption of private property rights from First Amendment scrutiny

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77 See Eileen Hintz Rumfelt, Comment, *Political Speech: Priceless—Mastercard v. Nader and the Intersection of Intellectual Property and Free Speech*, 55 EMORY L.J. 389, 389 (2006) ("[T]hose with a message to convey must compete daily with thousand [sic] of other messages . . ."). My point here is that the owner's actual use of the property is not the dispositive issue. Cf. Lemley & Volokh, *supra* note 3, at 184 (arguing that "the nonrivalrous aspect of intellectual property infringement weakens the property rights argument").

78 See David McGowan, *Some Realism About the Free-Speech Critique of Copyright*, 74 FORDHAM L. REV. 435, 447 (2005) (arguing copyright suits, like trespass suits, are not state action).

79 See *Hudgens v. NLRB*, 424 U.S. 507, 519–20 (1976) (holding that private shopping mall may exclude union picketers).

80 One authority to the contrary is *Shelley v. Kraemer*, which held judicial enforcement of a racially exclusive covenant to be state action. 334 U.S. 1, 20 (1948). *Shelley* is widely understood as a unique case prompted by the unique harms of racially exclusive covenants, and it has not been applied outside of that context. See Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 526 (1985) ("The Supreme Court . . . largely has refused to apply *Shelley*").

81 See *Hudgens*, 424 U.S. at 513 ("[E]ven truisms are not always unexceptionably true, and an exception to this one was recognized almost 30 years ago . . ."); cf. Lemley & Volokh, *supra* note 3, at 182 n.163 (arguing that "[t]he incantation 'property' seems sufficient to render free speech issues invisible" (alteration in original) (quoting Gordon, *supra* note 28, at 1537)).

is subject to two caveats. First, the exemption applies only to types of property that are content and viewpoint neutral at the systemic level. Second, even when the exemption applies, it is not absolute: in exceptional cases, where a property owner possesses overwhelming ownership power, First Amendment scrutiny will still attach.

*A. Content and Viewpoint Neutrality in the Property System*

The first condition is that the government-created rules of the property system must be neutral towards speech. At a doctrinal level, what the property theory says is that the private enforcement of property rights is not state action subject to scrutiny under the First Amendment. But the government's creation of a property *system* in the first place is unquestionably a matter of state action. As such, the rules of the property system cannot discriminate on the basis of speech.<sup>82</sup>

Examples will clarify the distinction between the government's creation of the rules of a property system and the individual enforcement of a private property right under those rules.<sup>83</sup> A lawsuit filed by Goldman Sachs against Occupy Wall Street protesters is an example of the individual enforcement of a private property right. The fact that Goldman Sachs is viewpoint discriminatory in its enforcement—it only ejects speakers it does not like and does not sue speakers it does like—is irrelevant to the First Amendment calculus. This is because the relevant property *system*, which in this example is the real property system governing the ownership of land, is content and viewpoint neutral: anyone can own land, and the owner of a piece of land can use it to broadcast any message that he likes. At a systemic level, the rules of the real property system do not favor particular speakers or particular

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82 *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (“Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press.”).

83 Cass Sunstein has provided a similar explanation of the distinction:

A private university, expelling students for (say) racist speech, is not a state actor. The trespass law, which helps the expulsion to be effective, is indeed state action. The distinction matters a great deal. The trespass law, invoked in this context, is a content-neutral regulation of speech . . . . This . . . does not violate the First Amendment.

CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 205 (1993); *see also* Lillian R. BeVier, *Copyright, Trespass, and the First Amendment: An Institutional Perspective*, 21 *SOC. PHIL. & POL'Y* 104, 137 (2004) (“When a judge enjoins or awards damages for an infringement of copyright, though she is a government actor acting in her official capacity, she is not ‘deciding to restrict speech.’ Rather . . . , she is merely . . . enforcing the *copyright owner's* ‘decision to restrict speech.’”).

viewpoints. There is no rule of property law that says only banks and their ideological supporters can own land and bring trespass actions.<sup>84</sup>

This might seem banal, in that most property regimes are neutral towards speech at a systemic level. But this is not true of all property regimes. A good example of a property system that is neither content nor viewpoint neutral at a systemic level is the law of defamation, which protects a property right in reputation.<sup>85</sup> Although it is a property system, the rules of the defamation system favor some viewpoints and disfavor others: defamation law only punishes criticisms that hurt someone's reputation; it never punishes praise that enhances reputation.<sup>86</sup> The systematic tendency of defamation law is to mute criticism and preserve the status quo in favor of those who are already in power.<sup>87</sup>

This characteristic of the government-created libel *law*—and not the fact that individual plaintiffs are viewpoint discriminatory in their enforcement of that law—is the reason that defamation is subject to First Amendment scrutiny, even though it is a privately enforced property right.<sup>88</sup> The Supreme Court made this clear in the famous case of *New York Times Co. v. Sullivan*,<sup>89</sup> where it stated: “Although this is a civil lawsuit between private parties, the Alabama courts have applied a state *rule of law* which petitioners claim to impose invalid restrictions

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84 A counterargument here is that the real property system does have a systematic bias: it gives more voice to rich people who can afford to buy more land, or better land (e.g., close to the White House), than poor people. This is a systematic bias that afflicts all property systems. Implicit in the Court's general acceptance of the property theory in non-copyright contexts is the recognition that this kind of subtle wealth bias is not sufficient to make a regime speech-discriminatory.

85 See Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 693–99 (1986) (discussing the view of reputation as property). The view of reputation as property is not without problems. See Paul v. Davis, 424 U.S. 693, 701 (1976) (holding that reputation is not property for constitutional purposes). If one takes the view that reputation is not property, then the argument that copyright law should be subject to First Amendment scrutiny can be given short shrift, because the proponents of that argument nearly always rely on an analogy between copyright and defamation. See Baker, *supra* note 11, at 905–06. In order to have a meaningful discussion on the larger issue, I will assume for purposes of this Article that reputation is property.

86 See RESTATEMENT (SECOND) OF TORTS § 559 (1977).

87 See Chris Williams, Comment, *The Communications Decency Act and New York Times v. Sullivan: Providing Public Figure Defamation a Home on the Internet*, 43 J. MARSHALL L. REV. 491, 494 n.15 (2010) (“Common law libel actions were the road used to force the courts into maintaining the status quo.”).

88 See SUNSTEIN, *supra* note 83, at 206 (arguing that *New York Times Co. v. Sullivan* rests on a rejection of the lower court's holding that “the common law of tort, and more particularly of libel, was not state action at all”).

89 376 U.S. 254 (1964).

on their constitutional freedoms of speech and press.”<sup>90</sup> What was being scrutinized was not the individual lawsuit, but the government-created rules of defamation law. The Court reemphasized this point again in summarizing its holding: “We hold that the *rule of law* applied by the Alabama courts is constitutionally deficient . . . .”<sup>91</sup>

Once we understand this difference between individual enforcement and systemic neutrality, it becomes clear that many of the critics’ arguments are misplaced. Practically every critic of the copyright exemption bases his argument on an analogy between copyright and defamation, because both protect a property interest.<sup>92</sup> But the analogy draws the comparison at the wrong level of abstraction. It is true that, at the level of individual enforcement, both liability for copyright infringement and liability for defamation depend on the content of an accused communication;<sup>93</sup> but individual enforcement is not the right level of abstraction for a First Amendment analysis.<sup>94</sup> The First Amendment prohibits *Congress* from enacting *laws* that abridge the freedom of speech; it says nothing about private individuals.<sup>95</sup> The right level of abstraction is thus to look to the speech-abridging effects of the congressionally enacted law—e.g., the Copyright Act of 1976,<sup>96</sup> or the doctrine of defamation, as a whole—rather than individual lawsuits brought under such a law.<sup>97</sup>

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90 *Id.* at 265 (emphasis added).

91 *Id.* at 264 (emphasis added).

92 Baker, *supra* note 11, at 905 (“[T]he First Amendment critique of copyright invokes *New York Times Co. v. Sullivan* as the most relevant analogy.” (footnote omitted)); see also Lemley & Volokh, *supra* note 3, at 182–83 (relying on analogy between libel and copyright); Netanel, *supra* note 3, at 41 (comparing the lack of constitutional protection for libel and analogizing to copyright); Rubinfeld, *supra* note 2, at 26–27 (same).

93 Lemley & Volokh, *supra* note 3, at 186 (arguing that copyright is not speech-neutral because “liability turns on the content of what is published”).

94 See SUNSTEIN, *supra* note 83, at 205.

95 See U.S. CONST. amend. I.

96 Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–810 (2006)).

97 See Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1255 (2010) (arguing that a First Amendment violation depends on the law that Congress passed and “has nothing to do with the application of the law to any particular person”). I am not endorsing Rosenkranz’s further conclusion that the First Amendment does not apply to executive action—that conclusion contradicts existing doctrine—but it is a well-settled feature of existing doctrine that the First Amendment is violated only by state action. The only state action here is the congressional passage of the Copyright Act. Under the Copyright Act, a copyright grant is automatic and involves no executive action. See 17 U.S.C. § 302(a) (2006).

Libel lawsuits receive special scrutiny under the First Amendment because the libel *system*—in the Supreme Court’s words, the generally applicable “state rule of law” that comprises the doctrine of libel<sup>98</sup>—is content and viewpoint discriminatory; not because a particular libel lawsuit is. At the level of individual enforcement, numerous kinds of lawsuits turn on the content of a defendant’s speech. For example, a court that sanctions a defendant for giving evasive answers to an interrogatory request must read the content of the defendant’s response to determine whether it is “evasive” and subject to liability.<sup>99</sup> But nobody suggests that motions for sanctions under the Federal Rules of Civil Procedure should therefore receive heightened scrutiny under the First Amendment. Individual discovery sanctions receive no heightened First Amendment scrutiny because the civil discovery system as a whole is content and viewpoint neutral, while libel lawsuits receive heightened scrutiny because the libel system is content and viewpoint discriminatory. As I shall explain in Part III, the copyright system is like the civil discovery and real property systems, and unlike the defamation system, in being content and viewpoint neutral: anyone can obtain a copyright for any work, regardless of its content or viewpoint, and the copyright system gives the same protection to all works, again regardless of their content or viewpoint.<sup>100</sup> This difference at the systemic level explains why defamation is an inapt analogy for copyright.

A second implication of the above analysis is that Lemley and Volokh’s nightmare hypothetical about the flag is inapt. Lemley and Volokh argue that the property theory is obviously wrong because it supposedly implies that Congress could declare the flag to be government property and then prosecute flag burning as criminal trespass.<sup>101</sup> But, putting aside the obvious response that the property theory pertains to private enforcement of private property rights, and not government prosecution of criminal trespass to government property, a congressionally enacted statute that declared the flag and only the flag (or only the flag and other symbols that the government favored) to be government property and subject to protection would not be content or viewpoint neutral.<sup>102</sup> The property theory would therefore not remove First Amendment scrutiny for such a statute. In

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98 *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

99 See FED. R. CIV. P. 37(a)(4) (making an evasive or incomplete response sanctionable).

100 See *infra* Section IV.B (refuting the argument that copyright is content discriminatory).

101 Lemley & Volokh, *supra* note 3, at 182–83.

102 Nor would selectively enforcing a general criminal trespass law against only flag burners and no one else—to the extent such a government prosecution policy can be

this way, the requirement of *systemic* neutrality makes the property theory far more nuanced than its cavalier dismissal by the critics would suggest.

*B. Protection Against Overwhelming Ownership Power*

Even when the rules of the property system are neutral, the property theory only provides a qualified exemption of private enforcement of property rights from First Amendment scrutiny. The First Amendment will still intervene to protect free speech values when a property owner possesses such overwhelming ownership power as to foreclose all alternative avenues of expression.

The case that establishes this principle is *Marsh v. Alabama*.<sup>103</sup> In *Marsh*, a private company owned all the land in an entire town and ran all the operations of the town. The company then forbade Jehovah's Witnesses from distributing religious literature on its property. In most ordinary circumstances, the company's actions would be quite lawful—a private property owner is generally entitled to prohibit the advocacy of disfavored views on its property. But when a company owns the entire town, it is difficult to ignore the practical consequence: the residents of the town would then effectively have no free speech rights. As the Court framed the issue, the question was: "Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town?"<sup>104</sup>

The Court's answer was "no." Because the company/landowner was performing an essential public function, its ownership rights were qualified and its exercise of those rights was subject to First Amendment limitations.<sup>105</sup> *Marsh* thus establishes a First Amendment limitation on the private individual enforcement of property rights, even when the property system at issue is content neutral. Although there is *generally* no First Amendment right to trespass, in exceptional circumstances there is.

The *Marsh* exception is conceptually important because it refutes the contention—central to the argument of property theory critics—that the property theory entails a categorical, formalistic, automatic, and unthinking exemption of anything and everything labeled "prop-

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proven—be permissible. *See* *Wayte v. United States*, 470 U.S. 598, 608–10 (1985) (recognizing a selective prosecution defense for First Amendment activity).

103 326 U.S. 501 (1946).

104 *Id.* at 505.

105 *See id.* at 506.



erty” from First Amendment scrutiny.<sup>106</sup> These critics aggrandize the property theory to unreasonable extremes in order to defeat it. That is, *if* the property theory meant that anything labeled “property” was categorically exempt from First Amendment scrutiny, then it would be so manifestly unreasonable that no one would or should subscribe to it. But the absolutist version of the property theory is not reflective of existing law, either as applied to copyright or in the broader fabric of the First Amendment. In short, the critics are attacking a strawman.<sup>107</sup>

What the *Marsh* exception shows is that the property theory accommodates a balance between respect for property rights and free speech values. One might still argue that courts are *insufficiently* protective of free speech values, but at that point the question becomes one of degree, with no clear principled line on what the right balance should be. The critics have thus far eschewed such a messy line-drawing argument in favor of portraying the property theory as accommodating no balancing at all,<sup>108</sup> and to that extent the *Marsh* doctrine refutes their argument.

A remaining counterargument is that the *Marsh* doctrine is so infrequently applied that it has been de facto overruled.<sup>109</sup> It is true

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106 Lemley & Volokh, *supra* note 3, at 182–83 (arguing that the property theory would allow Congress to label the flag as property); Rubinfeld, *supra* note 2, at 27 (“The unthinking defense runs as follows. Major premise: [t]here is no First Amendment right to trample on other people’s property. Minor premise: [c]opyright is property. Conclusion: [a] copyright infringer can have no First Amendment defense.”); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1097 (2003) (stating that the property theory rests on an “assertion [ ] that intellectual property rules are per se proper”); *see also* Lawrence Lessig, *Re-crafting a Public Domain*, 18 YALE J.L. & HUMAN. 56, 81 (Supp. 2006) (“The ordinary [layperson’s] view about property is binary at its core. Limits or subtle restrictions on the scope or strength of ‘copyright’ are not internalized within this view.”).

107 In fairness, some commentators do take the absolutist position. *See* James L. Swanson, *Copyright Versus the First Amendment: Forecasting an End to the Storm*, 7 LOY. L.A. ENT. L.J. 263, 265, 291–93 (1987) (arguing “we must not, under any circumstances, recognize a First Amendment privilege to copyright” because it “[a]ttacks the [p]roperty [r]ight [b]asis of [c]opyright [l]aw”). But my point is that the absolutist position is not reflective of existing law. Attacking only the most extremist version of a theory while ignoring the more reasonable version—especially when the more reasonable version reflects existing law—is attacking a strawman.

108 *See, e.g.*, Lessig, *supra* note 50, at 1068 (characterizing the property theory as implying that copyright deserves “absolute and permanent protection”); Volokh, *supra* note 106, at 1097 (stating that the theory implies that all intellectual property is “per se proper”).

109 *See* Wayne Batchis, *Business Improvement Districts and the Constitution: The Troubling Necessity of Privatized Government for Urban Revitalization*, 38 HASTINGS CONST. L.Q. 91, 129 (2010) (arguing that *Marsh*’s holding is “a virtual nullity”).

that *Marsh* is infrequently applied, but there is no reason to think that this is because its principle—that First Amendment scrutiny will attach when a property owner possesses overwhelming power as to be able to block all reasonable avenues of expression—lacks continuing legal validity.<sup>110</sup> Rather, the *Marsh* doctrine is not frequently applied simply because, in the tangible property context, it is intrinsically rare that anyone will own so much land or goods as to pose this kind of real and substantial threat to free speech.<sup>111</sup> If Occupy Wall Street cannot protest inside Goldman Sachs headquarters, it can protest outside on the public street, which is only slightly less effective in terms of communicating its message. In the context of tangible property, it takes something akin to a company town—where there is *no* public sidewalk—for the threat to free speech to be a sufficiently substantial one.<sup>112</sup>

### III. APPLYING THE PROPERTY THEORY TO COPYRIGHT LAW

Part II described the First Amendment treatment of non-copyright property, from which two principles emerged. The first principle is that the private enforcement of a property right is generally exempt from First Amendment scrutiny, provided that the government-created rules of the property system are content and viewpoint neutral at the systemic level. The second principle is that this exemption is not absolute: in situations where a property owner possesses overwhelming economic power and can eliminate all alternative avenues of expression, First Amendment scrutiny will still attach.

In this Part, I will show how these two principles, which together I call the property theory, both explain and justify the current state of the law pertaining to the relationship between the First Amendment and copyright. Properly understood, copyright is not a “giant First Amendment duty-free zone” where the normal principles of First

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110 See Louis Michael Seidman, *The Dale Problem: Property and Speech Under the Regulatory State*, 75 U. CHI. L. REV. 1541, 1550 (2008) (stating that “*Marsh* has never been overruled, and remnants of the *Marsh* approach continue to influence some corners of free speech jurisprudence”); *id.* at 1577–83 (arguing that *Marsh* continues to influence free speech jurisprudence, including in the context of copyright).

111 See Rubinfeld, *supra* note 2, at 28 (arguing that tangible property has intrinsic limits, but copyright does not).

112 See *Lloyd Corp. v. Tanner*, 407 U.S. 551, 561–62 (1972) (distinguishing *Marsh* because it involved a situation where, because “title to the entire town was held privately, there were no publicly owned streets, sidewalks, or parks where [free speech] rights could be exercised”).

Amendment jurisprudence fail to apply.<sup>113</sup> Instead, when viewed through the lens of the property theory, the normal principles of First Amendment jurisprudence support both (1) exempting private enforcement of copyright rights from First Amendment scrutiny, and (2) conditioning this exemption on the continued existence of an idea/expression dichotomy and a fair use defense. In other words, the property theory provides a powerful descriptive explanation for current law; one that is much superior to the Framers' intent theory that the Supreme Court has relied upon.

A. *The Copyright System Is (Mostly) Content Neutral*

The first principle of the property theory is that the private enforcement of a property right (such as trespass actions for real property) is generally exempt from First Amendment scrutiny if the government-created rules of the property system are content and viewpoint neutral. Copyright conforms to this principle. Like real property law, copyright is content and viewpoint neutral at the systemic level: anyone can obtain a copyright without regard to the content of what is being protected, and the scope and duration of copyright protection does not discriminate between different types of speech. At least since the 1976 Copyright Act, copyright protection has been *automatic*<sup>114</sup>: 17 U.S.C. § 102 vests copyright protection in all works of authorship that are fixed in a tangible medium,<sup>115</sup> without regard to what the work says; and § 106 creates a neutral rule that forbids the reproduction of a copyrighted work,<sup>116</sup> again without regard to what the specific work actually says. A book that criticizes the U.S. government is just as protected by copyright as a book that praises the government. Nor does the copyright system—at least generally speaking—discriminate between different types of content: a trashy novel or pornographic movie is protected against copying just as much as a work of high art.<sup>117</sup>

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113 Rubinfeld, *supra* note 2, at 3; *see* Netanel, *supra* note 3, at 37 (arguing copyright currently enjoys “sui generis” treatment).

114 *See* Berne Convention for the Protection of Literary and Artistic Works art. 5(2), Sept. 9, 1886, 1161 U.N.T.S. 3 (revised July 24, 1971) (forbidding formalities and requiring automatic copyright protection).

115 17 U.S.C. § 102(a) (2006) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . .”).

116 *Id.* § 106.

117 This is an overgeneralization. As I discuss in Section IV.B, the copyright system is not completely content neutral, even at the level of the statutory enactment. *See infra* text accompanying notes 181–83.

This feature of copyright is shared by most other property systems (e.g., personal property law forbids someone else from burning your book, without regard to what the book says or whether the burner intends to communicate a message by destroying your book), and not uncoincidentally such property systems are generally exempt from First Amendment scrutiny. But it powerfully distinguishes copyright law from libel law—and libel law is the critics' favorite analogy.<sup>118</sup> Libel law, as discussed above, is neither content nor viewpoint neutral at the systemic level.<sup>119</sup> The rules of libel law require a challenged statement to be “defamatory”—they only make injuring reputation unlawful and not enhancing reputation.<sup>120</sup> Copyright law makes *all* reproduction of a protected work an infringing act,<sup>121</sup> whether the copying benefits the copyright owner or hurts him.<sup>122</sup> To be sure, at a bottom line level the results tend to have a certain similarity—copyright owners are more likely to bring suit against people who disparage their work than people who praise it—but there is a key difference in terms of governmental action. In libel law, the discrimination between favored and disfavored speech is built into the legal rule itself: *the government* mandates only criticism and not praise will be punished. In copyright law and real property law, the discrimination is as a result of private choices. Those choices may be somewhat predictable as a practical matter, but they are not a direct product of government mandate.

As I will discuss in Section IV.B, the copyright system is not *completely* content neutral, even at the level of the statutory enactment. Specifically, the Copyright Act delineates various carve-outs from copyright protection,<sup>123</sup> and some of these carve-outs are content specific. But these exceptions do not detract from the main point: the copyright statute is mostly content neutral, and the parts where it is content specific have not been the focus of the arguments against copyright's constitutionality. My goal is substantially met if the reader concludes that copyright is generally constitutional, even if some of

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118 See Baker, *supra* note 11, at 905.

119 See *supra* text accompanying notes 92–100.

120 See RESTATEMENT (SECOND) OF TORTS § 559 (1977). Indeed, libel law even picks and chooses between the types of reputation to protect. See, e.g., *id.* cmt. e, illus. 3 (explaining that a gang member's reputation for loyalty to the gang is not protected).

121 17 U.S.C. § 106.

122 With one important qualification: The doctrine of fair use grants stronger protection to criticism of a copyrighted work than to praise. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580–82 (1994). On why this does not make copyright law unconstitutional, see *infra* text accompanying notes 194–97.

123 See 17 U.S.C. §§ 107–122.

the content specific carve-outs from copyright protection might be invalid. It is worth noting that such a conclusion would likely result in *broader* copyrights, which contradicts the general thrust of First Amendment arguments against copyright law.<sup>124</sup>

*B. The Idea/Expression Dichotomy and the Fair Use Defense Serve as Safeguards Against Overwhelming Ownership Power*

Even when a property system is speech-neutral at a systemic level, the property theory does not say that the inquiry is always at an end. As we have seen, the First Amendment still demands that there be some protection for free speech against overwhelming private economic power<sup>125</sup>—at least in instances where the private power is so pervasive as to foreclose alternative avenues of expressing a particular message. In the context of tangible property rights, this protection is often *intrinsic*: it is intrinsically difficult for anyone to own enough land or tangible property as to control all potential avenues for communicating a particular message. And because the problem of overwhelming ownership power is intrinsically unlikely to occur, the law needs few doctrinal safeguards against it. For this reason, *Marsh* is a narrow and rarely applied doctrine in the tangible property context.

Copyright is not subject to the same intrinsic limits. As Jed Rubenfeld has observed,

A copyright owner's power over speech applies to the public at large, anywhere and everywhere. While a homeowner may block certain texts from being recited on his premises, a copyright owner can block certain texts from being published, copied, or recited by virtually anyone, in public and often in private.<sup>126</sup>

As I will explain, Rubenfeld draws too broad a conclusion from this observation—he concludes that “[c]opyright cannot be constitutionally justified by analogy to ordinary property law”<sup>127</sup>—but the observation itself is correct. Unlike tangible property, copyright law lacks intrinsic limits on its economic scope.<sup>128</sup> And without some

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124 See David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281, 282 (2004) (arguing that the First Amendment argument against copyright is motivated by a concern about excessively broad copyright protection).

125 See *supra* Section II.B.

126 Rubenfeld, *supra* note 2, at 29.

127 *Id.* at 30.

128 To use a popular phrase, there are no “[s]idewalks in [c]yberspace” to provide readily available alternative forums for expression. Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1535 (1998); Noah D. Zatz, Note, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH. 149, 149 (1998).

limit, private ownership power will pose an unacceptable threat to free speech values.<sup>129</sup>

But although copyright has no intrinsic limits, it has doctrinal limits that serve to limit the economic scope of a copyright monopoly. The two doctrinal safeguards against excessively broad copyright scope are well known. The first is the idea/expression dichotomy: A copyright does not prevent other people from speaking in general, or even talking about a copyright holder's idea.<sup>130</sup> It prevents only the reproduction of the copyright holder's particular expression of the idea. This is not to say that copyright scope is narrowly confined to slavish photocopying—it is not—but only to say that the idea/expression dichotomy imposes an important limit on the scope of the copyright monopoly and reduces its footprint on the ability of others to convey a particular message.<sup>131</sup>

The second doctrinal limit is the fair use defense.<sup>132</sup> Even with the ability to copy the idea, sometimes it is impossible to convey a particular political message without copying someone's expression. For example, if I want to criticize Professor X's argument, it is often impossible to do so persuasively without quoting Professor X's words, which in the absence of a fair use defense would be copyright infringement.<sup>133</sup>

What emerges is that the doctrinal limits that address the concern over excessive private ownership power are precisely those that the Supreme Court has identified as conditions for copyright's continued exemption from the First Amendment. Contrary to Rubinfeld, the analogy between copyright and ordinary property is not defeated simply by pointing to the fact that tangible property has an intrinsic limit (i.e., nobody is likely to own enough land to be able to stifle all reasonable alternative forums for expression) while copyright does not. All this difference means is that the law must impose some *substitute* limit that performs the same function in terms of safeguarding against excessive private ownership power. The idea/expression dichotomy

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129 Jay Thomas has similarly argued that patents provide excessive private control over liberty interests. See John R. Thomas, *Liberty and Property in the Patent Law*, 39 HOUS. L. REV. 569, 618–19 (2002).

130 See 17 U.S.C. § 102(b) (2006).

131 See generally *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (Hand, J.) (discussing the difficulty that “the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations,” but, “as soon as literal appropriation ceases to be the test,” the limit of copyright scope becomes unclear).

132 See 17 U.S.C. § 107.

133 See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580–81 (1994) (holding parodies to be fair use because “[p]arody needs to mimic an original to make its point”).

and the fair use defense perform this function, and they are thus required by the property theory.

It should be clear what the property theory contributes here. The notion that the idea/expression dichotomy and the fair use defense balance copyright incentives against the harms of excessive ownership power—and thus serve to safeguard free speech values against excessive ownership power—is not new. This concept of “definitional balancing” was explained by Melville Nimmer in his original 1970 article,<sup>134</sup> and has been cited numerous times by the Supreme Court since.<sup>135</sup> The problem has always been that Nimmer justified definitional balancing on purely results-oriented grounds: he argued that copyright should be exempt from the First Amendment, so long as it had an idea/expression dichotomy and a fair use defense, *merely* because this setup created a good policy result.<sup>136</sup> There is no explanation from the perspective of traditional legal theory on how this outcome can be deduced from the ordinary principles of legal analysis.<sup>137</sup> The Supreme Court later tried to plug this theoretical gap with the Framers’ intent theory—supposedly the idea/expression dichotomy and the fair use defense are the “traditional contours of copyright”—but its attempt was strikingly unconvincing.<sup>138</sup>

What the property theory contributes is a way to plug the theoretical gap. The property theory shows that conditioning copyright’s exemption from the First Amendment on the continued existence of an idea/expression dichotomy and a fair use defense is not unprincipled or made up from thin air. Rather, it is entirely consistent with the principles that can be found in the broader body of First Amendment jurisprudence, which always conditions an exemption from First Amendment scrutiny—for any form of property, including real property—on safeguards against excessive private ownership power. In this way, the property theory provides a coherent framework to explain why the idea/expression dichotomy and the fair use defense are the conditions for a First Amendment exemption. It shows that

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134 Nimmer, *supra* note 19, at 1184, 1189–93; see Goldstein, *supra* note 67, at 1006–07 (arguing that the “copyright statute reflects a reasoned compromise between” free speech values and incentives for creating new works).

135 See, e.g., *Golan v. Holder*, 132 S. Ct. 873, 890 (2012); *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985).

136 Nimmer, *supra* note 19, at 1192 (placing emphasis on idea/expression dichotomy to safeguard free speech values); see Goldstein, *supra* note 67, at 1011 (identifying fair use as an important safeguard for free speech values).

137 See *supra* text accompanying notes 26–29.

138 *Eldred*, 537 U.S. at 221; see *supra* Section I.C.

the Court's doctrine in this area is not an unprincipled departure from the greater body of First Amendment law.

A reader might ask, why the idea/expression dichotomy and fair use defense but not other limits on copyright scope? For example, copyright scope has long been limited by the first-sale defense,<sup>139</sup> and the modern copyright statute contains numerous additional specific limits on copyright scope, such as allowing the production of copies in specialized formats for blind people.<sup>140</sup> But one cannot logically derive that kind of highly specific limitation on copyright scope from the content of existing First Amendment doctrine.<sup>141</sup> *Morse* can be quite plausibly read to stand for a general principle that there must be some general limit on private ownership power, and limits such as the idea/expression dichotomy and the fair use defense correspond well to that principle.<sup>142</sup> In contrast, the kind of highly specific rule that comprises the first-sale doctrine cannot be logically derived from the holding of *Morse*. The fact that the idea/expression dichotomy and fair use defense are highly amorphous is usually considered a defect, and the vague nature of these doctrines do cause many problems in other contexts; but in terms of doctrinal fit with existing First Amendment doctrine, the flexibility of the idea/expression dichotomy and fair use defense is an important advantage.

### C. Payoffs

So what are the payoffs of applying the property theory to copyright? Initially, the payoffs are descriptive. As this Article has explained, the property theory provides a coherent framework within which to view the existing law. It explains both why copyright is generally exempt from First Amendment scrutiny (because it is a property system that is content and viewpoint neutral at the systemic level), as well as why this exemption is conditioned on the continued existence of the idea/expression dichotomy and the fair use defense (because

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139 See 17 U.S.C. § 109 (2006); *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350 (1908) (recognizing the first-sale defense).

140 See 17 U.S.C. § 121. See generally *id.* §§ 108, 110–22 (delineating the scope of and limitations on exclusive rights in copyrights).

141 See McGowan, *supra* note 124, at 284 (arguing that the First Amendment does not contain “principles a judge could actually use to limit Congress’s power over copyright”).

142 See *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (describing the flexibility of the idea/expression dichotomy); William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 CAL. L. REV. 1639, 1645 (2004) (arguing that a “redeeming feature[ ]” of fair use in solving the problem presented by *Eldred* is its flexibility).



those doctrines provide an essential safeguard against overwhelming ownership power). In this way the property theory provides an explanation for all the major elements of the modern doctrine surrounding the relationship between copyright law and the First Amendment.

Beyond simply providing a descriptive understanding, the property theory has an implication for the scholarly literature: it provides a refutation of the critique that the copyright exemption is an exceptional and unprincipled carve-out from the larger body of First Amendment jurisprudence. What the property theory illustrates is that, properly understood, courts have not treated copyright as a “giant First Amendment duty-free zone”<sup>143</sup> and have not given it “sui generis” treatment.<sup>144</sup> Instead, copyright has been subject to the same limitations as any other system of property.

Another important point here is that the property theory is not the absolutist copyright-expanding theory that its critics suppose. As I have explained, the property theory does in fact have internal limits that protect free speech interests. This is important because it holds out some potential for reconciliation between the opposing viewpoints in this debate.<sup>145</sup> At a fundamental level, the critics’ ultimate position does not appear to be that all copyright protection is categorically unconstitutional (a position that really is incompatible with the property theory), but only that existing law strikes the balance too much in favor of copyright holders.<sup>146</sup> Nothing in the property theory, however, dictates that copyright protection must be broad. The fact that *judges* have applied the property theory in a copyright-expanding manner says more about the ideological leanings of the current federal judiciary than it does about the property theory—judges who are ideologically inclined towards broad copyright holder rights can reach that outcome whatever the formal level of scrutiny.<sup>147</sup> If the ultimate goal of those attacking the property theory is to achieve

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143 Rubinfeld, *supra* note 2, at 3.

144 Netanel, *supra* note 3, at 37.

145 See Hanoch Dagan, *Property and the Public Domain*, 18 *YALE J.L. & HUMAN.* 84, 84 (2006) (observing that “[f]riends of the public domain are typically suspicious of property-talk,” but arguing they should not be).

146 See Mark A. Lemley, *The Constitutionalization of Technology Law*, 15 *BERKELEY TECH. L.J.* 529, 530–31 (2000) (arguing expansion of intellectual property rights strains their “uneasy truce” with the First Amendment); Lessig, *supra* note 50, at 1062, 1070–73 (arguing modern copyright is too strong); Netanel, *supra* note 3, at 13 (“[T]oday’s capacious copyright bears scant resemblance to the narrowly tailored, short-term right in force when Nimmer wrote his article.”).

147 Cf. *Grutter v. Bollinger*, 539 U.S. 306, 387 (2003) (Kennedy, J., dissenting) (accusing majority of surreptitiously watering-down the strict scrutiny test).

narrower copyright rights,<sup>148</sup> then my analysis suggests that they are aiming at the wrong target.

To be sure, there are two differences between the property theory and the critics' preferred approach. The first difference is the relevant legalistic label. My approach uses the internal doctrines of copyright law to modulate the balance between private ownership and free speech values, while the critics would generally prefer to use something external to copyright law—such as direct application of First Amendment scrutiny—to do so.<sup>149</sup> Although this is largely a labeling difference, the labels do matter, and they lead to the second difference: as a practical and political matter, courts are likely to be more protective of copyright owners if the inquiry is done under the internal rubric of the idea/expression dichotomy and fair use,<sup>150</sup> while they are likely to be more protective of free speech values if the inquiry is done under the external rubric of strict scrutiny. This is because there is a subtle shift of the mental baseline: framing the issue under the rubric of copyright law naturally presents free speech policy concerns as a limited exception to more general copyright rights, while framing the issue under the rubric of First Amendment law naturally presents copyright policy concerns (e.g., the need for incentives to create new works) as a limited exception to more general free speech values.<sup>151</sup>

But while there is a *rhetorical* and *political* difference, there is no *logical* difference between the two framings. At bottom, both approaches accommodate a balance between copyright policy concerns and free speech policy concerns. And if the critique of the property theory is no longer based on logic and principle but is instead solely about the likely political effects, then much of the force of the critique dissipates.

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148 See McGowan, *supra* note 124, at 281–83 (suggesting that proponents of First Amendment scrutiny are primarily motivated by the perception that “Congress is simply a tool rich media conglomerates use to soak consumers”).

149 Wendy Gordon has previously made a similar point, in arguing for “develop[ing] limits for intellectual property, and concomitant protections for expressive activity, that are *internal* to the definition of property rights themselves.” Gordon, *supra* note 28, at 1607. Her approach, however, relies on a highly detailed (and highly contested) natural law theory of intellectual property rights, which this Article eschews. See *id.* at 1535.

150 See Netanel, *supra* note 3, at 12–23 (calling the protection offered by the fair use defense and the idea/expression dichotomy “[i]ncreasingly [t]enuous”).

151 See generally Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874–75 (1987) (discussing how the choice of baseline affects legal analysis).

## IV. ADDRESSING OBJECTIONS

A. *Copyright Is Not Property*

The most frequent objection that I have received from commentators is that copyright should not be considered “property,” and thus comparing copyright to the First Amendment treatment of tangible property is misguided. Given that there is a longstanding debate among property theorists over whether copyright should be considered property,<sup>152</sup> my assumption on this point may appear to be an unsubstantiated leap of logic.

My response is that I assume copyright is property because the proponents of copyright’s unconstitutionality generally make the same assumption. And this assumption is crucial to their argument. Without the assumption that copyright is property, the conventional argument against copyright’s constitutionality cannot be sustained.

This requires some explanation. As a predicate matter, it is important to understand that the conventional argument against copyright’s constitutionality is *doctrinal* in nature. The argument is that copyright is unconstitutional under the letter of standard First Amendment doctrine, not its underlying policy rationale.<sup>153</sup> Jed Rubenfeld explicitly acknowledges this facet of his argument,<sup>154</sup> but it is implicit in those of other critics as well. For example, Lemley and Volokh argue that copyright is content discriminatory and thus should be subject to strict scrutiny, invoking the doctrinal rule that content discriminatory laws are subject to strict scrutiny.<sup>155</sup> But they do not look to the underlying policy rationale for this rule; doing so would undermine their argument. The policy rationale for the rule that content discriminatory laws are subject to strict scrutiny is that it serves as a prophylactic measure against the possibility of viewpoint discrimination—once the government looks at the content of a communication, it might then be able to protect favored views and censor

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152 For some entries in this enormous literature, see, for example, Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1 (2004); Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J.L. & PUB. POL’Y 108 (1990); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005); Adam Mossoff, *Is Copyright Property?*, 42 SAN DIEGO L. REV. 29 (2005); Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742 (2007).

153 See Rubenfeld, *supra* note 2, at 58–59 (“I make no claim about whether this result would be good or bad policy. The result is not supposed to follow from policy considerations. It is supposed to follow from constitutional considerations . . .”).

154 See *id.*

155 Lemley & Volokh, *supra* note 3, at 185–86.

disfavored views.<sup>156</sup> But even Lemley and Volokh acknowledge that copyright is not viewpoint discriminatory,<sup>157</sup> so if the argument depended on underlying policy, there would be little reason to find copyright unconstitutional. The critics' argument is that one should follow the black letter rule without ad hoc policy analysis,<sup>158</sup> because doing otherwise creates an unprincipled and results-oriented carve-out that invites every special interest group to make policy arguments supporting their own little pet carve-outs.<sup>159</sup> This is what the critics mean when they criticize "[c]opyright [e]xceptionalism."<sup>160</sup>

I fully agree with this doctrine-based approach. Not only is a First Amendment policy analysis prone to interest group lobbying concerns, in the context of copyright's constitutionality it also runs straight into a theoretical and empirical impasse. In a policy debate, the argument against copyright's constitutionality ultimately must be that—as a matter of first principles and without piggybacking on doctrine—copyright law violates the “correct” free speech balance between authorial incentives to create original speech and subsequent access to that speech.<sup>161</sup> The argument in favor of copyright's constitutionality must likewise ultimately be that current copyright law reflects the “correct” balance or falls within some zone of congress-

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156 See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 456 (1998) (“[T]he Court uses content-discrimination as a proxy for what may be its ultimate concern: regulations that strike at speech because it expresses a disfavored view.”); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 198–200 (1988) (arguing that the Court imposes heightened scrutiny for content discrimination because a content-based measure “is too likely to have been influenced by the legislature’s hostility to the speech in question”).

157 See Lemley & Volokh, *supra* note 3, at 186 (“It’s true that copyright law draws no ideological distinctions . . .”).

158 See *id.* (emphasizing that content discrimination, even without viewpoint discrimination, is enough to violate First Amendment doctrine).

159 See *id.* at 198 (“Exempting restrictions such as copyright law—which is largely identified with rich and powerful interests—from the ‘normal’ rules of the First Amendment throws the legitimacy of free speech protection into question.”); see also *supra* text accompanying notes 24–29 (collecting arguments against copyright exceptionalism).

160 Bohannon, *supra* note 27, at 1115–16; see also Gordon, *supra* note 28, at 1537 (arguing First Amendment law should “subject intellectual property to the same free speech principles” as apply elsewhere); Lemley & Volokh, *supra* note 3, at 197–98 (arguing “[a]gainst [s]pecial [p]leading for [c]opyright”).

161 One can short-circuit the empirical problems by arguing that the constitutionally mandated balance is to permit no restriction on subsequent access whatsoever. But one would need a very ambitious (and I think implausible) theory of constitutional interpretation to reach that conclusion.

sional discretion.<sup>162</sup> The theoretical questions are daunting because one's views about how to define the "correct" balance (and the zone of congressional discretion, if any) depend on one's theory of constitutional interpretation, which is a source of perennial disagreement. The empirical questions are practically impossible to resolve because nobody really knows even what the real-world balance in today's copyright regime is,<sup>163</sup> let alone what the balance would look like in a counter-factual world with stronger First Amendment scrutiny. Given these unresolved predicates, the policy argument is unlikely to be resolved anytime soon. The only analytically sound argument that can be made against copyright's constitutionality, given the existing state of knowledge, is one based on doctrine.<sup>164</sup>

Given the doctrinal premise,<sup>165</sup> the critics of copyright's constitutionality *must* assume that copyright is property. As a matter of doctrine, the status of copyright as property is well settled.<sup>166</sup> It is true that property scholars continue to debate the question as a matter of theory and policy. But the critics of copyright's constitutionality cannot make free-floating arguments based on theory and policy—at least not without contradicting the premise of their main argument.

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162 See Nimmer, *supra* note 19, at 1192 ("I would conclude that the idea-expression line represents an acceptable definitional balance . . .").

163 See Richard A. Posner, *Intellectual Property: The Law and Economics Approach*, 19 J. ECON. PERSP. 57, 59 (2005) ("[E]conomists do not know whether the existing system of intellectual property rights is . . . a source of net social utility . . ."); George L. Priest, *What Economists Can Tell Lawyers About Intellectual Property: Comment on Cheung*, in 8 RESEARCH IN LAW AND ECONOMICS 19, 21 (John Palmer & Richard O. Zerbe, Jr. eds., 1986) (describing "[t]he inability of economists to resolve the question of whether activity stimulated by the patent system or other forms of protection of intellectual property enhances or diminishes social welfare").

164 I admit to some status quo bias here. Like the policy case against copyright's constitutionality, the policy case in favor of copyright's constitutionality also depends on unresolved theoretical and empirical predicates. But I think it reasonable to say that those who wish to change existing doctrine based on a policy argument would bear the burden of proof.

165 Lemley and Volokh are hardly alone in implicitly assuming the correctness of doctrine. Virtually every critic invokes *New York Times v. Sullivan* without conducting a first-principles analysis of its correctness. See Baker, *supra* note 11, at 905.

166 See *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127–28 (1932) (holding that copyright is private property of the owner and not an instrumentality of the United States); *Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir. 1983) ("An interest in a copyright is a property right protected by the due process and just compensation clauses of the Constitution."); see also *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (analogizing copyright infringement to breaking and entering, and stating that neither activity is privileged by the First Amendment); Lessig, *supra* note 106, at 80 (acknowledging that "in the United States, there is no ambiguity about whether copyright is property").

Procedural objections aside, I have no substantive objection to an argument that copyright should not be considered property as a matter of free-floating theory and policy. The debate over whether copyright is property is far too complex for me to resolve here. My point is purely about consistency. If a critic argues that copyright is not property based on first principles (and contrary to standard doctrine), then that critic must also argue that copyright is unconstitutional based on first principles, without piggybacking on standard doctrine. Given the numerous theoretical and empirical quagmires, I do not believe the latter argument has been convincingly made.

There is one final point to add. Even if one believes, as a matter of first principles, that copyright ought not be considered property, my argument is still important because it provides a limited defense of judges and their actions. If the only objection to my analysis is that copyright should not be considered property, then the failure of courts to apply strict scrutiny to copyright law is, at most, an understandable mistake: courts *think* that copyright is property and accordingly exempt it from First Amendment scrutiny, when the “best” theoretical answer is that copyright is not property. This is a far cry from how the literature usually portrays the issue, which is that judges are engaging in an inexplicable, aberrational, and clearly wrong carve-out from the First Amendment, and that the obvious inference is that they are doing so at the behest of rich copyright-holding interests.<sup>167</sup> At an absolute minimum, my analysis shows that the property theory is not a “non sequitur” and is a reasonable (if normatively contestable) argument, and that the literature’s cavalier dismissal of it is therefore unwarranted.

### B. *Copyright Is Content Based*

A common argument among critics of the First Amendment exemption for copyright is that copyright law is content based, and content-based restrictions are generally subject to strict scrutiny.<sup>168</sup> What these critics generally mean is that copyright *enforcement* is content based. As Lemley and Volokh explain the argument, the key is

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167 See Lemley & Volokh, *supra* note 3, at 198 (“Exempting restrictions such as copyright law—which is largely identified with rich and powerful interests—from the ‘normal’ rules of the First Amendment throws the legitimacy of free speech protection into question.”).

168 See, e.g., *id.* at 206 (“[I]ntellectual property rights, unlike other property rights, are a form of content-based, government-imposed speech restriction.”); Rubinfeld, *supra* note 2, at 5 (“[A] core doctrinal premise of modern First Amendment law is that content-based speech restrictions must satisfy strict scrutiny.” (internal quotation marks omitted)).

that “[c]opyright liability turns on the content of what is published.”<sup>169</sup>

It is true that, at the level of individual enforcement, copyright liability turns on the content of what is published. Specifically, infringement liability is usually determined by looking to whether the content of what is published by the accused infringer is substantially similar to what was originally published by the copyright holder.<sup>170</sup> But, as previously explained,<sup>171</sup> the level of individual private enforcement is not the correct level of abstraction to judge compliance with the First Amendment.<sup>172</sup> The First Amendment prohibits only *Congress* from enacting *laws* that abridge the freedom of speech. An individual copyright grant, or an individual copyright enforcement lawsuit, is not a “law” passed by Congress. Because copyright grants are automatic,<sup>173</sup> the creation and enforcement of an individual copyright involves no state action;<sup>174</sup> the state action occurs only in the passage of the Copyright Act of 1976. And, as explained above, the Copyright Act of 1976 is generally not content or viewpoint discriminatory.<sup>175</sup>

Critics who analogize the copyright statute’s prohibition on copying to more typical content-based laws (such as laws against obscenity

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169 Lemley & Volokh, *supra* note 3, at 186; see Rubinfeld, *supra* note 2, at 5 (giving an enforcement-based example that “[y]ou cannot begin to tell if *The Wind Done Gone* infringes without reading it, understanding it, and comparing its content to that of *Gone with the Wind*”).

170 See *Nova Design Build, Inc. v. Grace Hotels, LLC*, 652 F.3d 814, 817 (7th Cir. 2011) (“Because direct evidence of the copying of protectable elements of a copyrighted work is usually unavailable, copying may be inferred where the ‘defendant had access to the [plaintiff’s] work and the [putatively infringing] work is substantially similar to the [plaintiff’s] work.’” (alterations in original) (quoting *Incredible Techs., Inc. v. Virtual Techs., Inc.*, 400 F.3d 1007, 1011 (7th Cir. 2005))); *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 532 (5th Cir. 1994) (“As direct evidence of copying is uncommon, plaintiffs generally demonstrate copyright infringement indirectly or inferentially by proving that (1) defendants had access to the copyrighted works, and (2) there is a substantial similarity between infringed and infringing works.”).

171 See *supra* Section III.A.

172 See SUNSTEIN, *supra* note 83, at 205; cf. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (stating that copyright law is a “generally applicable law[ ]” that does “not offend the First Amendment simply because [its] enforcement against the press has incidental effects on its ability to gather and report the news”).

173 See 17 U.S.C. § 302(a) (2006) (establishing that copyright subsists automatically from the creation of a work).

174 In this respect, copyright law differs crucially from patent law. The issuance of an individual patent does involve state action. See 35 U.S.C. §§ 131, 153 (2006) (providing for individualized examination and issuance of patents).

175 See *supra* Section III.A.

or defamation) are missing an important conceptual difference between these two categories. A law that broadly prohibits *copying* is neutral as to the content of what is being copied.<sup>176</sup> A law that prohibits obscenity or defamation is not. One literally cannot know whether something is obscene or injurious to reputation without actually viewing its content.<sup>177</sup> In contrast, one can, at least in theory, know that copying has occurred without considering the content of what is being copied. For example, if a defendant photocopies a page of a book, copying has occurred—and we know this to be the case even without knowing the content of what has been copied.<sup>178</sup> A law that prohibits *copying* is therefore content neutral at the level of the legal prohibition. And the copyright statute is such a law because it forbids the copying of nearly<sup>179</sup> everything that has been fixed in a tangible medium in at least the last seventy years.<sup>180</sup> The copyright statute does not merely prohibit the copying of *my* work; it prohibits the copying of *all* works. The fact that individual instances of copyright enforcement usually ask a more content-specific question (whether *my* work has been copied) is beside the point.

One qualification to what I have said above is that, even at the level of the copyright statute, copyright law in fact does make distinc-

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176 It is true that a law prohibiting copying still has an influence on the proverbial “marketplace” for speech, in that overall it pushes the market towards some kinds of expression (original expression) and away from others (repetition of prior expression). But this does not make a law “content discriminatory” in the relevant sense, because virtually every law has that effect: a law against loud sounds will push the marketplace away from some kinds of expression (rock concerts) and not others.

177 See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (articulating the standard for obscenity as “I know it when I see it”).

178 Rubinfeld concedes that “perfect reproduction can be demonstrated without anyone understanding the speech in question.” Rubinfeld, *supra* note 2, at 49. But he argues that imperfect reproduction cannot. *Id.* This is wrong; both perfect and imperfect reproduction can be demonstrated without anyone understanding the speech in question. For example, a photocopier with insufficient toner will produce an imperfect copy, but one does not need to see the content of the resulting copy to realize it is derived from the original.

179 It is true that the copyright law does not forbid absolutely all copying. But the exception is that copyright law permits copying of ideas and fair uses. See *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1165 (9th Cir. 1977) (“When the court . . . refers to ‘copying’ which is not itself an infringement, it must be suggesting copying merely of the work’s idea, which is not protected by the copyright.”). As I will explain below, the idea/expression dichotomy and the fair use defense cannot render copyright law unconstitutional. See *infra* text accompanying notes 189–93.

180 See 17 U.S.C. § 106(1) (2006) (establishing copyright protection against reproduction of the work); *id.* § 302 (setting duration of copyright as the life of author plus seventy years).



tions based on content. The clearest examples are the moral rights provisions, which grant works of visual art special protection against changes that are prejudicial to the author's honor or reputation.<sup>181</sup> Content-specific distinctions are also drawn in delineating the various limitations on copyright rights, such as 17 U.S.C. § 110's exemption relating to the performance or display of copyrighted works for teaching purposes,<sup>182</sup> and § 115's and § 116's exemptions relating to non-dramatic musical works.<sup>183</sup> These are content-based differences—one cannot determine whether something is related to “teaching content”<sup>184</sup> or a “dramatic”<sup>185</sup> musical work, or whether a change will be prejudicial to the author's “honor or reputation,”<sup>186</sup> without looking to the content of the work and the allegedly infringing use.<sup>187</sup> But these are not the kinds of content discrimination that the critics have in mind. Nobody argues that copyright law is broadly unconstitutional because of these relatively esoteric provisions. When the critics argue that copyright violates the First Amendment because it is a content-based restriction, they are really pointing to the feature that “[c]opyright liability turns on the content of what is published.”<sup>188</sup> And this argument misses the mark, because it only proves individual enforcement is content specific, and not the copyright *law* enacted by Congress.

A second, perhaps more important, qualification is that the copyright statute is not quite a blanket prohibition on all copying of all works fixed in a tangible medium.<sup>189</sup> Rather, the copyright statute

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181 *See id.* § 106A(a)(3).

182 *Id.* § 110(2)(B).

183 *Id.* § 115 (2006 & Supp. V); *id.* § 116 (2006).

184 *Id.* § 110(2)(B).

185 *Id.* § 115 (2006 & Supp. V); *id.* § 116 (2006).

186 *Id.* § 106A(a)(2), (3)(A).

187 This may be an overly generous concession on my part. There is a great deal of literature that argues that the Court's test for content discrimination is incoherent. *See* Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 113 (1981) (content discrimination doctrine is “both theoretically questionable and difficult to apply” (footnote omitted)); Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 205–06 (1982); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 620 (1991) (“[C]ontent discrimination is not one concept but many.”). One can therefore make a plausible argument that no part of copyright law flunks this incoherent test.

188 Lemley & Volokh, *supra* note 3, at 186; Rubinfeld, *supra* note 2, at 5 n.17 (quoting Lemley and Volokh).

189 *Cf.* 17 U.S.C. § 102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . .”).

expressly permits the copying of ideas<sup>190</sup> and other fair uses of copyrighted works.<sup>191</sup> Both the idea/expression dichotomy and the fair use defense are content discriminatory: one cannot tell whether something is an “idea” or an “expression” without knowing its content, nor can one tell whether a use is “fair” without knowing the content of the use.<sup>192</sup> The fact that the copyright statute explicitly distinguishes between unprotected ideas and fair uses, on the one hand, and protected expression and unfair uses, on the other, makes it content discriminatory on its face. And, unlike the esoteric provisions discussed previously, the idea/expression dichotomy and the fair use defense are central concepts in modern copyright law.<sup>193</sup> They cannot be dismissed as *de minimus* violations.

But the idea/expression dichotomy and the fair use defense cannot be what make the copyright statute unconstitutional under the First Amendment. The speech-protective content discrimination that occurs under the idea/expression dichotomy and the fair use defense is generally understood to be *compelled* by the First Amendment.<sup>194</sup> Compliance with the First Amendment cannot itself be the cause of a law’s unconstitutionality; otherwise the First Amendment becomes a catch-22. For this reason, nobody to my knowledge has ever argued that the idea/expression dichotomy is what makes copyright law unconstitutional.

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190 *See id.* § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea . . .”).

191 *See id.* § 107.

192 *Id.* § 107(2)–(3) (considering “the nature of the copyrighted work” and the “substantiality” of the copying).

193 *See Sag, supra* note 60, at 1371 (“The fair use doctrine is a central part of modern copyright law . . .”); John Shepard Wiley, Jr., *Copyright at the School of Patent*, 58 U. CHI. L. REV. 119, 119 (1991) (describing the idea/expression dichotomy as “the central limit on the extent of copyright protection”).

194 *See Golan v. Holder*, 132 S. Ct. 873, 890 (2012). Although it is most explicitly stated in *Golan*, the understanding that the idea/expression dichotomy and the fair use defense are compelled by the Constitution long predates that case. *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (stating that the idea/expression dichotomy and the fair use defense serve as “First Amendment protections already embodied in the Copyright Act[ ]”); *see also Lee v. Runge*, 404 U.S. 887, 892 (1971) (Douglas, J., dissenting) (“Serious First Amendment questions would be raised if Congress’ power over copyrights were construed to include the power to grant monopolies over certain ideas.”); *N.Y. Times Co. v. United States*, 403 U.S. 713, 726 n.\* (1971) (Brennan, J., concurring) (stating that copyright law has no relevance to a First Amendment dispute because “the [g]overnment . . . is seeking to suppress the ideas expressed”); *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 63 (1911) (upholding copyright law against constitutional challenge because “there is no attempt to make a monopoly of the ideas expressed”).

Jed Rubinfeld does make this argument with respect to the fair use defense.<sup>195</sup> But Rubinfeld's article illustrates precisely what is wrong with the argument: short of abolishing copyright altogether, *any* kind of free speech solution will do almost exactly the same thing as the fair use defense and have the same defect. For example, after criticizing the fair use defense, Rubinfeld proposes a test that would find "pirated" uses to be copyright infringement but not "reimagined" works incorporating new content.<sup>196</sup> But this distinction between slavish piracy and imaginative new creation is strikingly similar to what the Supreme Court has already dubbed the "central" inquiry of fair use analysis: whether an accused work is "transformative" and "adds something new" to the prior copyrighted work.<sup>197</sup> And one cannot determine whether something is "reimagined" without knowing its content—unless "reimagined" simply means independent creation—so Rubinfeld's own proposed test is content discriminatory.<sup>198</sup> In short, Rubinfeld cannot argue that fair use doctrine is unconstitutional without arguing that his own proposal is as well. This is merely an illustration of the broader point: if the kind of speech-protective content discrimination that occurs under the idea/expression dichotomy and the fair use defense makes copyright law unconstitutional, then the First Amendment becomes a catch-22. And if these two doctrines are put aside, then the copyright statute is content neutral at the systemic level.

The same logic also provides a rebuttal to an argument that the copyright statute is unconstitutionally content discriminatory because its protection is limited to "original" works.<sup>199</sup> I have already explained above why copyright law's prohibition on copying is not content discriminatory,<sup>200</sup> but the originality requirement not only requires non-copying but also requires a minimal degree of creativity.<sup>201</sup> The creativity requirement *is* content discriminatory because whether a work is creative cannot be judged without reference to its content. However, because the originality requirement is constitu-

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195 See Rubinfeld, *supra* note 2, at 17.

196 *Id.* at 48–49, 55.

197 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). The Court relies on the distinction to hold that parodies and criticisms of an original work are more likely to be transformative and thus more likely to be fair. See *id.* at 580–82. Yet this is the precise feature of fair use doctrine that Rubinfeld criticizes. See Rubinfeld, *supra* note 2, at 17.

198 Rubinfeld, *supra* note 2, at 55 (proposing that courts compare the two works to determine if the differences are "[t]rivial or obvious").

199 17 U.S.C. § 102(a) (2006).

200 See *supra* text accompanying notes 176–80.

201 *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

tionally mandated by Article I, Section 8, Clause 8,<sup>202</sup> it once again follows that this cannot be what renders copyright law problematic under the First Amendment. If the First Amendment prohibited Congress from discriminating in favor of original works, then Congress could not pass any copyright statute at all (or could do so only under strict scrutiny): a copyright statute that contained an originality requirement would violate the First Amendment, while a copyright statute that did not would violate Article I, Section 8, Clause 8.

### C. *Copyright Is Content Neutral and Subject to Intermediate Scrutiny*

A variation of the prior counterargument is that even if copyright law is content neutral, it is still a law about speech and therefore subject to intermediate scrutiny under *United States v. O'Brien*.<sup>203</sup> I have two responses to this argument.

The first is that there is very little doctrinal support for the proposition that *O'Brien*-type intermediate scrutiny applies to laws granting private property rights, as opposed to regulations of a more direct nature.<sup>204</sup> The facts of *O'Brien* itself concern a law banning the destruction of draft cards, and while it may be argued that a physical draft card is government property, there is no plausible argument that *O'Brien* concerned any property interest in the expressive conduct at issue (i.e., the act of *burning* the draft card). More generally, all manner of uncontroversial private property rights are plausibly characterized as being “about” speech, yet attract no constitutional scrutiny. For example, the common law doctrine of nuisance effectively grants a limited property right over one’s neighbor’s speech, in that it prohibits the neighbor from speaking too loudly,<sup>205</sup> yet no one argues

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202 *Id.* at 346 (“Originality is a constitutional requirement.”).

203 391 U.S. 367 (1968); *see* Netanel, *supra* note 3, at 54–69.

204 Except for the fact that it might be considered to be part of the issue being analyzed (and therefore its correctness need not be taken as a given), the Supreme Court’s decision in *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522 (1987) would be dispositive of this point. In that case, the Court held that “Congress’ decision to grant the USOC a limited property right in the word ‘Olympic’ falls within the scope of trademark law protections, *and thus certainly* within constitutional bounds.” *Id.* at 534 (emphasis added). The Court did not apply intermediate scrutiny, and this would seem to indicate that such scrutiny does not apply to intellectual property rights about speech.

205 *Cf.* Rubinfeld, *supra* note 2, at 25–26 (arguing that “[o]rdinary property law raises no First Amendment problem because it does not render people liable *for* speaking”). Contrary to Rubinfeld, nuisance liability does precisely this. *See* *Christie v Davey*, [1893] 1 Ch. 316 (U.K.) (finding that it was a nuisance to intentionally play loud music to annoy neighbor).

that common law nuisance is subject to intermediate scrutiny.<sup>206</sup> In contrast, a more direct governmental regulation with a substantially similar effect, such as a city ordinance banning loud music in residential neighborhoods, is subject to *O'Brien*-type intermediate scrutiny.<sup>207</sup> The case can therefore be plausibly made that *O'Brien* does not apply to content neutral laws granting private property rights, even if they could be characterized as laws “about” speech.

The second response is that, even assuming *O'Brien*-type intermediate scrutiny applies, copyright law satisfies it. At face value, the *O'Brien* test is quite demanding, requiring that a law be: (1) “justified without reference to the content of the regulated speech,”<sup>208</sup> (2) “narrowly tailored to serve a significant governmental interest,”<sup>209</sup> and (3) “leave open ample alternative channels for communication of the information.”<sup>210</sup> For the reasons explained previously, copyright law clearly satisfies (1) and (3), in that it is justified without reference to the content of the regulated speech and does leave open alternative avenues for communication. However, the requirement of narrow tailoring might be thought to pose problems if applied strictly. That is, although the promotion of “Progress” surely counts as a significant governmental interest,<sup>211</sup> it would be difficult to maintain based on the existing empirical evidence that copyright law is “narrowly tailored” to serve this interest,<sup>212</sup> if we adopted the same standards for narrow tailoring as the Court generally demands in, say, the sex discrimination context.<sup>213</sup>

In practice, however, “narrow tailoring” under *O'Brien* is far less demanding than in virtually any other area.<sup>214</sup> The burden of proof is effectively placed on the *challengers* to show that a challenged law is

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206 For a general discussion of the analogy between nuisance and intellectual property, see Christopher M. Newman, *Patent Infringement as Nuisance*, 59 CATH. U. L. REV. 61 (2009).

207 See *Ward v. Rock Against Racism*, 491 U.S. 781, 789–801 (1989).

208 *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

209 *Id.*

210 *Id.*

211 U.S. CONST. art I, § 8, cl. 8.

212 Priest, *supra* note 163, at 21.

213 See *United States v. Virginia*, 518 U.S. 515, 524 (1996) (requiring an “exceedingly persuasive justification” (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982))).

214 Netanel, *supra* note 3, at 55 (noting that “courts applying the test generally give considerable deference to government regulation” and “the test appears to prohibit only gratuitous inhibitions of speech”).

overbroad and not narrowly tailored.<sup>215</sup> Copyright's challengers will have an extremely difficult time meeting this burden, precisely because nobody really knows what the optimal balance between authorial incentives and free subsequent use lies.<sup>216</sup> Given the extremely deferential nature of the *O'Brien* test as it has been generally applied, it is a mere matter of semantics whether copyright law is said to be subject to no scrutiny at all, or whether it is subject to scrutiny but always passes.<sup>217</sup>

#### D. Copyright Is Nonrivalrous

Another argument that the conventional literature has made against the property theory is that copyright is nonrivalrous.<sup>218</sup> The argument is that violations of copyright do not cause the same degree of injury to the owner as violations of tangible property rights, because a violation of copyright does not deprive the owner of his use of the underlying work.<sup>219</sup>

At bottom, it is difficult to understand this argument as anything other than a covert argument that copyright is not really property.<sup>220</sup>

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215 See *Ward v. Rock Against Racism*, 491 U.S. 781, 801–02 (1989) (rejecting the challengers' argument that the law was not narrowly tailored because challengers produced no evidence of "material impact" on their ability to communicate); see also *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (dismissing argument that regulation was insufficiently narrowly tailored by stating that it represents "no more than a disagreement with the Park Service over how much protection the core parks require or how an acceptable level of preservation is to be attained").

216 See *supra* text accompanying notes 161–63.

217 Netanel, *supra* note 3, at 55 ("From a practical standpoint, if 'intermediate scrutiny' were applied to copyright law with similar laxity, it might not much matter whether copyright were deemed to constitute content-neutral regulation or simply to fall outside the First Amendment scheme."). Netanel resists the conclusion by arguing that more rigorous scrutiny is applied when Congress acts with an improper motive. *Id.* at 59. This argument is contradicted by *O'Brien* itself. The legislative history in *O'Brien* makes clear that Congress had an illicit protest-suppressing motive in prohibiting the destruction of draft cards. Dean Alfange, Jr., *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1, 15. Yet the Court expressly declined to consider this motive and applied a highly deferential test. See *United States v. O'Brien*, 391 U.S. 367, 382–83 (1968).

218 See Bohannon, *supra* note 27, at 1123–24; Lemley & Volokh, *supra* note 3, at 184.

219 See Bohannon, *supra* note 27, at 1124 (arguing "copyright infringement ordinarily does not cause harm by dispossessing the copyright holder of her property"); Lemley & Volokh, *supra* note 3, at 184 ("Generally speaking, writing graffiti on someone else's building damages the building owner in a different way than making a copy of a book injures the author.").

220 I say "covert" because the critics almost always argue that this point stands even if copyright is considered property. See, e.g., Bohannon, *supra* note 27, at 1083

My response to the argument is thus the same: it contradicts the doctrinal premise of the debate.<sup>221</sup> There is no generally recognized First Amendment doctrinal rule that nonrivalrous forms of property should receive less protection than other forms of property.<sup>222</sup> The general rule in constitutional law is that intellectual property is treated the same as other forms of property, notwithstanding its nonrivalrous nature.<sup>223</sup>

What the critics are really making is a policy argument that the doctrine should be changed, and an exception to the standard rules of the First Amendment should be made for copyright, because violations of nonrivalrous copyright property impose less severe harms than violations of rivalrous property. There is nothing intrinsically wrong with this policy argument, but it is not logically consistent with the critics' other doctrinally based arguments. If the critics want a debate about doctrine, they must discard the copyright-is-nonrivalrous argument. Alternatively, if the critics want a policy debate, they must discard all the arguments that take existing doctrine as an implicit premise—such as assuming that content discrimination should be subject to strict scrutiny, that *New York Times v. Sullivan* is correctly

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(“[T]he fact that copyrights are in some sense property does not justify their aberrant treatment.”); Lemley & Volokh, *supra* note 3, at 184 (recognizing that the logical implication of the argument is that copyright is not property, but arguing—without elaboration—that “[w]hether or not that’s correct, the nonrivalrous aspect of intellectual property infringement weakens the property rights argument”).

221 See *supra* Section IV.A. There is one way to understand the argument without it being inconsistent with the doctrinal premise of the debate: The critics may be making a preemptive reply to a hypothetical pro-copyright argument that, even if copyright law is subject to strict scrutiny, it passes such scrutiny because it serves a compelling interest. At *that* point, an argument that copyright infringement causes no real harm has doctrinal relevance. But, if this is the argument, then it is not an objection to my analysis, because the property theory denies that copyright should be subject to strict scrutiny in the first place.

222 Lemley and Volokh cite a single case, *Chavez v. Arte Publico Press*, 157 F.3d 282, 289 (5th Cir. 1998), as supporting their argument. Lemley & Volokh, *supra* note 3, at 184 & n.174. However, soon after the publication of their article, the en banc Fifth Circuit overruled that decision. See *Chavez v. Arte Publico Press*, 180 F.3d 674, 675 (5th Cir. 1999) (en banc).

223 See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (holding that “intangible property rights protected by state law are deserving of the protection of the Taking Clause”); *Consol. Fruit-Jar Co. v. Wright*, 94 U.S. 92, 96 (1876) (“A patent for an invention is as much property as a patent for land.”); *Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir. 1983) (“An interest in a copyright is a property right protected by the due process and just compensation clauses of the Constitution.”); see also *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (analogizing copyright infringement to breaking and entering, and stating that neither activity is privileged by the First Amendment).

decided, and that injunctions against speech ought to be prohibited.<sup>224</sup> And they must also address Nimmer's argument that the current treatment of copyright is wise because copyright incentives are necessary for the greater public good.<sup>225</sup> The point is that it is a mistake of logic to oscillate between a doctrinal argument and a policy argument in the same article.

#### *E. Congress Can Game the Exemption*

A third common counterargument to the property theory is that recognizing a First Amendment exemption for private enforcement of property rights allows Congress to game the system.<sup>226</sup> Lemley and Volokh give the example of a law making the U.S. flag copyrighted in order to prohibit flag burning.<sup>227</sup>

But my argument is not that courts do or should mechanically exempt anything that Congress labels as "copyrighted" from First Amendment scrutiny. My point is that courts should (and do) exempt private enforcement of property rights from First Amendment scrutiny only when (1) the property system is content and viewpoint neutral; and (2) there is sufficient accommodation for alternative avenues of expression on a case-by-case basis. A law that specifically protects the U.S. flag would not be content or viewpoint neutral. Moreover, there would be no accommodation of alternative forums for expression, since presumably the whole point of such a law is to suppress the message of would-be flag burners. In short, the property theory has some inbuilt protections against the potential for congressional gamesmanship.

To be sure, these inbuilt protections are not perfect. But at that point the objection proves too much. Congress can equally game the exemption of tangible property from the First Amendment by vesting physical property in the hands of favored groups (e.g., by gifting the grounds surrounding the Capitol to political allies who then enforce

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<sup>224</sup> I do not mean that a critic cannot ever rely on these propositions. I mean that, before doing so, a critic must first establish that the propositions are the correct interpretation of the First Amendment as a matter of first principles; he cannot take them as established merely because they have been pronounced by the Supreme Court.

<sup>225</sup> See *supra* note 25 and accompanying text.

<sup>226</sup> See Tushnet, *supra* note 5, at 33–34 (arguing that under the property theory "any interest can be reconceptualized as a property interest to defeat a speech claim" (citing Volokh & McDonnell, *supra* note 5, at 2445–46)); Volokh, *supra* note 106, at 1096–97 (portraying the property theory as asserting "that intellectual property rules are per se proper").

<sup>227</sup> Lemley & Volokh, *supra* note 3, at 182–83; see also *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (holding flag burning to be constitutionally protected speech).



trespass actions against protesters).<sup>228</sup> If the potential for congressional gaming is sufficient to justify strict First Amendment scrutiny of private property rights enforcement, then the logical implication is to strictly scrutinize the enforcement of ordinary trespass laws for tangible property as well. For obvious reasons, no critic is prepared to defend such a proposal, and in fact they run away from it like the plague.<sup>229</sup> But there is no principled distinction between tangible and intangible property in their potential for gaming. The potential for congressional gaming thus does not serve as a justification for subjecting copyright to more stringent First Amendment treatment than other forms of property.

*F. The Idea/Expression Dichotomy and Fair Use Defense  
Are Currently Inadequate*

Another objection to my argument is that, even assuming the property theory is correct that the idea/expression dichotomy and the fair use defense are intended to serve as safeguards against overwhelming economic power, they currently fail in that role.<sup>230</sup> Given this, the argument goes, the First Amendment needs to impose additional constraints on copyright to meet the property theory's own requirements.<sup>231</sup>

The answer to this objection is that it is not really a doctrinal argument about the property theory, but a policy argument about the desirable level of free speech protection. That is, one cannot say that the current level of protection for free speech is inadequate without

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<sup>228</sup> See *Salazar v. Buono*, 559 U.S. 700, 706–07 (2010) (deciding a case where Congress transferred land to a private party to evade First Amendment violation).

<sup>229</sup> See, e.g., Lemley & Volokh, *supra* note 3, at 183 (“The First Amendment does not, of course, license people to trespass on private real estate in order to speak.”); Rubinfeld, *supra* note 2, at 25 (“There is no First Amendment right to trespass.”).

<sup>230</sup> See Netanel, *supra* note 3, at 12, 40 (“The notion that copyright’s internal free speech safety valves substitute for First Amendment scrutiny falls apart . . . . [G]iven changes in copyright doctrine, copyright’s internal safety valves have become woefully inadequate to that task.”). In a recent article, Netanel seems to have become more optimistic that these doctrines can meaningfully restrain copyright law. See Neil Weinstock Netanel, *First Amendment Constraints on Copyright After Golan v. Holder*, 60 UCLA L. REV. 1082, 1084–85 (2013) (“*Golan* and *Eldred* impose potentially significant First Amendment constraints on copyright protection . . . .”).

<sup>231</sup> See Denicola, *supra* note 24, at 299–300 (arguing for a First Amendment privilege because the protection of the idea/expression dichotomy and fair use are inadequate); Henry S. Hoberman, *Copyright and the First Amendment: Freedom or Monopoly of Expression?*, 14 PEPP. L. REV. 571, 594 (1987) (calling for a First Amendment privilege because “[c]ourts can no longer rely on a variety of flawed exceptions to copyright law to ensure the free flow of information”); Netanel, *supra* note 3, at 40.

some theory of what level of free speech protection is adequate. Since there is no objectively correct (or even widely accepted) theory of the correct balance between free speech protection and other social values such as economic incentives for creating new original speech,<sup>232</sup> the argument is necessarily subjective.

Another way of saying this is that objectors who argue that the First Amendment dictates narrower copyright and greater free speech protection do not seem to appreciate an important irony in their argument.<sup>233</sup> According to the objectors, existing courts have watered down copyright's internal free speech protections to undesirable levels.<sup>234</sup> But, if this is so, it makes little sense for the objectors to argue for those *very same courts* to create, and to then robustly apply, a new doctrinal protection such as a First Amendment privilege.<sup>235</sup> Every legal theory requires a judge to administer, and a First Amendment privilege can be watered down just as much as copyright's internal protections can (if the privilege is even created in the first place).<sup>236</sup> The mere fact that judges currently administer the property theory in a way that is perceived as undesirable is not an objection (or, at most, is a purely results-oriented objection) to the theory itself.

## V. LIMITATIONS OF THE PROPERTY THEORY

Although the property theory provides an important foundation to explain the First Amendment exemption for copyright law, it does not save all of copyright law. As this Part will explain, some features of the existing copyright statute—most notably the criminal enforcement and moral rights provisions—cannot be exempted from First Amendment scrutiny under the property theory.<sup>237</sup> I do not regard

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<sup>232</sup> See *supra* text accompanying notes 161–64.

<sup>233</sup> See Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?* 1 (Law Sch. Univ. Chi., Pub. Law & Legal Theory Working Paper No. 422, 2013).

<sup>234</sup> See, e.g., Netanel, *supra* note 3, at 13–23 (discussing the weakening of the idea/expression dichotomy and the fair use defense).

<sup>235</sup> Netanel seems to be of two minds when it comes to creating a First Amendment privilege for copyright. Compare *id.* at 41 (arguing that copyright should be subject to external First Amendment scrutiny in the same manner as defamation), with *id.* at 83 (arguing that courts should strengthen the fair use defense instead of applying direct First Amendment scrutiny). In any case, many other scholars have explicitly called for courts to create a First Amendment privilege. See, e.g., Denicola, *supra* note 24, at 299–300; Hoberman, *supra* note 231, at 594.

<sup>236</sup> This is not to deny that the rhetorical framing of an issue can affect how judges perceive it. See *supra* text accompanying notes 150–51. But that is not an objection to the analytical correctness of the property theory.

<sup>237</sup> I should make clear that I am not saying that the criminal enforcement and moral rights provisions are necessarily unconstitutional. I am merely saying that they

this as a serious defect in my argument: my goal in this Article is to rehabilitate the property theory in the face of the literature's harsh and cavalier dismissal of it, and my thesis requires only that the property theory can save *most* of copyright law, as well as explain and justify leading cases such as *Eldred* and *Golan*, both of which involved broad challenges to the copyright scheme. The property theory need not, and does not, justify every specific feature of the present copyright statute.

### A. *Criminal Copyright Enforcement*

The reason that the criminal enforcement provisions cannot be saved by the property theory is simple: at the core of my argument is the fact that copyright law is content neutral at the level of the copyright statute. The reason that this is the correct level to analyze content neutrality is because the passage of the copyright statute by Congress is the only government action involved in most instances of copyright enforcement, and the First Amendment only applies to governmental and not private action.<sup>238</sup> This rationale does not apply, however, when it comes to criminal prosecution: under a straightforward application of traditional state action principles, a decision by a federal prosecutor to prosecute is state action and is accordingly subject to First Amendment analysis at the level of that decision.<sup>239</sup> And in the context of criminal copyright infringement, a decision to prosecute will almost inevitably consider the content of the allegedly infringing work.<sup>240</sup>

I should note an important wrinkle in this argument. Although, as a straightforward matter of normal state action principles, a decision to arrest or prosecute is certainly state action, a number of courts have held that a government decision to arrest or prosecute for crimi-

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cannot be justified under the property theory. The property theory is merely one—though I regard it as the most important—theory for copyright's exemption from First Amendment scrutiny.

<sup>238</sup> See *supra* Section II.A.

<sup>239</sup> See *Wayte v. United States*, 470 U.S. 598, 608–10 (1985) (recognizing a First Amendment defense for selective prosecution). Nicholas Rosenkranz has argued that, as a matter of textualist logic, the First Amendment is limited to “Congress” and therefore does not cover executive action. Rosenkranz, *supra* note 97, at 1266. However, such a position is not supported by existing doctrine, and is therefore not part of my argument.

<sup>240</sup> See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-71.010 (1997) (directing prosecutors to consider the “nature . . . of the infringing activity”).

nal trespass to tangible private property is *not* state action.<sup>241</sup> Based on these cases, one could make a reasonable argument that criminal prosecutions for copyright infringement ought not be considered state action either.

Although the argument is reasonable, I believe the better view is that criminal prosecution for copyright infringement *is* state action. The legal rationale for holding the prosecution of criminal trespass to not be state action is that the police and prosecutors are assumed to be merely neutrally enforcing a private property owner's complaint and not exercising any kind of prosecutorial discretion based on the content of the speech at issue.<sup>242</sup> This assumption may or may not be well founded in the tangible property context; it is manifestly untrue in the copyright infringement context.<sup>243</sup> Unless the Department of Justice adopts some policy that resembles automatically prosecuting all cases of criminal copyright infringement where copyright owners request it—which is not going to happen—criminal copyright prosecutions are likely to remain non-neutral as to content (at least at a subconscious level), and thus will not fall within the property theory.

### B. *Content Discriminatory Copyright Rights*

A second limitation on the property theory is that, as has been noted above,<sup>244</sup> the present copyright statute is not entirely content neutral, even at the level of the statute itself. For example, the conferral of moral rights limited to works of visual art (and not other visual works),<sup>245</sup> and special provisions governing non-dramatic musical works<sup>246</sup> and teaching content,<sup>247</sup> are content distinctions drawn by the statute itself. The property theory cannot justify these provisions.

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241 See, e.g., *People v. DiGuida*, 604 N.E.2d 336, 345 (Ill. 1992) (holding that arrest and prosecution of a petition signature-gatherer not state action); *City of Sunnyside v. Lopez*, 751 P.2d 313, 319 (Wash. Ct. App. 1988) (holding police arrest of anti-abortion protestor not state action); *State v. Horn*, 407 N.W.2d 854, 859–60 (Wis. 1987) (same); see also *State v. Marley*, 509 P.2d 1095, 1099, 1103, 1112 (Haw. 1973) (holding that prosecution for criminal trespass not unconstitutional “in the absence of a showing of discriminatory intent”).

242 See *DiGuida*, 604 N.E.2d at 345 (“[D]efendant was not arrested because of the content of his speech or prosecuted because of his expressive activities. He was arrested and prosecuted simply because he refused to leave Dominick’s property. The State action in this case was directed exclusively at enforcing the trespass law.”).

243 See *supra* text accompanying note 240.

244 See *supra* text accompanying notes 181–87.

245 See 17 U.S.C. § 106A (2006).

246 See *id.* § 115 (2006 & Supp. V).

247 See *id.* § 110(2)(B) (2006).

I am also not attempting to provide an exhaustive list of all the content-specific measures in the statute.<sup>248</sup> Such a list is both difficult to compile—because the Supreme Court has not provided a clear definition of what constitutes “content” regulation<sup>249</sup>—and largely beside the point of my argument. The key point is that the core exclusive rights of copyright law that are enumerated in § 106 (to reproduction, derivative works, distribution, and public performance and display)<sup>250</sup> are not content discriminatory as they are written in the statute.<sup>251</sup> The common argument that copyright is broadly content discriminatory is thus misplaced. Again, my goal in this Article is to argue that the property theory is important to explaining the First Amendment treatment of copyright law, not that it saves all of it.

I should note that the content discriminatory provisions at copyright’s periphery may well be constitutionally defensible if one takes a more high-level approach: that is, if one looks to the underlying policy rationales for the doctrine rather than to the black letter doctrine itself. As a matter of underlying policy rationales, the rationale for the prohibition against content discrimination is to act as a prophylactic measure against the possibility of viewpoint discrimination by government officials, and since copyright is clearly not viewpoint discriminatory there is little reason to apply the doctrinal rule to it.<sup>252</sup> But, as has been emphasized, my argument here is doctrinal,<sup>253</sup> and as a doctrinal matter the prohibition on content discrimination is well settled.<sup>254</sup> As such, the provisions of the copyright statute that make express content distinctions cannot be justified under the property theory as I have articulated it. But if a better understanding of the property theory can shift the scholarly conversation away from arguing that copyright is broadly unconstitutional to arguing about the constitutionality of its individual provisions, then much progress will have been made.

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248 See, e.g., *id.*; see also *id.* § 113(c) (limiting the scope of rights in the display of useful articles in “advertisements” and “news reports”).

249 See *supra* note 187 (collecting citations).

250 See 17 U.S.C. § 106. Even the right to performance through transmission, which is limited to “sound recordings,” *id.*, is not reasonably seen as a content specific measure because it governs only the *medium* and not the information *content* being transmitted. A regulation specific to sound and not to other communicative mediums does not seem any more “content” based than a zoning ordinance that prohibits noise but not other types of nuisances.

251 See *supra* Section III.A.

252 See *supra* text accompanying notes 156–57.

253 See *supra* Section IV.A.

254 See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2740 (2011).

### C. *The Property Theory and Other Forms of IP*

In this Section, I will briefly explore the implications of the property theory for other forms of intellectual property. As I shall discuss, the property theory has less explanatory power in these areas than in the context of copyright law. However, my analysis will also show that the property theory still has important implications for these areas.

#### 1. Patent Law

At first glance, the area of intellectual property that might be thought to most strongly reflect the property theory is patent law. Like copyrights, it is well settled doctrinally that patents are a species of property for constitutional purposes.<sup>255</sup> And, like copyright law, patent law has long-enjoyed a de facto exemption from First Amendment scrutiny. To the extent that the exemption of patent law from First Amendment scrutiny is even noticed, the fact that patents are considered private property is viewed as a central explanation.<sup>256</sup>

Yet patent law's exemption from First Amendment scrutiny is in fact quite inconsistent with the property theory. Unlike the situation of copyright law, where the grant of a copyright is automatic and the only state action occurs at the level of the passage of the copyright statute, the grant of a patent is done on a case-by-case basis by the Patent and Trademark Office.<sup>257</sup> Thus, the proper level of abstraction to analyze for content and viewpoint neutrality—the level of state action—is at the level of the individual patent. And individual patents are quite often content and viewpoint discriminatory in their claimed subject matter, which should subject them to heightened scrutiny.<sup>258</sup>

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<sup>255</sup> Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. REV. 689 (2007).

<sup>256</sup> See Thomas, *supra* note 129, at 606 (“More like a private property owner exerting the trespass law to eject an unwelcome speaker, the relationship between the patent right and a particular constitutional guarantee appears more tangential.”).

<sup>257</sup> 35 U.S.C. § 131 (2006) (providing for individualized examination). One might argue that the PTO's discretion is so constrained during patent examination that its actions should not be considered in a First Amendment analysis. However, as I have argued elsewhere, this view of the PTO as performing a ministerial role is mistaken. Despite frequent protestations to the contrary, the PTO in fact exercises enormous discretion in shaping the content of patent rights. See Tun-Jen Chiang, *The Levels of Abstraction Problem in Patent Law*, 105 Nw. U. L. REV. 1097, 1101 (2011) (“[A] central tenet of the patent system—automatic calibration of reward to contribution—is an illusion.”).

<sup>258</sup> See, e.g., U.S. Patent No. 6,311,211 (filed Jan. 14, 1999) (delivering electronic advocacy messages); U.S. Patent No. 7,996,262 (filed July 18, 2008) (making political contributions using frequent flier miles); U.S. Patent No. 8,286,286 (filed Sept. 8, 2009) (cushions for *Islamic* prayer).

Moreover, on the criterion of overwhelming private ownership power, patent rights can facilitate private power over speech just as much as copyright rights can. For example, a method patent covering a particular piece of advertising provides just as much, if not more, control over subsequent distribution of the underlying message than a copyright over the same advertisement; and a software patent<sup>259</sup> can provide much greater control than a software copyright. Yet patent law has none of the safeguards that copyright law has against the threat of private control over speech: patent law has no fair use defense,<sup>260</sup> and although it does forbid the patenting of an “abstract idea,”<sup>261</sup> this prohibition is much weaker than the idea/expression dichotomy in copyright law.<sup>262</sup> The sum of the situation is that, viewed through the lens of the property theory, it is patent law that has the greater First Amendment problem, not copyright law.<sup>263</sup>

## 2. Trademark Law

One observation that cuts against the descriptive force of the property theory is that courts have proven somewhat receptive to First Amendment arguments in the trademark context.<sup>264</sup> If trademarks are also “property” and contain internal fair use protections,<sup>265</sup> the

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259 See Dan L. Burk, *Patenting Speech*, 79 TEX. L. REV. 99, 101 (2000) (arguing that software can constitute speech and software patents therefore pose First Amendment problems).

260 *Id.* at 150 (arguing that a fair use defense for patent law may be necessary to ameliorate First Amendment tensions).

261 *Bilski v. Kappos*, 130 S. Ct. 3218, 3230 (2010).

262 See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 296 (2003) (contrasting patent law’s protection of ideas with copyright law’s non-protection of them).

263 *But see* Bartholomew & Tehranian, *supra* note 24, at 3 n.3 (arguing that patent law does not generally confront free speech issues as copyright does); Lemley & Volokh, *supra* note 3, at 234 (arguing that patent law does not implicate speech except in isolated circumstances).

264 See *E.S.S. Entm’t 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099 (9th Cir. 2008) (creating a limited First Amendment privilege that “[a]n artistic work’s use of a trademark that otherwise would violate the Lanham Act is not actionable unless the use of the mark has no artistic relevance to the underlying work whatsoever, or . . . explicitly misleads as to the source or the content of the work” (quoting *Mattel Inc. v. MCA Records, Inc.*, 296 F.3d 894, 902 (9th Cir. 2002)) (internal quotation marks and alterations omitted)).

265 Trademark law has two different fair use doctrines. There is the “descriptive” fair use defense, codified at 15 U.S.C. § 1115(b)(4) (2006). There is also the “nominative” fair use defense that is recognized in some circuits but not others. *Compare* *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 308 (9th Cir. 1992) (recognizing defense), *with* *PACCAR Inc. v. TeleScan Techs., L.L.C.*, 319 F.3d 243,

logic goes, then the property theory should predict that trademark enforcement is subject to essentially no external First Amendment scrutiny.<sup>266</sup> The fact that courts in fact sometimes do invoke the First Amendment, over and above the internal doctrines of trademark law, then calls the validity of my descriptive argument into question.

My response to this critique is twofold. As an initial matter, the property theory in fact predicts that the First Amendment would play a more direct role in the trademark context than in the copyright context, for three reasons. First, trademarks have a weaker claim to being “property” than copyrights do.<sup>267</sup> Among other things, trademark protection is effectively revoked if the mark becomes such a feature of common language that it is deemed generic,<sup>268</sup> whereas vested property rights such as copyrights and patents are generally not subject to revocation merely because continued protection turns out to be inconvenient.<sup>269</sup> Second, trademark law is content discriminatory—the central rule of trademark law is the prohibition of uses that are likely to *confuse* consumers<sup>270</sup>—in a way that copyright is not.<sup>271</sup> Third, although trademark law has some internal protection for free speech principles, including the limitation of liability to commercial use,<sup>272</sup> the fanciful/descriptive distinction,<sup>273</sup> and the statutory and

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256 (6th Cir. 2003) (rejecting the invocation of the defense), *overruled on other grounds* by *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111 (2004) (declining to adopt nominative fair use analysis).

266 Although less extensive than in the copyright context, the literature arguing in favor of applying First Amendment scrutiny to trademark law makes the same basic argument as in the copyright context. *See, e.g.*, Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 *YALE L.J.* 1687, 1715 & n.149 (1999); Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 *SMU L. REV.* 381 (2008).

267 *Cf. Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 157 (1989) (describing trademarks as “‘quasi-property rights’ in communicative symbols”).

268 *See* 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 12.1 (4th ed. 2008) (calling this “genericide”).

269 *Cf. Ty Inc. v. Perryman*, 306 F.3d 509, 514 (7th Cir. 2002) (identifying the policy rationale of genericide as facilitating additions to common language).

270 15 U.S.C. § 1125(a)(1)(A).

271 The originality requirement and idea/expression dichotomy of copyright law are constitutionally mandated. *See supra* text accompanying notes 194–202. The likelihood of confusion requirement, even though it has a compelling policy rationale, is not constitutionally required. *See S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 539–40 (1987).

272 *See Taubman Co. v. Webfeats*, 319 F.3d 770, 774 (6th Cir. 2003) (“The Lanham Act is constitutional because it only regulates commercial speech, which is entitled to reduced protections under the First Amendment.”).

273 *See Tisch Hotels, Inc. v. Americana Inn, Inc.*, 350 F.2d 609, 611 & n.2 (7th Cir. 1965) (explaining that fanciful marks get more protection than descriptive ones).



nominative fair use defenses,<sup>274</sup> these doctrines are limited in scope and are also less flexible than the protections of copyright law.<sup>275</sup> They cannot fully protect against the threat of overwhelming private power.

A second, more important, point is that, even though courts are relatively *more* willing to directly apply the First Amendment to trademark cases than to copyright cases, they are still overall extremely hesitant to do so.<sup>276</sup> And the fact that trademark is generally regarded as property (even if the claim is weaker than copyright) seems a central explanation for this phenomenon. Without the property theory, the fact that courts are mostly untroubled by laws that facially restrict the use of certain words (e.g. the word “Olympic”<sup>277</sup>) would seem puzzling. With the property theory the state of existing doctrine mostly makes sense. It follows that trademark law does more to reinforce the descriptive power of the property theory than to undermine it.

#### CONCLUSION

This Article has made three contributions to the literature. First, it provides a more concrete account of the property theory than has occurred previously. For example, when Lemley and Volokh criticize the property theory, they cite no source for it beyond saying that they have “heard this view among copyright lawyers.”<sup>278</sup> And they conceptualize the property theory in simplistic terms, as entailing that anything labeled “property” is categorically exempt from all First Amendment scrutiny.<sup>279</sup> What I provide is a more detailed, more nuanced, and more defensible account of the property theory, which rejects the absolutist conception of property rights. In this way, even

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274 15 U.S.C. § 1115(b)(4).

275 The statutory fair use defense is limited to situations where a defendant uses a word (that happens to be trademarked) in a descriptive capacity, and even then there are additional statutory requirements (such as a requirement of fairness and good faith). *Id.* The nominative fair use defense is limited to situations where a trademark is used to refer to the trademark-holder’s product (among other requirements). *See New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 308 (9th Cir. 1992).

276 *See Ramsey*, *supra* note 266, at 385 (“[C]ourts do not generally apply constitutional analysis to trademark laws or injunctions.”).

277 *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 534–43 (1987) (holding that the special trademark-like protection given to Olympic symbols does not violate the First Amendment).

278 Lemley & Volokh, *supra* note 3, at 182.

279 *Id.*; *see also Rubinfeld*, *supra* note 2, at 27 (“Major premise: [t]here is no First Amendment right to trample on other people’s property. Minor premise: [c]opyright is property. Conclusion: [a] copyright infringer can have no First Amendment defense.”).

those who disagree with my conclusions should find some value to this Article, in that it provides a more meaningful target to attack and criticize.

Second, the Article has explained how the property theory provides a coherent framework to understand the modern doctrine surrounding the intersection between copyright law and the First Amendment. The property theory explains both why copyright enforcement is generally exempt from the First Amendment (because the copyright system is speech neutral) and why this exemption is conditioned on the idea/expression dichotomy and the fair use defense (because they provide safeguards against excessive ownership power). As a positive theory, the property theory is superior to the Framers' intent theory that the Court has relied upon.

Third, the Article has rebutted the criticisms of the property theory that depend on portraying it as an absolutist, formalistic, unthinking, and extremist theory that produces absurd consequences. Properly understood, the property theory does not say that anything and everything labeled "property" is automatically exempt from the First Amendment. The property theory in fact has two internal limits that accommodate a balance between the social interests underlying property ownership (including, but not limited to, the incentive for creation) and free speech concerns.

At a broader normative level, what I am saying is that the property theory is not—or at least does not have to be—the enemy of protection for free speech.<sup>280</sup> The proper balance between free speech protection and private ownership rights is an open question whether we regulate that balance within copyright law itself (through the fair use and idea/expression dichotomy) or through an external mechanism of direct First Amendment scrutiny. A policy proposal that relies on courts jettisoning existing doctrine—including by considering copyright to be non-property and regulating it as such—may one day find political appeal. For those who live within the existing system, however, the property theory may well offer a more productive way to engage with courts and existing doctrine. It is thus eminently unhelpful to write off the property theory as a "non sequitur"<sup>281</sup> or an "unthinking"<sup>282</sup> "incantation."<sup>283</sup>

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280 See David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139, 141 (2009).

281 Lemley & Volokh, *supra* note 3, at 182.

282 Rubinfeld, *supra* note 2, at 27.

283 Volokh, *supra* note 106, at 1096 n.217 (quoting Gordon, *supra* note 28, at 1537).

