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First Amendment Challenges to Copyright after Eldred v. Ashcroft: The DMCA's Circumvention of Free Speech;Note

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FIRST AMENDMENT CHALLENGES TO COPYRIGHT AFTER *ELDRED v. ASHCROFT*: THE DMCA'S CIRCUMVENTION OF FREE SPEECH

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I. INTRODUCTION

Last fall, as *Eldred v. Ashcroft*[1] approached the Supreme Court to challenge the constitutionality of the Sonny Bono Copyright Term Extension Act ("CTEA"),[2] many members of the legal community took the opportunity to protest the burden on free speech posed by expansive copyright protections.[3] Like many of its predecessors,[4] *Eldred* argued that copyright provisions impermissibly chilled speech because they were overinclusive and overbroad. The solution, according to *Eldred*, was to construe the Federal Copyright Act as a "speech restriction" and subject it to the First Amendment analysis developed by the Court.[5]

In spite of the attention given to *Eldred*, the Supreme Court decision turned out to be a disappointment for free speech advocates.[6] The Court disposed of Eric Eldred's claims simply by reciting its reasoning in earlier First Amendment-Copyright cases.[7] As *Eldred* demonstrated, the First Amendment challenge to copyright is one of the most predictable in the Court's jurisprudence—it is almost always rejected.[8] The problem with this approach, however, is that the Court's dismissive attitude sweeps across copy-

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1. 123 S. Ct. 769, 774 (2003).

2. Pub. L. No. 105-298, 112 Stat. 2827, 2827-28 (1998) (codified as amended at 17 U.S.C. §§ 302, 304 (2002)).

3. *E.g.*, Neil W. Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 4 (2001).

4. *See* cases cited *infra* note 8.

5. *See* discussion *infra* Part II.A.

6. 123 S. Ct. at 790.

7. *Id.* at 801.

8. Veeck v. S. Bldg. Code Congress Int'l., Inc., 241 F.3d 398, 408-409 (5th Cir. 2001) (rejecting First Amendment argument); Universal City Studios, Inc. v. Corley, 273 F.3d 429, 445-60 (2d Cir. 2001) (rejecting First Amendment argument); Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1115-16 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1486 (2001) (rejecting First Amendment argument); Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd., 55 U.S.P.Q. 2d 1680, 1696 (S.D.N.Y. 2000) (rejecting First Amendment argument); Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290, 1295 (D. Utah 1999) (rejecting First Amendment argument); Religious Tech. Ctr. v. Henson, 182 F.3d 927 (9th Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000) (stating that the defendant's First Amendment "argument fails in light of [the Supreme Court's decision in] *Harper & Row*, in which the Court stated that the laws of the Copyright Act already embrace First Amendment concerns."); A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 922 (N.D. Cal. 2000) (stating that "free speech concerns are protected by and coextensive with the fair use doctrine."); L.A. Times v. Free Republic, 54 U.S.P.Q. 2d 1453, 1472 (C.D. Cal. 2000) (stating that free speech concerns "are subsumed within the fair use Analysis").

right provisions categorically, even though certain statutes pose a far greater threat to free speech than others. This Note seeks to draw a distinction between the Court's treatment of First Amendment challenges to "traditional" copyright protections and to challenges to the Digital Millennium Copyright Act ("DMCA").[9] The DMCA was added onto the Copyright Act five years ago to address the threat posed to copyright protections by the growing use of online communication.[10] While cases like *Eldred* emphasize the potential burden on free expression resulting from broad copyright protections, I would like to suggest that the blame is misplaced. The case for chilled speech rests far better on the DMCA than the provisions of the 1976 Copyright Act or the CTEA.

First, I will provide a brief summary of the Court's treatment of First Amendment challenges to copyright in light of its most recent interpretation of the law in *Eldred.* Then, I will introduce the DMCA and identify the problems that it presents for the Court's current First Amendment-copyright jurisprudence. Here, I will also explain why the Court's established framework fails when applied to the DMCA. I will conclude that although the Court is justified in dismissing First Amendment challenges to the Copyright Act and the CTEA, its reasoning is unpersuasive and disingenuous when applied to free speech claims against the DMCA.

II. COURT'S DEVELOPED FRAMEWORK FOR FIRST AMENDMENT-COPYRIGHT CASES

The First Amendment plays a few different roles in copyright cases. Frequently, defendants in copyright infringement suits rely on the First Amendment as the last of a series of alternative defenses.[11] Alternatively, plaintiffs like Eric Eldred may also attack the Copyright Act on its face, claiming that the federal statute is overbroad, or perhaps over and underinclusive in achieving its ends.[12]

Applying the First Amendment to copyright cases has been a difficult endeavor for a few reasons. First and foremost, it seems as though the two clauses achieve different objectives. The First Amendment protects speech or expression from unconstitutional state interference,[13] while the Copyright Clause mandates Congress to encourage creativity and authorship by protecting the proprietary interests of authors.[14] The two clauses are not in dialogue with each other, which makes it difficult to determine the nature of their relationship within the boundaries of "original" understanding.[15] While the Founding Fathers may not have envisioned the First Amendment being used to challenge copyright provisions, the Court has confronted this dilemma in two ways. It has approached the problem through the First Amendment lens by evaluating copyright as a speech restriction and subjecting it to First Amendment scrutiny. Second, the Court has addressed the issue through an "internalist" copyright framework, in which free speech

9. Digital Millennium Copyright Act, Pub. L. No. 105-304, §§ 103, 1201, 112 Stat. 2860, 2863-65 (1998) (codified at 17 U.S.C. §§ 1201-1205 (2002)).

10. Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 331-32 (S.D.N.Y. 2000) (describing the threat of digital theft as a "propagated outbreak epidemic"); United States v. Elcom Ltd., 203 F. Supp. 2d 1111, 1129 (N.D. Cal. 2002) (holding that the chief threat "to electronic commerce and to the rights of copyright holders was the plague of digital piracy").

11. *See* cases cited *supra* note 8.

12. 123 S. Ct. at 789.

13. U.S. CONST. amend. I.

14. U.S. CONST. art. I, § 8, cl. 8.

15. *See generally* Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970).

claims are subsumed under Section 107's fair use exception to the rights provided for by Section 106.[16]

A. First Amendment Analysis: Evaluating Copyright as a Speech Restriction

The Court's First Amendment analysis reflects the overarching goal of First Amendment doctrine, which is to thwart regulations of speech based on message, ideas, subject matter, or content.[17] By doing so, the Court prevents the government from "effectively driv[ing] certain ideas or viewpoints from the marketplace" by restricting messages with which it disagrees.[18] Thus, the Court's First Amendment analysis often starts by sorting the disputed regulation into content-neutral or content-based categories before analyzing the restriction. Content-based restrictions, which regulate on the message of the speech, are subject to strict scrutiny.[19] Content-neutral restrictions, which control the channels or "time, place and manner" of speech are evaluated under a lesser "intermediate" scrutiny.[20] But despite the First Amendment's broad protection for free expression, not all speech is protected. In fact, there are countless instances in which the government eliminates and even criminalizes expression.[21] These forms of speech are excluded from the First Amendment's protection because they do not advance the "goals" of free expression.

According to the most widely accepted theories, the "purposes" of free speech fall into roughly three[22] schools of thought: the "marketplace" of ideas theory,[23] the theory of democratic self-government,[24] and the notion that free speech promotes individual

16. Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 560 (1985).

17. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

18. Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 116 (1991).

19. Buckley v. Valeo, 424 U.S. 1, 74 (1975).

20. Restrictions on the posting of signs on public property, or a ban on billboards in residential communities, for example, have been upheld by the Court because the restrictions have allowed ample alternative channels for the speech. Frisby v. Schultz, 487 U.S. 474, 485 (1988); Content-neutral regulations are far less indicative of an ulterior government motive than content-based regulations. In many instances, content-neutral regulations usually serve some kind of valuable purpose, such as regulating noise levels or maintaining city property. *See* 487 U.S. at 486.

21. *See* Miller v. California, 413 U.S. 15, 23 (1972) (holding that obscene speech is unprotected); Watts v. United States, 394 U.S. 705, 707 (1969) (holding that "true" threats fall into unprotected categories of speech); Brandenberg v. Ohio, 395 U.S. 444, 447-48 (1969) (holding that the use of force as a means of political reform is an unprotected form of speech); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (holding that incitement is unprotected).

22. Among the more popular theories discussed *infra*, scholars like Vincent Blasi have written that the First Amendment's purpose in its historical context was to "check the inherent tendency of government officials to abuse the power entrusted to them." Vincent Blasi, *The Checking Value in First Amendment Theory*, AM.B.FOUND. RES. J. 521, 528-538 (1977).

23. The "marketplace" theory focuses on the truth-seeking purposes advanced by a menagerie of viewpoints and perspectives. John Stuart Mill, *On Liberty* (1859), *reprinted in* THE FIRST AMENDMENT: A READER, 58-65 (John H. Garvey & Frederick Schauer eds., 2nd ed. 1996). A diversity of speech enriches the "marketplace" by providing listeners with the necessary information to choose between ideas. *Id.* Under this theory, false or deceptive sorts of speech (such as misleading commercial advertising, for example) should not be given protection by the First Amendment because they do not contribute to its truth-seeking function. *See also* Abrams v. United States, 250 U.S. 616, 630 (1919) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market....").

24. Alexander Mieklejohn argues that the First Amendment is the foundation of political debate in the "town square," resulting in a healthy system of self-government. *Political Freedom* (1960), *reprinted in* THE FIRST AMENDMENT: A READER, *supra* note 23, at 101-03. Similarly minded critics believe that allowing individuals to express themselves is a prerequisite to the discussion of public problems, which would be wholly ineffective if speech were abridged. *See* Michael Kent Curtis, *Free Speech: The People's Darling*

self-realization.[25] Speech that contributes negligibly to these goals is considered "low-value" speech unworthy of First Amendment protection.[26] The government may freely regulate unprotected speech as long as there is a rational purpose for the restriction.

To place copyright into this framework, we must first view the Copyright Act (or any of its provisions) as a state-enacted restriction of speech. The restriction would affect all speech that potentially infringes another copyrighted expression. In this hypothetical scenario, our first task would be to answer the threshold question: does the restricted speech (potentially infringing speech) deserve First Amendment protection? Is it akin to "core" political speech, or is it more like pornography, incitement, or threats—all of which are unprotected?

Certainly, there are arguments on both sides of the debate. On one hand, infringing speech contributes very little to self-fulfillment, the marketplace of ideas, or healthy political debate. After all, expressing one's beliefs does not require using the exact words or medium used by others (copyrighted expressions). As harsher commentators might argue, "one who pirates the expression of another is not engaging in *self*-expression."[27] On the other hand, certain types of expression lose meaning when expressed differently. The seminal case of *Cohen v. California* demonstrates the guttural, expletive impact of "Fuck the Draft" written on the back of a jacket, which carries with it all the vehemence of its wearer in three monosyllabic words.[28]

In fact, sometimes potentially infringing speech is striking only when taken in conjunction with the copyrighted work.[29] Alice Randall's *The Wind Done Gone*, for example, relies on *Gone with the Wind* to illuminate the stereotypes in the original work.[30] Scholars point to these cases to demonstrate that speech should not be restricted when the very purpose of its message is to critique a copyrighted piece.[31] If the infringing speech passes this threshold, it would receive First Amendment protection—requiring

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Privilege, *in* THE FIRST AMENDMENT 324 (Eugene Volokh, ed., 2001) ("To give effect to the [the will of the people], free thought, free speech, and a free press are absolutely indispensable. Without free discussion there is no certainty of sound judgment; without sound judgment, there can be no wise government"); Cass Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 301 (1992) ("[T]he First Amendment is principally about political deliberation.").

25. Martin Redish posits that free speech facilitates individual self-realization, which allows citizens to attain knowledge and autonomy on an individual level. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593-94, 601-604, 627-629 (1982). *See also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 n.12 (1978) ("The individual's interest in self-expression is a concern of the first amendment separate from the concern for open and informed discussion, although the two often converge."); *See generally* Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civil Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CAL. L. REV. 267 (1991).

26. *See* cases cited *supra* note 21. Incitement is considered to be low-value speech that contributes only trivially to the marketplace of ideas. *See* Charles R. Lawrence III, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT, 77 (1993) (stating that certain forms of low-value speech, such as racist speech, "infects, skews, and disables the operation of a market. It ... distorts the marketplace of ideas and renders it dysfunctional.").

27. Michael J. Haungs, *Copyright of Factual Compilations: Public Policy and the First Amendment*, 23 COLUM. J.L. & SOC. PROBS. 347, 366 n.122 (1990).

28. *See* 403 U.S. 15, 26 (1971) (holding that an epithet conveys "not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well"). *See also* City of Ladue v. Gilleo, 512 U.S. 43, 54, 56 (1994) (holding that some forms of speech are meaningful when expressed in a particular way, i.e., display through the window of a residential home).

29. *See* Gross v. Seligman, 212 F. 930, 931 (2d Cir. 1914) (holding that Rochlitz's photograph "Cherry Ripe" would have had little value absent his earlier and virtually identical work, "Grace of Youth").

30. *E.g.*, SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1269 (11th Cir. 2001).

31. Netanel, *supra* note 3, at 47.

the Court to subject copyright to its category-based First Amendment analysis. Here, scholars like Neil Netanel have contended that the Copyright Act is a content-neutral regulation that should implicate intermediate scrutiny because it does not discriminate on the basis of subject-matter, viewpoint or substantive content.[32]

Unfortunately, the high Court has not been persuaded by arguments. As mentioned earlier, it has refused to recognize a First Amendment right to use another's copyright expression in almost every case.[33] Furthermore, the Court has steered clear of even construing copyright provisions through the First-Amendment category-based approach.[34] Instead, it has largely dealt with the problem from an "internalist" approach that looks to the Copyright statute to reconcile the two clauses.

B. Internal Safety Valves of Copyright

The Court has disposed of First Amendment challenges to copyright by pointing to the internal limitations of the copyright statute itself. In the seminal case of *Harper & Row Publishers Inc. v. Nation Enterprises*,[35] the Court found the First Amendment inapplicable to the Copyright clause because the "internal safety valves" of copyright were the functional equivalent of the First Amendment's protections.[36] These safety valves include the idea/expression dichotomy, the statutory restrictions on the subject matter of copyright, and the fair use doctrine, all of which have served as limiting principles on the broad grant of exclusive rights.[37]

1. The Dynamic Idea/Expression Dichotomy

The idea/expression dichotomy is a concept that limits copyright protection only to the form of expression, not the ideas expressed.[38] This concept was first raised by the godfather of Copyright law, Melville Nimmer, who concluded that copyright and free speech were perfectly compatible on a theoretical level.[39] Although copyright protections prevented new authors from making use of the copyrighted work, Nimmer wrote, new authors were only limited in using that *particular expression* of the idea.[40] They were otherwise free to express themselves in unique ways. The greatest virtue of the idea/expression dichotomy is the dynamic nature of its application. If an idea can be

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32. This was not always the case. The court originally held that copyright would not be extended to obscene or unlawful works. Later, Congress removed all content-based restrictions of copyright. *See generally* Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 860 (5th Cir. 1979).

33. *See* cases cited *supra* note 8.

34. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1015 (9th Cir. 2001) (holding that there is no overarching societal interest in obtaining free, copyrighted music); Universal City Studios, Inc. v. Reimerdes, 111 F.Supp.2d 294, 329-30 (S.D.N.Y. 2000) (holding that Congress's interest in preventing copyright is enough to justify restricting the freedom of speech).

35. 471 U.S. 539 (1969).

36. *Id.* at 560 (holding that "[i]n view of the First Amendment protections already embodied in the Copyright Act's distinction between Copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to Copyright").

37. Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1186-1204 (1970).

38. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 726-27 (1971) (Brennan, J., concurring) (stating that Copyright laws only protect the form of expression and not the ideas expressed).

39. *See* Nimmer, *supra* note 37, at 1186-1204.

40. *Id.*

expressed in a limited number of ways, the court pushes up the standard of infringement.[41] On the other hand, if there is a much larger gap between the idea and expression, the Court is quicker to find infringement. Thus, there are many instances where a new work is not found to be infringing of an original work because the idea of the work is expressed in typical ways. "West Side Story," for example, is not infringing of "Romeo and Juliet" because the tale of "star crossed lovers" born into warring families is as old as time.[42]

The dynamic nature of the idea/expression dichotomy undercuts the chilling of free speech because of its flexibility. If the Court evaluated infringement with a bright-line rule that found infringement after a particular number of "similar" attributes, works based on ideas that were limited in the means of their expression would categorically be at a disadvantage. In these cases the Court would always find infringement, which would result in a *de facto* chilling of new works of authorship. The dynamic idea/expression dichotomy restores this balance by requiring an unusually high degree of similarity, which allows new authors to exercise their First Amendment right of free expression without a fear of infringement.[43]

2. Statutory Limitations on Copyrightable Subjects

Under the statutory regime of the current Copyright Act, important restrictions reduce the volume of material that is eligible for copyright protection. Although Section 101(a) is broad in its scope,[44] Section 101(b) excludes all ideas, procedures, processes, systems, methods, concepts, and discoveries from the realm of copyright.[45] These categories of works are more functional rather than fanciful, which makes them of greater use for public benefit than to one exclusive owner.[46] The Court has not allowed copyright protections to extend to works without any fanciful attribute.

In addition to the fanciful/functional distinction, courts also have reserved newsworthy and factual accounts for greater public use because of the "public benefit in encouraging the development of historical and biographical works and their public distri-

41. One particularly famous case, involving a jeweler who sought to create a pin in the shape of a bee, illustrates this point. Herbert Rosenthal Jewelry Corp v. Kalpakian, 446 F.2d 738 (9th Cir. 1971) (holding that the jeweled pin in the shape of a bee was not copyrightable because the idea and expression were indistinguishable). The Court found that since a jeweled pin bearing the shape of bee can only be expressed in a limited set of ways before it no longer resembles a jeweled pin of a bee, the gap between idea and expression is very close – the idea and expression are essentially merged. *Id.* A related idea is that of "scenes a faire," where copyright protection is not granted for items that are inherent in the circumstances described. *See* Cain v. Universal Pictures Co., 47 F.Supp 1013, 1017 (S.D.Cal. 1942) ("The other small details, . . . such as playing of the piano, the prayer, the hunger motive . . . are inherent in the situation itself.").

42. Nichols v. Universal Pictures Corp., 45 F.2d 119, 120-24 (2d Cir. 1930) (holding the author of "Abie's Irish Rose" not liable for copyright infringement of "The Cohens and the Kellys" which featured substantially similar themes, premises, characters and plot).

43. M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 1.10[B] (1989) ("[I]t appears that the idea-expression line represents an acceptable definitional balance as between copyright and free speech interests."); *see also* Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283, 289-93 (1979).

44. The Copyright Act protects literary works, musical works, dramatic works, pantomimes/choreography, pictorial/graphic/sculptural works, motion pictures/audiovisual works, sound recordings, and architectural works. 17 U.S.C. § 102(a) (1994).

45. 17 U.S.C. § 102(b) (1994).

46. Several famous cases, such as *Baker v. Selden*, distinguish between artful works and works that serve a useful purpose, such as books about proper bookkeeping. 101 U.S. 99, 104 (1879).

bution."[47] Copyrighting newsworthy events, such as an illustration of President Kennedy's assassination for example,[48] would be detrimental to the free flow of information and to the larger interest in historical works.[49]

The Court has often pointed to these limitations in First Amendment claims because there is a low likelihood that a work of immense use or value will be given copyright protection. If only expressions that are artistic, fanciful, and creative are restricted for use, there is very little chilling of "important" speech.[50]

3. Fair Use

The final "safety valve" of copyright may be its most important—the fair use doctrine. Pursuant to the exclusive rights awarded to copyright owners in Section 106 in the current regime, reproducing, displaying, or distributing copyrighted works all constitute infringement. The fair use doctrine subjects the rights granted by Section 106 to a broad exception—that notwithstanding those rights, "fair uses" of copyrighted works will not constitute infringement. The statute provides several factors to determine whether the use of a work is "fair." These include: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use of the potential market for or the value of the copyrighted work.[51]

While courts have used all of the factors in the finding of fair use, the last has often been the strongest indicator.[52] Although fair use does not extend to "innocent" infringements,[53] it allows for criticism, comment, news reporting, teaching (including multiple copies for classroom use), and even parody.[54]

The Supreme Court considers all First Amendment copyright claims to be subsumed under the fair use doctrine.[55] An individual may display, reproduce, distribute, or perform copyrighted works in many cases, which makes copyright seem far less likely to resemble a "speech restriction" than a protection of property or pecuniary interests. By its very definition, a speech restriction (the Copyright Act) cannot truly "restrict"

47. *See, e.g.*, Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 978 (2d Cir. 1980) (holding that Universal could freely produce a movie that made use of Hoehling's factual account of the Hindenberg crash) (quoting Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966)).

48. Time Inc. v. Bernard Geis Assoc., 293 F. Supp. 130, 146 (S.D.N.Y. 1968).

49. In some cases, the Court has protected the effort taken to develop such information. Section 301(b)(3) allows for state law to supplement copyright-related protections when not preempted by the federal law. 17 U.S.C. § 301 (2001). *See generally* International News Service v. Associated Press, 248 U.S. 215, 237-238 (1918) (holding that "hot news" is protectable under misappropriation); NBA v. Motorola, Inc. 105 F.3d 841, 845 (2d Cir. 1996) (holding that state law may still protect noncopyrightable elements such as the transmission of real-time game scores).

50. *E.g.*, Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 577 n.13 (1977) ("We note that Federal District Courts have rejected First Amendment challenges to the federal Copyright law on the ground that 'no restraint [has been] placed on the use of an idea or concept.'").

51. 17 U.S.C. §107 (1994).

52. Harper & Row, 471 U.S. at 566.

53. Wihtol v. Crow, 309 F.2d 777, 780 (8th Cir. 1962) (holding that defendants can be found liable even with no intent of harmful infringement).

54. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (holding that 2 Live Crew's musical parody of Roy Orbison's "Oh, Pretty Woman" constituted fair use).

55. New Era Publ'n Int'l v. Henry Holt & Co., 873 F.2d 576, 584 (2d Cir. 1989) ("Our observation that the fair use doctrine encompasses all claims of first amendment in the copyright field [has] never been repudiated.").

speech (by prohibiting speech that infringes copyrighted works) if it allows the speech to be selectively used for specific purposes. As a result of its reliance on the "safety valves" built into copyright, the Court has otherwise dismissed First Amendment challenges to copyright.[56]

III. *ELDRED'S* CONTRIBUTION TO FIRST AMENDMENT—COPYRIGHT CASELAW

This past January, the Court issued its decision in *Eldred*, in which Eric Eldred challenged the Sonny Bono Copyright Term Extension Act.[57] The CTEA was enacted as a supplement to the 1970 Copyright Act by adding twenty years to the copyright grant of Life + 50 years *post mortem*.[58] *Eldred* claimed that the retroactive application of the CTEA to existing copyrighted works chilled new speech that might have been based on those works, had they gone into the public domain when the original copyright grant expired.[59]

The District of Columbia trial court first ruled against Eldred, stating that it recognized no First Amendment right to use of the copyrighted works of others.[60] The Appellate Court affirmed, reasoning that copyright protections only granted the author rights to the specific *form of expression*, not the idea itself. [61] The Supreme Court affirmed as well, relying on the reasoning used in *Nation Enterprises*, in which fair use was considered to be the functional substitute for the First Amendment's protections.[62] Here, the Court asserted that the CTEA actually enhanced traditional First Amendment safeguards through two provisions.[63]

The Supreme Court correctly ruled against *Eldred* for a few reasons. Most importantly, the Court's internalist approach to the issue was coextensive with *Eldred's* claim. The CTEA may have extended the duration of copyright privileges, but it did not substantially enlarge them to the detriment of free speech. The additional duration of rights posed no shift in the balance between the idea and expression, nor did it expand the scope of copyrightable subject matter. In addition, the provisions of the CTEA actually expanded the application of fair use in certain circumstances.[64] Having to wait an addi-

56. *See* cases cited *supra*, note 8.

57. Eldred v. Ashcroft, 123 S. Ct. 769, 774 (2003).

58. 17 U.S.C. §§ 302, 304 (2002).

59. There is a great deal of evidence that companies such as Disney, the Gershwin Family trust, and other groups lobbied their cause in front of Congressional hearings during early discussions of the matter. *See Disney Lobbying for Copyright Extension No Mickey Mouse Effort; Congress OKs Bill Granting Creators 20 More Years*, CHI. TRIB., Oct. 17, 1998, at 22; John M. Garon, *Media and Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 524 (1999).

60. Eldred v. Reno, 345 U.S. App. D.C. 89, 92 (2001); Eldred v. Reno, 239 F.3d 372, 375 (D.C. Cir. 2001) (citing *Nation Enters.*, 471 U.S. at 556 and United Video, Inc. v. FCC, 890 F.2d 1173, 1176-78 (D.C. Cir. 1989)).

61. Eldred v. Reno, 239 F.3d 372, 375 (D.C. Cir. 2001) (citing *Nation Enters.*, 471 U.S. at 556 and United Video, Inc. v. FCC, 890 F.2d 1173, 1176-78 (D.C. Cir. 1989)); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.10(D) (2002).

62. Eldred, 123 S. Ct. at 774.

63. §108(h) allows libraries and similar institutions to reproduce and distribute copies of certain published works for scholarly purposes during the last 20 years of any copyright term, if the work is not already being exploited commercially and further copies are unavailable at a reasonable price; §110(5)(b) exempts small businesses from having to pay performance royalties on music played from licensed radio, television, and similar facilities. 17 U.S.C. §§ 108, 110 (1994).

64. *Id.*

tional twenty years to use the works of others, the Court argued, was not a persuasive First Amendment claim.[65]

In a few ways, *Eldred* demonstrates that the Court's developed First Amendment copyright analysis is still intact, offering little change in this field of the law. The Court continues to rely on the internal safety valves of copyright to dispose of First Amendment claims. Therefore, a successful challenge to copyright must implicitly argue that those mechanisms have weakened to the detriment of free speech interests. However, the Court seems to cling to its tried-and-true approach, even when it is clear that free speech interests are in peril due to certain provisions of the Copyright Act, namely, the DMCA.

IV. THE DMCA'S CIRCUMVENTION OF FREE SPEECH

The Digital Millennium Copyright Act was added to the U.S. Code in 1998 to keep up with the threat that copyright owners felt due to the digitalization of mass media.[66] The DMCA strengthens copyright protections through a trifecta of provisions: 1) Section 1201(a)(1)(A) is known as the "anti-circumvention" provision, which prohibits the circumvention of any access control; 2) Section 1201(a)(2) is the "anti-trafficking" provision, which prohibits the trafficking of devices for circumventing access controls; 3) and Section 1201(b)(1) which prohibits the trafficking of devices for circumventing *copy* controls.[67] An access control consists of any technological provision that controls access to a copyrighted work, and a copy control is any technological measure that protects any rights of a copyright owner. Violators face both criminal and civil penalties as well as injunctions ordered by the court to prevent unauthorized access.[68]

While the DMCA claims to have not enlarged or modified the scope of copyright protections,[69] it has implicitly authorized copyright owners to use self-help measures to protect their works. Authors may prevent access to their works by using encryption codes, passwords, or other tools. Any individual who tries to circumvent these devices, even for benign purposes, violates the DMCA. Although the DMCA has been almost universally condemned by academics as an "ill-conceived" and "unsound" provision,[70] the Court has been given very few opportunities to weigh in on the matter.

A. The Court's treatment of First Amendment—DMCA Cases

Among the handful of cases that have challenged the DMCA on First Amendment grounds, three are especially relevant: *Universal City Studios v. Reimerdes*,[71] *Universal*

65. As Justice Souter asked plaintiff's counsel Lawrence Lessig at the *Eldred* oral arguments, there must be a "possibility of a kind of a causal connection between the extension and the promotion or inducement for the creation of some subsequent work" to hold the CTEA liable of burdening free speech. Oral Arguments, Oct. 9, 2002, *available at* http://cubicmetercrystal.com/log/eldred2.html (last visited May 20, 2003).

66. *E.g.*, Glynn Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813 (2001).

67. 17 U.S.C. §1201(a)-(b) (2001).

68. 17 U.S.C. §1203(b)(1) (2001).

69. 17 U.S.C. §1203 (2001).

70. *See* Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulation Needs to Be Revised*, 14 BERKELEY TECH. L.J. 519, 533, 562 (1999).

71. *See* Universal City Studios, Inc. v. Reimerdes, 82 F. Supp. 2d 211, 219-23 (S.D.N.Y. 2000).

City Studios v. Corley,[72] and *United States v. Elcom*.[73] *Reimerdes* and *Corley* both consisted of complaints made by motion picture studio corporations against the distributors of a computer code that decrypted DVDs.[74] In *Elcom*, the manufacturers of eBooks, who provided digital books for purchase and download, brought suit to enjoin Elcomsoft from providing software that allowed the free distribution of eBook files.[75] Examining each of these cases will reveal the progression of the Court's First Amendment DMCA jurisprudence as well as its shortcomings.

In *Reimerdes*, the first of the trio, the Court was presented with the first free speech challenge to the DMCA. At issue was a decryption program (DeCSS) that circumvented the encryption technology that movie studios placed on DVDs of motion pictures.[76] The writers of the code argued that their purpose was to provide for DVD compatibility on non-Windows systems such as Linux.[77] They further alleged that the DMCA was unconstitutional in its violation of the First Amendment.[78] The Court responded to this claim in two ways. First, the Court pointed to Chief Justice Marshall's broad definition of Congress's powers mandated by the Necessary and Proper Clause in *McCulloch v. Maryland*.[79] The Court argued that the DMCA was Congress's "technological means of protecting copyrighted works" which "facilitate[d] the robust development and worldwide expansion of electronic commerce. . . ."[80] Although the Court stated that this reasoning was alone sufficient to dispose of *Reimerdes'* First Amendment claim, it continued to analyze the DMCA through some sort of balancing test. Here, the Court found that DeCSS sought to "render intelligible a data file on a DVD" which did "little to serve [the] goals" of free speech.[81] The Court balanced this against the DMCA's purpose of "protect[ing] copyright in the digital age" and unsurprisingly, ruled in favor of the DMCA.[82]

In the related *Corley* case, decided a year later, the Court modified its approach to First Amendment challenges to the DMCA. In *Corley*, the Court replaced its balancing approach with that of the First Amendment framework.[83] When Eric Corley challenged the validity of the DMCA on First Amendment grounds, the Court revised its understanding of computer code—it ruled that computer code contained expressive elements and constituted protectable "speech."[84] However, the Court went much further and evaluated the DMCA through its First Amendment analysis, making *Corley* one of the first cases of its kind. The Supreme Court, which had previously refused to construe

72. *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 445-459 (2d Cir. 2001).

73. *See* United States v. Elcom, Ltd., 203 F. Supp. 2d 111, 1125-37 (N.D. Cal. 2002).

74. The original defendants in the lawsuit were Shawn Reimerdes, Roman Kazan, and Eric Corley, all of whom owned or operated websites that were distributing DeCSS. 82 F. Supp. 2d at 214-15. Defendants Shawn Reimerdes and Roman Kazan entered into settlement agreements with the plaintiffs. Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 312 n.91 (S.D.N.Y. 2000). The plaintiffs then amended the complaint to include Eric Corley's company, 2600 Enterprises, Inc. as a defendant. *Id.* The remaining defendants in the case were Eric Corley and his company 2600 Enterprises, Inc., which publishes a computer magazine known as *2600: The Hacker Quarterly* and operates a web site at http://www.2600.com (2600.com). *Id.* at 308-09.

75. 203 F. Supp. 2d at 1117.

76. 82 F. Supp. 2d at 214.

77. *Id.* at 217 n.14.

78. *Id.* at 219.

79. 17 U.S. 316, 324 (1819).

80. 82 F. Supp. 2d at 221.

81. *Id.* at 222.

82. *Id.*

83. 273 F.3d at 450.

84. *Id.* at 449, 451.

copyright as a speech restriction, did so in *Corley*. The DMCA, as the Court argued, was a content-neutral regulation which required only intermediate scrutiny. [85] Relieved from meeting the high demands of strict scrutiny, the DMCA needed only to "avoid burdening 'substantially more speech than [was] necessary to further government's legitimate interests'" in order to pass constitutional muster.[86]

In *Elcom*, the last of the three cases, the Court issued the most comprehensive statement of its attitude toward the DMCA. As briefly mentioned above, *Elcom* involved the distribution of eBook files without the "voucher" or "header information" that restricted the use of the file to the computer purchasing the eBook.[87] The defendant, Elcomsoft Company Ltd. ("Elcomsoft") developed and sold a product known as the Advanced eBook Processor which stripped away the restrictions placed on each file, so that eBooks could be copied, emailed, and otherwise distributed freely.[88] In its response to *Elcom's* First Amendment challenge to the DMCA, the Court reiterated that computer code did indeed contain expressive elements that implicated First Amendment interests.[89] Hoping to avoid the fate of *Corley's* First Amendment claim, however, *Elcom* made a bold assertion—that the DMCA was not a content-neutral regulation, but content-based in its regulation of speech that circumvented access and copy controls.[90] Since content-based regulations must pass strict scrutiny, *Elcom* argued, the DMCA was unconstitutional because it was not a narrowly tailored, least restrictive means of achieving Congress's stated purpose.[91] The Court responded by saying it could find no evidence that Congress enacted the DMCA "because of agreement or disagreement with the message it convey[ed]."[92] Instead, Congress sought to ban the code not because of what the code said, but rather because of what the code did.[93] With the "least restrictive means" obstacle removed, the Court had no trouble upholding the DMCA.

B. The Death of Fair Use

The reader will recall that in "traditional" copyright cases, the Court almost entirely avoided evaluating free speech concerns using the First Amendment framework—instead, it relied heavily on fair use and other internal mechanisms to settle claims.[94] In DMCA cases, however, the Court dismisses First Amendment claims just as quickly, but seems to forget the emphasis it placed on fair use.

In *Reimerdes*, the defendant stated that developing DVD compatibility on Linux machines constituted fair use, relying on § 1201(f) of the DMCA, which permits reverse engineering of copyrighted computer programs.[95] Unfortunately, the Court found no fair use, stating that Shawn Reimerdes did not merely reverse-engineer the CSS encryption function, but that he circumvented a technological system in doing so, for which the

85. 273 F.3d at 454.
86. *Id.* at 455 (*citation omitted*).
87. 203 F. Supp. 2d at 1118.
88. *Id.*
89. *Id.* at 1126-27.
90. *Id.* at 1127.
91. *Id.*
92. *Id.* at 1128.
93. 203 F. Supp. 2d at 1128.
94. 471 U.S. at 539-40, 560.
95. 82 F. Supp. 2d at 218.

reverse-engineering exception did not provide.[96] This telling response to *Reimerdes'* fair use defense illuminated the true effect of the DMCA on fair use—although fair use was still technically available as an exception to copyright protections, it could not be used in violation of the DMCA. Making fair use of a copyrighted work becomes impossible if the work is protected by any access or copy control.

Corley brought this to the Court's attention and complained that the DMCA eliminated fair use.[97] But without explaining exactly why, the Court dismissed this notion as an "extravagant" claim, merely stating that the Constitution did not require fair use.[98] In *Elcom*, as well, the Court stated that the Constitution did not guarantee a fair user the right to the most technologically convenient way to engage in fair use.[99] But despite the Supreme Court's defensive responses describing fair use as more of a privilege than a constitutional right, the Court implicitly acknowledged the weakening of fair use. In *Elcom*, the Court stated that although fair use was still available, it was "more difficult for such uses to occur with regard to technologically protected digital works."[100] The Court seemed indifferent to the fact that the DMCA effectively abolished the fair use of electronic works. A user who required a newspaper article would not be able to make fair use of the piece if he sought to find it online, but would if he walked to the library and photocopied the article.

C. *The Unintended Right of Access*

Although the court ruled against all three cases on both First Amendment and fair use claims, it did so correctly with respect to the former. The Court may have approached free speech claims against the DMCA differently than those against copyright provisions, but it came to the same conclusion—that there is simply no First Amendment right to make use of the copyrighted works of others. Ultimately, it seems as though challenges against the DMCA on First Amendment grounds are fatally flawed regardless of the circumstances. As long as the DMCA's provisions are content-neutral in application, the Court will adhere to an intermediate scrutiny test in which the DMCA will always triumph.

With respect to the fair use claim, however, the Court's reasoning is exceedingly unpersuasive. If internal mechanisms of copyright, like fair use, are to represent free speech interests, then they must be rigidly supported. Instead, the Court argues that fair use still exists, albeit behind the unwelcoming gatekeeper, the DMCA. Unfortunately, its response to the complaints made by *Reimerdes, Corley*, and *Elcom* are inadequate for a few reasons.

Above all, the Court ignores the effect of digitalization on mass media. While it is easy to expect fair users to find non-electronic sources of copyrighted works, it is far more difficult in practice. Keeping paper copies of newspaper articles, books, papers, and other literary works is expensive and inefficient when compared to electronic storage. Literary works that were stored in hard copy were moved to microfilm for archival purposes a decade ago, and now have been transferred to permanent homes on servers,

96. *Id.*
97. 273 F.3d at 458.
98. United States v. Elcom, 203 F. Supp. 2d 1111, 1131 (N.D. Cal. 2002).
99. *Id.*
100. *Id.* at 1134.

CDs, and other storage devices. Authors who were unable to restrict access to their works in hard-copy format now enjoy the freedom to take whatever measures necessary to prevent a violation of their rights. Thus, the greatest tragedy imposed by the DMCA is its creation of a right never conceived by the Copyright clause or the Copyright Act—the right of access. Under traditional copyright principles, individuals are free to access copyrighted works, but are restricted from displaying, reproducing, performing, or distributing them pursuant to § 106(a).[101] The DMCA alters this by denying new authors the ability to even view the copyrighted work.

As a result of this new right bestowed upon copyright owners by the DMCA, authors may now ask for fees before allowing users to obtain access to works, such as ones used by nationwide newspaper sites.[102] Worse, the DMCA gives authors leverage to bully individuals into accepting "term of use" agreements as a prerequisite to access.[103] Moreover, if a user encounters a site that contains both copyrighted works and works in the public domain, he is unable to copy or access the public work because of the DMCA, even though he is entitled to do this. He must simply abide by the terms of the author's access and copy control systems.

The DMCA has had a debilitating effect on fair use because fair use presupposes access to the copyrighted work. After viewing the work, a user can make fair use of the work under the guidelines of § 107 or take his chances by violating the author's copyright. However, the individual has always enjoyed the choice to decide the extent of his use—something that is rendered nugatory by the DMCA.[104] In this sense, the DMCA's weakening of fair use has huge implications for Constitutional rights, including free speech. It is dangerous to give private parties free reign to enforce their copyrights through *their own inventions* because they are not bound to particular provisions of the Copyright Act, such as fair use. The DMCA sought to give teeth to the Copyright Act, but has created a monster instead. As described by the House Commerce Committee, the DMCA encourages a "legal framework that inexorably create[s] a pay-per-use society."[105] The Court's indifference to these issues is unacceptable.

D. Finding Fair Use in the DMCA

As many scholars suggest, the DMCA must be modified to resurrect fair use.[106] Professor Jane Ginsburg suggests that a close reading of § 1201(c)'s sentence structure

101. 17 U.S.C. §106(a) (2003).

102. *See, e.g.*, THE NEW YORK TIMES, *available at* http://www.nytimes.com (last visited May 20, 2002); CHICAGO TRIBUNE, *available at* http://www.chicagotribune.com (last visited May 20, 2002).

103. Siva Vaidhyanathan, *Copyrights and Copywrongs: Why Thomas Jefferson would love Napster*, at http://www.stayfreemagazine.org/ml/readings/siva_jefferson.pdf (last visited October 13, 2003) (arguing that under the DMCA, copyright holders "could extract contractual promises that the use would not parody or criticize the work in exchange for access").

104. The *Corley* court held that the DMCA contains exceptions for schools and libraries that want to use circumvention technologies to determine whether to purchase a copyrighted product. 17 U.S.C. § 1201(d) (2003). This includes individuals using circumvention technology "for the sole purpose" of trying to achieve "interoperability" of computer programs through reverse-engineering, and encryption research aimed at identifying flaws in encryption technology, if the research is conducted to advance the state of knowledge in the field, 17 U.S.C. § 1201(f)-(g)(2003).

105. Netanel, *supra* note 3, at n.99 & n.101; John R. Therien, *Exorcising the Specter of a "Pay-Per-Use" Society: Toward Preserving Fair Use and the Public Domain in the Digital Age*, 16 BERKELEY TECH. L.J. 979, 982 (2001).

106. Pete Singer, *Mounting a Fair Use Defense to the Anti-Circumvention Provisions of the Digital Millennium Copyright Act*, 28 U. DAYTON L. REV. 111, 127 (2002).

may place the DMCA under the same title as the Copyright Act, which would subject it to the § 107 fair use exception.[107] Others like Professor Pete Singer suggest a federal common law statute which would provide a specific fair use exception to the DMCA.[108] The large amount of scholarship in this area suggests that the DMCA has wrongfully attempted to cabin the constantly changing field of technology to the detriment of fair use and free speech. Because of its robust nature and dynamic application, fair use has been broad enough to allow for non-infringing uses of copyrighted works fixed in various forms of media. Its strength should not be preempted by the overbroad and unduly restrictive DMCA.

V. CONCLUSION

Although free speech advocates had great hopes for *Eldred's* First Amendment claim against the CTEA, their efforts would have been far better spent on the DMCA's burden on free speech. The Court had previously argued that the internal mechanisms of copyright, especially fair use, had represented all free speech claims. However, it has all but ignored the DMCA's deleterious effect on fair use. Without a robust fair use doctrine, free speech interests are unrepresented and in danger of being impermissibly burdened. To correct this imbalance, Congress must fashion exceptions to § 1201(a)(1)(A) and § 1201(a)(2) of the DMCA so that individuals are allowed to determine the extent of their uses themselves.[109] Until then, the DMCA exceeds the scope of power granted to Congress by awarding copyright owners two dangerous tools—the power to regulate access to their works and a set of sanctions to enforce self-help measures, which ultimately cause the greatest injury to free speech.

107. *See generally* Jane C. Ginsburg, *From Having Copies to Experiencing Works: the Development of an Access Right in U.S. Copyright Law*, *available at* http://papers2.ssrn.com/paper.taf?ABSTRACT_ID=222493 (last visited October 12, 2002).

108. Singer, *supra* note 107, at 132.

109. *See generally* Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulation Needs to Be Revised*, 14 BERKELEY TECH. L.J. 519, 533 (1999).