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# Free Speech in A Digital Economy: An Analysis of How Intellectual Property Rights Have Been Elevated at the Expense of Free Speech, 36 J. Marshall L. Rev. 109 (2002)

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# FREE SPEECH IN A DIGITAL ECONOMY: AN ANALYSIS OF HOW INTELLECTUAL PROPERTY RIGHTS HAVE BEEN ELEVATED AT THE EXPENSE OF FREE SPEECH

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## INTRODUCTION

An inherent conflict exists between the First Amendment and the Copyright Clause of the Constitution.[1] The First Amendment prohibits the Government from making laws that interfere with a person's free expression.[2] At the same time, the Copyright Clause allows the Government to grant monopolies over speech.[3] These monopolies pose a potential burden on free speech rights.[4] Individuals may be prohibited from using a particular word combination because copyright law has removed that combination

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1. *See* Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 560 (1985) (recognizing a possible conflict between the First Amendment and copyright law but ultimately holding that copyright law is a valid speech restriction). *See also* Lawrence Lessig, *Copyright's First Amendment,* 48 UCLA L. REV. 1057, 1059 (2001) (discussing copyright law's relationship with the First Amendment); Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases,* 107 YALE L.J. 2431, 2433-35 (1998) (reviewing cases involving the conflict between the First Amendment and copyright law); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?,* 17 UCLA L. REV. 1180, 1180-86 (1970) (analyzing copyright law's balance with First Amendment developments).

2. U.S. CONST. amend. I.

3. U.S. CONST. art. I, § 8, cl. 8. The Copyright Clause states: "Congress shall have Power . . . to 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." Section 106 of the Copyright Act lists six exclusive rights conferred to the copyright owner. These rights include the right to publish, copy, perform, and distribute the work. 17 U.S.C. § 106 (2000).

4. *See* Spence v. Washington, 418 U.S. 405, 417 (1974) (Rehnquist, J., dissenting) (listing copyright law as a speech restriction).

from the public domain.[5] The creation of entirely new works may be prohibited if those works use part of another's copyrighted expression.[6]

Despite this conflict, the Supreme Court maintains that the two provisions can coexist.[7] The Court has stated that copyright law balances free speech interests by creating a number of statutory exceptions.[8] For instance, authors cannot copyright facts or ideas.[9] Only the original expression of ideas warrants a copyright.[10] Further, an expression may not be monopolized in perpetuity.[11] Copyright protection lasts for a limited amount of time.[12] In addition, the Copyright Act allows authors the "fair use" of other copyrighted works.[13] Every author gives the public the privilege of using the copyrighted work in a reasonable manner.[14] These safeguards, according to the Court, balance a copyright holder's interest in receiving compensation for the original expression with the public's interest in obtaining access to ideas.[15]

Recent developments have caused the balance to shift. Congress and the courts have extended intellectual property rights at the expense of free speech. The Second Circuit recently dismissed a First Amendment challenge to the Digital Millennium Copyright Act of 1998 (DMCA).[16] The DMCA prohibits any

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5. Nimmer, *supra* note 1, at 1180.

6. Volokh & McDonnell, *supra* note 1, at 2431.

7. *Harper & Row*, 471 U.S. at 560.

8. *Id.* at 547.

9. 17 U.S.C. § 102(b) (2000).

10. *Id.* at § 102(a). *See also* Lee v. Runge, 404 U.S. 887, 892 (1971) (Douglas, J., dissenting from denial of certiorari) (stating "[s]erious First Amendment questions would be raised if Congress' power over copyrights were construed to include the power to grant monopolies over certain ideas.").

11. *See* U.S. CONST. art. I, § 8, cl. 8 (allowing grants of copyright for "limited times").

12. Currently, an author receives copyright protection for the author's entire life plus seventy years. 17 U.S.C. § 302(a) (2000).

13. 17 U.S.C. § 107 (2000). Fair use allows a third party to use a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research. *Id.* A teacher, for instance, is allowed to make a limited number of copies of a copyrighted work for classroom use. *Id.* Section 107 lists four factors to be considered when determining whether a particular use is a fair use: 1) the purpose and character of the use; 2) the nature of the copyrighted work; 3) the amount copied; and 4) the effect of the use of the market for the copied work. *Id.*

14. HORACE G. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944) (restating the common law definition of fair use). Section 107 of the Copyright Act codified the common-law definition of fair use. H.R. REP. NO. 94-1476, at 66 (1976).

15. *See* Stewart v. Abend, 495 U.S. 207, 228 (1990) (stating that "the Act creates a balance between the artist's right to control the work during the term of copyright protection and the public's need for access to creative works.").

16. Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001).

transmission of computer code that allows users to break the copying lock on copyrighted works.[17] Soon after Congress passed the DMCA, a fifteen-year-old high school student from Norway composed computer code that allowed users to break the copying lock on Digital Versatile Discs (DVDs).[18] Eric Corley wrote a story about the discovery and placed the piece on *Hacker Quarterly's* Internet site.[19] The author also posted the computer code.[20] A week later, every major motion picture company in the United States filed suit, alleging Corley violated the DMCA.[21] The studios obtained a preliminary injunction.[22] Corley argued that the circumvention code constituted protected speech and that the DMCA abridged his free speech rights to transmit the code.[23] After a trial on the merits, the United States District Court for the Southern District of New York upheld the DMCA and permanently enjoined any transmission of circumvention code.[24] On appeal, the Second Circuit classified the DMCA as a content-neutral restriction that did not burden substantially more speech than necessary to further the Government's interest.[25] The court affirmed the injunction.[26]

The *Corley* decision is startling. It moves away from the Supreme Court's First Amendment precedents and abolishes the delicate balance between copyright law and the First Amendment. In *Corley*, the Second Circuit applied a very deferential standard of review. The court assumed the government had a substantial interest in protecting authors' works by barring the transmission of circumvention code. The court did not closely examine the importance of this interest or the likelihood that the regulation

17. 17 U.S.C. § 1201(a)(1) (2000). Computer code that breaks copying locks is commonly referred to as circumvention code.

18. *Corley*, 273 F.3d at 437.

19. *Id.* at 439. *Hacker Quarterly* is a computer magazine that frequently publishes articles on new developments in technology. *Id.* at 435.

20. *Id.*

21. *Id.* at 440.

22. *Id.* at 441.

23. *Id.* at 442.

24. *Id.* at 443.

25. *Id.* at 442.

26. *Id.* at 435. The DMCA is not the only recent copyright legislation that has been challenged on First Amendment grounds. *Eldred v. Reno,* 239 F.3d 372 (D.C. Cir. 2001) challenged the Sonny Bono Copyright Term Extension Act. *Eldred*, 239 F.3d at 379. The act extended an author's copyright term by twenty years. 17 U.S.C. § 303(a) (2000). The act applied to works already copyrighted, thereby prolonging the copyright of many works that were about to enter the public domain. *Eldred*, 239 F.3d at 379. The plaintiffs contend that extending the copyright of these works infringes the public's right to free speech. *Id.* The Supreme Court recently granted certiorari on the issue. Eldred v. Ashcroft, 534 U.S. 1126 (2002). The Supreme Court's willingness to review the case shows the importance of the First Amendment's relationship with new copyright legislation. *Id.*

furthers the interest. The court also failed to seriously consider alternative means of regulating the speech. It simply declared the regulation constitutional.[27] This deferential standard is not appropriate for the DMCA. First Amendment jurisprudence requires that the statute be subjected to a much more exacting form of scrutiny.

Part I of this article begins by addressing the threshold question of whether computer code implicates the First Amendment. The section demonstrates that computer code falls within the Supreme Court's definition of "speech." Part II of the article reviews the Supreme Court's distinction between content-neutral and content-based regulations. It also reviews the different standards of review for each category of regulation. Part III considers the type of scrutiny that should be applied to the DMCA. This section, which relies on a theory of copyright developed by Professor Neil Weinstock Netanel, explains that the DMCA is a content-neutral regulation and should be subjected to a heightened form of intermediate scrutiny. When subjected to a higher degree of scrutiny, the regulation does not survive a First Amendment challenge.

## I. DEFINING "SPEECH" UNDER THE FIRST AMENDMENT

### *A. The Supreme Court's Standard*

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[28] For the First Amendment clause to apply in any case, speech must be involved.[29] Thus, the threshold question in any First Amendment analysis is whether the challenged regulation implicates speech.[30] In many cases, the determination requires little analysis. The Supreme Court does not even address the issue in cases involving political debate, artistic expression, or news reporting.[31] The traditional forms of speech addressed by these cases are often identified as the types of expression the First Amendment intends to protect.[32] The issue is not as clear in other cases. A regulation

27. *Id.* at 459.

28. U.S. CONST. amend. I.

29. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) (discussing as an initial matter whether the conduct at issue involves speech).

30. *See id.* (discussing whether conduct sufficiently expresses an idea to implicate the First Amendment).

31. Katherine A. Moerke, *Free Speech to a Machine? Encryption Software Source Code is Not Constitutionally Protected "Speech" Under the First Amendment,* 84 MINN. L. REV. 1007, 1010 (2000).

32. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 15-19 (1948) (discussing the First Amendment's importance in public debate and government); Cass Sunstein, *Free Speech Now,* 59 U. CHI. L. REV. 255, 301 (1992) (stating "the First Amendment is

may apply to conduct that has both expressive and non-expressive elements. These regulations may fall outside the First Amendment's definition of speech restriction.

The Court articulated the test for determining whether a regulation implicates speech in *United States v. O'Brien*.[33] David O'Brien was arrested for burning his draft card.[34] His conduct violated a statute that prohibited the knowing destruction of a selective service registration certificate.[35] O'Brien claimed the statute violated his First Amendment rights because burning the card was an expressive act.[36] The Court held that O'Brien's act constituted speech for First Amendment purposes.[37] The Court recognized that First Amendment protection does not end at the spoken or written word.[38] However, the Court declined to give a limitless definition of speech.[39] Instead, the Court stated that a physical act must be sufficiently imbued with elements of communication to classify as speech.[40] In O'Brien's case, burning the draft card during a time of war contained sufficient elements of communication.[41]

The Court clarified this test in *Spence v. Washington*.[42] In *Spence*, the Court struck down a state statute prohibiting desecration of the U.S. flag.[43] A student was convicted for affixing a peace symbol to a flag and hanging it upside down.[44] The Court found that the student's act constituted expression protected by the First Amendment.[45] The Court began its analysis by restating the *O'Brien* test.[46] It then noted that an act would be sufficiently imbued with communication whenever a particularized message is present and understood by those who view it.[47] In *Spence*, much like *O'Brien*, the Court stated that it was highly likely that the observers understood Spence's message because the country had been at war in Vietnam.[48] Whether a particularized message is present has become the first line of inquiry when applying the

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principally about political deliberation").

33. 391 U.S. 367 (1968).
34. *Id.* at 369.
35. *Id.* at 370.
36. *Id.*
37. *Id.* at 376.
38. *Id.*
39. *Id.*
40. *Id.*
41. *See id.* (proceeding on the assumption that O'Brien's conduct contained sufficient communicative elements).
42. 418 U.S. 405 (1974).
43. Spence v. Washington, 418 U.S. 405 (1974).
44. *Id.* at 406.
45. *Id.* at 410.
46. *Id.* at 409.
47. *Id.* at 410-11.
48. *Id.*

*O'Brien* standard.[49]

Although the intent to convey a particularized message will nearly always constitute speech, a specific message is not required for the First Amendment to apply. For example, the Court held that participating in a parade that contained no particularized message constituted speech in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*.[50] The Court said that a "narrow, succinctly articulable message was not a condition of constitutional protection . . . ."[51] If it were, the First Amendment would not extend to the "unquestionably shielded [works] of Jackson Pollock, the music of Arnold Shoenberg, or the Jabberwocky verse of Lewis Carrol."[52]

As *Hurley* suggests, the Court applied the *O'Brien* test liberally. Almost any mode of communication that expresses an idea will be sufficiently imbued with communicative elements within the purview of the First Amendment. The Court has held that wearing a black armband,[53] nude dancing,[54] campaign finance expenditures,[55] and commercial advertising[56] classify as speech.[57] Sleeping in a park as part of a demonstration of the plight of the homeless also constitutes speech.[58] None of these examples are speech in a traditional sense. Nevertheless, the Court applied the First Amendment based on the expressive characteristics of the conduct.

### *B. Computer Code as Speech*

The first question presented in *Universal City Studios v. Corley*[59] was whether computer code constitutes speech. Computer code "is the instructions people write to tell computers what to do."[60] The code consists of statements written in a programming

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49. Ryan Christopher Fox, *Old Law and New Technology: The Problem of Computer Code and the First Amendment*, 49 UCLA L. REV. 871, 885 (2002). *See also Spence*, 418 U.S. at 411 (explaining how hanging the American flag, under the circumstances, manifested an intent to convey a "particularized message".).

50. Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 569-70 (1995).

51. *Id.* at 569.

52. *Id.*

53. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505-06 (1969).

54. Barnes v. Glen Theater, Inc., 501 U.S. 560, 565-66 (1991).

55. Buckley v. Valeo, 424 U.S. 1, 16-17 (1976).

56. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 763 (1976).

57. *See generally* Moerke, *supra* note 31, at 1010-15 (reviewing the court's tests for classifying certain conduct as speech).

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

59. 273 F.3d 429 (2001).

60. Fox, *supra* note 49, at 873.

language.[61] The programming languages, "while not intelligible to many laypeople, are easily read and comprehended by [computer programming] professionals."[62] The languages mix "English words with mathematical symbols that demonstrate the steps the computer should [execute]."[63] Computers function by performing these instructions.[64] In *Corley*, the computer code allowed users to bypass the security controls on DVDs.[65] A user could download the software from a web site and then copy the DVD onto a computer hard drive.[66]

Although relying on different reasoning, federal appellate courts have held that computer code constitutes speech.[67] In *Bernstein v. United States*,[68] the Ninth Circuit deemed computer code an intended form of political expression.[69] Similarly, in *Junger v. Daley*,[70] the Sixth Circuit held that source code is an expressive means of exchanging information, thereby implicating the First Amendment.[71]

In *Corley*, the Second Circuit relied on *Junger* and determined that circumvention code constituted speech.[72] The court recognized the expressive capacity of code and found it within First

61. John P. Collins, Jr., *Speaking in Code*, 106 YALE L.J. 2691 (1997); *see also* Fox *supra* 49, at 877 (explaining types of codes used by programmers including LISP, Java, HTML, and XML).

62. Fox, *supra* note 49, at 877. *See also Corley*, 273 F.3d at 446 (stating that while some code is "incomprehensible to readers outside the programming community . . . [it] can be, and often is read and understood by experienced programmers."); Collins, *supra* note 61, at 2694-95 (reviewing the basics of code technology).

63. Fox, *supra* note 49, at 877.

64. *Id.* at 876.

65. *Corley*, 273 F.3d at 435-36.

66. *Id.* at 435-36.

67. *See* Fox, *supra* note 49, at 886-903 (reviewing the federal cases analyzing code); Moerke, *supra* note 31, at 1024-27 (discussing recent developments in code cases); Robert Post, *Encryption Source Code and the First Amendment*, 15 BERKELEY TECH. L. J. 713, 714-18 (2000) (analyzing the recent decisions in code cases).

68. 176 F.3d 1132 (9th Cir. 1999), *reh'g granted and opinion withdrawn*, 192 F.3d 1308 (9th Cir. 1999).

69. Bernstein v. United States, 176 F.3d 1132, 1141 n.14 (9th Cir. 1999). In *Bernstien*, a professor developed a computer program, in part, to demonstrate the absurdity of a government regulation requiring the license of certain programs. *Id.* After developing the code, the professor brought suit against the government, challenging the regulation as an unconstitutional prior restraint. *Id.* at 1136. The appellate court concluded that the government's licensing scheme constituted an impermissible prior restraint. *Id.* at 1147.

70. 209 F.3d 481 (6th Cir. 2000).

71. Junger v. Daley, 209 F.3d 481, 485 (6th Cir. 2000). Similar to *Bernstien*, *Junger* involved a challenge to a regulation that prohibited the export of computer code. *Id.* at 483. The court upheld the regulation because "national security interests can outweigh the interests of protected speech." *Id.* at 485.

72. *Corley*, 273 F.3d at 446, 449.

Amendment jurisprudence.[73] Although the Second Circuit did not restate the *O'Brien* standard, the court seemed to utilize the *O'Brien* test for determining whether the code was expression. The court emphasized programmers' ability to communicate using code.[74]

The *O'Brien* standard is the correct standard to apply to code cases because computer code has both expressive and non-expressive features.[75] Code is functional because it instructs computers how to operate.[76] At the same time, computer code allows computer professionals to express ideas about computer programming.[77] This mixture of functional and expressive features resembles the expressive and non-expressive action of burning a draft card. Because computer code contains expressive and functional features, the *O'Brien* test should apply to any speech analysis involving code. Thus, the question to be asked in any code case is whether there is a sufficient amount of speech imbued within the code.

Computer code is sufficiently imbued with communicative elements to satisfy the standards of *O'Brien* and *Spence*. Computer code is a vehicle for communicating specific ideas about computer programming.[78] Professors and researchers write numerous articles and textbooks describing algorithms, methods, and data structures.[79] Many of these discussions use code examples.[80] These examples allow the writer to express ideas about computer programming efficiently and precisely.[81] Code is the most effective means of communicating complex information about computers among many experienced programmers.[82] Furthermore "[c]ode is often used in lieu of other, less cumbersome expressions . . . or demonstrative purposes . . . ."[83] Computer code is comparable to music.[84] Though musical scores cannot be read by

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73. *Id.* at 445-46.

74. *Id.* at 448.

75. *See* Fox, *supra* note 49, at 893 (noting the dichotomy between functional and expressive features of code); *see also Junger*, 209 F.3d at 484 (stating that source code has both expressive and functional features).

76. Fox, *supra* note 49, at 876.

77. *Id. See also Junger,* 209 F.3d at 484 (discussing the vast uses of computer code).

78. *See Corley,* 273 F.3d at 446; *Junger,* 209 F.3d at 483; Collins, *supra* note 61, at 2694; *and* Fox, *supra* note 49, at 877 for an explanation of computer programming as a primary source of communication between computer programmers.

79. Fox, *supra* note 49, at 879.

80. *Id.*

81. *Id.*

82. *Junger,* 209 F.3d at 484.

83. Fox, *supra* note 49, at 879.

84. *See* Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) (stating "Music, as a form of expression and communication, is protected under the First Amendment.").

laypersons, they are protected as a means of communication among musicians.[85] Similarly, a book written in Sanskrit would be protected though only understood by those versed in the language.[86] Because code contains expressive elements that allow programmers to exchange information about computer programming, it classifies as speech under the First Amendment.

## II. THE CONTENT DISTINCTION IN FIRST AMENDMENT

Once the court determines that the challenged regulation implicates speech, the next step is to determine the scope of protection that the speech enjoys. Not all speech receives identical protection.[87] The scope of protection depends on the type of regulation at issue.[88] The Supreme Court categorizes the restriction as content-based or content-neutral.[89] The Supreme Court applies different standards of analysis for each category.[90] In general, content-based restrictions are subject to strict scrutiny while content-neutral regulations are subject to a form of intermediate scrutiny.[91] If the regulation cannot overcome the level of scrutiny applied by the courts, then the speech is protected and the regulation fails.[92] If, on the other hand, a court does not protect the speech, then the regulation may stand and fully restrict the speech.[93] Courts can even impose prior restraints upon unprotected expression.[94]

### *A. The Rise of the Content Distinction*

The modern Supreme Court primarily decides First Amendment challenges by distinguishing between content-based and content-neutral restrictions.[95] This analysis began with the

85. *Id. See also Lesbian & Bisexual Group*, 515 U.S. at 569 (stating musical scores are unquestionably protected by the First Amendment).

86. *Corley*, 273 F.3d at 446.

87. *See generally* DANIEL A. FARBER, THE FIRST AMENDMENT 21 (1998) (explaining the different standards of review for speech).

88. *See* Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 637 (1994) (stating "not every interference with speech triggers the same degree of scrutiny under the First Amendment") [hereinafter *Turner I*].

89. *See generally* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983) (providing a detailed analysis of the content distinction).

90. *Id.* at 189-90.

91. *Turner I*, 512 U.S. at 642.

92. *Id.*

93. *See id.* (stating that the First Amendment does not tolerate governmental control over the content of speech and explaining the levels of scrutiny).

94. Pittsburgh Press Co. v. Comm'n on Human Relations, 413 U.S. 376, 390 (1973) (holding speech may be restricted once an adequate determination has been made that it is unprotected by the First Amendment).

95. FARBER, *supra* note 87, at 21; Stone, *supra* note 89, at 189.

Supreme Court's decisions in the 1930s and 1940s.[96] By the late 1970s and early 1980s, the content distinction became the most "pervasively employed doctrine in the jurisprudence of free expression."[97] The distinction was first clearly declared in *Police Department of Chicago v. Mosley*.[98] In *Mosely*, the Court struck down an ordinance that prohibited all picketing within 150 feet of a school except peaceful picketing involving a labor dispute.[99] The Court declared that, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[100] After *Mosley*, the categorical approach became the central focus of the Court's First Amendment jurisprudence.[101]

### *B. Distinguishing Between Content-Based and Content-Neutral Regulations*

To determine whether a regulation is content-based or content-neutral, a court primarily looks to the purpose behind the regulation.[102] The express language of the regulation will often expose that purpose.[103] A content-based regulation limits "speech because of [agreement or] disagreement with the message it

96. Stone, *supra* note 89, at 189.

97. *Id.*

98. 408 U.S. 92, 99 (1972) (explaining the difference between restrictions based on time, place and manner and restrictions based on subject).

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

100. *Id.* at 95.

101. *See* FARBER, *supra* note 87, at 21 (stating, "[T]he content distinction is the modern Supreme Court's closest approach to articulating a unified First Amendment doctrine."). *See also* Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 617 (1991) (stating that the distinction between content-based and content-neutral regulations of speech marks the central concern of the Supreme Court's First Amendment jurisprudence).

102. Bartnicki v. Vopper, 532 U.S. 514, 526 (2001). The Court first evaluates the express language of the statute. *See Bartnicki*, 532 U.S. at 526 (stating that a distinction based on ideas is a content based regulation). If, on its face, the statute restricts speech on the basis of content, then the regulation warrants strict scrutiny review. *See Mosley*, 408 U.S. at 98-99 (explaining that subject based restrictions must be carefully scrutinized). In contrast, if the language of the statute appears neutral the Court evaluates the intent of the legislature in enacting the legislation. *See Bartnicki*, 532 U.S. at 526 (stating that the purpose behind the regulation must be examined to determine whether the regulation is content based or content-neutral); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 510 (1969) (holding a regulation that prohibited the wearing of armbands was motivated only by the school's desire to avoid controversy over anti-war sentiment). The Court will examine "whether the government has adopted the regulation [to suppress certain types of expression] because of disagreement with the message it conveys." *Ward*, 491 U.S. at 790.

103. *Turner I*, 512 U.S. at 642.

conveys."[104] It suppresses expression of a particular viewpoint because of its likely communicative impact.[105] A regulation, for instance, may attempt to suppress speech because of its potential to incite violence.[106] Laws that restrict anti-government libel,[107] the ability to publish information from confidential sources,[108] teachers from advocating the overthrow of the Government,[109] and racist fighting words are other examples of content-based regulations.[110]

In contrast, content-neutral regulations limit expression without considering the message conveyed or the communicative impact of the speech.[111] Examples of content-neutral regulations include laws that prohibit noisy activities in residential areas,[112] limit expenditures on campaign donations,[113] prohibit the destruction of draft cards,[114] ban billboards in residential communities,[115] impose license fees for parades,[116] or forbid the distribution of leaflets in public places.[117] For these regulations, the government regulates only the time, place, and manner of the speech activities; it does not consider the content of the speech.

### *C. The Standard of Review for Content-Based Regulations*

Determining the constitutionality of a content-based regulation requires a two-step analysis.[118] First, the Court

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104. *Ward*, 491 U.S. at 791.

105. R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992) (explaining why "fighting words," "obscenity" and other forms of speech have not received First Amendment protection).

106. *Id.* at 382-83.

107. *See id.* at 384 n.4 (listing prohibition of anti-government libel as an example of a content-based restriction).

108. Branzburg v. Hayes, 408 U.S. 665 (1972).

109. Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

110. *R.A.V.*, 505 U.S. at 384 (*citing* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). *See generally* Stone, *supra* note 89, at 190 (listing similar examples of content based regulations).

111. *Turner I*, 512 U.S. at 642.

112. *See* Kovacs v. Cooper, 336 U.S. 77, 87-89 (1949) (upholding a prohibition of loud and raucous noises on any public street).

113. *See* Buckley v. Valeo, 424 U.S. 1, 15-17 (1976) (upholding regulation limiting individual contributions to political campaigns).

114. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) (upholding regulation prohibiting the destruction of draft cards).

115. *See* City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994) (invalidating an ordinance that prohibited homeowners from displaying signs on their property).

116. *See* Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 137 (1992) (striking down ordinance permitting government administrator to vary the fee for parades to reflect the estimated cost of maintaining public order).

117. *See* Schneider v. State, 308 U.S. 147, 152 (1939) (invalidating an ordinance that prohibited any person to distribute leaflets in any street or way).

118. *See* Stone, *supra* note 89, at 194-95 (detailing the analysis of content-based restrictions).

determines whether the speech falls into one of the categories of unprotected expression.[119] These categories include: obscenity;[120] false or misleading advertising;[121] false statements of fact;[122] and fighting words.[123] If the speech is of low value, it will receive only limited First Amendment protection.[124] A court will perform a categorical balancing test to determine the constitutionality of the regulation.[125] A court evaluates the "relative value of the speech and the "risk of inadvertently chilling 'high' value expression."[126] Usually, the Government is free to regulate in the area of low value speech.[127]

However, if the burdened speech does not fall within one of the low-value categories, a court will subject the regulation to strict scrutiny.[128] Under strict scrutiny, Congress must narrowly tailor the law to meet a compelling governmental interest.[129] The regulation is presumed invalid and the Government must produce evidence showing that the regulation advances the compelling interest.[130] For content-based regulations, the legislature's goals must be more than "legitimate, or reasonable, or even praiseworthy."[131] The law must advance a pressing public necessity while restricting "as little speech as possible to serve the goal."[132] Content-based laws nearly always fail constitutional analysis.[133]

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119. *Id.* at 194. The unprotected categories of speech are deemed low value speech. *Chaplinsky*, 315 U.S. at 571-72 (1942). The low value theory first appeared in *Chaplinsky*. *Id.* at 572. The Court stated that "certain well-defined and narrowly limited classes of speech . . . are no essential part of any exposition of ideas, and . . . any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*

120. Miller v. California, 413 U.S. 15, 23 (1973).

121. Friedman v. Rogers, 440 U.S. 1, 9-10 (1979).

122. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

123. *Chaplinsky*, 315 U.S. at 571-72 (1942).

124. Stone, *supra* note 89, at 195.

125. *Id.*

126. *Id.*

127. *See* Barnes v. Glen Theatre, Inc. 501 U.S. 560 (1991) (upholding a statute prohibiting any person to appear in a state of nudity in a public place); Posadas de Puerto Rico Assoc. v. Tourism Co. of P.R., 478 U.S. 328 (1986) (upholding a Puerto Rican statute that prohibited any advertising of casino gambling aimed at residents of Puerto Rico); *see also* New York v. Ferber, 458 U.S. 747, 763 (1982) (noting child pornography can be restricted because it is outside of First Amendment protection); Miller v. California, 413 U.S. 15, 25 (1973) (stating that obscene material can be regulated); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 770 (1976) (stating that "[s]ome forms of commercial speech regulation are surely permissible.").

128. *Turner I*, 512 U.S. at 642; Stone, *supra* note 89, at 196.

129. Boos v. Barry, 485 U.S. 312, 321 (1988).

130. *Id.*

131. *Turner I*, 512 U.S. at 680 (O'Connor, J., concurring).

132. *Id.*

133. *See Boos*, 485 U.S. at 312 (striking down a statute that prohibited

The Supreme Court modified this two-step analysis in *R.A.V. v. City of St. Paul*,[134] by making it more difficult for content-based restrictions to survive a First Amendment challenge. The Court struck down a Minnesota ordinance that prohibited fighting words that insult or provoke violence "on the basis of race, color, creed, religion, or gender."[135] The Court objected to the ordinance's special prohibition on speakers who express particular viewpoints.[136] This type of content regulation, though it applies to otherwise low value speech, is subject to strict scrutiny review.[137] Thus, the Court firmly established a hostility toward any content-based restriction.

Content-based regulations receive strict scrutiny review because they conflict with important First Amendment principles and values.[138] One of the primary purposes of the First Amendment is to provide the public with a marketplace of ideas and viewpoints.[139] The Government's role in this marketplace is to serve as a neutral facilitator in citizens' public discourse, thereby allowing citizens to weigh the value of another's expression for themselves.[140] The Government violates this role when it seeks to suppress particular ideas or information.[141] Such "restrictions raise the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."[142] Accordingly,

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individuals from carrying signs critical of foreign governments); *Mosley*, 408 U.S. at 92 (invalidating content-based restriction on picketing); Keyishian v. Bd. of Regents, 385 U.S. 589 (1967) (refusing to uphold a statute that prohibited hiring teachers that advocated the overthrow of the government). Stone has observed that "the Court has invalidated almost every content-based restriction that it has considered in the past quarter-century." Stone, *supra* note 89, at 196.

134. 505 U.S. 377 (1992).

135. *Id.* at 380.

136. *Id.* at 384.

137. *Id.* at 395-96. The Court stated that the issue was "whether the content discrimination [was] reasonably *necessary* to achieve St. Paul's *compelling* interests . . ." rather than *narrowly* tailored to meet a *substantial* interest. *Id.* at 395-96 (emphasis added).

138. *Turner I*, 512 U.S. at 641.

139. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Justice Holmes said:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by 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 that truth is the only ground upon which their wishes safely can be carried out.

*Id. See also* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 974-78 (1978).

140. *Turner I*, 512 U.S. at 641.

141. *Id.*

142. *Id.*

content-based restrictions require strict scrutiny review.[143]

### *D. The Standard of Review for Content-Neutral Regulations*

A court subjects content-neutral regulations to a less exacting form of scrutiny – often labeled intermediate scrutiny.[144] A lower standard of scrutiny applies in these cases because content-neutral regulations pose a less substantial risk of removing certain ideas or viewpoints from the public dialogue.[145] Over the years, the Supreme Court has utilized a number of different forms of intermediate scrutiny.[146] In some cases the Court will defer to the Government and uphold a speech-burdening regulation with little analysis.[147] In other instances, it will apply a more exacting form of scrutiny and deeply inquire into the motives and effectiveness of the regulation.[148] Commentators have identified three distinct standards that the Court uses to analyze content-neutral restrictions.[149]

#### *1. Deferential Standard of Review – The O'Brien Analysis*

The Court introduced its most deferential standard for analyzing content-neutral regulations in *O'Brien*.[150] The *O'Brien* Court stated that a content-neutral regulation would be upheld:

> [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the government interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the

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143. *Id.* at 642. *See* Stone, *supra* note 89, at 192 (discussing the rational behind the content distinction).

144. *Turner I*, 512 U.S. at 642.

145. *Id.*

146. *See* Geoffrey R. Stone, *Content-Neutral Restrictions,* 54 U. CHI. L. REV. 46, 48-50 (1987) (listing the different standards of review the Court uses); *see also* Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 37-47 (2001) (analyzing the different forms of scrutiny applied to content-neutral regulations).

147. *See* Stone, *supra* note 146, at 50 (referring to the Court's use of deferential review).

148. *See id.* at 36 (noting how the Court's analysis of intermediate scrutiny ranges from "highly exacting" to "exceedingly deferential").

149. *Id.* at 46. The Court does not explicitly label its different standards of intermediate scrutiny. *Id.* at 53-54. It is sometimes difficult to determine the type of intermediate scrutiny applied in a particular case. *Id.* at 54. Some commentators, for instance, cite *Roberts v. United States Jaycees,* 468 U.S. 609 (1984) as an example of where the Court applied intermediate scrutiny, while other commentators have said the case is too obscure to tell what type of scrutiny was applied. *See generally* Neal E. Devins, *The Trouble with Jaycees*, 34 CATH. U. L. REV. 901 (1985) (discussing the Court's ambiguous analysis in *Jaycees*).

150. See *supra* notes 33-41 and accompanying text for a review of the facts of *O'Brien*.

furtherance of that interest.[151]

The first part of the test simply states the requirement for any federal legislation.[152] The third part of this test reiterates that the regulation must be content-neutral.[153] Thus, in substance the *O'Brien* test consists of a two-part analysis: the "regulation must serve a substantial government interest and must be narrowly tailored to . . ." achieve that interest.[154]

The Court applied this test with considerable deference to the Government and ultimately upheld the regulation.[155] The Court assumed that the Government had a substantial interest in providing proof that an individual had registered for the draft.[156] It also assumed a substantial interest in facilitating communication between a registrant and the local draft board and reminding the registrant to notify the draft board of any address changes.[157] The Court did not analyze the importance or substance of these interests.[158] Instead, it simply declared the interests substantial.[159] Seemingly, the Court turned the Government's legitimate interests into substantial interests.[160] As one commentator notes, a substantial interest under the *O'Brien* formulation is one that is not imaginary rather than one that is important or weighty.[161]

Moreover, the Court did not address whether prohibiting the destruction of draft cards was the least restrictive means of furthering the Government's interests.[162] It simply declared that the statute was an "appropriately narrow" means of protecting the Government's goals.[163] Thus, application of the *O'Brien* test does not require the Government to narrowly tailor the regulation.[164] All that is necessary is that the regulation helps the Government achieve its interest in a more effective manner than in the absence

151. *O'Brien*, 391 U.S. at 377.

152. *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1202 (1996) (restating the Court's announcement that regulations "restricting symbolic speech . . . must be 'within the constitutional power of the Government' . . .").

153. *Id.*

154. *Id.*

155. *O'Brien*, 391 U.S. at 380.

156. *Id.* at 381.

157. *Id.* at 379.

158. *See* Dorf, *supra* note 152, at 1202-03 (stating that "the *O'Brien* does not require that the regulation be the least restrictive means of achieving the state interest").

159. *O'Brien,* 391 U.S. at 377.

160. *See* Stone, *supra* note 146, at 51 (stating that under some formulas the Court "terms any legitimate governmental interest 'substantial'").

161. *Id.*

162. *Id.* at 51.

163. *O'Brien,* 391 U.S. at 382.

164. Stone, *supra* note 146, at 51.

of the statute.[165] The Court clarified the standard in *Ward v. Rock Against Racism*.[166] There, the Court held that the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial governmental interest that would be achieved *less effectively absent the regulation*."[167]

In general, the Court applies this test to content-neutral regulations that burden expressive conduct or for regulations that restrict the time, place, and manner of speech.[168] The *O'Brien* application of intermediate scrutiny almost always results in upholding the regulation.[169] Only gratuitous speech inhibitions will be struck down.[170] In fact, some commentators compare this test to the rational-basis standard employed for equal protection review.[171] Under the *O'Brien* test, a court avoids analyzing the importance of the governmental interest and does not investigate the alternative ways in which the Government could accomplish its objectives.[172] The regulation will survive so long as it furthers some legitimate governmental interest.[173]

*2. Middle-Tier Intermediate Scrutiny – The Turner Analysis*

The Court has also developed a middle-tier standard of intermediate scrutiny.[174] This test uses the same framework as the *O'Brien* test, but applies the standard without deference to the government.[175] Under this test, a court scrutinizes the substantiality of the governmental interest.[176] Middle-Tier Intermediate Scrutiny tests the legitimacy of the asserted interest

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165. *Id.*
166. 491 U.S. 781 (1989).
167. *Ward*, 491 U.S. 781, 799 (1989) (emphasis added) (alteration in original).
168. Stone, *supra* note 146, at 50-51.
169. *See Ward*, 491 U.S. at 781 (upholding a time, place, and manner restriction on the use of a band shell in a park); *see also* United States v. Albertini, 472 U.S. 675 (1985) (holding that the general exclusion of recipients of bar letters for a military open house does not violate First Amendment); Wayte v. United States, 470 U.S. 598 (1985) (upholding a Government regulation that prosecuted only those persons who reported themselves as having violated the law, or who were reported by others); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984) (holding that a National Park Service regulation prohibiting camping in certain parks did not violate the First Amendment); City Council of City of L.A. v. Taxpayers for Vincent, 466 U.S. 789 (1984) (holding that an ordinance prohibiting posting of signs on public property did not violate First Amendment).
170. Stone, *supra* note 146, at 50-51. *See also* Dorf, *supra* note 152, at 1202-03 (stating the *O'Brien* test has no teeth and is meaningless).
171. Stone, *supra* note 146, at 50.
172. *Id.*
173. *Id.*
174. *Id.* at 52-53.
175. *Id.*
176. *Id.*

and requires much more than a declaration of validity.[177] A court will not assume that any governmental interest is substantial[178] but rather requires the government to demonstrate that the restriction furthers the asserted interest.[179] General assertions that the regulation is necessary to accomplish the government's objective will not satisfy the test.[180] Further, a court closely examines whether the government could accomplish its goals in a less restrictive manner.[181] The availability of less restrictive alternatives will assuredly invalidate the statute under this test.[182]

*Turner I*[183] illustrates the Court's application of middle-tier intermediate scrutiny. In *Turner I*, cable television operators claimed the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992 violated their right to free expression.[184] The provisions required cable operators to carry local broadcast stations.[185] The Court deemed the regulation to be content-neutral and began its analysis by restating the four-step test of *O'Brien*.[186] The Court, however, applied the *O'Brien* rule with no deference to the Government. The Court stated that abstract assertions regarding the importance of the government's interest would not satisfy the test.[187] The government must "adequately show . . ." that the regulation "will *in fact* advance those interests."[188] The government must also prove that its regulation "does not 'burden substantially more speech than is necessary to' . . ." achieve its goals.[189] Ultimately, the Court remanded the case to determine whether the regulation was supported by "reasonable inferences based on *substantial* evidence."[190]

On appeal from remand, the Supreme Court articulated a test that appears more deferential to Congress than *Turner I*.[191] In

177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. 512 U.S. 622 (1994).
184. *See id.* at 634 (challenging the constitutionality of the must-carry provisions).
185. *Id.* at 630.
186. *Id.* at 662.
187. *Id.* at 664.
188. *Id.* (emphasis added).
189. *Id.* at 665.
190. *Id.* at 666.
191. For an analysis of the Turner decisions and their placement in the middle-tier/intermediate scrutiny category, see Netanel, *supra* note 146, at 58-59; J.I.B., *Lessons from the Supreme Court's Turner Broadcasting Decisions*, 97 COLUM. L. REV. 1162 (1997); THE HARVARD REVIEW ASSOCIATION 1998, *Note: Deference to Legislative Fact Determinations in First Amendment Cases After Turner Broadcasting*, 111 HARV. L. REV. 2312 (1998).

*Turner II*, however, the Court still examined the district court's findings of fact and scrutinized the substantiality of the government's interests.[192] The Court also refused to defer to Congress to the level it did in *O'Brien*.[193] Thus, the *Turner* decisions require the Government to support its judgments with "substantial evidence" and allow courts to exercise "independent judgment" in assessing the evidence.[194] Subject to this standard, a content-neutral regulation is often struck down.[195]

Generally, the *Turner* standard applies in cases where the government allots speech entitlements to one speaker or a class of speakers.[196] The primary examples of speech entitlements are campaign finance regulations[197] and must-carry cable broadcast provisions.[198] In these cases, the government allows certain individuals to control the channels of communication.[199] The government allocates these entitlements to further a content-neutral interest.[200] The government does not consider the

192. Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 520 U.S. 180, 189-97 (1997) [hereinafter "*Turner II*"].

193. *See* Netanel, *supra* note 146, at 58-59 (noting that the Court in *Turner II* "looked to [the] lower courts findings of fact, rather than simply deferring to Congress . . .").

194. *Id.* at 58-59 (internal quotations omitted).

195. *See* Denver Area Educ. Telecomm. Consortium, Inc. v. F.C.C, 518 U.S. 727 (1996) (invalidating two provisions of the Cable Television Consumer Protection and Competition Act on First Amendment grounds); Vill. of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) (striking down an ordinance prohibiting door-to-door or on-street solicitation); Stone, *supra* note 146, at 48-50 (reviewing cases of content-neutral restrictions analyzed under intermediate scrutiny).

196. Netanel, *supra* note 146, at 59-62.

197. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 386 (2000); *Buckley*, 424 U.S. 1, 17 (1976). Campaign finance restrictions can be viewed as a speech entitlement because donations allow certain individuals a greater opportunity for political expression. The Court has applied middle-tier intermediate scrutiny in these cases. *Buckley*, 424 U.S. at 17-21.

198. *See Denver Consortium*, 518 U.S. at 732-33 (upholding only one provision of a statute that blocked cable programs aimed at the compelling interest of protecting children); *see also Turner I*, 512 U.S. at 637 (refusing to apply a "less rigorous standard of First Amendment scrutiny to broadcast regulation[s] . . .").

199. *Turner I*, 512 U.S. at 656.

200. In *Turner I*, for instance, the Government attempted to prevent the eradication of broadcast television stations. *Id.* at 647; Netanel, *supra* note 146, at 58-59. This interest was content-neutral because it did not consider the viewpoint or content of the broadcast. *Turner I*, 512 U.S. at 647. In reviewing the challenge, the Court recognized that regulations that discriminate among media or among different speakers within a single medium often present serious First Amendment concerns. *Id.* at 637-38. The Court then ruled that despite favoring local off-air broadcasters over cable operators, the must-carry provisions did not evince the illicit governmental purpose of seeking to distort the marketplace of ideas. *Id.* Rather, the provisions represented a content-neutral response to the physical bottleneck characteristics of the cable medium and the perceived economic vulnerability

viewpoint or subject matter of the speech when doling out speech entitlements.[201] The speech entitlements, however, receive a higher form of intermediate scrutiny because they raise concerns about improper government motive.[202] By doling out speech allotments, the government could favor certain speech or particular groups over the public at large.[203] As a result, a court evaluates the regulation more closely and cannot assume that it is substantial and narrowly tailored.[204] Under Middle-Tier Intermediate Scrutiny, a court tries to ensure that the government has given adequate weight to the First Amendment burdens that speech entitlements impose.[205]

*3. Strict Intermediate Scrutiny – The Bartnicki Analysis*

The final type of intermediate scrutiny applied by the Supreme Court is often labeled strict intermediate scrutiny.[206] This test requires "a compelling rather than substantial governmental interest. . . ."[207] It also requires that the government show that "the challenged restriction is 'necessary' to achieve that interest."[208] Strict intermediate scrutiny mirrors the Court's test for content-based regulations.[209] Almost all content-neutral regulations subject to this test will fail.[210]

*Bartnicki v. Vopper*[211] demonstrates the Court's most recent application of this test. In *Bartnicki*, the Court struck down a law forbidding the disclosure of information obtained from illegally intercepted cell phone conversations.[212] The case arose after an

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of the local broadcast industry. *Id.* at 661.

201. *Id.* at 647.

202. Netanel, *supra* note 146, at 59.

203. *Id.*

204. *Id.* at 60.

205. *Id.*

206. Stone, *supra* note 146, at 52.

207. *Id.*

208. *Id.*

209. *See supra* notes 118-127 and accompanying text (explaining the Court's review of content-based regulations).

210. *See* Minneapolis Star & Tribune Co. v. Minn. Com'r of Revenue, 460 U.S. 575 (1983) (declaring a special tax statute unconstitutional for lack of a compelling state interest); Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982) (holding the Ohio Campaign Expense Reporting Law unconstitutional because there was no "'substantial relation between the information sought and [an] overriding and compelling state interest.'") (alteration in original); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (declaring a statute requiring portions of rape trial closed to the public because it was not narrowly tailored enough to meet the state's compelling interest); NAACP v. Button 371 U.S. 415 (1963) (finding unconstitutional a statute prohibiting the NAACP from soliciting despite the state's substantial interest in regulating the practice of law).

211. Bartnicki v. Vopper, 532 U.S. 514 (2001).

212. *Id.* at 518.

unidentified person intercepted a cell phone conversation between Gloria Bartnicki and Anthony Kane, two persons representing local teachers in a collective-bargaining dispute.[213] Fredrick Vopper, a radio commentator, played a tape of the intercepted conversation on his talk show.[214] Bartnicki filed suit under the federal and state wiretapping laws.[215] All members of the Court agreed that the federal and Pennsylvania wiretapping statutes were content-neutral.[216] The Court then applied its most rigorous standard of intermediate scrutiny.[217] The Court said that a content-neutral regulation that prohibits publication of the lawfully obtained, truthful information must be struck down "absent a need . . . of the highest order."[218] When strict intermediate scrutiny is applied, the government must also produce evidence indicating that the regulation actually fulfills the stated governmental objective.[219]

This test most often applies to regulations that involve members of the media. In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,[220] the Court applied strict intermediate scrutiny to invalidate a content-neutral statute imposing a tax on the cost of paper and ink products consumed in production of publications.[221] In *Globe Newspaper Co. v. Superior Court*,[222] the Court invalidated a provision of a content-neutral statute that excluded the press from certain criminal trials. Despite the state's compelling interest, the Court ruled that the statute was not narrowly tailored to serve that interest.[223] The rationale for applying the highest form of intermediate scrutiny to these cases was that restrictions upon the press substantially diminish the opportunities for free expression.[224] The laws in these cases have great potential to "restrict the flow of speech into the 'marketplace of ideas'."[225] The Court's concern is with the interest of the entire community, not just the parties involved in the suit.[226] Thus, the highest degree of scrutiny must apply, even though the

213. *Id.* at 518-19.
214. *Id.* at 519.
215. *Id.* at 520.
216. *Id.* at 526.
217. *See id.* at 527-28 (stating that a newspaper could not be punished for publishing truthful information it obtained lawfully "absent a need . . . of the highest order.") (omission in original).
218. *Id.*
219. *Id.* at 529.
220. 460 U.S. 575 (1983).
221. *Minneapolis Star*, 460 U.S. at 585 (declaring a special tax statute unconstitutional for lack of a compelling state interest).
222. 457 U.S. 596 (1982).
223. *Globe Newspaper*, 457 U.S. at 606-09.
224. Stone, *supra* note 146, at 71.
225. *Id.* at 75.
226. *Id.*

regulations are content-neutral.[227]

## III. APPLYING FIRST AMENDMENT PRINCIPLES TO THE DIGITAL MILLENNIUM COPYRIGHT ACT

Application of the Supreme Court's First Amendment principles to the DMCA demonstrates the Second Circuit's error in labeling circumvention code low-level speech. The Second Circuit deemed the act to be a content-neutral regulation.[228] The court then applied the most deferential form of intermediate scrutiny; the *O'Brien* standard. The court assumed that the government had a substantial interest in passing the legislation and did not fully consider less restrictive means of regulating the speech.[229] The court declared that "[t]he Government's interest in preventing unauthorized access to encrypted copyrighted material is unquestionably substantial, and the regulation of [circumvention code] . . . plainly serves that interest."[230] Little analysis accompanied this proposition. The court simply deferred to Congress' judgment. This deferential form of intermediate scrutiny is inappropriate when analyzing the DMCA in the context of the Supreme Court's prior decisions.[231] The Second Circuit should have applied a heightened form of intermediate scrutiny.[232]

### *A. The Standard That Should Be Applied to the Digital Millennium Copyright Act*

The DMCA is best classified as a content-neutral regulation.[233] The Act prohibits the transmission of code that is designed to circumvent a technological measure that controls access to a copyrighted work.[234] It burdens speech without considering the content of the expression, and it applies evenly to all speakers.[235]

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227. *Id.* at 58.

228. *Corley*, 273 F.3d at 454.

229. *Id.*

230. *Id.*

231. *See* Netanel, *supra* note 146, at 77 (advocating rigorous *Turner* scrutiny of the DMCA).

232. *See generally id.* at 81 (advocating for heightened scrutiny to be applied to the DMCA and similar copyright legislation).

233. *See Corley*, 273 F.3d at 454 (disagreeing with the argument that the DMCA is content-based). *See also* Brief of Amici Curiae Professors Benkler & Lessig at 5-6, Universal Studios v. Corley, 273 F.3d 429 (2nd Cir. 2001) (No. 00-9185), *available at* http://www.eff.org/IP/Video/MPAA_DVD_cases/20010126_ny_2profs_amicus.html (last visited Nov. 20, 2002) (explaining that the DMCA is a content-neutral regulation).

234. 17 U.S.C. § 1201(a)(2) (2000). Section 1201(a)(2) states that "[n]o persons shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology . . . that is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title." *Id.*

235. *Corley*, 273 F.3d at 454.

In *Corley*, the plaintiff argued that the DMCA should be classified as a content-based regulation because liability turns on the content of the computer code.[236] The Supreme Court, however, categorizes a regulation by looking at the purpose of the statute.[237] A content-based regulation occurs when the government restricts speech to suppress or favor a particular viewpoint or subject matter.[238] The DMCA, like most copyright statutes, intends to protect the copyrighted works of authors so that they may reap the full benefits of their work.[239] In enacting the law, the government did not take a position on the viewpoint or subject matter of the burdened speech. Thus, the regulation should be considered content-neutral.

Since the DMCA is content-neutral, it must be subject to a form of intermediate scrutiny.[240] The most appropriate form of scrutiny to be applied to any newly enacted copyright legislation is middle-tier intermediate scrutiny, the *Turner* analysis.[241] *Turner* scrutiny is appropriate because copyright law acts as a speech allotment.[242] Copyright law removes particular expression from the public domain and allows the author to monopolize that expression for a lengthy period of time.[243] This allocation of expression resembles the speech entitlements of *Turner*. Just as *Turner* assigned channels of expression to particular parties, copyright law entitles authors to a particular type of expression. Laws enacted for the purpose of furthering a copyright holder's speech entitlement should be subject to a higher degree of scrutiny. The DMCA intends to protect a copyright holder's interest by prohibiting code that allows users to copy protected works.[244] The DMCA seeks to further the speech entitlement scheme by strengthening an author's control over his or her

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236. Appellant's Supplemental Letter Brief at 1, Universal Studios v. Corley, 273 F.3d 429 (2001) (No. 00-9185), *available at* http://www.eff.org/IP/Video/MPAA_DVD_cases/20010530_ny_eff_supl_brief.html (last visited Nov. 20, 2002). Corley classifies the act as content-based because it targets scientific expression based on the particular topic addressed by that expression – namely, techniques for circumventing the copying locks on DVDs. *Id.*

237. *Bartnicki*, 532 U.S. at 526. *See also supra* notes 102-110 and accompanying text (explaining the methods used to determine whether a statute is content-based or content-neutral).

238. *Bartniki*, 532 U.S. at 526.

239. S. REP. No. 105-190, at 15 (1998).

240. See *supra* notes 144-149 and accompanying text of Analysis Section II(d) for an explanation of the intermediate scrutiny as applied to content-neutral regulations.

241. *See* Netanel, *supra* note 146, at 67-69 (advocating for intermediate scrutiny to be applied to all copyright legislation). *See also* Amici Brief, *supra* note 233, at 5-6 (stating that intermediate scrutiny is the most appropriate form of analysis for the DMCA).

242. Netanel, *supra* note 146, at 67.

243. Lessig, *supra* note 1, at 1065.

244. S. REP. No. 105-190, at 15 (1998).

expression.[245] Because the DMCA furthers speech entitlements, courts should evaluate the legislation in the same manner as the Supreme Court analyzed the cable regulations in *Turner I* and *Turner II*. Under that analysis, evidence must be produced to show that the government gave adequate weight to the First Amendment burdens imposed by the speech entitlement.[246]

Copyright law should also be subject to a higher degree of scrutiny because the interest groups affected often draft statutes.[247] Congress drafted the first copyright act in 1790.[248] In the first decade of the twentieth century, Congress needed to update the law.[249] Congress, however, deemed the statute "too complex to entrust to normal American legislative processes."[250] Instead, the legislators called upon representatives of industries with interest in copyright to shape the new statute.[251] Congress has relied on interest groups to negotiate and draft new versions of copyright statutes ever since.[252] In many cases, new copyright laws reflect outright congressional rubber-stamping of industry-drafted legislation with little or no committee record to support the legislation.[253] Congress' consultation with industry professionals does not automatically subject a regulation to heightened scrutiny.[254] However, the specter of an improper motive is raised when the very persons receiving the benefits of speech entitlements draft the statutes regulating their distribution.[255] These regulations must withstand a closer analysis of the governmental interests and must demonstrate that they are

245. *Id.*

246. *Turner I*, 512 U.S. at 665 (stating that the government "bears the burden of showing that the remedy it has adopted does not 'burden substantially more speech than is necessary' . . .").

247. Netanel, *supra* note 146, at 67. *See also* Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 869-79 (1987) (analyzing the negotiations among industry stakeholders during the drafting of the Copyright Act of 1976); Thomas P. Olson, *The Iron Law of Consensus: Congressional Responses to Proposed Copyright Reforms Since the 1909 Act*, 36 J. COPYRIGHT SOC'Y USA 109, 111 (1989) (discussing the methods of passing copyright legislation).

248. JESSICA LITMAN, DIGITAL COPYRIGHT 35 (2001).

249. *Id.* at 36.

250. Niels Schaumann, *Copyright Infringement and Peer-to-Peer Technology*, 28 WM. MITCHELL L. REV. 1001, 1006 (2002).

251. LITMAN, *supra* note 248, at 36.

252. *See* Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519, 522 (1999) (describing the intense lobbying by Hollywood movie studios to pass the DMCA).

253. Netanel, *supra* note 146, at 68.

254. *Id.* at 69.

255. *See id.* 68-69 (explaining that legislation granting speech entitlements to the industry bidders responsible for shaping and drafting the legislation should be subject to rigorous scrutiny).

narrowly tailored to accomplish those interests.[256] Otherwise, Congress runs the risk of passing legislation that dispenses speech entitlements to industry bidders at the expense of the public at large.[257] In fact, some commentators contend that copyright's legislative process has already contributed to significant benefits to private interests without consideration of the diffuse, external costs to future generations.[258]

Copyright law may also lend itself to a higher degree of scrutiny because of its fragile balance with First Amendment law.[259] The Supreme Court has ruled that the Copyright Clause and the First Amendment can coexist even though the First Amendment protects freedom of speech while the Copyright Clause grants monopolies over speech.[260] According to the Court, the internal restraints of copyright law construct a delicate balance with the First Amendment.[261] The copyright statute does not allow authors to monopolize ideas and allows for a number of non-infringing uses of copyrighted speech.[262] Copyright law supposedly abridges speech only to the point necessary to provide incentives for authors to produce more speech, thereby furthering the arts and sciences.[263] Since the two clauses contain a delicate balance, any new copyright legislation requires careful scrutiny to ensure that the burden imposed upon speech is necessary and narrowly tailored to advance the arts and sciences. Without a careful analysis, a court could allow Congress to pass legislation that destroys this balance – as it appears the Second Circuit has done with the DMCA.

Finally, a deferential analysis is inappropriate because the context of *Corley* differs dramatically from the context of *O'Brien*. In *O'Brien*, the Supreme Court applied a deferential standard because the speech conduct impacted a government program involving military affairs. The Court provides Congress the

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256. *Id.* at 69.

257. *Id.* at 68.

258. Netanel, *supra* note 146, at 68. *See also* Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 111 HARV. J.L. & TECH. 287, 299 (1998) (explaining how a lack of legislative control harmed the radio business).

259. *See* Stewart v. Abend, 495 U.S. 207, 230 (1990) (stating there is a balance between copyright law and the First Amendment); *see also Harper & Row*, 471 U.S. at 545 (stating that copyright law is balanced with the First Amendment).

260. *Harper & Row*, 471 U.S. at 556.

261. *Id.*

262. *Id. See also supra* notes 8-14 and accompanying text (explaining that copyright laws do not give complete monopolies on speech to authors).

263. *See Harper & Row*, 471 U.S. at 557 (stating that without copyright, a great deal of speech would not exist because authors would have little incentive to create new expression).

greatest amount of deference in areas of military affairs.[264] It will nearly always uphold a regulation that helps promote national defense.[265] In the Court's view, O'Brien's burning of the draft card affected the efficient implementation of the selective service program.[266] The draft board used the regulation to prove that an individual had registered for the draft and to facilitate communication between the registrant and the local draft board.[267] In such cases, a court will nearly always uphold the regulation and defer to Congress.[268]

However, *Corley* does not involve impact on a government program. The impact is instead on the public's access to information and on the public's ability to develop new technology. Thus, it would be inappropriate to give the DMCA a deferential review. Instead, a high degree of intermediate scrutiny should apply.[269]

### *B. Application of Middle-Tier Scrutiny to the Digital Millennium Copyright Act*

The DMCA cannot satisfy the application of *Turner* scrutiny.[270] *Turner* scrutiny requires that the law serve an important governmental interest in a manner no more restrictive than necessary.[271] The Government's primary purpose in passing the DMCA, like all other copyright legislation, was to promote the

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264. Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981). In *Rostker,* the Court used a rational basis analysis to uphold a congressional regulation that excluded women from military combat but allowed men to participate in combat. *Id.* at 64-65. The Court said: "[t]his is not . . . merely a case involving the customary deference accorded congressional decisions. The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference." *Id.*

265. *Id.*

266. United States v. O'Brien, 391 U.S. 367, 381 (1968).

267. *Id.* at 378-79.

268. *Rostker*, 453 U.S. at 64-65.

269. *See* Netanel, *supra* note 146, at 74-81 (discussing the impact the DMCA will likely have on access to information and advocating for a higher degree of scrutiny when analyzing the act).

270. Because the DMCA will not survive middle-tier intermediate scrutiny, this article will not subject the DMCA to strict intermediate scrutiny. It should be noted that the particular facts in *Corley* could allow a court to use strict intermediate scrutiny. *Corley* involves the posting and reporting of lawfully obtained information that is of interest to the public. *Corely*, 273 F.3d at 435-36. *Bartnicki* involves the use of similar information. *Bartnicki*, 532 U.S. at 518-19. Further, *Corley* involves suppressing the speech of the media. *Corely*, 273 F.3d at 435-36. The DMCA would survive *Bartnicki* only if the governmental interest was of the highest order. *Bartnicki*, 532 U.S. at 527-28. Because this article will demonstrate that the Act does not survive *Turner* scrutiny it will be assumed that the DMCA also fails strict scrutiny.

271. *Turner I*, 512 U.S. at 662.

arts and sciences.[272] Promoting the arts and sciences traditionally means providing increased public access to works of authorship.[273] The ultimate goal of copyright legislation is to foster the dissemination and creation of intellectual, literary, or artistic works for the public welfare.[274] The DMCA attempts to further this interest by ensuring that copyright owners receive the fullest economic benefits from their work.[275] With new advances in digital technology, copyright holders felt additional mechanisms were needed to protect their works from unauthorized copying.[276] Advancing the arts and sciences by helping authors protect their copyrighted works certainly classifies as an important, if not compelling, interest.[277] After all, the Constitution expressly gives Congress the power to promote the arts and sciences through copyright legislation.[278] *Turner* scrutiny, however, requires "that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[279] Thus, in applying *Turner* scrutiny, the first question is whether the studio plaintiffs have adequately shown that studios face a threat of losing revenue and that the progress of arts and sciences will be stunted without the DMCA.

*1. The Act Does Not Promote the Arts and Sciences*

Little evidence exists showing that the DMCA promotes the arts and sciences. In fact, most of the evidence proves the opposite. For instance, the DMCA greatly reduces access to works. Prior to adopting the DMCA, content owners controlled only the use of their copyrighted material. Any use by a third party that fell into one of the six exclusive rights of copyright would constitute an infringement. Under the DMCA, content owners

272. *See* S. REP. No. 105-190, at 15 (1998) (explaining the intent of Congress). *See also* U.S. CONST. art. I, § 8, cl. 8 (giving congress the power to pass copyright legislation for the purpose of promoting the arts and sciences); Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (stating that copyright legislation is "intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired").

273. Schaumann, *supra* note 250, at 1024.

274. *Id.* at 1024-25.

275. S. REP. No. 105-190, at 15 (1998). The senate report states the purpose of the act is to "make digital networks safe places to disseminate and exploit copyrighted materials." *Id.* at 2.

276. *Id.* It has become increasingly easy to copy and distribute digital works over the Internet. *Id.* at 8. As a result, Congress predicted "copyright owners [would] hesitate to make their works readily available [over] the Internet . . ." unless the works were "protected from massive piracy." *Id.* The DMCA attempts to provide authors with this protection. *Id.*

277. Amici Brief, *supra* note 233, at 6.

278. U.S. CONST. art. I, § 8, cl. 8.

279. *Turner I*, 512 U.S. at 664.

now control access to their digital works. In essence, Congress has granted copyright holders a new right. With this new right, content owners can lock-up not only their copyrighted works, but also works that belong in the public domain. As Professor Netanel notes, "nothing in the Act requires content providers to use [encryption] technology only for copyrighted works or only for portions of content that are protected by copyright."[280] By allowing the content owners to control access to the works, the owners may now prohibit permitted uses of digital works. This will greatly reduce the public's access to literary, artistic, and scientific creations.

There are other reasons why the DMCA does not conform to its constitutionally mandated purpose. Many of the works protected by the DMCA did not need another incentive for creation.[281] The works had been produced prior to the passage of the act, indicating that this extra protection played no role in authors' incentive to create the work. If the current structure of the copyright statute provided sufficient incentive to produce these works, then any further protection is not necessary.

Further, the DMCA inhibits the growth of science because it prohibits researchers and professors from publishing new discoveries in circumvention code technology.[282] Recently, a Princeton University professor wished to publish research that revealed the weaknesses of digital copy-protection technologies.[283] He "planned to publicly present his paper at a conference."[284] He withdrew from the conference, however, "after receiving what he characterized as a threat of a lawsuit from the movie and recording studios."[285] The professor brought a suit against the companies, claiming that the studios' threats of litigation prevented him from presenting academic findings.[286] The United States District Court for the District of New Jersey dismissed his suit, holding he had no legal complaint against the studios.[287]

This case illustrates the chilling effect the DMCA has upon

280. Netanel, *supra* note 146, at 75.

281. This argument has been used in the recent challenge to the Sonny Bono Copyright Term Extension Act (CTEA). Eldred v. Reno, 239 F.3d 372, 376-77 (D.C. Cir. 2001). The plaintiffs argued that the CTEA did not promote the arts and sciences because the authors did not need the term extension as an incentive to produce previously copyrighted works. *Id.*

282. *See* Patent, Trademark & Copyright Law Daily, Nov. 30, 2001, *Copyrights: Court Delivers From Bench Dismissal of Researcher's Objections to DMCA Provisions* at 1 (explaining the dismissal of a suit claiming the DMCA prohibited publication of research exposing weaknesses in copy-protection technology).

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

scientific development. The act does not accomplish its stated purpose; it does not promote the arts and sciences. Instead, it stunts the development of more advanced forms of digital code production.

The movie industry responded by claiming that the transmission of circumvention code would severely reduce revenue because consumers would no longer purchase DVDs.[288] Without that flow of revenue, the studios argued they would be unable to produce new works for the public.[289] The studios, however, were unable to point to any instance where circumvention code had resulted in a loss of revenue. They only indicated that allowing the transmission of circumvention code *could* reduce DVD sales. The studios made a similar argument in 1984 when Sony invented the videocassette recorder.[290] The studios claimed that Sony should be prohibited from selling the new technology because it allowed users to record copyrighted material.[291] The Supreme Court rejected the argument and held that the availability of the new equipment did not amount to illegal copying so long as it was capable of non-infringing uses.[292] Home video sales now account for the majority of movie studio revenues.[293] The availability of Sony's new technology did not inhibit the dissemination of new creative works, just as the availability of circumvention code has not been shown to retard the production of new movies. Thus, it has not been proven that the DMCA's prohibition of transmitting circumvention code helps further the purpose of the act, promoting the arts and sciences.

### *2. The Act Does Not Accomplish its Purpose by the Least Restrictive Means*

Even if the movie studios were able to survive the first prong of *Turner* scrutiny, they still must show that the remedy adopted by the Government "does not burden substantially more speech than is necessary to further [its] interests."[294] *Turner* requires a court to conduct a careful analysis of the scope of the statute and consider any less restrictive alternatives.[295] As applied, the DMCA

288. Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d. 294, 315 (S.D.N.Y. 2000).

289. *Id.*

290. *See* Sony Corp. v. Universal City Studios, Inc., 464 U.S. at 424-25 (noting the perceived threat that VCR'S posed to movie and television studios).

291. *Id.* at 425.

292. *Id.* at 442.

293. *See* Dick Kelsey, *Video-On-Demand? Not So Fast*, NEWSBYTES NEWS NETWORK, Jan. 30, 2002, *available at* 2002 WL 3447462 (noting that home video accounted for nearly 75 percent of movie studio revenue in 2000).

294. *Turner I*, 512 U.S. at 662.

295. *Id.*

cuts off all forms of circumvention computer code.[296] It makes no exception for the use of the code for legitimate, speech-related purposes, including access to movies that are no longer copyrighted or scholarly studies of code.[297] In fact, the Second Circuit conceded that the act prohibits publication of scientific studies about the circumvention computer code and limits fair uses[298] of copyrighted works.[299] The Second Circuit acknowledged that its ruling would prevent, for example, the use of digital quotations from a film by a movie reviewer, digital analysis of portions of the sound track by a musicologist, or clips of scenes by a film scholar to make a comparative point.[300] All of these fair uses helped create a balance between copyright law and the First Amendment.[301] In fact, these types of illustrations are what the Supreme Court pointed to when it said that copyright law would not infringe upon the First Amendment.[302] The DMCA eliminates these examples, and at the same time eliminates the internal restraints that allowed copyright law to coexist with the First Amendment. Indeed, the Second Circuit has substantially reduced the public's ability to communicate by upholding the DMCA's prohibition of circumvention code.

When considering less restrictive alternatives, a court may look to other statutes that address a similar problem.[303] The Copyright Act contains two provisions that allow copying of videocassettes and musical works.[304] The act allows users to use available technology to make a limited number of copies in those cases.[305] It simply prohibits the sale and mass distribution of those

296. 17 U.S.C. § 1201(a)(2) (2000).

297. *See Corley*, 273 F.3d at 440-41. (discussing the exceptions to the DMCA).

298. *See supra* note 13 and accompanying text (explaining the fair use doctrine).

299. *Corley*, 273 F.3d at 458-59.

300. *Id.*

301. *Harper & Row*, 471 U.S. at 549-51.

302. *Id.*

303. *Denver Consortium*, 518 U.S. at 742. The Court said: a court "can take Congress' different, and significantly less restrictive, treatment of a highly similar problem as at least some indication that more restrictive means are not essential (or will not prove very helpful)." *Id.* at 758.

304. *See* 17 U.S.C. § 1201(k)(2) (2000) (prohibiting VCR manufactures from implementing technologies that would prevent users from making copies of VCR cassettes); *see also* 17 U.S.C. § 1002(a) (2000) (permitting fair and non-infringing users to make a limited number of copies of a copyrighted audio work but not permitting serial copying of the work); *see generally* Amici Brief, *supra* note 233, at 5 (pointing to these provisions as adequate alternatives to protect an author's copyrighted work).

305. *See* 17 U.S.C. § 1201(k)(2) (2000) (permitting the use of certain copying devices for particular purposes); *see also* 17 U.S.C. § 1002(a) (2000) (permitting the distribution of certain copying devices that conform to specified regulations).

copies.[306] These two provisions have carved exceptions so copyright holders will not have total control over expression. They serve the same purpose as the DMCA, but do so using less restrictive means. Following these provisions as a model would have allowed the DMCA to protect copyrighted works and still maintain a balance with the First Amendment. Instead, Congress chose to impose a complete ban on circumvention computer code. The Second Circuit acknowledged that these less restrictive alternatives were available.[307] Nevertheless, the court deferred to Congress and assumed that Congress had avoided burdening more speech than is necessary to further its interests.[308] The court did not carefully analyze available alternatives. Had the court seriously considered less restrictive alternatives, it would have been forced to invalidate the Act.

## CONCLUSION

Passage of the DMCA has eliminated the contours of traditional copyright law that allowed it to dwell in harmony with the First Amendment.[309] The Second Circuit contributed to destroying this balance by upholding the law with a very deferential form of analysis.[310] This decision follows in a path of recent appellate decisions that elevate intellectual property rights at the expense of free expression.[311] If courts continue to apply deferential review to copyright legislation, the public interest will be injured. The dissemination of information and ideas will be greatly reduced. Speech monopolies will corrupt the marketplace of ideas. To avoid this result, a greater degree of scrutiny must be applied when examining copyright legislation. Otherwise, our digital economy will not live up to its promise of delivering greater amounts of information to the public.

306. *See* 17 U.S.C. § 1201(k)(2) (2000) (prohibiting serial copying of works); *see also* 17 U.S.C. § 1002(a) (2000) (prohibiting the distribution of copying devices that do not conform to specified regulations).

307. *Corley*, 273 F.3d at 454-55.

308. *Id.* at 455.

309. Netanel, *supra* note 146, at 81.

310. *Corley*, 273 F.3d at 454-56.

311. *See supra* note 26 and accompanying text (discussing the D.C. Circuit's recent *Eldred* decision).