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COPYRIGHT = SPEECH

Derek E. Bambauer^{*}

ABSTRACT

Expression eligible for copyright protection should be presumptively treated as speech for First Amendment purposes. Both copyright and the First Amendment share the goal of fostering the creation and dissemination of information. Copyright's authorship requirement furnishes the key link between the doctrines. This Essay examines where the two areas of law align and conflict in offering or denying protection. Using copyright law as a guide for the First Amendment offers three benefits. First, many free speech problems can be clarified when examined through copyright's lens. Second, this approach makes the seeming puzzle of non-human speakers understandable. Finally, it can help end technological exceptionalism in First Amendment doctrine.

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INTRODUCTION

Copyright equals speech.¹

This formula is plainly controversial, but it is also correct, as this Essay will show. It reverses the usual scholarly flow: normally, copyright looks to the First Amendment for guidance.² Here, this Essay argues the First Amendment has much to learn from copyright. This Essay takes the position that if expression can be copyrighted, and if it does not fall into one of the categories of material that the Supreme Court has designated as beyond the First Amendment pale, then that expression is speech that enjoys First Amendment protection.

This contention engages the hotly contested debate over what constitutes “speech”—meaning expression that receives protection against government regulation. Under Chief Justice John Roberts, the Supreme Court has increasingly extended First Amendment protections—to violent video games,³ videos showing cruelty to animals,⁴ emotionally distressing demonstrations near funerals of soldiers killed in combat,⁵ and information about physicians’ prescribing habits.⁶ While some scholars differ,⁷ many see the Roberts Court as broadening the ambit of the First Amendment and reducing the potential scope of government regulation.⁸

¹ See NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 118 (2008) (describing copyright as speech regulation). I thank Alex Tsesis for this reference.

² See, e.g., David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281, 281 n.1 (2004) (listing articles); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970).

³ *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2742 (2011).

⁴ *United States v. Stevens*, 559 U.S. 460, 482 (2010).

⁵ *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

⁶ *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2672 (2011).

⁷ Ronald K.L. Collins, *Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 460 (2013).

⁸ See John C. Coates IV, *Corporate Speech and the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 225 (2015); Tamara R. Piety, “A Necessary Cost of Freedom”? *The Incoherence of Sorrell v. IMS*, 64 ALA. L. REV. 1, 4 (2012); Neil M. Richards, *Why Data Privacy Law Is (Mostly) Constitutional*, 56 WM. & MARY L. REV. 1501, 1530–31 (2015); Ronald Dworkin, *The Decision that Threatens Democracy*, N.Y. REV. BOOKS (May 13, 2010), <http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy/>.

Yet, the debate over speech continues to percolate, with decisions finding that search results⁹ and off-label drug marketing¹⁰ constitute protected speech, and decisions holding that conversations between physicians and patients about guns¹¹ or gay conversion therapy¹² are not. There are contests over protection for algorithmically generated information,¹³ revenge porn,¹⁴ emotionally injurious speech,¹⁵ unflattering information,¹⁶ political expenditures by corporations,¹⁷ network neutrality,¹⁸ and more. The hard question, as Toni Massaro frames it, is what speech is “above-the-line” (cognizable for First Amendment protection), and what is not?¹⁹ Copyright offers at least a partial answer. This Essay explains how authorship can inform First Amendment debates, applies copyright to free speech questions, discusses the implications of this approach and its shortcomings, and closes with some thoughts about higher-order ramifications of the methodology.

I. AUTHORSHIP

Copyright can be helpful to First Amendment conundrums because of its requirement of authorship. The Constitution permits Congress to grant copyright protection only to writings by authors,²⁰ and the Copyright Act limits its entitlements to original works of authorship.²¹ Over time, Congress has increased the scope of works that can qualify for copyright, subject as always

⁹ See *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 443 (S.D.N.Y. 2014); *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457-M, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003); *S. Louis Martin v. Google, Inc.*, No. CGC-14-539972 (Cal. Super. Ct., San. Fran. Cty. Nov. 13, 2014).

¹⁰ *United States v. Caronia*, 703 F.3d 149, 152 (2d Cir. 2012).

¹¹ *Wollschlaeger v. Governor of Florida*, No. 12-14009, 2015 WL 4530452, at *28 (11th Cir. July 28, 2015) (holding the regulation withstood intermediate scrutiny and was a permissible regulation of speech).

¹² *Pickup v. Brown*, 740 F.3d 1208, 1214–15 (9th Cir. 2014).

¹³ See Jane R. Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 60 (2014); Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1496–98 (2013).

¹⁴ Compare Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025, 2031 (2014), with Rebecca Tushnet, *How Many Wrongs Make a Copyright?*, 98 MINN. L. REV. 2346, 2348 (2014).

¹⁵ See *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011).

¹⁶ See Farhad Manjoo, *‘Right to Be Forgotten’ Online Could Spread*, N.Y. TIMES (Aug. 5, 2015), <http://www.nytimes.com/2015/08/06/technology/personaltech/right-to-be-forgotten-online-is-poised-to-spread.html>.

¹⁷ *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

¹⁸ See Jon Brodtkin, *AT&T et al Challenging Net Neutrality Order on 1st Amendment Grounds*, ARS TECHNICA (May 22, 2015, 11:15 AM), <http://arstechnica.com/tech-policy/2015/05/att-et-al-challenging-net-neutrality-order-on-1st-amendment-grounds/>.

¹⁹ Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 370 (2014).

²⁰ U.S. CONST. art. I, § 8, cl.8.

²¹ 17 U.S.C. § 102(a) (2012).

to the Constitution's constraints.²² This expansion has survived challenge in the courts, most notably when a lithography company defended against an infringement suit from noted photographer Napoleon Sarony by claiming that photographs were outside the Intellectual Property Clause's (IP Clause) grant because they lacked authorship—they had no spark of human creativity, but only reproduced nature in static fashion.²³ The Supreme Court rejected the company's contention—photography was nearly always imbued with authorial choices, and hence it was within Congress's power to award copyright privileges.²⁴

Since then, nearly all works that fall within the statutory categories of copyrightable subject matter will enjoy protection, and the exceptions tend to prove the rule. These works qualify for monopoly rents because they are authored—they are the product of human creative labors.²⁵ That is also why they qualify as speech under the First Amendment. Even computer programs, written in code impenetrable to most people, constitute expression of the ideas of their programmers.²⁶ As the lithography case held, any injection of composition is enough to earn protection, and subsequent precedent sets a minimal bar for originality.²⁷

The copyright scholarship on authors, though, is highly variegated. There are arguments about whether certain types of works ought to be within copyright's purview²⁸ and over who ought to qualify as an author.²⁹ There are

²² See Brad Greenberg, *Against Neutrality*, 100 MINN. L. REV. (forthcoming 2016) (manuscript at 9–11). Compare 17 U.S.C. § 102(a) (2012) (listing eligible works of authorship), with Act of May 31, 1790, ch. 15, 1 Stat. 124 (listing maps, books, and charts as only eligible works).

²³ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 56 (1884); see Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power*, 43 IDEA 1, 63 (2003) (“[I]t took a significant legal fiction to read ‘writings’ as covering artistic works reproduced by engraving and etching ‘historical and other prints.’ But once the fiction was achieved, it was only a matter of time before it would be expanded to have ‘writings’ cover any and all forms of artistic expression in tangible form.”). I thank Brad Greenberg for this reference.

²⁴ *Burrow-Giles Lithographic Co.*, 111 U.S. at 60.

²⁵ See Jane C. Ginsburg, *The Author's Place in the Future of Copyright*, 45 WILLAMETTE L. REV. 381, 381–82 (2009).

²⁶ See, e.g., *Apple Comput., Inc. v. Franklin Comput. Corp.*, 714 F.2d 1240, 1253–54 (3d Cir. 1983).

²⁷ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

²⁸ See Ned Snow, *The Regressing Progress Clause: Rethinking Constitutional Indifference to Harmful Content in Copyright*, 47 U.C. DAVIS L. REV. 1 (2013).

²⁹ See generally Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186 (2008) (tracing the historical development of American copyright law and the discourse surrounding authorship).

critiques of the concept of authorship itself, particularly singular authorship.³⁰ Principally, though, the fights are over who gets to be an author, and not whether there is an author for a particular work.³¹ For example, Ann Bartow argues that certain types of pornographic and violent works ought not to obtain copyright protection, but she frames this as a policy matter and not as a question of sufficient creativity.³² Wendy Gordon criticizes doctrinal and statutory changes that benefit publishers rather than authors.³³ And the question of whether an actress with a bit part in a movie denigrating Islam could use a claim of authorship to prevent the film's distribution has seized the attention of judges and scholars alike.³⁴

Yet authorship is key to the linkage between copyright and the First Amendment. Both seek to drive production and dissemination of information. In each area, judges are chary of all but the most minimal substantive analysis of content.³⁵ Copyright uses authorship as a gatekeeping function: a work must be one of authorship to obtain the doctrine's entitlements. The First Amendment is also enmeshed in the search for human creativity and expression. The Supreme Court, in considering the interaction of these two areas of law, has repeatedly emphasized their similarity of purpose, particularly as a mechanism for reconciling their demands when they differ.³⁶ This confluence makes copyright a natural resource for examining First Amendment issues.³⁷ Put simply, where one finds authorship, one should expect to find speech.

³⁰ See, e.g., Alan L. Durham, *Copyright and Information Theory: Toward an Alternative Model of "Authorship,"* 2004 BYU L. REV. 69 (proposing a more inclusive, "unromantic" conception of authorship); Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549 (2010).

³¹ But see Michael Steven Green, *Copyrighting Facts*, 78 IND. L.J. 919 (2003) (arguing that facts, properly understood, are works of authorship).

³² Ann Bartow, *Copyright Law and Pornography*, 91 ORE. L. REV. 1 (2012).

³³ Wendy J. Gordon, *The Core of Copyright: Authors, Not Publishers*, 52 HOUS. L. REV. 613 (2014).

³⁴ *Garcia v. Google, Inc.*, 766 F.3d 929, 933–34 (9th Cir. 2014); see *Garcia v. Google, Inc.*, U.S. CTS. FOR NINTH CIR., http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000725 (collecting amicus briefs) (last visited Nov. 4, 2015).

³⁵ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.")

³⁶ *Golan v. Holder*, 132 S. Ct. 873, 889–90 (2012); *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

³⁷ See generally Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015 (linking First Amendment and copyright to American constitutional commitments).

II. THE FIRST AMENDMENT'S HANDMAIDEN³⁸

Copyright can help First Amendment analysis. To determine what qualifies as speech versus non-speech, First Amendment doctrine examines (among other things) whether the expression is the result of human creativity.³⁹ The IP Clause and the First Amendment serve similar purposes and flow from similar concerns, which is why copyright law receives greatly relaxed free speech scrutiny.⁴⁰ Outside minimal limits, congressional power to set the contours of copyright protection is nearly absolute.⁴¹ This Essay suggests that the converse should also be true: outside minimal exceptions, works satisfying copyright's requirements ought to enjoy greatly enhanced free speech protection. Thus, where we find authorship for copyright purposes, we should expect to find speech. Or, put another way, we should usually be surprised to find a copyrightable work that is outside the scope of First Amendment protection—where the government could regulate the work in contravention of the author's wishes or ban it altogether.⁴² This approach serves the First Amendment value of imposing a structural constraint on governmental attempts to ban speech either outright or via the imposition of regulatory costs and uncertainty.⁴³ And, this Essay's methodology offers a rule-like test that has relatively low transaction costs: it is easy to employ with confidence in its accuracy.

To be clear, the issue is not which tier of scrutiny a particular work falls into but rather the binary question of whether it is “above-the-line” or below—speech for First Amendment purposes or non-speech.⁴⁴ Copyrighted works will range across the spectrum of First Amendment tiers, from expression receiving the highest protection (such as Vladimir Nabokov's *Lolita*,⁴⁵ or Citizens United's *Hillary: The Movie*⁴⁶) to that enjoying intermediate scrutiny (such as 44 Liquormart's ads about its low prices for alcohol⁴⁷) to that receiving no

³⁸ With apologies to David C. Lindberg. David C. Lindberg, *Science as Handmaiden: Roger Bacon and the Patristic Tradition*, 78 *ISIS* 518 (1987).

³⁹ *But see* Toni M. Massaro & Helen Norton, *Siri-ously?*, 110 *NW. U. L. REV.* (forthcoming 2016) (arguing for First Amendment rights for artificial intelligence in some circumstances).

⁴⁰ *See, e.g., Golan*, 132 S. Ct. at 889–90; *Eldred*, 537 U.S. at 218–19.

⁴¹ *Golan*, 132 S. Ct. at 889–90; *Eldred*, 537 U.S. at 218–19.

⁴² *See Miller v. California*, 413 U.S. 15, 25 (1973).

⁴³ *See* Derek E. Bambauer, *Against Jawboning*, 100 *MINN. L. REV.* 51 (2015); Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 *VA. L. REV.* 479, 529–30 (2012).

⁴⁴ Massaro, *supra* note 19, at 370.

⁴⁵ *See Banned Book Week: Lolita*, MARSHALL U. LIBR., <http://www.marshall.edu/library/bannedbooks/books/lolita.asp> (last modified Aug. 25, 2010) (describing the legal challenge to a novel in Ocala, Florida).

⁴⁶ *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

⁴⁷ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996).

protection (such as obscenity⁴⁸). There is a plethora of copyrighted material that falls within the commercial speech tier: advertisements for circus acts,⁴⁹ commercials for terrible light beer,⁵⁰ and the like.

There are also categories of material where copyright protection holds, and yet the First Amendment permits the government nearly unfettered regulation of content. And there are zones denied copyright protection where the First Amendment operates with full force. The exceptions in both categories tend to prove the rule:

⁴⁸ See Kurt L. Schmalz, Recent Development, *Problems in Giving Obscenity Copyright Protection: Did Jartech and Mitchell Brothers Go Too Far?*, 36 VAND. L. REV. 403, 404–06 (1983).

⁴⁹ *Bleistein v. Donaldson Lithographing*, 188 U.S. 239, 248 (1903).

⁵⁰ See *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 462 (S.D.N.Y. 2005).

FIGURE 1: COPYRIGHT PROTECTION VS. FIRST AMENDMENT PROTECTION

	No First Amendment Protection ⁵¹	First Amendment Protection
Copyrightable	Obscenity ⁵² Child pornography ⁵³ Defamation ⁵⁴ Fraud ⁵⁵ Speech integral to criminal conduct ⁵⁶ Incitement to violence ⁵⁷	The remainder
Not Copyrightable	Conduct ⁵⁸ Systems ⁵⁹ Functional matter ⁶⁰ Fighting words ⁶¹	Ideas ⁶² Unfixed material (federal copyright) ⁶³ Copied/infringing material ⁶⁴ Facts ⁶⁵ Material subject to merger doctrine ⁶⁶ Scènes à faire ⁶⁷ Public domain works ⁶⁸

⁵¹ The Supreme Court recently insisted that content-based restrictions on expression are limited to a small set of historically dependent categories. *See* *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012); *United States v. Stevens*, 559 U.S. 460, 468–72 (2010).

⁵² *Miller v. California*, 413 U.S. 15, 23 (1973); *Jartech Inc. v. Clancy*, 666 F.2d 403, 408 (9th Cir. 1982). *But cf.* *Devils Films, Inc. v. Nectar Video*, 29 F. Supp. 2d 174 (S.D.N.Y. 1998).

⁵³ Eldar Haber, *Copyrighted Crimes: The Copyrightability of Illegal Works*, 16 YALE J.L. & TECH. 454, 470 (2014).

⁵⁴ *See, e.g., Ventura v. Kyle*, 63 F. Supp. 3d 1001, 1004–05 (D. Minn. 2014) (denying motion for judgment as matter of law or for new trial in defamation suit by Jesse Ventura over “American Sniper”); *American Sniper*, Registration No. TX0007495803.

⁵⁵ *Belcher v. Tarbox*, 486 F.2d 1087, 1089 (9th Cir. 1973).

⁵⁶ *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (upholding conviction for “threatening, profane or obscene revilings,” which might nonetheless qualify for copyright).

⁵⁷ *Cf. Cantwell v. Connecticut*, 310 U.S. 296, 308–09 (1940) (considering conviction for breach of the peace based upon playing of phonograph record).

⁵⁸ *See* 17 U.S.C. § 102(b) (2012); *United States v. O’Brien*, 391 U.S. 367, 382–83 (1968). *But see* *Horgan v. MacMillan, Inc.*, 789 F.2d 157, 163 (2d Cir. 1986) (protecting fixed works of choreography).

⁵⁹ 17 U.S.C. § 102(b).

⁶⁰ *See* *Mazer v. Stein*, 347 U.S. 201 (1954).

⁶¹ *Cohen v. California*, 403 U.S. 15, 20 (1971) (requiring that fighting words be “directed to the person of the hearer,” and that the “individual actually or likely . . . be present” (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940))). Thus, fighting words are not fixed, and hence are ineligible for protection.

⁶² 17 U.S.C. § 102(b).

⁶³ *Id.*

⁶⁴ *See* *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at *5 (C.D. Cal. Apr. 25, 1989).

⁶⁵ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 351 (1991).

⁶⁶ *Baker v. Selden*, 101 U.S. 99, 104 (1880).

⁶⁷ *See* *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

There are also unresolved areas, such as the now-famous “monkey selfie” photograph, which likely does not enjoy copyright protection (since the author is not human) and which hence might not be protected under the First Amendment.⁶⁹ Generally, however, First Amendment speech and copyrightable works of authorship are coterminous.

III. IMPLICATIONS

This approach generates at least three useful insights. First, and most critically, using copyright doctrine to assess speech offers a new angle on challenging First Amendment questions. This Essay argues that copyright and First Amendment protection normally travel together. Thus, where one finds a work with sufficient authorship to obtain copyright protection, one should nearly always conclude that the work merits protection against regulation based on freedom of speech. For most works, authorship is straightforward, and First Amendment recognition will follow as a matter of course.⁷⁰ The work moves above the line. That conclusion does not bar regulation by the state: it is straightforward to impose controls on works that constitute commercial speech,⁷¹ and even constraints on works at the heart of the First Amendment can survive scrutiny with sufficient tailoring and justification.⁷² A copyright approach can simplify the identification of protected speech, since (unlike with copyright doctrine itself) it is not necessary to identify who the author is—it suffices to ascertain simply that there is sufficient authorship. Speech where the author is indeterminate, such as anonymous speech, is still constitutionally

⁶⁸ See, e.g., 17 U.S.C. § 105 (2012) (denying copyright protection to U.S. government works); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (permitting newspaper to publish secret government work).

⁶⁹ U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.2 (3d ed. 2014), <http://copyright.gov/comp3/docs/compendium.pdf> (stating that the Office will not register, among other works, “[a] photograph taken by a monkey”); James Eng, *Monkey Selfie Can’t Be Copyrighted, U.S. Regulators Confirm*, NBC NEWS (Aug. 21, 2014, 5:22 PM), <http://www.nbcnews.com/tech/social-media/monkey-selfie-cant-be-copyrighted-u-s-regulators-confirm-n186296>; Sarah Whitten, *Photographer Continues Fight over Monkey Selfie*, CNBC (Dec. 15, 2014, 1:57 PM), <http://www.cnbc.com/2014/12/15/photographer-continues-fight-over-a-monkey-selfie.html>. People for the Ethical Treatment of Animals (PETA) has sued the photographer who owns the camera on behalf of the monkey, seeking the proceeds from the photo on its behalf. Complaint at 1, *Naruto v. Slater*, No. 3:15-CV-04324 (N.D. Cal. Sept. 21, 2015), <http://www.media.peta.com/peta/PDF/Complaint.pdf>.

⁷⁰ See Ginsburg, *supra* note 25, at 381–82.

⁷¹ See, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430 (1993); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68 (1983); *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975).

⁷² *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2731 (2010); *Burson v. Freeman*, 504 U.S. 191 (1992); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957). I thank Toni Massaro for helpful discussion of this point.

protected.⁷³ In short, one can detect speech protected under the First Amendment by analyzing whether speech is within copyright and is not within one of the First Amendment exclusion zones. Works that meet those two criteria obtain protection based upon freedom of speech.

Second, the Supreme Court's decisions in *Citizens United v. FEC*⁷⁴ and *McCutcheon v. FEC*⁷⁵ begin to look unremarkable under this Essay's approach. If one accepts (even if just temporarily) the argument that financial expenditures for political communications during campaigns implicate the First Amendment, then the extension of this free speech protection to non-human persons becomes unexceptional.⁷⁶ Copyright law has long conferred entitlements over a protected work directly upon non-human authors at times, even when humans physically generate the relevant protected expression.⁷⁷ Indeed, copyright's recognition of non-human entities as authors predates First Amendment recognition of them as potential speakers by over seventy years.⁷⁸ Under § 201 of the Copyright Act, the employer or entity for whom the work was made is considered the author.⁷⁹ This results in important differences in entitlements: works for hire enjoy different (determinate) copyright terms,⁸⁰ and are exempt from termination of assignments and licenses.⁸¹ Thus, for copyright purposes, a management company was considered the author of a large sculpture designed and constructed by three professional artists.⁸² The management company supplied the money, the artists supplied the creativity,

⁷³ *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995); see also *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005); *Solers, Inc. v. Doe*, 977 A.2d 941, 950 (D.C. 2009).

⁷⁴ 558 U.S. 310 (2010).

⁷⁵ 134 S. Ct. 1434 (2014).

⁷⁶ See Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 420 (2013).

⁷⁷ The 1909 Copyright Act provided for a "work for hire" designation for works created by employees within the scope of employment, and for commissioned works. See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 743–44 (1989); *Yardley v. Houghton Mifflin Co.*, 108 F.2d 28, 32 (2d Cir. 1939). The Supreme Court first dealt with the work for hire concept in 1903. *Cnty. for Creative Non-Violence*, 490 U.S. at 744 n.9 (citing *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 248 (1903)).

⁷⁸ *Compare Bleistein*, 188 U.S. at 244, with *Buckley v. Valeo*, 424 U.S. 1, 17 (1976) (noting that the "interests served by the [challenged] Act include restricting the voices of people and interest groups who have money to spend" on campaigns (emphasis added)), and *id.* at 50 (invalidating provision imposing "a \$1,000 limitation on the amount of money any person or association can spend during an entire election year in advocating the election or defeat of a candidate" (emphasis added)).

⁷⁹ 17 U.S.C. § 201(b) (2012).

⁸⁰ *Id.* § 302(c).

⁸¹ *Id.* § 203(a).

⁸² *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 88 (2d Cir. 1995).

and under copyright law, the company attained authorship status.⁸³ Juridical persons can be co-authors with human ones under the right circumstances.⁸⁴ “Work for hire” status is clear for employees: a software engineer who writes a new program for Microsoft will find that the company, not she, is the author and owner of copyright in the code.⁸⁵ It is also plain—though perhaps still odd—that a non-human entity can commission a work by a human artist and thereby agree that the entity, not the artist, will be the author.⁸⁶ Authorship is fungible and context-dependent.⁸⁷

But it can also occur, as with the sculptors, in situations where the humans involved in creation likely did not understand that they would not be authors. For example, cartoonist Jack Kirby, creator of the Fantastic Four, worked principally for Marvel as an artist.⁸⁸ Because his status appeared closer to that of an employee than an independent contractor, the comics were deemed works for hire, leaving Kirby (and eventually his heirs) with no copyright interest.⁸⁹ Instead, Marvel Characters, a corporation, was the author.⁹⁰ Kirby thought he was the author—certainly, his hands and creativity helped craft some of Marvel’s most famous heroes.⁹¹

It does not seem quite so discordant for a corporation to be a speaker if it can already be an author.⁹² As with First Amendment speech, the corporation must operate through agents, but the firm’s interests and resources are at the root of the expression. Some content would not exist without the firm: it would be quite difficult for Joss Whedon to create *The Avengers*, with a reported production cost of \$220 million, without the financial backing and

⁸³ *Id.*

⁸⁴ *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 753 (1989) (noting that CCNV and Reid might be joint authors).

⁸⁵ *See JustMed, Inc. v. Byce*, 600 F.3d 1118, 1128 (9th Cir. 2010).

⁸⁶ 17 U.S.C. § 101 (describing a “work made for hire” as, *inter alia*, “a work specially ordered or commissioned for use” in one of nine enumerated types of works).

⁸⁷ *See Bambauer*, *supra* note 14, at 2073 (“Authorship should be understood as an entirely utilitarian concept—one that is otherwise normatively empty.”).

⁸⁸ *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 126 (2d Cir. 2013).

⁸⁹ *Id.* at 143.

⁹⁰ *Id.* at 140. Note that Marvel Characters did not *become* the author—the corporation *was* the author from the moment Kirby set ink to paper.

⁹¹ *See Jacob Reiser, Kirby/Marvel Settle—Law Surrounding “Work for Hire” Remains Unsettled*, ENTMT, ARTS & SPORTS L. BLOG (Oct. 8, 2014, 9:58 AM), http://nysbar.com/blogs/EASL/2014/10/kirby_marvel_settle_-_law_surro.html.

⁹² For example, Twentieth Century Fox is the author and copyright owner of *Crusade in Europe*, even though President Dwight D. Eisenhower wrote the book. *Twentieth Century Fox Film Corp. v. Entm’t Distrib.*, 429 F.3d 869, 881–82 (9th Cir. 2005).

organizational resources of Marvel Studios and Paramount Pictures.⁹³ And we may remember the agents better in both cases—Robert Downey Jr. rather than Marvel/Paramount, or Jamie Dimon rather than JP Morgan Chase—but we do not think the speech is theirs personally.⁹⁴ They are paid to deliver an author’s messages. That author (a person) may be a corporation, non-profit, or partnership, though not a human. This conclusion has drawn little complaint in copyright for over a century, and may help us adapt to its extension in First Amendment doctrine.⁹⁵

Third, borrowing from copyright’s approach to authorship may helpfully end technological exceptionalism in First Amendment law.⁹⁶ Copyright has had a fraught history with the combination of authors and technological tools. Photography, for example, was widely viewed as outside the congressional power to confer copyrights because the camera merely reproduced facts of nature—there was no authorship to recognize.⁹⁷ After the Supreme Court refuted that argument in 1884, courts found copyrightable subject matter in most cases, though they often struggled to articulate a rationale for so doing.⁹⁸ Similarly, courts and scholars struggled with how to treat computer code (software) from a subject matter perspective. After the report of the Commission on New Technological Uses⁹⁹—which argued that code was already properly the subject of copyright as a literary work—Congress slightly

⁹³ *The Avengers*, IMDB, <http://www.imdb.com/title/tt0848228/> (last visited Nov. 5, 2015); THE AVENGERS (Marvel Studios, Paramount Pictures 2012). *But see* Peter Schorn, *Sky Captain and the World of Tomorrow*, IGN (Jan. 21, 2005), <http://www.ign.com/articles/2005/01/22/sky-captain-and-the-world-of-tomorrow> (describing director who obtained \$60 million in financing outside studio system based on homemade six-minute demonstration movie).

⁹⁴ *Cf.* Erika Kelton, *More Compliance, Fewer Complaints Needed from JPMorgan’s Jamie Dimon*, FORBES (Jan. 26, 2015, 2:45 PM), <http://www.forbes.com/sites/erikakelton/2015/01/26/more-compliance-fewer-complaints-needed-from-jpmorgans-jamie-dimon/>; Ross Miller, *Iron Man is Forever. Robert Downey Jr. Isn’t*, VERGE (Oct. 16, 2014, 8:47 AM), <http://www.theverge.com/2014/10/16/6985725/marvel-iron-man-is-forever-rdj-isnt>.

⁹⁵ *See generally* Nina Totenberg, *When Did Companies Become People? Excavating The Legal Evolution*, NPR (July 28, 2014, 4:57 AM), <http://www.npr.org/2014/07/28/335288388/when-did-companies-become-people-excavating-the-legal-evolution> (discussing differing views on how corporations have become “people” with First Amendment protections in certain contexts over the last century).

⁹⁶ *Compare* Miami Herald Publ’g Co. v. Tornillo, 418 U.S. 241, 258 (1974), *with* Turner Broad. Sys. v. FCC, 520 U.S. 180, 224–25 (1997).

⁹⁷ *Burrow-Giles Lithography v. Sarony*, 111 U.S. 53, 58–59 (1884).

⁹⁸ Christine Haight Farley, *The Lingering Effects of Copyright’s Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 438–51 (2004).

⁹⁹ NAT’L COMM’N ON NEW TECH. USES OF COPYRIGHTED WORKS, FINAL REPORT OF THE NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS (1978).

modified the Copyright Act to clarify the matter.¹⁰⁰ Though courts still struggled at times to find the boundaries of software copyrights, the premise that code and its outputs could be protected has been largely settled as a doctrinal matter.¹⁰¹ Courts protected both the output of software code, such as a video game display,¹⁰² and also its internal operations, such as operating system code that controlled components.¹⁰³ From a copyright perspective, code and cameras teach the same lesson: the expressive output of human interaction with machines can be protected.¹⁰⁴

Yet similar First Amendment questions remain unsettled, at least among legal scholars. Tim Wu argues that courts do not protect actors that perform functional roles regarding speech, such as transporting or collating it.¹⁰⁵ Oren Bracha goes further, contending that search engine results are descriptively and deservedly unprotected by the First Amendment.¹⁰⁶ Jane Bambauer presses the case that data must receive First Amendment protection (though at varying levels of scrutiny) to prevent governments from interfering in knowledge regulation.¹⁰⁷ Eugene Volokh and Donald Falk also see search engines as speakers, particularly given their editorial judgment in constructing results.¹⁰⁸ James Grimmelmann, by contrast, seeks to chart a middle course: search engines deserve protection in their role as advisors, but should face liability if they deliberately mislead their users about their calculations.¹⁰⁹ And Annemarie Bridy sets out to show that works produced via artificial

¹⁰⁰ An Act of Dec. 12, 1980, Pub. L. No. 96-517, 94 Stat. 3015 (amending §§ 101 and 117 of the Copyright Act).

¹⁰¹ See *Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1448 (9th Cir. 1994).

¹⁰² *Midway Mfg. Co. v. Artic Int'l, Inc.*, 704 F.2d 1009, 1011 (7th Cir. 1983).

¹⁰³ *Apple Comput., Inc. v. Formula Int'l, Inc.*, 725 F.2d 521, 525 (9th Cir. 1984); see Robert P. Merges, Comment, *Apple v. Franklin: An Essay on Technology and Judicial Competence*, 2 YALE L. & POL'Y REV. 62, 66–68 (1983).

¹⁰⁴ See, e.g., *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 443 (S.D.N.Y. 2014); *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 450 (S.D.N.Y. 2005); *Search King v. Google Tech., Inc.*, No. CIV-02-1457-M, 2003 WL 21464568, at *4 (W.D. Ok. May 27, 2003); Jeff Roberts, *Google Has Free Speech Right in Search Results, Court Confirms*, GIGAOM (Nov. 17, 2014, 10:05 AM), <https://gigaom.com/2014/11/17/google-has-free-speech-right-in-search-results-court-confirms/>.

¹⁰⁵ Wu, *supra* note 13, at 1496–98.

¹⁰⁶ Oren Bracha, *The Folklore of Informationalism: The Case of Search Engine Speech*, 82 FORDHAM L. REV. 1629, 1654–55 (2014).

¹⁰⁷ Bambauer, *supra* note 13, at 60. Obvious disclosure: she and the author are married.

¹⁰⁸ Eugene Volokh & Donald M. Falk, *First Amendment Protection for Search Engine Search Results* (2012), <http://www.volokh.com/wp-content/uploads/2012/05/SearchEngineFirstAmendment.pdf>. The paper was commissioned by Google. *Id.* at 1.

¹⁰⁹ James Grimmelmann, *Speech Engines*, 98 MINN. L. REV. 868, 917–18 (2014).

intelligence are more similar to directly human-authored works, and fit better within current copyright law, than is widely assumed.¹¹⁰

Here, copyright doctrine presses towards the conclusion that protectable outputs generated by code—itself a work of authorship in most cases—are First Amendment speech. That does not insulate software firms from liability: commercial spam can be punished without First Amendment objection,¹¹¹ and the FTC has a successful track record of punishing firms that vend malware.¹¹² But it does suggest, if not compel, the government to meet a significant burden before imposing penalties, rather than allowing the state to regulate this expression as though it were beef jerky.¹¹³

IV. EXCEPTIONS

Sometimes the First Amendment and copyright part ways. The First Amendment may protect speech ineligible for copyright for some reason, and copyright may extend eligibility to expression that the government can regulate or ban without First Amendment quarrel.¹¹⁴ Those divergences require explanation.

The schism where the First Amendment withdraws speech protection, but copyright extends it, is largely illusory. Here, the First Amendment tends to trump. For example, few authors are likely to assert copyright protection over child pornography, for the obvious reason that they will not prefer to confess liability to law enforcement by way of the Copyright Office.¹¹⁵ Creators of obscene, fraudulent, or defamatory materials are also unlikely to advertise their

¹¹⁰ Annemarie Bridy, *Coding Creativity: Copyright and the Artificially Intelligent Author*, STAN. TECH. L. REV., Mar. 2012, at 27.

¹¹¹ See Controlling the Assault of Non-Solicited Pornography and Marketing Act, 15 U.S.C. §§ 7701–7713 (2012) (regulating the use of spam messages); *United States v. Ralsky*, No. 07-CR-20627 (E.D. Mich. Nov. 24, 2009). But see *Jaynes v. Commonwealth*, 666 S.E.2d 303, 313 (Va. 2008) (blanket ban on unsolicited e-mail violated First Amendment).

¹¹² *FTC v. Ross*, 743 F.3d 886, 895 (4th Cir. 2014).

¹¹³ *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2666 (2011) (quoting *IMS Health Inc. v. Ayotte*, which concluded that “that because [plaintiffs’] product is information instead of, say, beef jerky, any regulation constitutes a [First Amendment] restriction. . . . such an interpretation stretches the fabric of the First Amendment beyond any rational measure” (550 F.3d 42, 52–53 (1st Cir. 2008))).

¹¹⁴ But see *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (prohibiting government from banning only fighting words that communicate a particular viewpoint or idea).

¹¹⁵ See 17 U.S.C. § 411(a) (requiring registration for U.S. works before an infringement lawsuit can be instituted); U.S. COPYRIGHT OFFICE, DEPOSIT REQUIREMENTS FOR REGISTRATION OF CLAIMS TO COPYRIGHT IN VISUAL ARTS MATERIAL 3 (2012), <http://www.copyright.gov/circs/circ40a.pdf> (requiring deposit of two complete copies for registration of photographs).

illegality via registration.¹¹⁶ Even in these non-speech zones, though, copyright has the decisional ordering right: the government must demonstrate that expression is unprotected rather than protected. Copyright's default of eligibility operates properly here, but unlike in speech areas where First Amendment protections attach, those protections are defeasible. In this zone, since the state can ban this type of expression altogether, copyright does not serve utilitarian goals much but instead may serve an expressive role.

The challenging zone is where the First Amendment protects as speech expression to which copyright is denied.¹¹⁷ Here, copyright law is simply a poor predictor, and one needs an alternative theory of the First Amendment to explain why the information at issue counts as speech.¹¹⁸ This is unfortunate, but inevitable—all theories of the First Amendment are incomplete. Exploring the lacunae here, though, may prove useful.

The zone of free speech, but not copyright, protection can be helpfully bifurcated into prudential and mandatory exclusions. There are areas where federal copyright protection does not extend, but could. Two examples are sound recordings and derivative works. Before 1972, the Copyright Act did not include sound recordings as eligible subject matter; instead, bands and musicians had to turn to state copyright laws.¹¹⁹ Congress changed that in 1972, but failed to sweep existing sound recordings within federal copyright law—although it likely could have done so.¹²⁰ Thus, there are works that are not the subject of federal copyright protection that could, by congressional grace, be so. Similarly, the Copyright Act denies protection to the original expression contained in an unauthorized derivative work.¹²¹ Thus, someone who writes a sequel to the movie *Rocky* without Sylvester Stallone's permission cannot protect even the original contributions to the sequel.¹²² This is a deliberate congressional policy choice—the Copyright Act could extend

¹¹⁶ See generally James R. Alexander, *Evil Angel Eulogy: Reflections on the Passing of the Obscenity Defense in Copyright*, 20 J. INTELL. PROP. L. 209 (2013).

¹¹⁷ Unfixed verbal statements would not be eligible for federal copyright protection. 17 U.S.C. § 102(a) (2012). However, some such statements are at the heart of First Amendment protections. See *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940).

¹¹⁸ See Bambauer, *supra* note 13.

¹¹⁹ See U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS 9 (2011), <http://copyright.gov/docs/sound/pre-72-report.pdf>.

¹²⁰ Sound Recording Amendment, Pub. L. No. 92-140, § 3, 85 Stat. 391, 392 (1971). Sound recordings became eligible for federal copyright protection as of February 15, 1972. See *id.*

¹²¹ 17 U.S.C. § 103(a).

¹²² See *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at *7–8 (C.D. Cal. Apr. 25, 1989).

protection to those contributions, creating a system of “blocking copyrights” similar to that of the Patent Act.¹²³ Both of these are prudential exclusions: copyright law could extend protection to this expression, but Congress has decided not to.

For prudential exclusions, copyright can provide guidance to First Amendment analysis, but it requires more work, and some conjecture, by courts or other policymakers. The analysis has to consider not the Copyright Act itself, but the reach of the Copyright Act consistent with constitutional limits.¹²⁴ That methodology can help guide free speech considerations, but is only somewhat more determinate than the First Amendment itself. The IP Clause offers a number of textual clues to limits on copyright—the requirement of a writing (fixation), the requirement of authorship, and the purposive mandate that Congress act to promote the progress of science—but those are not nearly as precise or specific as the copyright statute.¹²⁵ Thus, this Essay’s methodology is of some, but limited, utility for First Amendment analysis when treating prudential exclusions from copyright eligibility.

The second type of exclusion from copyright is mandatory: unfixed works, ideas, facts, processes, concepts, *scènes à faire*, and the like. These exceptions are constitutionally mandated.¹²⁶ Ideas, processes, and concepts qualify for patent protection as discoveries, if at all.¹²⁷ Unfixed works do not count as writings. And facts lack authorship.¹²⁸ Processes might count as conduct, but the other mandatory exclusions clearly qualify for First Amendment protection. Facts are free speech; even false factual claims may be protected in contexts such as political campaigns.¹²⁹ Ideas are at the heart of the First Amendment. And unfixed works, such as extemporaneous political speeches, are similarly free speech canon.¹³⁰ This is a zone where copyright and the First Amendment share similar goals but must necessarily come to different doctrinal results. Copyright denies protection to facts,¹³¹ *scènes à faire*,¹³² ideas

¹²³ See Derek E. Bambauer, *Faulty Math: The Economics of Legalizing The Grey Album*, 59 ALA. L. REV. 345, 358 (2008).

¹²⁴ Cf. *Golan v. Holder*, 132 S. Ct. 873, 878 (2012) (holding that Congress acted within its constitutional authority when it extended the terms of existing copyrights).

¹²⁵ U.S. CONST. art. I, § 8, cl. 8.

¹²⁶ *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

¹²⁷ See *Baker v. Selden*, 101 U.S. 99, 103 (1879).

¹²⁸ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344–45 (1991).

¹²⁹ *United States v. Alvarez*, 132 S. Ct. 2537, 2555 (2012) (Breyer, J., concurring in the judgment).

¹³⁰ Cf. *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

¹³¹ *Feist Publ'ns, Inc.*, 499 U.S. at 344–45.

¹³² See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

(in the form of the merger doctrine),¹³³ and similar types of expression precisely to bolster informational output—if Ian Fleming could copyright the suave British spy,¹³⁴ Mike Myers likely could not make “Austin Powers,”¹³⁵ nor could John Le Carré write his novels.¹³⁶ The First Amendment protects this material for precisely the same reason. Copyright accomplishes its mission by conferring exclusive rights upon an author (or, on rare occasion, authors); the First Amendment is inherently anti-monopoly. It seeks the widespread dissemination of ideas and points of view, while copyright leaves that choice to the author.¹³⁷ This zone of conflict, then, is one where the doctrinal differences between copyright and the First Amendment overwhelm their shared goals of creating and disseminating information.

Copyright is, generally, a good guide to First Amendment speech. In areas where copyright denies protection, but free speech provides it, the doctrines conflict. However, copyright law helpfully spells out its exclusions—areas where it is of no help in the analysis—leaving other theories or methodologies to fill the gap.

CONCLUSION

This Essay’s approach to constitutional borrowing—drawing upon copyright doctrine to illuminate puzzles about the boundaries of free speech protection—generates several higher-order ramifications.¹³⁸ First, the copyright-driven methodology is likely to tend towards First Amendment maximalism: the broad scope of subject matter will tend to sweep most expression within the protective grasp of free speech. For some scholars, that is a virtuous characteristic.¹³⁹ For others, it may generate backlash, combining extant fears about overweening copyright¹⁴⁰ with new ones about “First Amendment Lochnerism.”¹⁴¹ The latter concern seems hyperbolic—unlike

¹³³ *Baker v. Selden*, 101 U.S. 99, 103 (1879).

¹³⁴ *See, e.g.*, *DR. NO* (Eon Productions 1962).

¹³⁵ *See, e.g.*, *AUSTIN POWERS: INTERNATIONAL MAN OF MYSTERY* (New Line Cinema 1997).

¹³⁶ *See, e.g.*, *JOHN LE CARRÉ, THE SPY WHO CAME IN FROM THE COLD* (1963).

¹³⁷ *But see* *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2723 (2010).

¹³⁸ *See* Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 463 (2010) (explaining the concept of constitutional borrowing).

¹³⁹ *See* Bambauer, *supra* note 13, at 77.

¹⁴⁰ *See, e.g.*, Raymond Shih Ray Ku, *Copyright Lochnerism*, 33 N. KY. L. REV. 401, 402 (2006).

¹⁴¹ *See, e.g.*, Jedediah Purdy, *The Roberts Court v. America*, 23 DEMOCRACY, Winter 2012, at 52, http://www.democracyjournal.org/pdf/23/the_roberts_court_v_america.pdf; Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1211 (2005); Howard M. Wasserman, Bartnicki as Lochner: *Some Thoughts on First Amendment Lochnerism*, 33 N. KY. L. REV. 421, 424 (2006);

freedom of contract,¹⁴² the First Amendment is explicitly included in the Bill of Rights, and speech regulation in most areas operates unabated—but if one favors restrictions on violent video games,¹⁴³ or bans on videos showing animal cruelty,¹⁴⁴ the risk of a broader First Amendment will appear disconcerting. If the First Amendment is not an automatic trump card, then defensible regulations of information will be precisely that: capable of being defended by the state as serving important interests and being properly tailored.¹⁴⁵

Alternatively, one might fear that Congress, confronted with a constitutional doctrine that limits its legislative freedom to operate, might alter the contours of copyright law to increase its power. Copyright already suffers from a number of idiosyncratic industry-specific tweaks; the need to cabin First Amendment protection might worsen the situation.¹⁴⁶ There are at least two responses that mitigate this concern. First, copyright industries have proven highly effective in driving the expansion of the doctrine and its entitlements in the past and could be expected to deploy their efforts to preserve current scope.¹⁴⁷ Thus, First Amendment pressures might, from a policy perspective, helpfully balance the public choice problems inherent in copyright legislation and rulemaking.¹⁴⁸ Or the courts could examine copyright not from the particular contours of current federal (and perhaps state) legislation, but based on the overall scope of congressional authority under the IP Clause. This would remove this Essay's proposed copyright methodology from the legislative process altogether, with the benefit of reducing strategic behavior at the cost of losing more precise targeting based upon statute.

Susan Crawford, *Verizon v. FCC: Why It Matters*, SUSAN CRAWFORD (Sept. 8, 2013), <http://scrawford.net/verizon-v-fcc-why-it-matters/>; Rebecca Tushnet, *NFL Films Protected by First Amendment Against Players' Right of Publicity Claims*, REBECCA TUSHNET'S 43(B)LOG (Oct. 14, 2014), <http://tushnet.blogspot.com/2014/10/nfl-films-protected-by-first-amendment.html>.

¹⁴² *Lochner v. New York*, 198 U.S. 45, 53 (1905) (“The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.”).

¹⁴³ *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011).

¹⁴⁴ *United States v. Stevens*, 559 U.S. 460, 472 (2010).

¹⁴⁵ See Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, NEW REPUBLIC (June 3, 2013), <http://www.newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation> (calling the First Amendment “the new nuclear option for undermining regulation”).

¹⁴⁶ See, e.g., 17 U.S.C. §§ 111, 115 (2012) (regulating cable television and compulsory license for non-dramatic musical works, respectively).

¹⁴⁷ See JESSICA LITMAN, *DIGITAL COPYRIGHT* 37, 62–63 (2000).

¹⁴⁸ See generally Bambauer, *supra* note 43, at 65 (noting the “asymmetry between the government’s ability to obtain results informally versus through rulemaking or legislative mechanisms”).

Second, the reciprocity between copyright law and the First Amendment might validate, if not create, a parallel that worries scholars in both disciplines. The removal of formalities from the instantiation of copyright, combined with the shift to digital formats, increasingly mean that most expression is copyrighted.¹⁴⁹ Copyright owners have also increasingly pressed the case that any activity involving their works that falls within § 106's entitlements must either have an excuse (such as authorization or fair use) or infringe.¹⁵⁰ That, along with the elimination of the *de minimis* doctrine in some circuits, has caused scholars such as Jessica Litman to worry that copyright has become unbalanced and out of step with its history.¹⁵¹ Similarly, this Essay's approach might shift nearly everything above the line, making all regulation of expression or information impermissible unless adequately justified.¹⁵² That possibility has worried scholars in areas such as privacy, professional responsibility, and securities regulation.¹⁵³ It seems likely that much if not most regulation in areas like the Securities and Exchange Commission's rules for publicly-traded equities would survive unscathed since the government would be able to defend both the interest at stake and the tailoring of the rules; however, it would come at some cost in litigation and uncertainty. Here, too, the level of concern depends upon one's normative priors, but the evolution towards all-inclusive rules could be troublesome.

Lastly, tightening the link between copyright and the First Amendment seems like a natural and inevitable consequence of the shift to an information-based economy.¹⁵⁴ Increasingly, America produces bits instead of things. Trade in information leads both to conflicts over rights, property, or otherwise, in those bits, and also to resistance to or wariness of governmental regulation of communication. Here, recent presidential administrations have not helped,

¹⁴⁹ See Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 487–88, 527 (2004). But see Brad Greenberg, Comment, *More Than Just a Formality: Instant Authorship and Copyright's Opt-Out Future in the Digital Age*, 59 UCLA L. REV. 1028 (2012).

¹⁵⁰ See James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 65 (2003); Pamela Samuelson, *The Copyright Grab*, WIRED, http://archive.wired.com/wired/archive/4.01/white.paper_pr.html.

¹⁵¹ Jessica Litman, *Fetishizing Copies*, in COPYRIGHT IN AN AGE OF LIMITATIONS AND EXCEPTIONS (Ruth Okediji ed., forthcoming 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2506867.

¹⁵² See Massaro, *supra* note 19, at 426–27; Wu, *supra* note 145.

¹⁵³ See Coates, *supra* note 8, at 237–38; Miriam Galston, *When Statutory Regimes Collide: Will Citizens United and Wisconsin Right to Life Make Federal Tax Regulation of Campaign Activity Unconstitutional?*, 13 U. PA. J. CONST. L. 867, 905–06 (2011); Tamara R. Piety, “A Necessary Cost of Freedom”? *The Incoherence of Sorrell v. IMS*, 64 ALA. L. REV. 1, 51 (2012); Richards, *supra* note 8, at 1516.

¹⁵⁴ See generally CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES 4–5 (1999) (noting that “[d]igital information can be perfectly copied and instantaneously transmitted around the world”).

deploying both Internet and copyright policy to interdict disfavored expression.¹⁵⁵ Using copyright law instrumentally leads speakers and authors to look to constitutional constraints to limit those efforts. Whether for good or ill, the rise of digital networked computers and information exchange puts pressure on copyright and the First Amendment both to expand their roles.

Copyright can serve as the First Amendment's handmaiden: it can help resolve thorny free speech questions by focusing attention on the creative contributions that inhere in authorship. That role supports the generative function of both areas of law and recognizes the inevitable ascendancy of rights in and protection of information in an increasingly digital world.

¹⁵⁵ See Derek E. Bambauer, *Orwell's Armchair*, 79 U. CHI. L. REV. 863, 877, 889, 896 (2012).