

THE MODERN FIRST AMENDMENT AND COPYRIGHT LAW

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I. INTRODUCTION

The United States Constitution, the most influential document in American history, contains within its four corners both the First Amendment to the Constitution and the Copyright Clause. The First Amendment's guarantee of free speech remains essential for the maintenance of a free society that values enlightenment and the free flow of ideas highly. Indeed, the First Amendment's protection of the free-flow of information ensures creativity which leads to spectacular advancement in a wide variety of fields, including the arts and sciences. Similarly, the protections afforded by the Copyright Clause are also essential for the maintenance of an enlightened society that reaps the benefits of the creative genius of masterminds who invent useful devices, produce brilliant works of art, and author wonderful literature. Indeed, while some create for the sake of creating, giving authors and writers exclusive rights to their respective writings and discoveries for limited times certainly motivate many to share their captivating works and revolutionary inventions with the rest of society. Since both the First Amendment and copyright law find themselves within the Constitution and both remain critical for the operation of the modern American society, the interaction between these two pillars constitutes an intriguing topic, particularly in an era when both doctrines continue to expand rapidly. This Article will address the big and fascinating topic of the interaction between the modern First Amendment doctrine and copyright law.

The modern First Amendment doctrine is a strong, expansive, and protective doctrine that goes to great lengths to protect speech and expression. Copyright laws are subject to First Amendment challenges. In 1998, Congress passed the Digital Millennium Copyright Act ("DMCA"). The DMCA contains an anticircumvention provision in section 1201 of the Act. DMCA section 1201 violates the modern First Amendment doctrine for several reasons. Furthermore, DMCA section 1201 constitutes an impermissible extension of copyright law beyond its constitutional boundaries.

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This Article will argue that DMCA section 1201 is unconstitutional and will utilize a wide variety of constitutional arguments to support this thesis. Many methods of argument have been used to challenge copyright laws by various individuals. The actual holding of a court will not be used to determine the merits of such an argument. Rather, the analysis herein will focus on how such arguments for or against copyright law fit into the modern First Amendment framework at both a theoretical and practical level. After all, some of the most dynamic and intelligent-sounding majority opinions of the modern era often can be found in the dissenting opinions of a past era. Arguments will be made from concepts, logic, and practice, rather than parsing existing case law on First Amendment challenges to DMCA section 1201, which have not fared well in the courts.

DMCA section 1201 violates the First Amendment under a wide variety of theories. First, DMCA section 1201 violates the First Amendment because it is a content-based abridgment of free speech. Computer programs are speech. Computer programs are copyrightable under copyright law, which means they are considered “expressions” under copyright law. Since computer programs are considered “expressions” under copyright law, they should be considered expressions under the First Amendment. The modern First Amendment usually equates speech and expression for First Amendment protection. Since DMCA section 1201 criminalizes speech because of its content, it is unconstitutional. Second, DMCA section 1201 is sufficiently overbroad, making it unconstitutional. The Act is sufficiently overbroad because the number of invalid applications of the Act greatly exceeds the number of valid applications of the Act. Laws that are sufficiently overbroad are unconstitutional because such laws could result in a person refraining from protected speech and legitimate expression because of fear of prosecution under the law. Third, DMCA section 1201 is unconstitutionally vague. The Act is unconstitutionally vague because a reasonable person (or computer programmer) cannot look at the Act and determine the scope of the Act with any reasonable certainty. Laws that are unconstitutionally vague are unconstitutional because a person’s protected speech and expression might be chilled by the indeterminable scope of the law. Fourth, DMCA section 1201 is unconstitutional because it reaches far beyond the boundaries of the intellectual property clause of the constitution. The intellectual property clause of the Constitution was intended to benefit the public, not private individuals. The primary purpose of the intellectual property clause was public benefit, while private benefit for a limited time was a mere secondary condition necessary to stimulate public benefit. Since the purpose of the intellectual property clause is public benefit, any law that utilizes the clause for the purpose of private benefit to the detriment of public benefit exceeds the constitutional bounds of the clause. Fifth, copyright protection can remain strong in the digital age without the use of anticircumvention rules, because other methods are available to enforce copyright laws that are more consistent with the intent of the copyright clause. Anticircumvention rules are not essential to maintaining meaningful

copyright law in the digital age. For the foregoing reasons, DMCA section 1201 is unconstitutional.

Part II of this Article illustrates the depth, scope, and strength of the modern First Amendment jurisprudence by contrasting it with the historical First Amendment jurisprudence and explains the reasoning that underlies the evolution of the First Amendment into an expansive and powerful doctrine. This illustrates that the modern First Amendment possesses the strength to defeat modern copyright law (DMCA section 1201) without expanding the doctrine to a new level. Furthermore, it suggests an expansive interpretation of the First Amendment is reasonable. Part III illustrates the historical evolution of copyright law from the original copyright act to the modern DMCA. The section on the evolution of copyright law seeks to highlight the constitutional boundaries of copyright law, with an emphasis on policy and effect. Moreover, comparing DMCA section 1201 with historical changes in copyright law further highlights its legal fallacy in DMCA section 1201. Part IV of the Article then moves on to argue that DMCA section 1201 violates the First Amendment and is inconsistent with the purpose of the intellectual property clause. This section also suggests that anticircumvention rules are not necessary to preserve meaningful copyrights in the digital age and that a purpose/policy test is the best way to reconcile copyright law and the First Amendment.

II. THE EVOLUTION OF THE FIRST AMENDMENT

The First Amendment of the United States Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”¹ The “freedom of speech” guarantee that the Founding Fathers put into the Constitution represents a sharp departure from the vast majority of cultures in human history, which allowed governmental or authoritarian suppression of speech.² The notion that a government would seek to suppress speech is predictable given the enormous power of speech to effect social change. Speech, when uncontrolled, certainly possesses as much danger to social stability as any other item that governments seek to regulate. Given the great power that speech possesses to bring about social and political change, governments and societies seek to regulate it. After all, the written word has influenced human history more than warfare. The adage “[t]he pen is mightier than the sword” accurately reflects the power of speech to effect change. Governments and authoritarians throughout history have been well aware of the power of speech and thus have gone to great lengths to regulate it. These governments believe the regulation of speech is essential to their maintaining both power and societal stability.

Notwithstanding the immense power of speech, great scholars have always recognized the value of free speech. John Stuart Mill eloquently

¹ U.S. CONST. amend I.

² JOHN BAGNELL BURY, *A HISTORY OF FREEDOM OF THOUGHT* 2 (Henry Holt & Co. 1914).

stated the “peculiar evil of silencing the expression of an opinion is, that it is robbing the human race, posterity as well as the existing generation.”³ Justice Oliver Wendell Holmes recognized the value of free speech as well. He believed in the market place of ideas. That is, Justice Holmes believed in the “free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and the truth is the only ground upon which their wishes safely can be carried out.”⁴ Thus, the United States Constitution as well as great intellectuals supports the notion that citizens should have the liberty to put their opinions, views, and beliefs into the market place of ideas.⁵

Despite the enlightened views expressed in the amendment’s support of “freedom of speech” and the intellectual support for it expressed throughout ennobling literature by distinguished philosophers, historically the First Amendment did very little to protect the freedom of speech of citizens.⁶ Prior to the time after World War I, a First Amendment challenge to a law had very little, if any, chance at succeeding. The Court would simply defer to the legislature, thereby making the phrase “freedom of speech” meaningless most of the time.⁷ Historically the First Amendment doctrine was weak, narrow, and insignificant. By contrast, the modern First Amendment doctrine more generally reflects the views of the great intellectuals of yesteryears.⁸ The modern First Amendment doctrine rarely defers to legislative judgment.⁹ The phrase “freedom of speech” carries tremendous weight.¹⁰ The modern First Amendment doctrine is strong, broad, and significant. It includes penumbral rights and intellectual values such as autonomy, self-expression, tolerance, and freedom of thought.¹¹ It even covers acts traditionally viewed as conduct if such acts qualify as symbolic speech.¹² The First Amendment has evolved to greatly expand the concept and meaning of freedom of speech.¹³ Understanding the historical evolution of the First Amendment from a legally insignificant doctrine to a legally significant doctrine that is strictly enforced is essential to understanding why certain aspects of copyright law in general, and

³ JOHN STUART MILL, *ON LIBERTY* 14 (Dover Publ’ns, Inc. 2002) (1859).

⁴ *Abrams v. United States*, 250 U.S. 616, 630 (1919).

⁵ See also Universal Declaration of Human Rights, G.A. Res. 217A, at 19, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948). This document, adopted by the United Nations General Assembly in December of 1948, reflects an international recognition of the importance of the freedom of speech.

⁶ LEONARD LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (Harv. Univ. Press 1960).

⁷ See, e.g., *Debs v. United States*, 249 U.S. 211 (1919); *Schaefer v. United States*, 251 U.S. 466 (1920); *Gilbert v. Minnesota*, 254 U.S. 325 (1920); *Pierce v. United States*, 252 U.S. 239 (1920).

⁸ See C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 *UCLA L. REV.* 964, 979 (1978).

⁹ See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 34 (1971).

¹⁰ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *N.Y. Times v. Sullivan*, 376 U.S. 254, 269 (1964).

¹¹ See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 907 (1963).

¹² See Melville B. Nimmer, *The Meaning of Symbolic Speech under the First Amendment*, 21 *UCLA L. REV.* 29, 31 (1973) [hereinafter Nimmer, *Meaning of Symbolic Speech*].

¹³ See William T. Mayton, *From a Legacy of Suppression to the “Metaphor of the Fourth Estate,”* 39 *STAN. L. REV.* 139 (1986).

specifically parts of the DMCA, that years ago clearly would have not been held to violate the First Amendment may substantially violate the modern First Amendment doctrine. In other words, the historical evolution of the First Amendment into a powerful, broad, and widely applied doctrine probably renders key aspects of copyright law and certain provisions of the DMCA unconstitutional.

A. HISTORICAL FIRST AMENDMENT JURISPRUDENCE

Historically, the First Amendment was a mere doctrine against prior restraints. The doctrine against prior restraints would prohibit the government from requiring all authors to have their books pre-approved for publication but would allow the government to punish an author for the content of his book after the book's publication.¹⁴ In the words of William Blackstone:

The liberty of the press is, indeed, essential to the nature of a free state; but this consists in laying no *previous* restraint upon publications, and not in freedom from censure for criminal matter when published. . . . [I]f he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.¹⁵

The Supreme Court espoused a view similar to William Blackstone in the 1897 case *Robertson v. Baldwin*¹⁶ by dismissing any substantive guarantee of the First Amendment, stating that “[t]he law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the *Bill of Rights*, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors.” In the 1907 case *Patterson v. Colorado*,¹⁷ the Court stated that “[i]n the first place, the main purpose of [the First Amendment] is ‘to prevent all such *previous* restraints upon publications as had been practiced by other governments,’ and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.”¹⁸ Thus, the First Amendment doctrine adopted by the Court under the influence of William Blackstone imposed no substantive limit on the government to criminalize speech based on its content so long as prior restraints were not used.¹⁹ The historical view of the First Amendment as applied by the Court offers no substantive protections against government censorship of speech whatsoever.

It is noteworthy that the traditional doctrine of prior restraint does offer some protection against government censorship, but the protection is procedural in nature, not substantive. The government can only censor by

¹⁴ See Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955).

¹⁵ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151–52 (Harper & Bros. 1854) (1769). For a general discussion on freedom of speech and press, see David Lange, *The Speech and Press Clauses*, 23 UCLAL. REV. 77 (1975).

¹⁶ 165 U.S. 275, 281 (1897).

¹⁷ 205 U.S. 454, 462 (1907).

¹⁸ See *Respublica v. Oswald*, 1 U.S. 319, 325 (1788) (“they effectually preclude any attempt to fetter the press by the institution of licenser”).

¹⁹ See *Commonwealth v. Blanding*, 20 Mass. 304 (1825) (upholding criminal libel conviction based on content of newspaper published, even if article factually true).

prosecuting speech with which it disagrees. For a prosecution to be successful, the author (or speaker) must be convicted by a jury of his peers.²⁰ Thus, the jury, not a group of government agents, determines if the author deserves punishment for the content of his work. In theory the government could not suppress a book containing a view that resonates well with citizens but with which it strongly disagrees, because the author could publish his book knowing that a jury of his peers would never convict him. The jury is, in essence, the procedural safeguard. By contrast, if prior restraints were allowed, the government could set up a hearing board composed of government agents who could deny the author the right to publish his book. Thus, the ban of prior restraints allowed the author to publish his book. Nevertheless, the procedural protection offered by the prior restraint doctrine is significantly inadequate, almost *de minimus*, to protect the freedom of speech.

Historically, the First Amendment was akin to the carpet that lines the floor of Congress—the legislature was allowed to walk all over it. If Congress passed a law that clearly intended to abridge the freedom of speech, the Court typically deferred to the legislative judgment and upheld the law. In other words, ironically if the law were aimed directly at speech with the purpose of abridging speech, the Court would almost certainly uphold the law. Justice Sanford illustrates this reality in a case in which the defendant was charged with criminal anarchy.²¹ The anarchy statute at issue made the advocacy of such doctrines “by word of mouth or writings” a crime. Justice Sanford, writing for the majority, reasoned since the legislature clearly intended to include speech in the law, the Court should defer to the judgment of the legislature and uphold the conviction. Thus, the general rule was that a legislative judgment to target speech clearly weighed in favor of upholding the law. This is to be contrasted with cases in which people were prosecuted for speech under a statute aimed at “conduct” not “speech.” In those cases, it would not be clear that the legislature intended to include speech within the scope of the law, so Justice Sanford would not have the legislative judgment to which to defer. Historically Justice Sanford’s view prevailed. If the law is clearly aimed at speech, defer to the legislature.

Historically, the First Amendment doctrine even allowed the government to criminalize criticism of the government. The Sedition Act of 1789 prohibited malicious publication of defamatory material against the government, the Congress, or the President.²² The Sedition Act of 1918, an amendment to the Espionage Act of 1917, made it a crime to generate scorn or contempt for democratic government, the flag, or the military.²³ Neither Sedition Act was held to violate the Constitution. In other words, the government was allowed to prosecute citizens for making political

²⁰ U.S. CONST. amend VII.

²¹ *Gitlow v. New York*, 268 U.S. 652, 668 (1925) (“By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means . . . may be penalized in the exercise of its police power. That determination must be given great weight.”).

²² BLACK’S LAW DICTIONARY (8th ed. 2004).

²³ See H.R. 8753, 65th Cong. (2d Sess. 1918).

speech.²⁴ Political speech is the engine of change in a democratic country. To try to ban political speech is to advocate for tyranny. An open public discussion of the actions of the government is essential for any democratic society.²⁵ The citizens who elect the government should be allowed to make an informed vote. Even when the government attempted to abridge speech in such a way that it posed a danger to the core principle of democratic government, the Court refused to hold the law unconstitutional. Thus, historically, the First Amendment has been weak, narrow, and insignificant. Under the traditional First Amendment doctrine, it is possible that it would be impossible for Congress to draft any law to conflict with the Constitution. The phrase “freedom of speech,” though essential to democracy and strongly supported in the intellectual, freedom-loving communities, was virtually a hollow phrase to the majority on the Supreme Court.

B. MODERN FIRST AMENDMENT JURISPRUDENCE

The modern First Amendment in contrast to the historical First Amendment doctrine is akin to a Boeing 747 aircraft parked next to a small car with four flat tires. The modern First Amendment doctrine does a great deal to protect the freedom of speech. In fact, the modern First Amendment even goes beyond what is traditionally defined as “speech” to protect key First Amendment principles. While the traditional First Amendment doctrine did little to protect conventional speech, the modern First Amendment doctrine protects both speech and expressive values. The modern First Amendment doctrine gives little, if any, deference to Congress. The modern First Amendment doctrine is much more than a doctrine against prior restraints. It is a substantive, not procedural, prohibition against government penalty for expression. The modern First Amendment doctrine plays a large role in public policy and the Court takes enforcing the First Amendment seriously. The modern First Amendment is akin to the Boeing 747 flying through the air in terms of its power and sophistication. For another technology analogy, one could say the historical First Amendment doctrine is akin to an abacus (a very primitive calculator that used beads) while the modern First Amendment is akin to a supercomputer. The point is that the modern First Amendment doctrine is very extensive, value-laden, and expansive. Thus, a law may clearly violate the First Amendment even if it does not seem to encroach on “speech.”

The modern First Amendment doctrine evolved after World War I. In the 1925 case of *Gitlow v. New York*,²⁶ the Supreme Court held that the

²⁴ An example of a person who might have been prosecuted under the Sedition Acts if they were valid law today is Michael Moore, who made the film *Fahrenheit 9/11*. It is noteworthy that his film stimulated a wide range of political discussion that citizens were entitled to hear.

²⁵ United States Representative John Murtha spoke against the war in Iraq in November 2005 by advocating complete withdrawal of troops. He received coverage on major news stations CBS, NBC, and CNN as well as coverage by major newspapers such as The Wall Street Journal, The New York Times, and USA Today. This is much more consistent with democracy than having him arrested and then charging the Editors-in-Chief of the major newspapers and the Bureau Chiefs at the news stations with Seditious Libel or Espionage. Such arrests likely would have been permissible under the Sedition Acts of 1798 and 1918.

²⁶ 268 U.S. 652, 666 (1925).

First Amendment applied to the states by incorporation through the Fourteenth Amendment of the Constitution via the substantive due process principle. In other words, the Court held that a state, not just the federal government, is subject to the First Amendment.²⁷ Though the Court in *Gitlow* did not apply the substantive aspects of the First Amendment strongly, *Gitlow* greatly expanded the scope of the First Amendment by holding that it applies to the states. In the 1931 case of *Near v. Minnesota*,²⁸ the Court again held that the First Amendment applies to the states via the Fourteenth Amendment and that an injunction against the publication of a newspaper is unconstitutional. In *Near*, the Court held that an injunction against *The Saturday Press* prohibiting the publication of a story stating a Jewish gangster controlled gambling, bootlegging, and racketeering in Minneapolis was unconstitutional. Thus, between 1925 and 1931 the Court greatly expanded the First Amendment by widening the scope to the states and holding that injunctions are to be considered prior restraints.²⁹

In the 1960s the Court transformed the phrase “freedom of speech” into a substantive phrase designed to protect the freedom of speech as well as the freedom of expression. The views that Justice Holmes and Justice Brandeis, the dissenters in many of the historical First Amendment cases, became the majority view of the Court. The First Amendment “freedom of speech” guarantee came to resemble a guarantee of freedom of expression that the enlightened intellectual community envisioned years ago.

In the landmark case *New York Times v. Sullivan*,³⁰ the Court held that the First Amendment places restrictions on state libel law. The Court held that for a newspaper to be held liable under state law for defamation of a public official or public figure, at a minimum the plaintiff must prove by “clear and convincing” evidence “actual malice.” Actual malice means that the paper knew the printed article was false or published it with reckless disregard of whether the article was true or not. The Court emphasized the policy of allowing the free flow of information.³¹ In the landmark case *Brandenburg v. Ohio*,³² the Court held that a law that bans advocacy is unconstitutional because of the guarantee of freedom of speech by the First Amendment unless the state can show that “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” Thus, the *Brandenburg* Court set a very high standard. To be criminalized, speech must directly incite (as opposed to

²⁷ Application of the First Amendment to the states through substantive due process was revolutionary. It is not obvious from the text of the amendment that it would apply to states. The First Amendment says that “Congress shall make no law . . .” The emphasis is on the meaning of “Congress.” Does “Congress” mean the United States Congress or the California, New York, or Texas legislature? That is why prior to the year 1925 the Court believed that the amendment only applied to the United States Congress.

²⁸ 283 U.S. 697, 722–23 (1931).

²⁹ For more discussion on the application of the First Amendment to states, see *Fiske v. Kansas*, 274 U.S. 380 (1927); *Stromberg v. California*, 283 U.S. 359 (1931); *De Jonge v. Oregon*, 299 U.S. 353 (1937).

³⁰ 376 U.S. 254, 279–83 (1964).

³¹ It is noteworthy that the Court focused heavily on the policy behind free speech and the benefits that free speech brings to an enlightened society instead of just debating the original intent of the Founding Fathers.

³² 395 U.S. 444, 447 (1969).

having the effect of inciting) imminent (as opposed to action that may take place in the future) lawless action (as opposed to lawful action with which the government may disagree) and such action must be likely to produce such imminent lawless action (as opposed to someone who calls for an action with little chance of receiving followers). The *Brandenburg* test reflects two key principles designed to elevate free speech: direct incitement³³ as well as clear and present danger.³⁴ The direct incitement test coupled with the clear/present danger test covers a large amount of speech. This is because direct incitement protects speech that clear/present danger misses and clear/present danger protects speech that direct incitement misses.³⁵ *New York Times* coupled with *Brandenburg* clearly demonstrates the Court is committed to protecting free speech. The Court is asserting that the value of free speech almost always outweighs any harmful effects that could result from the speech.

The modern Court heavily values free speech.³⁶ Free speech is essential for a democracy.³⁷ The Court believes that the free flow of information greatly outweighs any negative or injurious consequences that might emerge from it. The Court believes that to allow the government to regulate speech because of its content poses a slippery slope. That slippery slope eventually leads to an undemocratic government or at least a government that lacks respect for individual rights, personal freedoms, and liberties. The laws in *New York Times* and *Brandenburg* penalized speech because of the content of the speech—that is, these laws placed restrictions based on the content of the speech. The Court in both cases believed that penalizing speech because of its content is inconsistent with democracy. These cases illustrate the important principle that laws that attempt to penalize speech because of the content of the speech violate the Constitution. After all, allowing the free flow of information is consistent with Justice Holmes' marketplace of ideas. Let the people choose which ideas they will accept or reject.³⁸ Additionally, the goal of government should be to have an enlightened citizenry with the ability to choose for itself what ideas it will accept or reject. These cases illustrate the anti-paternalism principle of the First Amendment. It is far better that citizens be given information and be

³³ In *Masses Publ'g Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1935), Judge Learned Hand formulated a test that essentially stated that a person must not be penalized for advocating an unlawful act unless the words themselves clearly indicate such advocacy. In other words, look only to the words themselves.

³⁴ In *Schenck v. United States*, 249 U.S. 47 (1919), Justice Holmes formulated the clear and danger test for advocacy. This test looks not to the words themselves but instead focuses on proximity and degree. His test looks to the effect of the words to see if there is a clear and present danger the words will bring about what Congress sought to prevent.

³⁵ For example, suppose someone says "All citizens need to overthrow the government." Direct excitement would allow a conviction but clear/present danger would not. Suppose a famous political figure says to a group of national guardsmen that "the extension of the time of duty past your original contracted time of duty is clearly unconstitutional." The speaker could be convicted under clear/present danger because of the effect the speech might have but he could not be convicted under the direct excitement test. Under the *Brandenburg* test, neither speaker could be convicted, illustrating the combined protective effect.

³⁶ See, e.g., *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002). Justice Kennedy refers to "the First Amendment's vast and privileged sphere."

³⁷ See MARTIN EDELMAN, *DEMOCRATIC THEORIES AND THE CONSTITUTION* (State Univ. of N.Y. Press 1984).

³⁸ *Cohen v. California*, 403 U.S. 15, 25 (1971) (Justice Harlan noted that "one man's vulgarity is another's lyric." This reflects the idea that people, not the government, judge the value of ideas.).

allowed to accept or reject the information than it is for the government to effectively make decisions for people by hiding information. This is the case even if the information is deemed harmful by the government.³⁹ That is why the Court will apply the most exacting and rigorous scrutiny to a law that attempts to abridge speech because of its content. That is why a law or injunction that is based on the content of speech is almost certain to be held unconstitutional.⁴⁰ It violates both the meaning of “free speech” as well as the very pillars that support democracy.

The modern First Amendment protects symbolic speech as well—that is, the modern First Amendment doctrine protects conduct that a reasonable speaker would believe sends a message and a reasonable listener would receive as a message. For example, in *Texas v. Johnson*,⁴¹ the Court held a law that prohibited the desecration of a state or national flag unconstitutional because it violated the First Amendment. The Court held that the defendant’s conduct was sufficiently expressive to fall within the scope of the First Amendment. In *United States v. Eichman*,⁴² the Court held a law passed by Congress that prohibited the burning of a flag unconstitutional because it violated the First Amendment. Again, it infringed on the speaker’s right to expressive speech.⁴³ It is noteworthy that each speaker could utilize another method to express his political view other than the expressive form of conduct. For example, he could write an editorial in the newspaper expressing his anger with the government or he could hand out flyers at a local mall or a public park. Yet, the fact that he has an alternative available is not sufficient. Symbolic speech is often a more effective way to make a point resonate with the public. Speakers need to be allowed to *communicate* effectively. Thus, the modern First Amendment doctrine protects an individual speaker’s right to communicate with symbolic speech and places this right over the will of Congress even when the speaker has every right to verbally voice his message.⁴⁴ The symbolic speech doctrine is another example of the modern Court expanding “freedom of speech” in a way that is consistent with expressive values. While the historical First Amendment doctrine rarely protected actual “verbal speech,” the modern First Amendment protects even “expressive conduct.”

In certain circumstances, the First Amendment places an affirmative duty on the government to provide services so that speakers can voice their

³⁹ See, e.g., *Yates v. United States*, 354 U.S. 298 (1957), where the Court notes that advocacy of abstract doctrine or belief supporting overthrow of government is within scope of Constitutional right.

⁴⁰ For examples of recent cases involving content-based laws held unconstitutional, see *Free Speech Coal.*, 535 U.S. 234; *United States v. Am. Library Ass’n*, 539 U.S. 194 (2003).

⁴¹ 491 U.S. 397 (1989).

⁴² 496 U.S. 310 (1990).

⁴³ *United States v. O’Brien*, 391 U.S. 367 (1968). This case introduces the modern symbolic speech test. Chief Justice Earl Warren delivered the opinion of the Court. The test states that if the purpose of the law is to ban expression, then strict scrutiny should apply. If the law happens to place an incidental burden on symbolic speech, intermediate scrutiny applies.

⁴⁴ See Nimmer, *Meaning of Symbolic Speech*, *supra* note 12. The great law professor and intellectual scholar in both copyright law and First Amendment law provides an intellectual and enlightening discussion about symbolic speech as it relates to free speech. Professor Nimmer successfully argued *Cohen v. California*, 403 U.S. 15 (1971), before the United States Supreme Court, thereby advancing the concept of free speech nationwide.

views. The affirmative duty principle of the First Amendment is a very significant expansion of the freedom of speech, because it transforms the First Amendment from a doctrine that just prohibits the government from prohibiting speech into a doctrine that, in some circumstances, requires the government to promote the freedom of speech. In *Schneider v. New Jersey*,⁴⁵ the Court held that the city could not prohibit the distribution of handbills or flyers in the streets or sidewalks even though the sole purpose of the statute was to prevent littering. Instead, the Court held that the First Amendment required the city to pay to have the litter disposed. Justice Roberts wrote that “[a]ny burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press.”⁴⁶ Thus, the Court held that the city must finance the free speech rights of citizens while in the public forum.⁴⁷ The Court ruled this way because of the high value it now places on freedom of speech. The Court wanted to allow for persuasion and the free flow of ideas.⁴⁸ If the free flow of ideas and information burdens the city in some way, the city must still allow for the free flow of ideas and information.⁴⁹ The free flow of ideas is essential to American democracy and freedom. Thus, the negative effect on the city fails to justify the city’s infringement on speech.⁵⁰ Once again, the modern First Amendment doctrine holds in favor of free speech despite the city having a valid and content-neutral purpose.

The modern First Amendment not only includes the right of a speaker to convey a message but it also includes the right of a listener to receive a message. This is another significant expansion of the First Amendment doctrine. The First Amendment now not only includes the rights of the speaker, but it also includes the rights of the listener. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁵¹ the Court stated that “[f]reedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both.” They entertained a lawsuit brought by “listeners” who claimed a Virginia law that prohibited

⁴⁵ 308 U.S. 147 (1939).

⁴⁶ *Id.* at 162. Compare *Schneider*, 308 U.S. at 162, with *Davis v. Massachusetts*, 167 U.S. 43 (1897), where the Court essentially held that for a city to infringe on public speaking is no worse than for the owner of a private home to infringe on speaking in his house. *Davis* is, in essence, the exact opposite of the rule in *Schneider*.

⁴⁷ See also Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLAL REV. 1713 (1987).

⁴⁸ See *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 802–03 (1996) (“Minds are not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media.”).

⁴⁹ To see the premium placed on free speech, compare the *Schneider* decision to a case involving the government’s authority to use its property. In *Adderley v. Florida*, 385 U.S. 39, 47 (1966), the Court noted that “[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”

⁵⁰ See, e.g., *City of Ladue v. Gilleo*, 512 U.S. 43 (1994). Justice Steven opined for the majority, holding a law that prohibited homeowners from displaying signs on their property to be unconstitutional. Signs are a form of *expression* protected by the First Amendment and other methods of communicating the same message are less effective. Once again, this case illustrates the First Amendment’s protection of both expression and speech. The case suggests a speaker is entitled to an *effective* means of communicating.

⁵¹ 425 U.S. 748, 756 (1976).

the advertising of drug prices violated their right to receive the information. The Supreme Court held the law unconstitutional based on the right of the listener to receive the information. The affected speaker in this case had no qualms with the law. In *Lamont v. Postmaster General*,⁵² the Court held that a law that prohibited citizens from receiving certain material from abroad “amounted to an unconstitutional abridgment of the addressee’s First Amendments rights.” In *Kleindienst v. Mandel*,⁵³ the Court noted that the First Amendment “protects the right to receive information and ideas.” Therefore, the First Amendment now includes the rights of a person receiving information. This can be traced to the idea that democracy functions better when ideas are allowed to flow freely from one person to another. It greatly expands the list of citizens with a First Amendment claim. One can infer that if a law infringes on a speaker, it implicitly infringes on the listener as well. In the digital age with the Internet and other advanced communication devices that have the capability to impart information very quickly, a law that places a burden on one speaker could burden millions of listeners. Thus, one abridgment of the speaker’s First Amendment rights could amount to over a million violations of the listeners’ First Amendment rights. Hence, if the government violates the free speech rights of one speaker, it may implicitly violate the free speech rights of one million listeners. Hence, in the modern world the Court takes its duty to enforce the First Amendment very seriously, for democracy and the free flow of information certainly depend on this in the digital age.

The modern First Amendment doctrine as administered by the modern Court enforces the First Amendment strongly. The First Amendment is allowed certain procedural protections that other laws are not given. A person can file a facial challenge to a law under the First Amendment.⁵⁴ In other words, if Congress passes a law that appears to violate the First Amendment, a court can render a judgment on the constitutionality of the law even if the person seeking the judgment has not been charged with violating the law.⁵⁵ Additionally, a court can review the findings of lower courts and juries de novo if the First Amendment is involved. In other words, a court can make its own judgment based on the facts instead of deferring to the lower court’s conclusions under an abuse of discretion standard. The fact that these special procedures are allowed illustrates the value that the First Amendment plays in modern society as well as the value the Court places on the free flow of information. This also illustrates a reasonable inference that under the modern First Amendment doctrine a law that imposes on speech will likely be unconstitutional. Otherwise, the Court would not entertain such facial challenges.

⁵² 381 U.S. 301, 307 (1965). Justice Douglas opined for the majority, upholding receivers’ free speech rights.

⁵³ 408 U.S. 753, 762 (1972) (internal quotation marks omitted).

⁵⁴ See, e.g., *Free Speech Coal.*, 535 U.S. at 244 (“[T]his case provides a textbook example of why we permit facial challenges to statutes that burden expression.”).

⁵⁵ See *id.* Facial challenges to a law that burdens expression are allowed under the First Amendment because free expression is so highly valued that even the risk that such a law might have a chilling effect on protected speech justifies action.

The modern First Amendment doctrine currently now affords commercial speech a very high level of protection. This illustrates the expansion of the modern First Amendment, because traditionally commercial speech was thought to be outside the scope of the First Amendment. For example, in *Valentine v. Chrestensen*,⁵⁶ the Court upheld a law that prohibited the distribution of handbill advertising on the street because “[w]e are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.” In *Breard v. City of Alexandria*,⁵⁷ the Court upheld a prohibition on door to door selling and dismissed the First Amendment concerns because “[t]he selling, however, brings into the transaction a commercial feature.” Thus, traditionally the Court felt that if speech was commercial in nature, it deserved no protection by the First Amendment. By contrast, in the later case of *Central Hudson Gas & Electric Corporation v. Public Services Commission*,⁵⁸ the Court afforded commercial speech a higher level of protection within the First Amendment. In *Central Hudson*, the Court authored a four prong test and required each of the four prongs to be met for a regulation to be valid.⁵⁹ Subsequent cases have heightened the standard required under each of the four *Central Hudson* prongs.⁶⁰ The Court has invalidated several laws that impose restrictions on commercial speech under the First Amendment. The Court seems to be on the march to applying the most exacting and rigorous scrutiny to regulations that infringe on commercial speech.⁶¹ Therefore, the modern Court clearly believes that commercial speech is within the scope of the First Amendment and now affords commercial speech a high level of protection. The area of commercial speech highlights the expanding nature of the First Amendment. The Court directly stated in the 1940s and 1950s that commercial speech is outside the scope of the First Amendment. Today, the Court directly states that commercial speech falls within the scope of the First Amendment and the Court affords commercial speech a fairly high level of protection.

A bedrock principle of modern First Amendment jurisprudence is the notion that the government should not be able to impose a burden on speech itself, even if the government can regulate the underlying conduct. Justice Kennedy stated that “[a]s a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear.”⁶² Moreover, speech promoting conduct that is well within the power of the

⁵⁶ 316 U.S. 52, 54 (1942).

⁵⁷ 341 U.S. 622, 642 (1951).

⁵⁸ 447 U.S. 557 (1980).

⁵⁹ The following is the Hudson test. First, the test applies only when the commercial speech at issue is not misleading. Second, the State must assert a substantial interest to be achieved by the restriction. Third, the restriction must directly advance the stated interest. Fourth, the stated interest must be no more extensive than necessary.

⁶⁰ See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 509 (1996), where the Court raised the third prong of the test to “directly and substantially” advance the state interest. In *Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173 (1999), the Court applied the fourth prong of the test akin to the way the “least restrictive means” test is typically applied.

⁶¹ See Note, *Making Sense of Hybrid Speech: A New Model for Commercial Speech and Expressive Conduct*, 118 HARV. L. REV. 2826 (2005).

⁶² *Free Speech Coal.*, 535 U.S. at 245.

government to ban altogether or regulate remains within the expansive scope of the modern First Amendment and is protected.⁶³ Justice Stevens observed that “[t]he text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct.”⁶⁴ Free speech is a value in itself and the regulation of speech threatens the core of democracy. The strength of free speech protection does not diminish just because the underlying conduct itself may be either prohibited or regulated.⁶⁵ Thus, the mere fact that the subject of the speech can be regulated does not mean that the speech itself is subject to restrictions. In the words of Justice Stevens, “there is far less reason to depart from the rigorous review that the First Amendment generally demands.”⁶⁶

The modern First Amendment even protects the very small categories of speech that are currently outside the scope of the First Amendment under certain circumstances. For example, a relatively recent development in First Amendment jurisprudence is that if a lawmaking body draws a line in a category of unprotected speech in a particular way effectively imposing a viewpoint on citizens, such a law is unconstitutional even if banning the entire category of speech itself is permissible. For example, it is permissible to ban “fighting words.”⁶⁷ However, a city cannot ban fighting words only when they are used to convey a particular message.⁶⁸ Thus, a city can pass a law banning fighting words but it is impermissible for a city to selectively ban fighting words depending on how they are used. For example, a city could not ban the use of all fighting words aimed at Democrats because this would express a particular viewpoint. The notion that the First Amendment protects so-called unprotected speech if a city draws the line based on a particular ideology stems from the core concept that the First Amendment prohibits the government from advocating a particular viewpoint by penalizing speech supporting the opposite viewpoint.⁶⁹ This probably stems from the idea that in a democratic society enlightened citizens must be allowed to shop in the marketplace of ideas and choose to which ideas they will subscribe. Thus, the government must not aid the shopper by hiding one idea while promoting the other. The modern First Amendment doctrine strongly believes that citizens should be

⁶³ See *44 Liquormart, Inc.*, 517 U.S. at 509. The Court rejects the greater-lesser power theory on commercially related speech that held that if the state can ban an activity, it can also ban advertising on that activity. As to the case that allowed the greater-lesser power theory on commercial speech, Justice Stevens stated “we are now persuaded that *Posadas* erroneously performed the First Amendment analysis.” *Id.*

⁶⁴ *Id.* at 512.

⁶⁵ See Eugene Volokh, *Speech as Conduct: Generally Applicable Law, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277 (2005). Volokh discusses the attempts of some to avoid the First Amendment by labeling speech as “conduct” instead of as “speech.” The concept of labeling “speech” as “conduct” is not a new tactic to avoid First Amendment but it is often unsuccessful. Nevertheless, the “speech” as “conduct” regime is an argument that is sometimes employed in an effort to avoid the exacting scrutiny of the First Amendment.

⁶⁶ *44 Liquormart, Inc.*, 517 U.S. at 501.

⁶⁷ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942). Fighting words are words that “ordinary men know are likely to cause a fight.” *Id.* They are words that “by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Id.* at 572.

⁶⁸ *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

⁶⁹ This is analogous to the Court rejecting the idea that speech can be regulated if the underlying conduct can be regulated. The Court goes to great lengths to preserve an open market place of ideas.

able to evaluate information on their own; therefore, it prohibits government suppression encouraging one form of ideology at the expense of another. The government must remain neutral as to viewpoint. Thus, even if an area of speech is completely unprotected, it will fall within the scope of the First Amendment if a lawmaking body crafts a law that prohibits only certain usage of the unprotected speech in order to suppress a viewpoint or promote a viewpoint. Perhaps, most importantly, this illustrates that the Court is willing to extend the First Amendment even into areas that it has not typically been extended to, in order to preserve the free flow of information in society.

The modern First Amendment doctrine places a very high value on protecting protected speech. If the speech is protected, the Court will defend the right to access the information. This often means that technology that would deny access to the information violates the First Amendment. In *United States v. American Library Association, Inc.*⁷⁰ Chief Justice Rehnquist narrowly escaped a holding that the law was unconstitutional on a facial challenge to the law by allowing Justice Kennedy to write a concurring opinion for the critical vote. In *American Library Association*, Congress passed a law requiring public libraries to place filtering software on the library computers. Congress stated the purpose of the law was to protect minor children from erotic photographs and other such materials that are widely available on the Internet. Justice Kennedy emphasized that “[i]f, on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without significant delay, there is little to this case. The Government represents this is indeed the fact.”⁷¹ He then stated that if a library is unable to disable the filter for an adult or substantially delayed, this could be used as an applied challenge to the law.⁷² The Court has held that adult access to erotic material falls within the scope of the First Amendment.⁷³ Therefore, refusing to remove a filter for an adult in a public library would be a First Amendment violation. Perhaps, this case can stand for the proposition that technology that blocks access to information falling within the scope of the First Amendment runs squarely into the First Amendment if a person who has a right to access the information is being denied access by technology. Justice Kennedy’s opinion made it clear that he would quickly reject a defense of the library that the technology is blocking access to the information, not the library. This case suggests the Court is willing to entertain cases on technology that adversely block the user from accessing information that he is entitled to access and wishes to access.

⁷⁰ 539 U.S. 194 (2003).

⁷¹ *Id.* at 214 (Kennedy, J., concurring).

⁷² *Id.* at 215.

⁷³ *See, e.g.*, *United States v. Playboy Entm’t Group*, 529 U.S. 803 (2000) (holding that requiring cable companies to either completely block signal bleed-through of images or only air programming at night to avoid children watching the programming violated the First Amendment because of adults’ right to view material); *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (holding law aimed at restricting access of minors by requiring adult verification on a website selling for a profit certain materials probably First Amendment violation because could discourage adult access and probably is not least restrictive means); *Stanley v. Georgia*, 394 U.S. 557 (1969) (holding that First Amendment freedom of expression protects right of viewer to possess and view obscene material).

The content mentioned herein clearly demonstrates that the modern First Amendment doctrine is much more expansive than the traditional First Amendment. This is because the Court that subscribes to the modern view of the First Amendment believes in the theories that underlie modern First Amendment jurisprudence. The modern Court sees the First Amendment as extremely critical in upholding the American democracy and preventing America from finding itself under the rule of tyrants. The modern Court essentially believes that democracy and an enlightened society are contingent upon the very existence of the First Amendment. Without the First Amendment, the Court must believe the United States ceases to be a true democracy but instead becomes an oppressive country much akin to the Soviet Union during the Cold War. Only such a belief could support the modern doctrine that upholds freedom of speech and expression but gives little consideration to anyone, including Congress. Yet, this proposition is not so absurd considering that the great intellectuals from a variety of time periods have stated that freedom of speech and expression is the most critical element of an enlightened society. Hence, any law that runs contrary to the guarantee of freedom of speech and expression will almost certainly be found unconstitutional when the modern First Amendment doctrine and its underlying values are properly applied. That must be the case even if the law in question is a copyright law, such as the DMCA of 1998.

III. THE EVOLUTION OF COPYRIGHT LAW

Copyright law, like the First Amendment doctrine, has also expanded greatly in recent years. Congress, not the Court, has been the primary force behind the expansion of copyright law. Of course, as copyright law and the First Amendment law continue to expand at rapid rates, the conclusion that a conflict has occurred between the two doctrines seems to be within the bounds of reason and logic. The power of Congress to pass copyright law is conveyed by the Constitution.⁷⁴ Nevertheless, copyright law is not immune from constitutional challenges.⁷⁵ Besides, at the point that copyright law expands beyond the boundaries the Constitution affords it, copyright law becomes subject to the First Amendment. This is particularly true because in recent years the draftsmanship of copyright legislation has sharply declined.⁷⁶ Poor draftsmanship often leads to laws that are either unconstitutionally vague, substantially overbroad, or both; this often puts laws well within the scope of the First Amendment.⁷⁷ Given the strength of the modern First Amendment doctrine, if the Court applies it correctly, this impermissible burden on free expression under the guise of copyright law must be held unconstitutional. To understand the point at which copyright law expands beyond its constitutional boundaries, one must understand the

⁷⁴ U.S. CONST. art I, § 8, cl. 8.

⁷⁵ Lawrence Lessig, *Copyright's First Amendment*, 48 UCLAL. REV. 1057 (2001).

⁷⁶ David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLAL. REV. 1233 (2004).

⁷⁷ See 16B C.J.S. *Constitutional Law* §§ 832, 833 for a general discussion of vagueness, overbreadth, and some examples of laws that have been invalidated under these theories. Arguably, some of the statutes found invalid resulted from poor draftsmanship, failing to account for the precision the Constitution requires.

historical evolution of copyright law. Then, one can determine at what point copyright law evolved into a law that violates modern First Amendment jurisprudence.

A. COPYRIGHT IN THE COLONIAL ERA

The United States Constitution states that Congress has the power “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”⁷⁸ Using this power, President George Washington signed the Copyright Act of 1790 into law in May of that year.⁷⁹ This Copyright Act of 1790, which only protected United States citizens or residents, applied to books, maps, charts, and other original material.⁸⁰ The limited time of protection the Act provided was fourteen years, with an optional right of renewal by the author for another fourteen years.⁸¹ Thus, the “limited time” under the first copyright act was a maximum of twenty-eight years, but a default rule of fourteen years. Additionally, the scope of the Act was narrow, as it did not apply to other materials such as music. Some historians suggest that the real motivation for passing the 1790 Act was to benefit Mr. Noah Webster. Compared to the modern copyright laws, this statute seems extremely “limited” both in the length of time covered and the scope of the Act.

B. COPYRIGHT IN THE PRE-MODERN ERA

Congress next approved the Copyright Act of 1831.⁸² This Act extended the initial term of coverage from fourteen years to twenty-eight years and gave the author the right to renew his copyright for another fourteen years. The scope of the 1831 Act was broadened to include “music and cuts.” Thus, the length of time was extended and the scope of the Act was, at least in the views of those in the entertainment industry, significantly broadened.⁸³ The Copyright Act Revision of 1870 created the Library of Congress Copyright Office, thereby federalizing the registration of copyrighted material, since prior to the Revision, copyrights were kept on file locally.⁸⁴ The International Copyright Act of 1891 (the Chase Act), accomplished through amendments to the 1870 Act, extended copyright protection to foreign people who met the 1790 Act requirements and

⁷⁸ U.S. CONST. art I, § 8, cl. 8.

⁷⁹ 13 COLUMBIAN CENTINEL 36 (July 17, 1790).

⁸⁰ Act of May 31, 1790, § 1, 1 Stat. 124 (repealed 1831).

⁸¹ *Id.*

⁸² Act of Feb. 3, 1831 § 1, 2, 4 Stat. 436 (repealed 1870).

⁸³ In the 1800s, copyright was not considered a perpetual natural right. Rather, copyright protections were considered pure statutory protections, with each and every protection deriving from the statute passed by Congress, not common law. *See, e.g.,* *Wheaton v. Peters*, 33 U.S. 591, 662 (1834) (“[I]f the right of the complainants can be sustained, it must be sustained under the acts of congress. Such was, probably, the opinion of counsel who framed the bill, as the right is asserted under the statutes, and no particular reference is made to it as existing at common law.”); *see also* *Banks v. Manchester*, 128 U.S. 244, 252 (1888) (“A copyright cannot be sustained as a right existing at common law; but, as it exists in the United States, it depends wholly on the legislation of congress.”).

⁸⁴ Act of July 8, 1870, § 85, 16 Stat. 198, 212.

published work with American publishers.⁸⁵ These two changes are relatively minor in terms of the substantive nature of copyright law. Nevertheless, the Act of 1870 would make copyright law more enforceable and the 1891 Act would increase the amount of copyrighted material available in the country by allowing those overseas potential protection from copyright infringement.

The first major revision since the first copyright law occurred in 1909.⁸⁶ The Copyright Act of 1909 significantly broadened the scope of copyright law. The 1909 Act used the term “copies” instead of “printing.”⁸⁷ It broadened the scope of categories to include all works of authorship, as opposed to material that had been published or printed. Thus, the law would include a book that an author had written but never formally published. The 1909 Copyright Act also extended the time of protection to twenty-eight years with a right of renewal for another twenty-eight years. It included derivative works of books. According to the Congressional Record, Congress attempted to strike a difficult balance. Congress wanted to give a composer an adequate return for the value of his composition and at the same time prevent the formation of “oppressive monopolies,” which might form on the very rights granted to the composer for the purpose of protecting his interests.⁸⁸ The Congressional Record for the 1909 Act seems to indicate Congress sought to protect the individual and his rights and did not desire for the Act to become a money making device for large corporations. Congress wanted to find a way to protect the individual while preventing the formation of “oppressive monopolies.” The purpose of the 1909 Act seems consistent with the Constitution in that it seeks to protect the individual by rewarding his creative effort, thereby, enhancing the arts and the sciences. This, in turn, enriches the material in the public domain available to the general public.

C. COPYRIGHT IN THE MODERN ERA

The next major revision to copyright law occurred with the Copyright Act of 1976.⁸⁹ The 1976 Copyright Act preempted all previous copyright acts. The revolutionary and important part of this Act was the granting of an automatic copyright for creative work. Federal law would automatically protect the creative work under the 1976 Act, even if the work was not registered and marked.⁹⁰ The 1976 Copyright Act also extended the amount of “limited time” a work could receive protection. The Act extended the term of protection to the life of an author plus fifty years. The Act provided that works for hire be protected for seventy-five years. The Act applied to unpublished works as well as published works. The Act codified the sales doctrines and the fair use defense. The Act also explicitly allowed photocopying for academic work under certain circumstances and made a

⁸⁵ Act of July 8, 1870, § 4956, 26 Stat. 1106, 1107 (amended 1891).

⁸⁶ Act of Mar 4, 1909, 35 Stat. 1075, 1076 (repealed 1976).

⁸⁷ Act of Mar 4, 1909, § 2, 35 Stat. 1075, 1076 (repealed 1976).

⁸⁸ See H.R. Rep. No. 60-2222, at 7 (1909).

⁸⁹ 17 U.S.C. §§. 101–810; Act of Oct 19, 1976, Pub. L. 94-553, 90 Stat 2541.

⁹⁰ Lawrence Lessig, *The People Own Ideas!*, TECH. REV., June 2005.

fair use for materials that are used for news, criticism, reporting, comments, teaching, etc. The purpose behind the Copyright Act of 1976 seems very different than the purpose behind the 1909 Copyright Act as reflected through the Congressional Record. The 1976 Act placed much less emphasis on the protection of individuals and the worthy goal of protecting individuals against oppressive monopolies. After all, the 1976 Act automatically took a large amount of materials outside of the public domain without the author's permission and it took such material out of the public domain for a longer period of time. While under the 1976 Act "limited time" started to sound similar to "a very long time," the most significant item of the Act was that it automatically copyrighted works as soon as they were created. This meant that a much greater amount of material would receive copyright protection. The 1976 Act essentially made "copyright" an opt-out option, while every other copyright act prior to the 1976 Act made "copyright" an opt-in option.

The Copyright Act of 1976 automatically copyrighted a work, but it did not provide that the renewal of the work occur automatically. However, Congress later passed the Copyright Renewal Act of 1992.⁹¹ In 1992, Congress voted to amend section 304 of Title 17 to make renewals of copyrights automatic. Thus, the Copyright Renewal Act of 1992 amended the 1976 Copyright Act by providing for automatic renewal.⁹² The effect of this is to make works entering the public domain slow down even more.⁹³ The 1976 Act extended the amount of time for the original copyright. The 1992 amendment in effect just adds more time to the 1976 Act since most authors or heirs of authors who would not mind if the works fell into the public domain would not think about the automatic renewal. Thus, the 1992 amendment is analogous to the 1976 Act in that it is setting a default rule of renewal. The 1976 Act combined with the 1992 amendment seems to be taking copyrighting out of the hands of individual citizens and authors and placing copyrighting into the hands of the government. After all, many works will be automatically copyrighted and automatically renewed even though the author might not mind if his work enters the public domain. Thus, the 1992 amendment makes both copyright and renewal an opt-out option instead of an opt-in option. One must wonder if this benefits individuals or "oppressive monopolies."

Congress next passed the Sonny Bono Copyright Term Extension Act of 1998.⁹⁴ Of course, this Sonny Bono Copyright Term Extension Act extended protection for most works to the life of the author plus seventy years.⁹⁵ It seems as though the "limited time" of this act might be described as a lifetime plus a lifetime. Assume that a person, who at the age of ten years writes a best selling book on Spiderman, lives to be eighty years old.

⁹¹ Act of June 26, 1992, Pub. L. No. 102-307, 106 Stat. 264 (amending chapter 3 of title 17).

⁹² See *Batjac Prods. Inc. v. GoodTimes Home Video Corp.*, 160 F.3d 1223, 1226 n.4 (9th Cir. 1998).

⁹³ The Copyright Renewal Act of 1992 applies to the renewal of works which were secured copyright between the dates January 1, 1964 and December 31, 1977.

⁹⁴ Act of Oct. 27, 1998, Pub. L. No. 105-298, 112 Stat. 2827 (further amending chapter 3 of title 17).

⁹⁵ The Sonny Bono Copyright Extension Act is often called the Mickey Mouse Act because of the widely held belief that Congress is extending the copyright law for the protection of the Walt Disney Company.

Under the current copyright law, including the 1998 extension, his work will receive 140 years of protection. That is, seventy years of protection during his lifetime and another seventy years of protection after his death. Though many lawyers do not like math, most can compute that seventy plus seventy equals 140. The Sonny Bono Copyright Terms Extension Act, coupled with the other expansive Acts, has the effect of limiting the public domain in terms of the number of items available. Lawrence Lessig states that “[t]his change meant that American law no longer had an automatic way to assure that works that were no longer exploited passed into the public domain. And indeed, after these changes, it is unclear whether it is even possible to put works into the public domain.”⁹⁶ Thus, modern copyright law seems to be keeping items out of the public domain even if the author might prefer them to be in the public domain. Besides, the phrase “limited time” does not seem to be the reality of modern copyright law.

Congress passed the Digital Millennium Copyright Act (“DMCA”) in 1998.⁹⁷ The DMCA is certainly among the most controversial of the Copyright Acts passed by Congress. As will be discussed in the next section of this Article, the DMCA is the most likely of the copyright acts to violate the First Amendment, for it seems to expand beyond the constitutional boundaries of copyright law and extend into content-based abridgment of speech. The DMCA, to hit some highpoints of the Act, establishes a safe harbor for online services providers, permits temporary copies of programs during computer maintenance, and makes miscellaneous amendments to copyright law, dealing with topics such as Internet broadcasting. Section 1201 of the Digital Millennium Copyright is the most troubling section of the Act. Section 1201 of the DMCA contains an “anticircumvention” provision. The anticircumvention provision essentially contains two prohibitions. First, Section 1201 prohibits acts of circumvention.⁹⁸ This means the Act restricts the cracking of code that protects copyrighted material.⁹⁹ Second, Section 1201 prohibits the distribution of tools and technologies used for circumvention.¹⁰⁰ This means the Act prohibits the creation of code that cracks code that protects copyrighted material.¹⁰¹ The aim of Section 1201 of the DMCA is to “lend legal support to the tools that copyright holders deploy to protect their copyrighted material.”¹⁰²

Justice Blatchford wrote that “[a] copyright cannot be sustained as a right existing at common law; but, as it exists in the United States, it depends wholly on the legislation of Congress.”¹⁰³ Thus, unlike the First Amendment doctrine, the evolution of copyright is best viewed through the

⁹⁶ LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 135 (Penguin 2004).

⁹⁷ Act of Oct. 28, 1998, Pub. L. No. 105-304, 112 Stat. 2860.

⁹⁸ 17 U.S.C. § 1201 (a)(1)(A).

⁹⁹ LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 187 (Random House 2001) [hereinafter LESSIG, *FUTURE OF IDEAS*].

¹⁰⁰ 17 U.S.C. § 1201(b)(1)(A).

¹⁰¹ LESSIG, *FUTURE OF IDEAS*, *supra* note 99, at 187.

¹⁰² *Id.*

¹⁰³ *Banks v. Manchester*, 128 U.S. 244, 252 (1888).

amendments and changes Congress makes to various copyright acts. The evolution of copyright doctrine, expansive and revolutionary indeed, is almost as spectacular as the evolution of the First Amendment doctrine. After all, the original copyright act referred to the printing, not copying, of a limited number of items and such items received protection for a “limited time,” in the line of fourteen years, if and only if the author wished the items to receive such protection. Under the original Act, the author could only renew his copyright for another fourteen years, if and only if he took action to do so. By contrast, the modern copyright law applies to a wide variety of items and such items can hardly be said to receive protection only for a “limited time,” given the fact that a work could easily receive up to 140 years of protection. About one and a half centuries is a long time in the minds and hearts of most people. Imagine the look on a prisoner’s face if the judge told the prisoner he would give him a “limited” jail sentence and then sentenced him to 140 years in prison. It would hardly seem to be a “limited jail sentence” to the prisoner who received it. Furthermore, the modern copyright law could give a work protection for 140 years unless the author takes action to place the work in the public domain.¹⁰⁴ Unlike the original copyright law that set the default as “public domain,” the modern copyright law sets the default as non-public domain for a very long time.¹⁰⁵ Even more surprisingly, the modern copyright law seeks to penalize speech and creative design of programs that might help the rightful owners of material place an item in the public domain or use the item in a way inconsistent with the intent of the producer of the product. Thus, the modern copyright law seeks not only to deal with issues of copying but also seeks to attack with full force certain devices that could be used to copy. Indeed, the original copyright law and the modern copyright law are extremely different in terms of policy, effect, purpose, scope, length of coverage, and actions covered. In the next section of this Article, First Amendment challenges to copyright law will be discussed and evaluated on a theoretical and practical level, with an emphasis on both policy and legal doctrine.

IV. THE INTERACTION: COPYRIGHT LAW AND THE FIRST AMENDMENT

The First Amendment can be used to challenge copyright law. Given the expansive nature of the modern First Amendment coupled with the expansion of copyright law, such challenges are with merit. In other words, a Court could void certain aspects of copyright law under a First

¹⁰⁴ The modern copyright law seems to aim to maximize the length of time a work spends outside of the public domain. For example, if a book is co-authored by two authors, the protection extends until the death of the last living author plus another seventy years. Thus, a forty year old man with a desire to keep his book outside of the public domain could “co-author” a book with a much younger individual to enhance the amount of time the work spends outside of the public domain.

¹⁰⁵ This is analogous to the opt-in versus opt-out provision on mass e-mail. If a company has an opt-out policy, most customers will allow the company to send them e-mail. By contrast, if the company has an opt-in policy, most customers will not allow the company to send the e-mail. Thus, setting the default rule can be an extremely critical aspect of policy.

Amendment theory without stretching the doctrine to a new level.¹⁰⁶ Several methods to challenge copyright law using the First Amendment exist.¹⁰⁷ These methods tend to focus on policy, plain text, and precedent. For this type of legal analysis, policy, plain text, and precedent all can be utilized for strong legal arguments.

One method of argument is to focus on the “limited time” phrase in the Constitution and argue that the current copyright law exceeds the “limited time” provision in the Constitution and is therefore unconstitutional. A variation of this method is to make a Federalism-based congressional power argument by asserting that Congress lacks the authority to retroactively extend the time on already existing copyrights. Another method is to argue that modern copyright law is a content-neutral law that imposes a burden on free speech; thus, it should be subjected to intermediate scrutiny and it fails the intermediate scrutiny test. Yet another method is to argue that modern copyright law is a content-based law that imposes a burden on speech based on the content of the speech itself; thus it should be subjected to strict scrutiny and it fails to meet the strict scrutiny test. With any argument involving both copyright law and the First Amendment, policy analysis is critical.¹⁰⁸ Of course, the best argument to use depends on which aspect of copyright law is at issue. As a general rule, it is best to argue copyright law is a content-based restriction, so that strict scrutiny is used, and that the copyright law at issue does not promote the public good and encourage the creation of novel works but rather, it rewards large corporations and encourages the formation of oppressive monopolies. The next best option is to find a constitutional plain text contradiction coupled with an argument suggesting the law at issue is not only inconsistent with the will of the Founding Fathers but is also inconsistent with good public policy for the modern nation. The most difficult argument to make is that copyright law is content-neutral but fails the intermediate scrutiny test nevertheless. This can be understood using a sports analogy. A lawyer reasonably arguing for strict scrutiny is akin to a basketball player standing almost under the goal with a clear shot. A lawyer reasonably arguing for a plain text violation is akin to a basketball player shooting from the free-throw line. A lawyer arguing for intermediate

¹⁰⁶ The theory of modern copyright law is largely based on Melville B. Nimmer’s article featured in the 1970 *UCLA Law Review*. See Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 *UCLA L. REV.* 1180 (1970) [hereinafter Nimmer, *Does Copyright Abridge the First Amendment*]. However, since the time of his article, Congress has significantly expanded copyright law. Thus reliance on Nimmer’s theory on copyright law as a basis for concluding that copyright law and First Amendment law are congruent would be misplaced, considering the rapid expansion of copyright law since the publication of Nimmer’s article.

¹⁰⁷ As noted in the introduction, many of the methods of argument mentioned above have been used to challenge copyright law by various individuals. The actual holding of a court shall not be used to determine the merits of such an argument. Rather, the analysis herein will focus on how such arguments for or against copyright law fit into the modern First Amendment framework at both a theoretical and practical level. After all, some of the most dynamic and intelligent-sounding majority opinions of the modern era often can be found in the dissenting opinions of a past era. Concepts and logic are key here.

¹⁰⁸ While policy arguments are critical for deciding any case with issues at the margin, policy is extremely critical in First Amendment versus copyright cases. Since both doctrines derive from the Constitution itself, the reasoning behind the law may be the determinative factor in the ruling. For example, if the underlying policy of copyright law is “public benefit,” then a copyright law aimed wholly at private benefit for certain individuals to the detriment of the public might be held to be void based on policy reasons.

scrutiny is akin to a basketball player shooting from half-court, meaning he could score but the odds are against it. Additionally, in any copyright case an overriding consideration is the public's right to benefit from the author's creative work via the public domain.

The commitment to free speech expressed through the modern First Amendment doctrine is essential to a democratic society that values free expression. Section 1201¹⁰⁹ of the DMCA probably violates the guarantee of free speech under the modern First Amendment Doctrine. Both of the two anticircumvention provisions found in Section 1201 of the DMCA probably violate the First Amendment for several reasons. First, DMCA section 1201 seeks to criminalize speech based only on the content of the speech.¹¹⁰ Second, DMCA section 1201 seeks to hinder free creative expression by prohibiting the development of certain software that has both expressive and useful purposes.¹¹¹ Third, the DMCA section 1201 is substantially overbroad because the invalid uses of the Act substantially exceed the valid applications of the Act; it is unconstitutionally vague because a reasonable computer programmer cannot look at the Act to determine precisely what falls within the scope of the Act.¹¹² Fourth, the underlying copyright protection policy of the DMCA section 1201 fails to serve as a compelling justification sufficient to justify the Act because the DMCA inhibits the development of creative sciences and useful arts.¹¹³

A. DMCA: A CONTENT-BASED ABRIDGMENT OF FREE SPEECH

Section 1201 of the DMCA is a law that criminalizes speech based on the content of the speech.¹¹⁴ Since the Act is a content-based abridgment of speech and expression, the law should be subject to strict scrutiny and found to falter under the most exacting scrutiny.¹¹⁵ After all, a fundamental First Amendment principle is that the government must not dictate "what we see or read or speak or hear."¹¹⁶ The DMCA precisely dictates "what we see or read or speak or hear" by imposing severe criminal penalties against individuals based on the content of their speech and their gaining access to information.¹¹⁷ In fact, the DMCA imposes a maximum sentence of imprisonment for five years and a fine of \$500,000 for the first offense.¹¹⁸ It imposes a penalty imprisonment of ten years and a fine of one million

¹⁰⁹ 17 U.S.C. § 1201.

¹¹⁰ Laws that criminalize speech because of the content of the speech are typically subjected to strict scrutiny, the most rigorous and exacting scrutiny.

¹¹¹ The modern First Amendment doctrine desires to protect "expression," not just traditional "speech."

¹¹² The substantially overbroad analysis is similar to a ratio. Just because the statute has a valid application does not mean the statute is constitutional if the statute also has a large number of invalid applications.

¹¹³ Since encouraging creativity and the creation of scientific and other useful works for the public good is the constitutional policy behind the copyright clause, a copyright law passed by Congress that has the opposite effect could not be used to justify the law.

¹¹⁴ See 17 U.S.C. § 1204 (listing criminal offenses and penalties).

¹¹⁵ In this context, strict scrutiny means the following: first, the regulation must serve a compelling state interest; second, the least restrictive means available must be used to regulate.

¹¹⁶ *Free Speech Coal.*, 535 U.S. at 245.

¹¹⁷ 17 U.S.C. § 1204.

¹¹⁸ 17 U.S.C. § 1204(a)(1).

dollars for any subsequent offense.¹¹⁹ Thus, the DMCA allows for severe penalties against individuals based on the content of their speech or forms of creative expression. This, in turn, has a negative effect on scientific research and other such promulgations of useful creative expression. Absent an extraordinary and extremely compelling justification, such an act should not survive the modern First Amendment doctrine.

Computer code should be considered a form of speech for First Amendment analysis. That is, computer code should be considered protected speech. By analogy, computer code is not akin to the rare types of speech that typically falls outside the scope of the First Amendment, like the fighting words in *Chaplinsky v. New Hampshire*.¹²⁰ Instead, computer code is akin to the type of speech that falls within the protection of the First Amendment.¹²¹ Indeed, courts have held that source code is “speech” protected by the First Amendment. For example, in *Bernstein v. United States Department of State*,¹²² the court explicitly stated “[f]or the purposes of First Amendment analysis, this court finds that source code is speech.” After all, computer code and language have the same functionality to a large degree. That is, they are communicative in nature. A person can express a message by writing it down on a piece of paper or he could express the same message by writing a computer program to display the message on a computer screen at a given moment in time. Computer code, just like any language or other form of communication, is capable of conveying ideas. For the forgoing reasons, computer code should be considered speech for First Amendment analysis.

Furthermore, computer programs are speech. Computer programs are copyrightable under copyright law, which means they are considered “expressions” under copyright law. Since computer programs are considered “expressions” under copyright law, they should be considered expressions under the First Amendment. The modern First Amendment usually equates speech and expression for the purposes of First Amendment protection. Thus, under the First Amendment computer programs count as speech and should receive the full protection of the First Amendment.

Since computer code equates to speech for First Amendment analysis, it can reasonably be asserted that the “speech” has been penalized under the DMCA section 1201 because of the content of the “speech” (computer code). The DMCA is a content-based, viewpoint discriminatory speech restriction. In other words, the DMCA section 1201 only penalizes speech (computer code) that “persuades” another device to forgo its encryption command by ignoring or disregarding content protection or restriction function. If the speech were to “persuade” the device to be more efficient in upholding its encryption duty, then the DMCA section 1201 would not allow prosecution. This is a techno-classic example of the government

¹¹⁹ 17 U.S.C. § 1204(a)(2).

¹²⁰ 315 U.S. 568 (1942).

¹²¹ See, e.g., *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 326 (S.D.N.Y. 2000) (“It cannot seriously be argued that any form of computer code may be regulated without reference to *First Amendment* doctrine.”).

¹²² 922 F. Supp. 1426, 1436 (N.D. Cal. 1996).

utilizing the technique of speech suppression because it disagrees with the content of the speech. The government is engaging in viewpoint discrimination via the DMCA and viewpoint discrimination goes against the core of the First Amendment. Viewpoint discriminatory regulations that suppress speech are virtually always unconstitutional. This case is akin to the violation in *Tinker v. Des Moines Independent Community School District*.¹²³ In *Tinker*, the Court held that a school district violated the First Amendment rights of a student by not allowing him to wear a black ribbon to school in protest of the Vietnam War. The Court ruled in favor of the student as it felt the principal sent him home because the principal supported the war and did not want other students to oppose the war. In *Tinker*, the principal's actions violated the Constitution only because he utilized viewpoint discrimination by using suppressive methods to foist his pro-war view upon other students. By comparison, the DMCA uses suppressive methods by penalizing any program or person that tries to persuade another program to forgo its *de facto* position favoring content restrictions. The DMCA is an attempt to refuse to allow advocacy by certain circumvention devices; these devices advocate that the rights to the material should be more elaborate. After all, the DMCA essentially forbids a computer program from asking another device or computer program for more leeway with the information product. Just as it was a constitutional right for the student in *Tinker* to ask his fellow classmates to oppose the war, so too should it be the constitutional right of another computer program to ask a device to be more liberal with its content.

Just as Justice Kennedy emphasized in *Ashcroft v. Free Speech Coalition*¹²⁴ and in *American Library Association*¹²⁵ that the government has no right to control what an individual sees or hears or speaks, the government has no right to tell a program with an encryption device what it sees or hears, or with what it interacts. The marketplace of ideas that Justice Holmes mentioned in *Abrams v. United States*¹²⁶ should apply in the context of encryption devices as well. Let the devices decide if they will be "persuaded" to allow additional uses of the restricted content. Let the encryption device shop in the marketplace of ideas and either be persuaded or not as to whether to unlock the restrictions on the content. The government must not make the decision for it by utilizing suppressive methods. Ideas and persuasion must motivate the decision made, not an act of government suppression. As a society moving into an age of extremely advanced technology and so-called artificial intelligence, the idea that persuasion must take place only in relation between humans is wholly inconsistent with democracy. Persuasion must be allowed, be it between man and man, man and machine, or machine and machine. Choices must be made based on free will or the mechanical equivalent thereof, not government suppression. Indeed, this is the bedrock of the First Amendment.

¹²³ 393 U.S. 503 (1969).

¹²⁴ 535 U.S. 234 (2002).

¹²⁵ 539 U.S. 194.

¹²⁶ 250 U.S. 616 (1919).

The idea of “persuasion” when a non-human is involved may seem strange to some at first blush. This concept can be understood under two lines of reasoning. The first line of reasoning is more philosophical and abstract. The second line of reasoning is more lawyer-like but not as interesting. The first line of reasoning recognizes that a whole field of philosophy is devoted to defining what it means to “think” and seriously advances the proposition that machines may have the ability to think. Alan Turing, the great engineer and inventor who helped Great Britain win World War II by cracking the enemy code, believed that a machine has the ability to think.¹²⁷ He viewed “thinking” as a mathematical process squarely within the functions of computers and was a strong supporter of the theory of artificial intelligence. In the 1940s he predicted that twenty-first century people would have intimate relationships with computers.¹²⁸ John Searle, the author of the famous Chinese Room Argument against artificial intelligence,¹²⁹ asserts that thinking is unique to humans and that a computer will never be able to copy the human thought process because thinking is more than mere symbol manipulation. At any rate, both Alan Turing and John Searle are considered to be great intellectuals and they are in serious disagreement about this issue. Thus, one can reasonably argue that devices should be given the benefit of “thinking” and the assumption that they can be “persuaded.” After all, it is always best to err on the side of enlightenment. Thus, for the purposes of First Amendment analysis, it is reasonable to argue in terms of “persuading” a computer and giving a device the right to “choose” based upon the persuasive input that it receives.

The second line of reasoning to justify the “persuasion of machine” argument has not really been debated by great philosophers. Yet, perhaps, lawyers will be more willing to accept it. When two people engage in a verbal argument, the air serves as the medium of communication. When two people e-mail each other, the electronic network serves as the medium of communication. The words and thoughts expressed are considered to be extensions of the two people engaging in conversation. Perhaps, the same should apply to software and source code. Assume the following: Code A is an extension of Programmer A. Circumvention Code B is an extension of Circumventor B. Therefore, when Circumvention Code B interacts with Code A, it is the same as if Circumventor B is interacting with Programmer A. Stated another way, when Programmer A writes his encryption devices, it is as if he just wrote a long e-mail. When Circumventor B attempts to circumvent the devices or design a program to do so, then it is as if he is responding to the e-mail of Programmer A. Either way, the program-as-extension-of-programmer model proposed in this paragraph makes possible the idea that the interaction with a device should be considered “persuasion” in the same way that computer code is considered “speech”

¹²⁷ See MARTIN DAVIS, *ENGINES OF LOGIC: MATHEMATICS AND THE ORIGIN OF THE COMPUTER* (W. W. Norton & Co. 2001).

¹²⁸ See B. Jack Copeland, *The Turing Test*, in *THE TURING TEST: THE ELUSIVE STANDARD OF ARTIFICIAL INTELLIGENCE 1* (James H. Moor ed., Kluwer Acad. Publishers 2003).

¹²⁹ See Josef Moyal, *The Chinese Room Argument*, in *CONTEMPORARY PHILOSOPHY IN FOCUS: JOHN SEARLE 214* (Barry Smith ed., Cambridge Univ. Press 2003).

for First Amendment purposes. Whether one accepts the abstract theory of Alan Turing or elects a more concrete theory, it is certainly reasonable in the twenty-first century to apply First Amendment analysis to interactions that involve a computer or some other device. Therefore, computer code equates to speech and is deserving of the most exacting level of First Amendment scrutiny.¹³⁰

One principle is certain: the government lacks the authority to restrict expression “because of its message, its ideas, its subject matter, or its content.”¹³¹ If DMCA section 1201 is considered to be a content-based speech regulation, it is almost certainly unconstitutional. The government might argue that it has a compelling right to protect the copyrighted content and that DMCA section 1201 is the least restrictive means available to accomplish this goal. Courts rarely accept that a speech regulation is the least restrictive means available to accomplish a goal because by definition a speech regulation is very restrictive. Courts will stretch to find another hypothetically less restrictive alternative even if it may be less plausible than the speech restriction method. In this case, a court need not look too far to find a less restrictive alternative. After all, existing copyright law would allow an action against someone who, after circumventing the devices, then proceeds to use the content in a manner inconsistent with copyright law. For example, if a person removes the anti-copying device from a DVD and makes a copy for his own use, then no actionable violation of copyright law has occurred. By contrast, if he makes the copy and sells it for profit, then the company can take action against him. The mere removal of an anticircumvention device does not make the author’s copyright rights disappear. The copyright holder is free to focus on the infringing act.¹³² Thus, the speech restriction is not the least restrictive means to protect the intellectual property rights of the authors.

The oppressive aspects of Section 1201 of the DMCA are not merely theoretical. Consider the case of Professor Edward Felten.¹³³ In 2000, he and his researchers accepted a challenge by Secure Digital Music Initiative to remove certain watermarking technologies designed to protect digital music. They were successful. When Professor Felten and his team attempted to present their results at an academic conference, Secure Digital Music Initiative threatened Professor Felten and his team under the DMCA. They withdrew their paper as a result of the threats. While the research was published at a subsequent conference, he withdrew the paper at the original conference because he was threatened by the DMCA because of the content of his paper. Thus, the case of Professor Felten illustrates the content-based nature of the Act.

¹³⁰ See also DAVID S. TOURETZKY, *COMMON LISP: A GENTLE INTRODUCTION TO SYMBOLIC COMPUTATION* (Benjamin/Cummings Publ’g Co., Inc. 1990). Professor Touretzky states that he believes source code is expressive speech meriting the full protection of the First Amendment. Regardless of the line of reasoning one uses for justification, the logical conclusion seems to be the same: computer code is speech deserving of the highest level of protection.

¹³¹ *Police Dep’t of the City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

¹³² See *infra* for discussion on the viability of such an option in the digital age.

¹³³ Information about the case is available at Electronic Frontier Foundation’s (“EFF”) website, <http://www.eff.org/>.

Another example of DMCA section 1201 in action occurred when Dmitry Sklyarov, a Russian programmer, decided to visit the United States to speak in Las Vegas at a programmers' conference.¹³⁴ However, his trip to America in July 2001 did not go as he expected. He was jailed for several weeks and detained for five months after speaking at the DEFCON conference. The prosecution alleged he worked on the Advanced e-Book Processor, which was available via the Internet through his Russian employer, ElcomSoft Co. Ltd. The software allowed owners of Adobe electronic books ("e-Books") to convert them from Adobe's e-Book format into Adobe Portable Document Format ("PDF") files, thereby removing restrictions embedded into the files by e-Book publishers. Sklyarov was never accused of infringing any copyrighted e-Books. He was not accused of assisting anyone else in infringing copyrights. His alleged crime was working on a software tool with many legitimate uses which third parties might use to copy an e-Book without the publisher's permission. The Department of Justice ultimately permitted Sklyarov to return home. After all, the jurisdiction of the DMCA is confined to the United States for the prosecution of individuals, and it is not an international treaty. However, the Justice Department elected to proceed against his employer, ElcomSoft, under the criminal provisions of the DMCA. In December 2002, a jury acquitted ElcomSoft of all charges, completing an eighteen month ordeal for the wrongly-accused Russian software company.

Consider yet another example of the DMCA used to attack speech and expression. In 2000, Universal City Studios filed suit against *2600 Magazine*, seeking an injunction against the magazine's website from linking to any page on the Internet that made DeCSS software available.¹³⁵ Thus, the lawsuit essentially sought to have a court demand that certain links be removed from a website because of the actions of parties not under the defendant's control. Thus, the suit focused specifically on the content of the webpage, meaning the links and indirect advocacy of DeCSS use, in an effort to remove such content from the webpage. Thus, this aspect of the lawsuit did not focus on the conduct of the defendant but instead focused on the content of the defendant's webpage.

The DMCA cases mentioned above, referring to Edward Felten, Dmitry Sklyarov, and *2600 Magazine*, should be treated as content-driven abridgment of the freedom of speech by the government of the United States. These cases, coupled with the fact that computer code and computer programs fall within the scope of the First Amendment make the conclusion that DMCA section 1201 is a content-based abridgment of speech almost undeniable. Thus, strict scrutiny should apply, and section 1201 of the DMCA should be held to be unconstitutional.

The government, in defense of DMCA section 1201, would probably argue that it is a content-neutral law that places an incidental burden on free expression. The government will argue that restricting computer code because of the content of the message it conveys is the last thing in the

¹³⁴ Lawrence Lessig, *Jail Time in the Digital Age*, N.Y. TIMES, July 30, 2001, at A17.

¹³⁵ *Universal City Studios, Inc.*, 111 F. Supp. 2d 294.

world it seeks to accomplish under the DMCA. Thus, the government will contend that the purpose of the DMCA has nothing whatsoever to do with the content of the speech. The government will argue that the DMCA is a content-neutral law that may have a negative effect on speech. Thus, the government will assert that intermediate scrutiny, not strict scrutiny, should apply. Thus, the government will argue that the test used in *United States v. O'Brien*¹³⁶ should apply and that DMCA section 1201 passes intermediate scrutiny under the *O'Brien* test.¹³⁷

The government would argue that protecting the content of copyrighted material is a substantial governmental interest and that the restriction limits speech no more than is necessary to accomplish its goal. In other words, the government will argue it only restricts speech that is used to circumvent and does not restrict speech that has other uses. For example, DMCA section 1201 would prohibit computer code in a program that makes an encrypted CD copyable but does not prohibit computer code that is used to check a document for spelling errors. Furthermore, the government may contend that in reality the design of such a program is conduct, and expressive conduct at best. Thus, the government will contend that DMCA section 1201 meets the less exacting standard of intermediate scrutiny.

However, the government's hypothetical reliance on *O'Brien* is problematic. In *O'Brien* the Court held that the government could prohibit the burning of a draft card mainly because the draft card has a function that is not related to speech that could not be served if the card were to go up in flames. Thus, the government sought to prohibit the destruction, not the creation, of an item that served a non-speech purpose. It would be akin to the government making it a crime for a person driving a car to destroy his driver's license because the law requires anyone driving a car to have a driver's license. The *O'Brien* Court wanted to assert that courts should not entertain frivolous First Amendment defenses of conduct that are truly not expressive in nature. For example, a court would not allow a political assassin to assert he has a First Amendment right to shoot a political leader to express his anger. Chief Justice Earl Warren did not want every criminal on trial for conduct to utilize a First Amendment defense because he did not want to see public respect and judicial honor for the First Amendment desecrated. Additionally, Chief Justice Warren did not want the Court to overlook or ignore legitimate First Amendment cases because of frivolous cases. Considering the context of *O'Brien*, the test found within that case should not apply here. *O'Brien* focused on destructive, not creative, action. Here, the creative expressive conduct would be at issue. Software is being created, not destroyed. Thus, this case is different from *O'Brien* so *O'Brien* need not apply.

The less stringent *O'Brien* test is not always used, even when the conduct is destructive. That is, sufficiently expressive conduct may be

¹³⁶ 391 U.S. 367 (1968).

¹³⁷ The *O'Brien* test is used when a government regulation places an incidental burden on expression. The *O'Brien* test, a form of intermediate scrutiny, requires the following: first, the regulation must serve a substantial governmental interest; second, the regulation must be no more extensive than necessary in its restriction on speech.

entitled to First Amendment protection even if it is destructive. Thus, a government argument asserting that such computer code should not be protected by the First Amendment because it is destructive, not creative, lacks merit. For example, in *Johnson*¹³⁸ and *Eichman*,¹³⁹ the Court held that burning the United States flag is protected by the First Amendment. In the latter case, the statute was written so that criminalizing the burning of a United States flag incidentally was included under the statute. Yet, the Court found the statute to be unconstitutional because it infringed on an individual's right of expression. The burning of a flag is expressive by nature. In the same way, DMCA section 1201 infringes on an individual's right of expression. Writing a computer program is also expressive by nature. Burning a flag is an expressive way to send a political message just as writing a computer program is an expressive way to send a mathematical message. Surely, if the destructive form of expression receives First Amendment protection, the creative form of expression should also receive protection. Obviously, if a protestor used a burning flag to commit an assault, he could not stand by the First Amendment. In the same way, if a computer programmer writes a program and uses it to damage a major computer system, he cannot hide behind the First Amendment. Yet, his crime would not be writing the malicious program but would be using it to destroy a system. Writing a computer program is akin to writing a book; it is creative by nature. The authorship of a book on a specific topic cannot be prohibited by the government because of the effect it might have on someone. That is a core principle of the First Amendment. In the same way, the authorship of a program cannot be prohibited because of the way a potential user might use the program. Even if one accepts that DMCA section 1201 imposes an incidental burden on expression, that does not mean it should be upheld under the First Amendment. Again, the government cannot impose or escape the First Amendment by finding an incidental method to impose on creative expression.

Suppose a law states that assaulting a person *using* a hard cover book as a weapon is a felony if it results in serious bodily injury. That would be constitutional. Now, suppose a law said that authorship of a book that might *motivate* a criminal to assault a person is a felony if serious bodily injury results. That would be unconstitutional. Because the government has the authority to protect its citizens and because the government has the authority to criminalize the use of a book as an assault weapon does not give the government the right to criminalize books that might motivate someone to infringe on the rights of citizens via assault. The only reason the latter is impermissible is it abridges the creative expression of the author. Similarly, because the government has the right to protect intellectual property and because the government has the ability to criminalize the use of computers for certain crimes does not give the government the right to prohibit the authorship and distribution of software that might infringe on copyright law. The only reason such is impermissible is it abridges the creative expression of the author. Creative expression is

¹³⁸ 491 U.S. 397.

¹³⁹ 496 U.S. 310.

highly valued. It would be a non-sequitur to assert that authors who write using a conventional language, such as English, are entitled to receive a higher level of First Amendment protection than are computer programmers who write using a non-conventional language, such as C++. Certainly, the creative expression of certain programmers who write code to circumvent encryption devices may cause harm. Yet, the enormous power of speech found within the pages of books is even more powerful and might even cause more harm. The value of a free society that is open to ideas and expression outweighs these considerations on balance. The government has overstepped its bounds via the DMCA because it has penalized expression.

The enlightenment value that results from a free society that encourages free expression, whether it emerges from book authors or computer programmers, outweighs any damage that could result from allowing such expression. In *Brandenburg*, the potential harm was significant, for the plaintiff threatened to take “revengeance” against the United States government if it continued to embrace policy that he believed harmed the nation. Severe damage could have resulted from Brandenburg’s speech.¹⁴⁰ Yet, his free speech rights outweighed that concern. Take the *New York Times* case.¹⁴¹ Slander results in serious and unjust harm to individuals. In fact, today the very qualified often refuse to enter into politics because they fear false statements will be made against them by their opponents, printed in newspapers, and the truth will never emerge. Any loss of intelligent, qualified politicians causes harm to the nation. Regulating newspapers and subjecting them to harsh penalties for false statements might go a long way toward reducing the harm of slander and encouraging the most qualified individuals to go to Washington. It is a real cost, but a real cost our society must endure. The cost is endured because it is substantially outweighed by the enlightenment value of free speech and free expression. American society suffers burdens to allow free speech. Yet, those burdens are quite small compared to the burdens that emerge in countries that do not value free speech. Thus, it is logical that the First Amendment value of free speech also requires that computer programmers be allowed to express themselves fully. Sure, circumvention devices might increase the number of copyright violations. That is a cost. Yet, in light of the other costs America endures to preserve free speech, it is a very small cost indeed. Therefore, the First Amendment requires that society endure the burden that results from circumvention devices and that computer programmers be allowed to express themselves freely.

DMCA section 1201 may be unconstitutional because it directly conflicts with the Constitution. Since the First Amendment applies to both the sender and the receiver, DMCA section 1201 may be unconstitutional because it not only infringes upon the expressive rights of computer programmers, but it also interferes with the receiver’s right to information. Circumvention devices can be used to allow people who have a right to receive certain information to actually access the information. If a person

¹⁴⁰ 395 U.S. at 446.

¹⁴¹ 376 U.S. 254.

has a right to receive certain information, then circumvention devices may actually be advancing the constitutional rights of receivers. To prevent the authorship of such devices or the valid use of such devices would therefore be unconstitutional.

Just as in *Schneider*,¹⁴² where the First Amendment imposed an affirmative duty on the government to allow free speech on the street, so too might the First Amendment impose an affirmative duty on the government to allow the use of circumvention devices when for a valid purpose. In *American Library Association*,¹⁴³ Justice Kennedy suggested the right to access information would outweigh any device placed on a computer to block information. Certainly, if the government passed a law asserting that an adult could not remove a computer filter in a library, it would be unconstitutional. That was clear. Yet, in a different context that is precisely what the government is requiring. To prevent legitimate access to information which one has purchased by banning methods used to access the information is in effect the same as banning access to the information. Therefore, a First Amendment conflict emerges.

To disallow the use of programs designed to further access information is to violate the First Amendment right to receive information and ideas, as per *Kleindienst*.¹⁴⁴ Since in *Lamont* it was an “unconstitutional abridgment of the addressee’s First Amendment rights”¹⁴⁵ for the post office, a branch of the government itself, to refuse to deliver communist themed political mail, then surely it would violate the First Amendment rights of the addressee for the government to assert that the individual cannot circumvent a device to gain access to the information. If the government itself cannot block individual access to information generally believed to be harmful, then surely the government cannot criminalize an individual, in the privacy of his home, gaining access to information that is in many cases completely harmless. If the government lacks the greater power to refuse to deliver information via its own carriers to individuals, then it must certainly lack the lesser power to criminalize access to information that one already possesses in one’s home.

The point made in the forgoing paragraph can be illustrated. Suppose a foreign country is sending publications to U.S. citizens that the government perceives to be problematic. *Lamont* suggests the Postmaster General must deliver this publication. Suppose a person has purchased an encrypted DVD that he enjoys and wishes to make a copy for his personal use. DMCA section 1201 would say he has committed a crime. Yet, he has purchased the DVD for its informational content. He owns the content, for the sale of the DVD does not constitute a license. He owns the information, and the information has an encryption device on it that will remain even after the copyright expires. He has the right to make a personal copy for his own use. Yet, DMCA section 1201 would make it a crime for him to exercise this right and a crime for anyone to give him software to enable

¹⁴² 308 U.S. 147.

¹⁴³ 539 U.S. at 215.

¹⁴⁴ 408 U.S. at 764.

¹⁴⁵ 381 U.S. at 307.

him to exercise his right to better utilize the information. It is incongruent with *Lamont* to say a person's right to information is so great that the Postmaster General must deliver mail the United States government finds problematic, but at the same time the government can control how a person uses, in the privacy of his home, information which he has purchased. Since DMCA section 1201 is inconsistent with *Lamont*, it should be found unconstitutional.

The First Amendment rights of the receiver are important. Since the Court has stated many times that the government has no right to (directly) control what a person views or listens to, then surely the government also has no right to (indirectly) control what a person views or listens to. A person who has a right to listen to information presumably also has a right not to have the government interfere with the methods he utilizes to listen to the message. At some point, government regulation of the methods used to listen to material merge with content regulation as a practical matter. Suppose a person, with the use of a circumvention device, copies a DVD onto a computer to watch it on an airplane during a trip. If he did not use the circumvention device, he could not put the DVD on his computer and therefore would not be able to view it on the airplane. Thus, he would not receive the content of the information on the airplane. Banning the use of circumvention devices tends to reduce one of the greatest aspects of the information age. The mobility and fluid nature of information and the ease at transporting information is a great benefit of the information age. It increases access to information. To ban the use of circumvention devices reduces the flexibility and ease of transportation of information and this in turn reduces access to the information. Thus, it interferes with the listener's right of access to the information and in many cases deprives the listener of access to the information. If a person buys a DVD and wants to access it using non-conventional media devices, the government has no right to tell him he is forbidden from utilizing software designed to make this possible. The right to access information implies a right to utilize whatever method the listener chooses to access the information.

In *Virginia State Board of Pharmacy*,¹⁴⁶ the Court held that the right to receive information even included price advertising on pharmacies and any state law banning such ads is unconstitutional because it violates the right to receive information. Since the state cannot ban advertising by pharmacies, it is presumed that the state could not make it a crime for a customer to open a pharmacy ad. The state could not make it a crime for a printing press or newspaper to print the ad. Yet, by analogy this is precisely what DMCA section 1201 seeks to accomplish. Therefore, it is also inconsistent with the holding in *Virginia State Board of Pharmacy*. If a person has a right to receive advertising, then a person must have even greater rights when the issue is information which the person has purchased. To say that a person cannot remove a device that hinders full and legal use of the information is akin to saying a person cannot open an ad by a pharmacy. To say that one cannot design software to allow the full

¹⁴⁶ 425 U.S. 748.

and legal use of information is akin to saying a printing press cannot print ads for pharmacies. Thus, the right to receive information under *Virginia State Board of Pharmacy* implicitly includes the right to utilize devices that aid in the lawful use of the information.

The rights of a user to receive information outweigh the potential copyright infringement by users. In the landmark copyright case *Sony Corporation of America v. Universal City Studios*,¹⁴⁷ the Supreme Court said that a company is not liable for creating a technology that some customers may use for copyright infringing purposes so long as the technology has substantial non-infringing uses. Thus, Sony was not liable for infringements by customers using the Betamax Video to record shows from the TV. If a technology has many uses, the public cannot be denied use just because some customers might use it to infringe upon copyrights. Justice Stevens, who wrote for the majority, emphasizes several of the legitimate uses of Betamax Videos. If such use falls outside of the copyright law, then surely a law preventing the design of products that have substantial legitimate uses could not be justified under copyright law. In the Betamax case, the Court emphasized that the remedies available to enforce the copyright law were numerous. Enforcement of such law need not infringe upon free speech rights and the rights of the receiver. Prohibiting the use or sale of certain software because of potential abuse by customers is inconsistent with the Betamax decision. Betamax coupled with the First Amendment's sensitivity to a listener's right to receive information suggests that DMCA section 1201 has expanded beyond what is permissible under the Constitution.

An examination of amendments to copyright law prior to the DMCA highlights the fact that DMCA section 1201 is remarkably different from the other amendments. It imposes penalties for speech and actions that occur prior to any actual copyright infringement. Thus, it does not extend the length of time for copyright or heighten the penalty once an infringement has occurred. Rather, it imposes a penalty for actions and speech that can occur in the absence of any actual copyright infringement. This significant turn is vastly different from any other copyright amendment in the history of copyright law. Thus, DMCA section 1201 should be more susceptible to a constitutional challenge. It is susceptible to First Amendment challenges even if the law itself does not actually violate free speech.

B. DMCA: AN UNCONSTITUTIONALLY VAGUE STATUTE

DMCA section 1201 violates the Constitution because it is unconstitutionally vague. It fails to give fair notice as to what constitutes a violation of the law. As a result, an unconstitutionally vague statute potentially has a chilling effect on speech that is protected by the Constitution. The predominate reason under the First Amendment to void a law on the grounds that it is unconstitutionally vague is that it could have a

¹⁴⁷ 464 U.S. 417 (1984).

chilling effect on legitimate speech. (The fair notice aspect emerges in the context of the Fourteenth Amendment substantive due process analysis.)

The fact that DMCA section 1201 is vague can be proven. The vagueness of the statute is not hypothetical. The vagueness of this law has resulted in valuable scientific research going outside of the United States. It has also resulted in scientists refusing to come to the United States to present their research because of fear of an attack under DMCA section 1201.¹⁴⁸ These are legitimate scientists conducting legitimate research. Yet, they refuse to enter the United States because they cannot be certain that their research is safe under DMCA section 1201. It is not clear what “primarily designed or produced for the purpose of circumventing protection” means in the context of computer research and programs. A scientist in the United States cannot be sure that his legitimate product will not be considered a device used to circumvent protection. The meaning of the phrase is vague enough to cause alarm in the scientific community. This is particularly true in the development of security software. Some scientists assert that they are afraid to publish the results of their scientific research as a result of the DMCA section 1201.¹⁴⁹ And, when they do publish the results, they stay clear of the United States because they cannot be sure that the government will not allege they violated the DMCA section 1201. Since the DMCA is aimed at the software industry, it seems reasonable that the terms in the Act should be clear to scientists who design software. If these reasonable researchers are confused about what falls in and out of the Act, then it is vague by definition.

DMCA section 1201 is unconstitutionally vague. Researchers are afraid to publish the results of their research because of DMCA section 1201. Considering these are researchers at universities and other reputable individuals, it is unlikely that only hackers are upset about the Act. Credible researchers generally conduct reputable and credible research. Credible research is almost always considered legitimate speech. Yet, much credible research is being withheld from the public because of the DMCA. Therefore, the DMCA is imposing a chilling effect on legitimate speech and is unconstitutionally vague.

The International Copyright Act of 1891¹⁵⁰ also supports a finding that DMCA section 1201 is unconstitutionally vague. The purpose of the 1891 Act was in part to encourage foreign scientists to publish within the United States. Yet, because of the DMCA many foreign scientists refuse to publish in the United States and will not even visit the United States. The DMCA has had a negative chilling effect on international scientists. In light of the purpose behind the International Copyright Act of 1891, it is reasonable to void the law as unconstitutionally vague because it is vague to both scientists who live in the United States and scientists who live outside of the United States. The fact that both U.S. citizens and foreign scientists are

¹⁴⁸ Will Knight, *Computer Scientists Boycott US over Digital Copyright Law*, NEW SCIENTIST, July 23, 2001.

¹⁴⁹ See, e.g., Niels Ferguson, *Censorship in Action: Why I Don't Publish My HDCP Results*, August 15, 2001, available at <http://www.macfergus.com/niels/dmca/cia.html>.

¹⁵⁰ Act of March 3, 1891, 26 Stat. 1106.

unable to determine with any reasonable certainty if their research falls within the scope of the DMCA section 1201 strongly suggests the Act is unconstitutionally vague.

C. DMCA: A SUFFICIENTLY OVERBROAD STATUTE

DMCA section 1201 is also unconstitutional because it is overbroad. The overbreadth doctrine allows judges to hypothesize about the possible applications of the law. The number of valid applications of the Act is small when compared to the number of invalid applications of the Act, so DMCA section 1201 is sufficiently overbroad and is, therefore, unconstitutional. The Act can be applied to penalize non-criminal and non-infringing actions that are legal and within the rights of an individual or company. It can also penalize individuals who were circumventing a device for the purpose of illegal piracy. Many individuals make copies for use that is within the bounds of fair use. For example, a professor might want to copy a small clip from a movie to illustrate a concept in class. A person might want to copy songs from various music CDs to play on his car stereo. A library might want to show various clips from movies to interest people in the book that accompanies the DVD. A person might want to copy an encrypted part of an e-Book to place on a word processor to make notes for a class. The anticircumvention devices prevent numerous uses that are within fair use. Eventually, such DVDs should enter the public domain; without the use of circumvention devices, as a practical matter, such DVDs will never enter the public domain. On the other hand, some individuals want to make several copies of a DVD or other information product to sell them in China or infringe on the copyright in some other way. Yet, in the digital age people increasingly value the flexibility and ease with which information can be transported. Also, people use the information in increasing amounts consistent with fair use. Therefore, in the modern era, people copy information consistent with fair use all the time. Copying consistent with fair use is a normal aspect of life for many individuals. Infringing use, on the other hand, is common but not nearly as common as copying that is consistent with fair use. Thus, the infringing copying (triggering valid application of the DMCA) compared with the fair use copying (triggering invalid application of the DMCA) is very small indeed. When taken as a whole, the number of invalid applications of the Act greatly exceeds the number of valid applications of the Act. Therefore, the DMCA section 1201 is sufficiently overbroad and should be considered unconstitutional.

Another aspect to consider is the practical consequences of attempting to suppress speech that the computer programmers value. One function of the First Amendment is that it is a safety valve to vent anger and frustration. It is far better to have an individual yelling in the street and distributing flyers in the street that advocate overthrow of the government than it is to have that same individual run into city hall armed and dangerous. Allowing free speech lets people vent their anger in words rather than actions. In much the same way, it is better to let a few hackers distribute circumvention software on the Internet than it is to have them

placing malicious software on websites and engaging in web-based attacks against companies they perceive as benefiting from DMCA section 1201. Besides, in all likelihood, the true hackers, given the anonymous nature of the Internet, are probably motivated by DMCA section 1201 to find ways to distribute their circumvention devices. True hackers are not deterred by the Act. The individuals predominately deterred by DMCA section 1201 are computer programmers working on legitimate research. The legitimate researchers should be the last people who have to worry about DMCA section 1201, not the only people who have to worry about it.

D. DMCA: AN UNNECESSARY STATUTE FOR PROTECTING COPYRIGHTS IN THE DIGITAL AGE

The best argument favoring DMCA section 1201 suggests that, regardless of the First Amendment standard of review, a legitimate concern is that without anticircumvention laws, copyright protection will vanish in the digital age.¹⁵¹ This argument suggests that anticircumvention rules are necessary to maintain copyright law in the digital age. While this argument makes a very valid point, it is not sufficient to justify DMCA section 1201. Ample alternative protections are available to protect copyrights, even in the digital age. DMCA section 1201 is not the least restrictive means to achieve the goal. Again, the ultimate copyright infringer can be prosecuted for the actual infringement. Thus, if a person uses circumvention technology to infringe on a copyright and causes substantial harm to the actual copyright holder, then he can be prosecuted for the actual infringement, not the use of a circumvention device. The key is that the prosecution must be based on the actual infringement. This is the best solution on balance. On the one hand, it is true that in the digital age the prosecution of the individual infringer is a rather limp weapon against file sharing; it is also true that the nature of the Internet makes prosecution for actual infringement rather difficult. On the other hand, the creative works of authors should enter the public domain to benefit the public; people should be free to use their information product to the full extent that fair use allows. It is impossible to strike a completely fair and even balance between the two competing interests. The policy of public benefit and allowing individuals to use their information to the full extent of fair use outweighs the policy of allowing overbearing copyright protection because of the difficulties that arise in the digital age.¹⁵² DMCA section 1201 is not essential to the protection of copyright law in the digital age. True, it helps to some extent, but its benefits are outweighed by its significant costs.¹⁵³ The benefits are marginal compared to the high cost of allowing the fair use rights of citizens to be violated on a daily basis and the high cost of

¹⁵¹ This argument provides the largest practical hurdle to overcome in order to truly justify the position that DMCA section 1201 violates the First Amendment. Nevertheless, this hurdle can be jumped but is a major consideration to anyone who seriously advocates that DMCA section 1201 is unconstitutional.

¹⁵² In other words, it is unjust to penalize millions of people on a daily basis and deny them their right to use information in a way that is consistent with fair use just because some individuals would use the material beyond what is permitted by fair use. Certainly it is important that copyrights be protected to the fullest extent in the digital age, but it is even more important that people be allowed fair use of the product.

¹⁵³ In more informal words, do not burn the house to roast the pig.

allowing the public domain to be robbed of information that it should acquire in time. Thus, the costs of DMCA section 1201 substantially outweigh the benefits of it.

In addition, the valid argument that suggests anticircumvention rules are needed in the digital age fails to take into account who is really affected by DMCA section 1201. A significant large-scale infringer, perhaps someone who profits heavily from the black market in China, will likely have the ability to remove the anticircumvention device. In other words, DMCA section 1201 is rather useless to fight significant infringements done by skilled individuals because they usually possess the technological know-how to circumvent an anticircumvention device without the use of a circumvention program that is available over the Internet. DMCA section 1201 will not stop the large-scale infringer. Thus, large-scale copyright infringement will continue to be a cost regardless of the status of DMCA section 1201. The people most affected by DMCA section 1201 are normal people who want to use the technology for a legitimate purpose well within their fair use rights. For example, a person who wants to use DeCSS to play a DVD on his computer with a Linux operating system is affected by DMCA section 1201. Since DMCA section 1201 is ineffective to fight large-scale copyright infringement, it should not be justified on the theory that it fights small-scale copyright infringement.

A person could not reasonably argue that without DMCA section 1201, the movie industry that produces DVDs, making billions of dollars, would suddenly go out of business or the technology companies would suddenly go under. Over one million DVDs are sold weekly. Suppose less DVDs (or music CDs) are sold because of file sharing or copying beyond fair use; that loss is not significant in the big picture. The damage that file sharing causes is minor compared to the damage that results from a deflated public domain and devices that prohibit fair use. It is flawed to assume that a person who engages in file sharing would have otherwise purchased the information product. The justification advanced for DMCA section 1201 is akin to saying that the radio hurts music artists because people will no longer attend their concerts. The justification advanced for DMCA section 1201 is akin to arguing that Xerox machines should be banned because a person could copy a book and cost the author money. Just as the benefits of music on the radio outweigh any damage to potential artists, the benefits of allowing circumvention technology for fair use outweigh the cost. Just as the benefits that Xerox machines bring to the business world outweigh costs, the benefits of allowing circumvention technology to make fair use possible outweigh the costs.

Thus, prosecuting actual infringement is a sufficiently narrow, ample alternative.¹⁵⁴ Anything broader should not be allowed. Prosecuting the infringer's use of the circumvention technology for infringement is narrower than DMCA section 1201 and is a viable alternative; however, such action should merge with the underlying crime. The government

¹⁵⁴ Arguably, prosecuting several significant copyright infringers would go further to protect copyrights in the digital age than would anticircumvention rules that come into play on the individual level.

should stick with the charge of actual infringement in order to comply with the merger doctrine.¹⁵⁵ Moreover, since it should be legal to use the technology for valid purposes, people should not be prosecuted for use of the technology for infringement. Rather, the underlying crime of infringement should be the issue. Prosecuting the provider of circumvention technology under an inducement theory when the provider of the technology does in fact induce a person to use it is also too broad. While such a proposal is very good because it is narrower than DMCA section 1201, it sets up a theory where the legality of a device depends not on the device itself but rather on how it is marketed. The focus should be the product itself, not the marketing of the product. Moreover, it is likely that a person who used technology to infringe had that purpose in mind before purchasing the technology. It seems unjust to hold the company liable under an inducement theory because the liability should fall upon the actual infringer.¹⁵⁶ Some individuals go to great lengths to shield the manufacturers of guns from any legal theory of liability. They contend that the liability rests on the shoulder of the user. Since individual liability prevails with guns, which are capable of very serious harm, it seems very reasonable that liability for copyright infringement that utilizes circumvention technology should rest on the shoulders of the user.

Thus, prosecution of actual infringers is the narrow alternative that should be used. Though largely ineffective in the digital age, any measure that is broader harms the public good and costs the public.¹⁵⁷ There is no clear and perfect solution to the copyright dilemma that the digital age proposes. One should err on the side of public benefit. DMCA section 1201 errs on the side of private benefit. All copyright laws should square with the policy of the Copyright Clause.

DMCA section 1201 seems to violate the First Amendment freedom of speech. Yet, the constitutionality of the Act is open to reasonable debate and reasonable inference on both sides of the issue. The policy behind the Copyright Clause of the Constitution strongly suggests that First Amendment freedom of speech consideration outweighs any copyright consideration proponents of the Act could advance. In the end, policy shifts the issue into the First Amendment jurisdiction. The policy behind the Copyright Clause makes clear that Congress has exceeded its constitutional bounds by passing DMCA section 1201.

¹⁵⁵ The merger doctrine is a principle used in criminal law that favors the defendant by not allowing the prosecuting authority to prosecute a defendant for multiple crimes that are in fact the same act. For example, if a person uses a knife to kill another with malice aforethought, the prosecution cannot charge the person with assault with a deadly weapon (a felony) to invoke the felony murder rule. The prosecution cannot charge the person with both assault with a deadly weapon and murder. The assault charge is said to merge with the murder charge. This same principle should apply here. The charge of using circumvention technology to infringe should merge with the actual infringement charge.

¹⁵⁶ The idea of an additional charge for using circumvention technology seems more narrow than DMCA section 1201. While advantageous in some respects, the best solution is for the government to be diligent in prosecuting individuals for actual harmful infringement, even though it is difficult.

¹⁵⁷ The balance would have to be re-evaluated if copyright infringement extended to the point that creative genius was not rewarded by society. If that were the case, more drastic measures might be justified. Currently, creative genius is greatly rewarded by society, and copyright infringement has not risen to the point making DMCA section 1201 necessary for public benefit. The DMCA now gives private benefit.

E. DMCA: A LAW IN OPPOSITION TO THE AIM OF THE INTELLECTUAL PROPERTY CLAUSE

The Copyright Clause and the First Amendment are in the same document, suggesting that they work in tandem toward the important goal of creating more information. Indeed, this is how Melville B. Nimmer justified his conclusion in his famous 1970 *UCLA Law Review* article that states the Copyright Clause does not contradict the First Amendment.¹⁵⁸ Nimmer focused on the fact that the copyright law is consistent with the First Amendment because copyright law actually aids in generating more speech. Thus, since it is an engine that generates speech, it cannot be said to suppress speech. Of course, Nimmer wrote his article before Congress passed the DMCA.

The ultimate policy behind the Copyright Clause is public benefit. Indeed, in *Sony Corporation of America*, the Court noted that the Copyright Clause is not “designed to provide a special private benefit.”¹⁵⁹ Thus, expressive speech is a high value and any burden a copyright act under the Copyright Clause places on an individual’s right to free expression must be outweighed by public, not private, benefit to the society as a whole. Therefore, any statute that justifies itself under the Copyright Clause of the Constitution but provides only private benefits to major corporations at the expense of the public’s right of free speech and free expression should be unconstitutional.

The policy of public good is the pillar that supports the Copyright Clause. The purpose of the Copyright Clause, according to the Court, is to stimulate artistic and scientific creativity “for the general public good.”¹⁶⁰ Thus, the policy is public benefit and the purpose is to create works for the general public to enjoy. Indeed, the reward the original author receives for his work is a secondary consideration to the benefit the public receives from gaining access to the creative powers of the author.¹⁶¹ The Copyright Clause was intended to benefit the public and the general welfare of the nation, not private individuals. Traditional copyright law offers limited monopolies only to serve as an incentive to motivate talented individuals to create works for the public. That is why the Congressional Record for the Copyright Act of 1909 reflects a great fear of “oppressive monopolies” but seeks to compensate the individual, not large corporations, for his works that enrich the public domain.¹⁶² Copyright law has always been viewed as a method to enrich the public domain of knowledge. To be valid, copyright law must seek to benefit the public good. Arguably, a law cannot be a legitimate “copyright law” that derives authority under the Copyright Clause unless it brings about public benefit.

The policy behind the Copyright Clause makes clear that DMCA section 1201 is unconstitutional. Nimmer, the 1909 Congressional Record,

¹⁵⁸ Nimmer, *Does Copyright Abridge the First Amendment*, *supra* note 106.

¹⁵⁹ 464 U.S. at 429.

¹⁶⁰ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

¹⁶¹ *Sony Corp. of Am.*, 464 U.S. 417.

¹⁶² See H.R. Rep. No. 60-2222, at 7 (1909).

the Supreme Court, and various historical documents that reflect the views of Thomas Jefferson and other great historical figures all seem to agree on one point: the Copyright Clause is designed to benefit the public. Yet, the DMCA section 1201 is designed to enrich certain corporations at the expense of the public. DMCA is designed to reduce the public domain. It seeks to deprive citizens of the tools that will someday be necessary to place an object in the public domain. While the Copyright Clause reflects a noble effort to expand and enrich the public domain, the DMCA section 1201 reflects a misguided attempt to rob the public domain and enrich the private corporations. The DMCA does not benefit the public by expanding the public domain or enhancing the material available within the public domain. Rather, it feeds the kinds of “oppressive monopolies” that the Congressmen who voted for the 1909 Copyright Act wanted to avoid. An abridgment of speech that results from the DMCA section 1201 should be held to be unconstitutional. In fact, DMCA section 1201 is so contrary to the Copyright Clause that it does not even deserve to stand within the shadows of the clause. DMCA section 1201 exceeds Congressional copyright authority. Therefore, policy mandates that free speech and free expression trump DMCA section 1201. That is what the First Amendment demands.

Copyright law, in general, should be subject to a purpose and policy test. To be valid, copyright law should be required to benefit the public good in some way. Public benefit is the policy behind the Copyright Clause, and any law that is erected upon the authority of the Copyright Clause should meet this challenge. The purpose and policy test seems to be a reasonable method for making copyright law and the First Amendment congruent. In close cases, it is reasonable for a court to defer to the legislature. Yet, if it is clear that the motivation or purpose of the modern aspect of copyright law in question is designed for the benefit of large private corporations and “oppressive monopolies” at the expense of the general public and the public domain, then such acts should be unconstitutional. It is clear that the “limited time” aspect of the Copyright Clause was designed so that the public benefit from the intellect of great authors. The “limited time” is an implicit policy statement that symbolically equates to public good. The inference from the limited time phrase is that an author deserves to be compensated for his work but his compensation is secondary to the benefit the public is entitled to receive. This is very consistent with the free speech values of great intellectuals such as John Milton and Oliver Wendell Holmes. So long as copyright law is creating more speech and making more speech available to the general public, it is consistent with both the First Amendment and the Copyright Clause. Yet, when a copyright law is used to suppress speech or deprive the general public or the public domain of a benefit, the copyright law at issue suddenly becomes in opposition to both the First Amendment and the Copyright Clause.

In modern copyright law and First Amendment litigation, much energy is focused on the type of burden that is placed on the speech (content-based, content-neutral, or incidental) and the level of scrutiny that should

be applied, as well as commerce clause limitations on federal power arguments. These arguments fit into the framework that the Court currently uses to address these issues. This framework, when applied properly, should lead to the correct conclusion that the First Amendment wins. Yet, this framework is problematic on a legally theoretical level. This method pits the First Amendment and the Copyright Clause in a game of tug-of-war. It makes it seem as if the two work against each other. By contrast, the purpose test allows the First Amendment and the Copyright Clause to work together. Under the purpose test, the game of tug-of-war is one in which the Copyright Clause, the First Amendment, and the general public are aligned against oppressive monopolies and big companies that seek to put profit ahead of the public good.

V. CONCLUSION

In conclusion, the policy behind the Copyright Clause makes clear that under the strong, expansive, and freedom-oriented First Amendment doctrine DMCA section 1201 is unconstitutional. Furthermore, a purpose and policy test may be the best way to analyze and address the constitutionality of copyright law with respect to the First Amendment. Under this test, the First Amendment and copyright law are not in conflict. Rather, they are working together to benefit the public good by ensuring that the United States is an enlightened nation that values democracy and, most importantly, freedom of speech and expression.