ARTICLES

COPYRIGHT LAW AND FREE SPEECH AFTER *ELDRED V. ASHCROFT*

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INTRODUCTION

Eldred v. Ashcroft, as decided by the Supreme Court in January 2003, added another chapter regarding the relationship between copyright law and freedom of speech to the judicial "chain novel" that has been in the writing for the past three decades.[1] The Court affirmed the constitutionality of the Sonny Bono Copyright Term Extension Act of 1998 ("CTEA"), which extended the copyright term by twenty years, both for existing works and for new works.[2] As in previous chapters, the Court reached the conclusion that there is no conflict between the two legal fields. It repeated the judicial sound bite that "the Framers intended copyright itself to be the engine of free expression."[3] *Eldred* nicely fits the conflict

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1. *See* Eldred v. Ashcroft, 123 S. Ct. 769 (2003). The metaphor of a "chain novel" is, of course, Dworkin's. *See* RONALD DWORKIN, LAW'S EMPIRE 228–32 (1985).

2. *See* Pub. L. No. 105-298, 112 Stat. 2827 (codified in scattered sections of 17 U.S.C.).

3. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985), *quoted in Eldred*, 123 S. Ct. at 788. For the notion of "judicial sound bites," see Pierre N. Leval, *Judicial Opinions As Literature*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 208 (Peter Brooks & Paul Gewirtz eds., 1996).

discourse, which is mostly one of denial.[4] But *Eldred* also included novel and interesting elements that offer a new direction to the conflict discourse, or at least a potential for redirection.

Eldred raises many intriguing copyright law and constitutional law questions.[5] Here, however, I wish to focus on the possible ramifications the case might have on the conflict discourse with respect to its constitutional level. Surprisingly, *Eldred* is the first facial constitutional challenge to copyright law in 213 years.[6] As copyright law continues to expand into new territories and in unpredictable ways,[7] and as new bills are introduced at a staggering rate to further the scope of the rights of copyright owners,[8] it is crucial that we study the contours of copyright law. This need is especially acute in light of the Court's comment that "[w]hen, as in this case, Congress has not altered the *traditional contours* of copyright protection, further First Amendment scrutiny is unnecessary."[9]

In this Article, I wish to challenge the constitutional dimension of the judicial rejection of the conflict argument, which concerns the conflict between copyright law and the First Amendment. I will structure the

4. Elsewhere, I analyzed the development of the conflict discourse. *See generally* Michael D. Birnhack, *The Copyright Law and Free Speech Affair: Making-Up and Breaking-Up*, 43 IDEA 233 (2003) (arguing that courts developed a narrative that denies the conflict).

5. Some of these issues are discussed in articles published before the Supreme Court handed down its decision. *See generally* Symposium, Eldred v. Ashcroft*: Intellectual Property, Congressional Power, and the Constitution*, 36 LOY. L.A. L. REV. 1 (2002) (summarizing the issues in the case before it was decided). For post-*Eldred* literature, see Pamela Samuelson, *The Constitutional Law of Intellectual Property After* Eldred v. Ashcroft, 50 J. COPYRIGHT SOC'Y (forthcoming 2003) (discussing the constitutional implications of the case).

6. For a discussion on the recent history of copyright law, see Thomas B. Nachbar, *Constructing Copyright's Mythology*, 6 GREEN BAG 37 (2002); Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. COPYRIGHT SOC'Y 19 (2001); Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 49 J. COPYRIGHT SOC'Y 675 (2002).

7. For a critical account of the expansion, see EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY (Rochelle Cooper Dreyfuss et al. eds., 2001) (explaining the trend of private-domain expansion).

8. In the 107th Congress, for example, the following pieces of legislation were proposed: A bill to amend title 17, United States Code, to limit the liability of copyright owners for protecting their works on peer-to-peer networks, H.R. 5211 (2002); Anticounterfeiting Amendments of 2002, S. 2395 (2002); Consumer Broadband and Digital Television Promotion Act, S. 2048 (2002); Freelance Writers and Artists Protection Act of 2002, H.R. 4643 (2002); Intellectual Property Protection Restoration Act of 2002, S. 2031 (2002); Copyright Technical Corrections Act of 2001, H.R. 614 (2001) (suggesting various enhancements to the copyright code); Music Online Competition Act of 2001, H.R. 2724 (2001); Technology, Education, and Copyright Harmonization Act, S. 487 (2001); Twenty-First Century Distance Learning Enhancement Act, H.R. 2100 (2001) (creating stricter guidelines for educational use). For a discussion of Internet-related legislation in previous Congresses, see Yochai Benkler, *Net Regulation: Taking Stock and Looking Forward*, 71 U. COLO. L. REV. 1203 (2000).

9. Eldred v. Ashcroft, 123 S. Ct. 769, 790 (2003) (emphasis added).

critique along the lines of an important distinction. When we pause and ask what it is that the courts have been denying in rejecting the conflict argument, we see, after close study of over thirty cases that addressed the conflict argument, that, surprisingly, courts reject different things at different points. This leads us to identify two kinds of conflict: one is *internal* to copyright law, and the other is *external* to it. These two conflicts derive, respectively, from an *internal view* of the relationship of copyright law and free speech, and also from an *external view*.

The internal view confines itself to the borders of copyright law: the familiar tension between the public and the individual author, between copyright's lofty goal of promoting progress and the earthly means that it applies to achieve this goal. The external view conceives the conflict as a collision between two separate areas of law on the constitutional level: the grant of power to Congress to enact copyright legislation on the one hand, and the First Amendment on the other.

In most cases, courts fail to distinguish between the two kinds of conflict and address only one of them, or, in some cases, confuse them altogether. Once we observe that there are two kinds of conflict, and that they are often confused or not even recognized, we can rephrase the conflict argument and its denial. The conflict argument aims mainly at the external level. The typical judicial response refuses to acknowledge the external level and keeps drawing us back to the internal level. The rejection of the conflict argument thus internalizes the discussion of the conflict. *Eldred* is no exception.

Part I of this Article introduces *Eldred*, locates it within the judicial no-conflict narrative, and highlights the constitutional aspects thereof. I explain how the Supreme Court closed the door on the conventional conflict argument, but at the same time, opened new doors regarding the power of copyright mechanisms to "take care" of free speech concerns and new forms of copyright protection.

Part II introduces the internal and external conflicts, and rephrases the conflict argument and the official no-conflict narrative in these terms.[10] It points to two ways in which courts have internalized and absorbed the external conflict into the internal conflict, and it illustrates this in several cases, including *Eldred*. In a nutshell, in *Eldred*, the plaintiffs raised

10. One caveat before we delve into the details of the distinction: It is rather modest in its claim. Each kind of conflict is familiar, at least intuitively. The explicit distinction is new, however, and it is a powerful tool that will enable us to see more clearly the superficial analysis of (some of) the official narrators, and the normative and conceptual mistakes they commit.

arguments on both the internal and external levels. The internal copyright argument was rejected due to the Court's deference to Congress. The external free-speech argument was internalized, but only after certain crucial lines were drawn.

Part III discusses the constitutional implications of the no-conflict narrative, exposes the conceptual risk that is inherent in it, and explains why both the internal and the external points of view should be taken when addressing the conflict argument.

I. *ELDRED* AND THE DENIAL OF THE CONFLICT ARGUMENT

A. ELDRED IN COURT

Eric Eldred runs an online service that enables people to download, for free, books that he has digitized.[11] The books are no longer protected by copyright. No one doubts that this is an act covered by the First Amendment: Eldred disseminates speech and makes it more accessible to the public than when protected by copyright. The public domain is the oxygen of this activity.[12] It begins where copyright ends, and thus depends on the copyright term. CTEA extended the copyright term by twenty years.[13] When Congress extended the copyright term, it expanded the enclosed copyrighted domain at the expense of the public domain. Accordingly, Eldred argued, inter alia, that his free speech rights had been violated.

Eldred's constitutional challenge was based on several arguments. First, he argued that the CTEA violates the Copyright Clause of the Constitution, which authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]"[14] This is the copyright argument. A second argument was

11. *See* ERIC ELDRED, ELDRITCH PRESS, *at* http://www.eldritchpress.org (last visited Aug. 17, 2003).

12. On the public domain, see Yochai Benkler, *Free As the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 360–64 (1999) (defining the public domain to include uses of information that are commonly perceived as permissible, and arguing that the public domain is a constitutional requirement); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990) (explaining the critical role of the public domain in the creative process); Edward Samuels, *The Public Domain Revisited*, 36 LOY. L.A. L. REV. 389, 394 (2002) (arguing that it is for Congress, not the courts, to make decisions about the proper copyright balance).

13. *See* Pub. L. No. 105-298, 112 Stat. 2827 (codified in scattered sections of 17 U.S.C.).

14. U.S. CONST. art. I, § 8, cl. 8. *See Eldred*, 123 S. Ct. at 774.

that the CTEA conflicts with the First Amendment, and that it requires, as the Supreme Court rephrased the argument, a "heightened judicial review." This is the First Amendment argument.[15] The latter argument is the focus of this Article. The constitutional challenge reached the Supreme Court—not a frequent event for copyright cases—but failed all along the way.[16]

The district court rejected the First Amendment argument in few words, noting that the claim is not supported by relevant case law. Relying on a D.C. Circuit precedent, the court stated that "there are no First Amendment rights to use the copyrighted works of others."[17] The D.C. Circuit Court of Appeals affirmed, and relying on its own precedent, determined that "copyrights are categorically immune from challenges under the First Amendment."[18] The D.C. Circuit also turned to the idea-expression dichotomy, and concluded that "the plaintiffs lack any cognizable first amendment right to exploit the copyrighted works of others."[19]

The Supreme Court affirmed. The Court, in a 7-2 decision, rejected all of Eldred's arguments. Justice Ruth Bader Ginsburg, writing for the majority, first rejected the copyright argument, finding that "CTEA is a rational enactment; we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be."[20] Here, I focus on the First Amendment argument. The Court provided a three-part response, one comment that signals a tendency toward a "proprietary" conception of copyright law,[21]

15. Neil Netanel argued (before *Eldred* was decided) that copyright is content-neutral regulation of speech, but deserves a rigorous, or exacting, intermediate scrutiny. *See* Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 5 (2001). Netanel argued that the level of scrutiny applied by the Supreme Court in *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622 (1994), should be applied in the context of the CTEA. *See* Netanel, *supra*, at 72. *See also* Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act is Unconstitutional*, 36 LOY. L.A. L. REV. 83 (2002). The Supreme Court, however, interpreted Eldred's argument to apply rigorous intermediate scrutiny as strict scrutiny, *Eldred*, 123 S. Ct. at 788, and refused to rely on *Turner*. *See id.* at 789.

16. Eldred v. Reno, 74 F. Supp. 2d 1 (D.D.C. 1999), *aff'd*, 239 F.3d 372 (D.C. Cir. 2001), *reh'g denied*, 255 F.3d 849, *aff'd*, *Eldred*, 123 S. Ct. at 769.

17. *Reno*, 74 F. Supp. 2d at 3.

18. *Reno*, 239 F.3d at 375 (citing United Video, Inc. v. F.C.C., 890 F.2d 1173 (D.C. Cir. 1989)).

19. *Id.* at 376.

20. *Eldred*, 123 S. Ct. at 782–83. This holding has already been applied in the context of the Digital Millennium Copyright Act's Internet Service Provider safe-harbor section (17 U.S.C. § 512 (2000)). *See* RIAA v. Verizon Internet Servs., 257 F. Supp. 2d 244, 275 (D.D.C. 2003).

21. I borrow the term "proprietary" conception, as well as its opposite, "regulatory" conception, from L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 11–12 (1991).

and several intriguing remarks.[22] The three-part response fits comfortably within the no-conflict judicial narrative. It points to the common history of copyright and the First Amendment, to their common goal, and to internal copyright-law mechanisms that take care of free speech concerns.[23] The "proprietary comment" refuses to acknowledge that using someone else's copyrighted work can constitute one's own speech, and thus provides a possible explanation for the Court's holding.[24] The "intriguing remarks" offer a redirection of the conflict discourse:[25] They signal that the power of copyright mechanisms should not always be taken for granted, and that the Court's ruling refers to the "traditional contours" of copyright law, but not beyond them.

B. THE NO-CONFLICT NARRATIVE

1. The Conflict Discourse

A strong copyright system has its benefits, but it has a price too. Many scholars argue that this price is too high to justify the continuous expansion of copyright law. The price is framed in terms such as the shrinking public domain,[26] the effect of copyright protection on future generations,[27] freedom or liberty,[28] users' rights,[29] and, occasionally, freedom of speech.[30] A stranger to the politics of copyright law might be surprised to see that the last avenue—that of free speech—did not, at least thus far, garner more prominence in the vigorous discussion. After all, the

22. *Eldred*, 123 S. Ct. at 788–90.

23. *See infra* text accompanying notes 48, 56, and 73.

24. *See infra* Part III.B.2.

25. *See infra* text accompanying note 81.

26. *See, e.g.*, JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 18–20 (1996); Benkler, *supra* note 12; Litman, *supra* note 12 (warning against the expansion of copyright at the expense of the public domain).

27. *See generally* Dawn C. Nunziato, *Justice Between Authors*, 9 J. INTELL. PROP. L. 219 (2002) (arguing that the rights of each generation of authors, including the rights that they might attempt to assert through private ordering measures, be limited for the benefit of subsequent generations of authors).

28. *See* Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 27–28 (2001); Julie E. Cohen, Lochner *in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462, 481–95 (1998).

29. *See generally* PATTERSON & LINDBERG, *supra* note 21.

30. *See* Mark Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998); Netanel, *supra* note 15; Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2445 (1998). *See generally* Benkler, *supra* note 12.

United States has a proud tradition of free speech[31] anchored in the First Amendment, and it is almost universally recognized as a fundamental human right.[32] The reason seems to be a tradition of denial of the relevance of free speech considerations within the legal regime of copyright law. The argument that there is some conflict between copyright law and free speech, a conflict that requires either resolution or dissolution,[33] has been explicitly made in courts in over thirty published cases between 1967 and 2002.[34] In all but two of those cases, courts

31. *See generally* HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (Jamie Kalven ed., 1988).

32. *See* G.A. Res. 217, U.N. GAOR, 3d Sess., Supp. No. 127, at 71, U.N. Doc. A/810 (1948) (referencing Article 19 of the United Nations' Universal Declaration of Human Rights). The right of free speech is also included in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

33. Resolving the conflict requires adopting some mechanism to accommodate, as much as possible, both fields of law, whereas dissolving the conflict means explaining in a convincing manner why there was no conflict in the first place.

34. The conflict argument was discussed or mentioned in the following cases: Spence v. Washington, 418 U.S. 405, 417 (1977); Lee v. Runge, 404 U.S. 887, 892–93 (1971) (denial of cert.); A&M Records v. Napster, 239 F.3d 1004, 1028 (9th Cir. 2001); Nihon Keizai Shimbun, Inc. v. Comline Bus. Data Inc., 166 F.3d 65, 74–75 (2d Cir. 1999); L.A. News Serv. v. Tullo, 973 F.2d 791, 795–96 (9th Cir. 1992); Pac. & S. Co. v. Duncan, 744 F.2d 1490, 1498–500 (11th Cir. 1984), *reh'g denied*, 749 F.2d 733 (11th Cir. 1984); Consumers Union of the U.S., Inc. v. Gen. Signal Corp., 724 F.2d 1044, 1053 (2d Cir. 1983); Nat'l Cable Television Ass'n v. Copyright Royalty Tribunal, 689 F.2d 1077, 1079 (D.C. Cir. 1982); Roy Exp. Co. v. Columbia Broad. Sys., Inc., 672 F.2d 1095, 1099–1100 (2d Cir. 1982); Iowa State Univ. Research Found., Inc. v. Am. Broad. Co., 621 F.2d 57, 61 n.6 (2d Cir. 1980); Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1187–88 (5th Cir. 1979); Meeropol v. Nizer, 560 F.2d 1061, 1067 (2d Cir. 1977); Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1169–71 (9th Cir. 1977); Wainwright Sec., Inc. v. Wall Street Transcript Corp., 558 F.2d 91, 95 (2d Cir. 1977); SunTrust Bank v. Houghton Mifflin Co., 136 F. Supp. 2d 1357, 1384–85 (N.D. Ga. 2001), *rev'd*, 252 F.3d 1165 (11th Cir. 2001), *comprehensive opinion*, 268 F.3d 1257 (11th Cir. 2001); Eldred v. Reno, 74 F. Supp. 2d 1, 3 (D.D.C. 1999), *aff'd*, 239 F.3d 372 (D.C. Cir. 2001), *aff'd*, 123 S. Ct. 769 (2003); Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290, 1295 (D. Utah 1999); Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 778 F. Supp. 1247, 1252 (S.D.N.Y. 1991); New Era Publ'ns Int'l v. Holt, 695 F. Supp. 1493, 1525 (S.D.N.Y. 1988), *aff'd*, 873 F.2d 576 (2d Cir. 1989); Harper & Row Publishers, Inc. v. Nation Enters., 557 F. Supp. 1067, 1070 n.4 (S.D.N.Y. 1983), *rev'd*, 723 F.2d 195 (2d Cir. 1983), *rev'd*, 471 U.S. 539 (1985); Encyclopedia Britannica Educ. Corp. v. Crooks, 542 F. Supp. 1156, 1180–81 (W.D.N.Y. 1982); Quinto v. Legal Times of Wash., Inc., 506 F. Supp. 554, 560–61 (D.D.C. 1981); Ass'n of Am. Med. Colls. v. Carey, 482 F. Supp. 1358, 1365 n.17 (N.D.N.Y. 1980); Schnapper v. Foley, 471 F. Supp. 426, 428 (D.D.C. 1979), *aff'd*, 667 F.2d 102 (D.C. Cir. 1981); Italian Books Corp. v. Am. Broad. Co., 458 F. Supp. 65, 71 (S.D.N.Y. 1978); Keep Thomson Governor Comm. v. Citizens for Gallen Comm., 457 F. Supp. 957, 959–61 (D.N.H. 1978); Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc., 445 F. Supp. 875, 881–84 (S.D. Fla. 1978), *aff'd on other grounds*, 626 F.2d 1171 (5th Cir. 1980); United States v. Bodin, 375 F. Supp. 1265, 1267 (W.D. Okla. 1974); Robert Stigwood Group Ltd. v. O'Reilly, 346 F. Supp. 376, 382–85 (D. Conn. 1972); Walt Disney v. Air Pirates, 345 F. Supp. 108, 116 (N.D. Cal. 1972), *aff'd in part, rev'd in part*, 581 F.2d 751 (9th Cir. 1978); McGraw-Hill, Inc. v. Worth Publishers, Inc., 335 F. Supp. 415, 422 (S.D.N.Y. 1971); N.Y. Times v. United States, 403 U.S. 713,

routinely rejected the conflict argument on various bases.[35] This systematic rejection has amounted to a denial of the conflict.

The denial was so persistent that the many scholarly attempts to challenge it seem to have reached a dead end. Most of the scholarly discussion of the conflict argument in the past three-and-a-half decades dived straight into the ontological question: Is there a conflict?[36] This discourse came up with important observations (e.g., the (un)common history of the two legal regimes),[37]and with various proposals on ways to solve the conflict,[38] or address it.[39] The time has come to approach the

726, 730 (1971); Pub. Affairs v. Rickover, 268 F. Supp. 444, 456 (D.D.C. 1967); Mitcham v. Bd. of Regents, 670 S.W. 2d 371, 372–73 (Tex. 1984).

35. The two exceptions are *Triangle Publications, Inc.*, 445 F. Supp. at 881–84, which was not followed by the Fifth Circuit, though it affirmed the judgment on other grounds, *see* 626 F.2d 1171, and *SunTrust Bank*, 252 F.3d 1165 (vacating an injunction that enjoined the publication of Alice Randall's *The Wind Done Gone*—the "other voice" version of the classic, *Gone With the Wind*, by Margaret Mitchell). The Eleventh Circuit said in a three-paragraph decision that the injunction was an "unlawful prior restraint in violation of the First Amendment." *Id.* Notably, the court, in its full opinion, based its refusal to issue an injunction on the likelihood of success in a fair-use analysis. The interpretation and application of the fair-use defense, however, were informed by First Amendment considerations. *See SunTrust Bank*, 268 F.3d at 1263–65.

36. The first three papers that marked this discourse were Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Melville Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970); Lionel S. Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. (ASCAP) 43 (1971).

37. *See* L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 13–19 (1987); Diane Leenheer Zimmerman, *Information As Speech, Information As Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 674–92 (1992).

38. *See, e.g.*, Michael D. Brittin, *Constitutional Fair Use*, 28 COPYRIGHT L. SYMP. (ASCAP) 141 (1982); Ralph S. Brown, *Civil Remedies for Intellectual Property Invasions: Themes and Variations*, 55 LAW & CONTEMP. PROBS. 45 (1992); Michael L. Crowley, *A First Amendment Exception to Copyright for Exigent Circumstances*, 21 CAL. W. L. REV. 437 (1985); Stacy Daniels, Casenote, Harper & Row, Publishers, Inc. v. Nation Enterprises*: Pirating Unpublished Copyrighted Works: Does the Fair Use Doctrine Vindicate First Amendment Rights?*, 19 J. MARSHALL L. REV. 501 (1986); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283 (1979); Stephen Fraser, *Conflict Between the First Amendment and Copyright Law and Its Impact on the Internet*, 16 CARDOZO ARTS & ENT. L.J. 1 (1998); W. Warren Hamel, Harper & Row v. The Nation*: A First Amendment Privilege for News Reporting of Copyrightable Material?*, 19 COLUM. J.L. & SOC. PROBS. 253 (1985); Henry S. Hoberman, *Copyright and the First Amendment: Freedom or Monopoly of Expression?*, 14 PEPP. L. REV. 571 (1987); Lemley & Volokh, *supra* note 30; James L. Oakes, *Copyrights and Copyremedies: Unfair Use and Injunctions*, 18 HOFSTRA L. REV. 983 (1990); Harvey S. Perlman & Laurens H. Rhinelander, Williams & Wilkins Co. v. United States*: Photocopying, Copyright, and the Judicial Process*, 1975 SUP. CT. REV. 355; Stephen G. Plichta, *Constitutional Limitations upon the Congressional Power to Enact Copyright Legislation*, 1972 UTAH L. REV. 534; Harry N. Rosenfield, *The Constitutional Dimension of "Fair Use" in Copyright Law*, 50 NOTRE DAME LAW. 790 (1974–75); Mythili Tharmaratnam, *Copyrighting Raw Videotapes: A Restriction of the Free Press?*, 1993 U. CHI. LEGAL F. 417; Hanibal Travis, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 BERKLEY TECH. L.J. 777 (2000); Tiffany D. Trunko, *Remedies for Copyright Infringement: Respecting the First*

conflict argument in a completely different way. One possible avenue is to reverse the order of the discussion: Rather than dive into the ontological question, study the denial of the conflict. I believe this can provide us with a better way of understanding the conflict. The reversal of the conventional order of the discussion reveals that the judicial rejection of the conflict argument does not rely on solid grounds; rather, it has developed as a mechanism of denial—a denial that has turned out to be too persuasive not to accept. The story of the denial is a reconstruction of the bits and pieces scattered in the thirty-plus cases that have addressed the conflict argument thus far.[40]

2. The Early Days of the Conflict Argument

The conflict argument was first raised in two law-review articles by distinguished law professors, and in a companion student note back in 1970.[41] These articles responded to two cases in which the copyright/free speech collision seemed to be frontal: *Time Inc. v. Bernard Geis*

Amendment, 89 COLUM. L. REV. 1940 (1989); Volokh & McDonnell, *supra* note 30; Stephen S. Zimmermann, *A Regulatory Theory of Copyright: Avoiding a First Amendment Conflict*, 35 EMORY L.J. 163 (1986); Celia Goldwag, Note, *Copyright Infringement and the First Amendment*, 79 COLUM. L. REV. 320 (1979); James Hall, Comment, *Bare-Faced Mess: Fair Use and the First Amendment*, 70 OR. L. REV. 211 (1991); Patricia Kreig, Note, *Copyright, Free Speech, and the Visual Arts*, 93 YALE L.J. 1565 (1984); Jeffrey Oakes, Note, *Copyright and the First Amendment*, 33 U. MIAMI L. REV. 207 (1978); Janice E. Oakes, Comment, *Copyright and the First Amendment: Where Lies the Public Interest?*, 59 TUL. L. REV. 135 (1984); Leslie Ann Rise, Comment, *The Rodney King Beating: Beyond Fair Use: A Broadcaster's Right to Air Copyrighted Videotape As Part of a Newscast*, 13 J. MARSHALL J. COMPUTER & INFO. L. 269 (1995); Leonard W. Wang, Note, *The First Amendment Exception to Copyright: A Proposed Test*, 1977 WIS. L. REV. 1158.

39. *See, e.g.*, C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002); Benkler, *supra* note 12; Netanel, *supra* note 15; Patterson, *supra* note 37; David E. Shipley, *Conflicts Between Copyright and the First Amendment After* Harper & Row Publishers v. Nation Enterprises, 1986 BYU L. REV. 983; James L. Swanson, *Copyright Versus the First Amendment: Forecasting an End to the Storm*, 7 LOY. L.A. ENT. L. REV. 263 (1987); Rebecca Tushnet, *Copyright As a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1 (2000); Douglas Y'Brabo, *On Legal Protection for Electronic Texts: A Reply to Professor Patterson and Judge Birch*, 5 J. INTELL. PROP. L. 195 (1997); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 EMORY L.J. 393 (1989); Greg A. Perry, Note, *Copyright and the First Amendment: Nurturing the Seeds for Harvest*, 65 NEB. L. REV. 631 (1986) (discussing the U.S. Supreme Court's analysis in *Harper and Row Publishers, Inc. v. Nation Enterprises*); Note, *Constitutional Law—Commercial Speech—Copyright and the First Amendment*, 1979 WIS. L. REV. 242.

40. For a full analysis, see Birnhack, *supra* note 4 (reconstructing the interplay of copyright and free speech in the case law). The subsequent discussion locates *Eldred* within this analysis.

41. *See* Goldstein, *supra* note 36; Nimmer, *supra* note 36.

Associates[42] and *Rosemont Enterprises v. Random House, Inc.*[43] In both cases, the copyright owners' claims were rejected on the ground of the fair-use defense. The First Amendment was not explicitly mentioned in either case.

Once the conflict argument was explicitly made in the 1970 articles, the initial response of the courts was to reject it outright. Later on, a more sophisticated answer developed, and it is the one that still governs today. I call these two responses the "early narrative" and the "contemporary narrative," respectively. The division between these narratives is by no means strict, but it provides a convenient analytical framework. *Harper & Row Publishers, Inc. v. Nation Enterprises* marked the peak of both narratives.[44] It reflects the definitive position of the U.S. Supreme Court on the question of the relationship between copyright law and the First Amendment—a position most recently reaffirmed in *Eldred*. In short, this question need not bother us.

The early narrative relies on an argument from the history of the Constitution and its text and structure, and adopts an originalist mode of interpretation. The narrative can be generalized: There is no conflict because of the constitutional coexistence of copyright law and the First Amendment. The historical argument is that the Framers did not perceive any conflict.[45] The effective meaning of the early narrative is that copyright law is immunized from the First Amendment.[46] The appeal to the Framers' intention is apparent in the encapsulation of the no-conflict argument in *Harper & Row*, in what I call the "engine metaphor": "In our haste to disseminate news, it should not be forgotten that the *Framers intended* copyright itself to be the engine of free expression."[47] *Eldred* left no doubt as to the originalist nature of this response: "The Copyright Clause and First Amendment were adopted close in time. This proximity

42. 293 F. Supp. 130 (S.D.N.Y. 1968) (permitting use of the copyrighted Zapruder film, which shows the assassination of President John F. Kennedy, in a critical book about the investigation of the assassination).

43. 366 F.2d 303 (2d Cir. 1966) (refusing to allow the mysterious tycoon, Howard Hughes, from asserting copyright through a corporation he controlled to block a biographer from using certain raw materials).

44. 471 U.S. 539 (1985).

45. *See* EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 466–68 (2002).

46. *See, e.g.*, Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1187 (5th Cir. 1979) (rejecting a conflict argument by turning to the "judgment of the constitution").

47. *Harper & Row Publishers, Inc.*, 471 U.S. at 558 (emphasis added).

indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles."[48]

This argument finds support in the structure of the Constitution. Both copyright law and the First Amendment were introduced into American law as coexistent. It is further mentioned that the Amendment does not repeal the grant of power in the original Constitution.[49] It is the constitutional structure that dictates the coexistence. Copyright, therefore, is a permitted restriction of the First Amendment.[50] Thus, the strength of the early narrative rests on our interpretive theory. No known debate took place regarding the Copyright Clause, however, and it was approved unanimously.[51] Little is known about the particular circumstances of the enactment of the Copyright Clause.

3. The Contemporary Narrative

Despite the outright hostility of the early narrative, the conflict argument persisted. We can identify a general structure composed of three stages: First, a peaceful harmonious situation is presented; second, the picture of harmony is challenged by the conflict argument; and finally, harmony is restored. I will retell the narrative according to these stages. Not all stages are found in all thirty-plus cases, but the overall narrative is rather clear.

Harmony. The first step is composed of two interdependent arguments, which I call the "shared-goal argument" and the "division-of-labor argument." They suggest a linear relationship in which copyright law and the First Amendment share the same goal, namely, the promotion of knowledge and the preservation of a robust public sphere. They divide the areas of responsibility as to the achievement of the goal, however. The shared-goal argument ties the two legal regimes together at their most important point: their goal. If we focus on a shared goal, we are less likely to conceive or observe a conflict. The argument is best captured in the engine metaphor, referenced above.[52] The metaphor invokes a theme of joint venture. Copyright law "pulls" free speech, and together they

48. Eldred v. Ashcroft, 123 S. Ct. 769, 788 (2003).

49. *See, e.g.*, Sobel, *supra* note 36, at 64, 68 (raising and then dismissing the argument that an amendment supersedes the original Constitution).

50. *See* Nimmer, *supra* note 36, at 1182.

51. *See* BRUCE WILLIS BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 117 (1967).

52. *See Harper & Row Publishers, Inc.*, 471 U.S. at 558.

progress,[53] together they explore new frontiers.[54] Consider the following statement: "The judgment of the constitution is that free expression is enriched by protecting the creations of authors from exploitation by others, and the Copyright Act is the congressional implementation of that judgment."[55] *Eldred* repeated the shared-goal argument by quoting the engine metaphor, and by adding that "copyright's purpose is to *promote* the creation and publication of free expression."[56]

The division-of-labor argument supports the shared-goal argument. It designates separate areas of responsibility for copyright law and the First Amendment, and thus creates a linear division of labor. The division negates an alternative view, which is one of "simultaneous operation," and hence, one of (at least) potential friction. The division-of-labor argument was clearly expressed in an Eleventh Circuit decision: Where the First Amendment removes obstacles to the free flow of ideas, copyright law adds positive incentives to encourage the flow.[57]

Under the labor division, copyright law is responsible for the production of creative works. Copyright law offers legal protection to anyone who complies with the requirements of the law and who wishes to enforce his or her rights. Once rights are introduced into the market, no player may ignore them. Creating the rights enables the trade of the underlying object. Viewed in this way, copyright law is presented as affirmative:[58] It is a permissible action taken by the government to promote

53. Recall the constitutional grant of power to Congress, which is "[t]o promote the *Progress* of Science . . . ." U.S. CONST. art. I, § 8, cl. 8 (emphasis added). For a discussion on this topic, see Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFF. INTELL. PROP. L.J. 3 (2001); Malla Pollack, *What Is Congress Supposed to Promote?: Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754 (2001).

54. This message is also conveyed in less fanciful statements. *See, e.g.*, Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc., 445 F. Supp. 875, 882 (S.D. Fla. 1978) ("Both [the Copyright Act and the First Amendment] are oriented toward the preservation of an atmosphere conducive to the interchange of ideas."), *aff'd on other grounds*, 626 F.2d 1171 (5th Cir. 1980).

55. Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1187 (5th Cir. 1979). *See also* L.A. News Serv. v. Tullo, 973 F.2d 791, 795 (9th Cir. 1992) ("Copyright law *incorporates* First Amendment goals by ensuring that copyright protection extends only to the forms in which ideas and information are expressed and not to the ideas and information themselves.") (emphasis added).

56. Eldred v. Ashcroft, 123 S. Ct. 769, 788 (2003).

57. Pac. & S. Co. v. Duncan, 744 F.2d 1490, 1499 (11th Cir. 1984), *reh'g denied*, 749 F.2d 733 (11th Cir. 1984). The Supreme Court denied certiorari while *Harper & Row Publishers* was pending. *Harper & Row Publishers* was argued on November 6, 1984. *Pacific & Southern Co.* was denied certiorari on April 1, 1985, and *Harper & Row Publishers* was decided on May 20, 1985.

58. *See Dallas Cowboys Cheerleaders, Inc.*, 600 F.2d at 1187 (erroneously stating that Congress "has an affirmative constitutional duty" to enact copyright laws).

takes a similar position and joins the other branches of government:

> [U]nless the framework for legitimate commerce is preserved and adequate protection for copyrighted works is ensured, the vast communications network will not reach its full potential as a true, global marketplace. Copyright protection is not an obstacle in the way of

In case the harmonious description and the defensive/offensive response to the trouble did not convince us, the judicial narrative engages in some hypotheses. The courts offer, in the words of Justice William Brennan, an "apocalyptic prophecy."[62] Without copyright, we are told, there would be no speech (and of course, without speech, there would be no free speech).[63] Again, the engine metaphor carries this message. The joint and productive task that turned out to be one of dependence leaves no doubt as to the final step: If the engine breaks down, copyright will be stopped; if the engine breaks down, the rest of the train will be halted somewhere (probably in the middle of nowhere), unable to break through and discover new frontiers. If the power source ceases to fulfill its task, the whole machine will stop working sooner or later. The threat is expressed explicitly in *Harper & Row*:

> Respondents' theory, however, would expand fair use to effectively destroy any expectation of copyright protection in the work of a public figure. Absent such protection, there would be little incentive to create or profit in financing such memoirs, and the public would be denied an important source of significant historical information.[64]

The respondents in that case were *The Nation*. Their theory was that the First Amendment requires a different interpretation of the fair-use doctrine. The public figure in that case was the retired President Ford, and the memoirs were his White House memoirs, which included a public account of the pardoning of President Nixon—the significant historical information. The plot of the judicial narrative is clear: Interfering with the current balance between the two legal entities would destroy "any expectation of copyright protection." This expectation is, as the Court

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> the success of the NII; it is an essential component. Effective copyright protection is a fundamental way to promote the availability of works to the public.

See INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 16 (1995). *See also id.* at 20 ("Copyright is the body of law that lets such a system work. It appropriates to intangible goods—copyrighted works—the characteristics of tangible property. This is what lets the information marketplace work."). Note that the "information marketplace" is not necessarily the same as the "marketplace of ideas" that the First Amendment celebrates. It is more of a commodified version of that market, one in which information—the subject matter of the First Amendment—is treated just like any other commodity. But as far as the *White Paper* is concerned, these are equated.

62. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 597 n.21 (1985) (Brennan, J., dissenting).

63. Jessica Litman observed a similar apocalyptic tone in the campaigns and lobbying of interested parties. *See* Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 36–37 (1994). This element of the story is also apparent in the debate regarding the right to publicity. *See* Diane Leenheer Zimmerman, *Who Put the Right in the Right of Publicity?*, 9 DEPAUL-LCA J. ART & ENT. L. & POL'Y 35, 50 (1998).

64. *Harper & Row Publishers, Inc.*, 471 U.S. at 557.

explains, the incentive to create, and the party that stands to lose the most is the public. The public's interest is described, interestingly, in what can be considered to be First Amendment language: "an important source" and "significant historical information." The message is clear: If we dare interfere with the current equilibrium, copyright law will fail, and immediately, free speech will collapse too. The Court made the same point again in a paragraph devoted to refuting the First Amendment argument. Quoting Lionel Sobel, the Court stated: "'If every volume that was in the public interest could be pirated away by a competing publisher[]. . . the public [soon] would have nothing worth reading.'"[65] *Eldred* skipped this part of the narrative. The Court did not engage in "apocalyptic prophecy," but turned directly to the resolution. In fact, the justices made it quite clear that they think the CTEA is bad law, but nevertheless, the majority held that it is a choice for Congress to make.[66] Then, as in the previous judicial chapters of the no-conflict narrative, it turned to resolving the conflict argument.

Resolution. Once trouble interferes with and disturbs the harmony, the problem should be resolved. The restoration of peace and harmony is the last step of the judicial narrative. It concludes the story and leaves us with a clear bottom line: There is no conflict between copyright law and the First Amendment, so there is no problem.

Courts undertake the mission to restore harmony by appealing to internal copyright mechanisms, especially the idea-expression dichotomy (that copyright law only protects expression) and the fair-use defense.[67] The defense and the dichotomy are designated a role in resolving the conflict, or, more accurately, dissolving it. These doctrines are the shield and sword with which the courts successfully defeat the conflict argument. Consider the solution in *Harper & Row*:

> In view of the First Amendment protections *already embodied in the Copyright Act's* distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and

65. *Id*. at 559 (quoting Sobel, *supra* note 36, at 78). *See also* Ladd, *supra* note 60, at 427. For more on apocalyptic visions, see Swanson, *supra* note 39, at 297; Perry, *supra* note 39, at 644.

66. *See* Eldred v. Ashcroft, 123 S. Ct. 769, 782–83 (2003); *supra* text accompanying note 20 (hinting that the CTEA is unwise). *See also Eldred*, 123 S. Ct. at 790 ("Beneath the facade of their inventive constitutional interpretation, petitioners forcefully urge that Congress pursued very bad policy in prescribing the CTEA's long terms. The wisdom of Congress' action, however, is not within our province to second guess."). In oral argument, Justice Sandra Day O'Connor expressed the same view, stating, "I can find a lot of fault with what Congress did here . . . ." United States Supreme Court Official Transcript, 2002 WL 31309203 at *14 (Oct. 9, 2002), *Eldred*, 123 S. Ct. at 769.

67. *See* 17 U.S.C. §§ 102(b), 107 (2000).

> comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright.[68]

The idea-expression dichotomy is familiar to any copyright student.[69] Many courts found recourse in the dichotomy, following the lead of Melville Nimmer. Nimmer identified what I call the "external conflict."[70] He found that the most efficient machinery in the resolution of the conflict is the dichotomy:

> [T]he idea-expression line represents an acceptable definitional balance as between copyright and free speech interests. In some degree it encroaches upon freedom of speech in that it abridges the right to reproduce the "expression" of others, but this is justified by the greater public good in the copyright encouragement of creative works. In some degree it encroaches upon the author's right to control his work in that it renders his "ideas" per se unprotectible, but this is justified by the greater public need for free access to ideas as a part of the democratic dialogue.[71]

This view was adopted in *Harper & Row*[72] and again in *Eldred*.[73]

The fair-use defense was also designated a role in solving the conflict in several cases. *Time Inc.* and *Rosemont*, though they did not mention the First Amendment explicitly, reached a free speech favorable result through a liberal analysis of the fair-use defense.[74] The first case to address the conflict directly, and to turn to the fair-use defense for its resolution, was

68. *Harper & Row Publishers, Inc.*, 471 U.S. at 560 (emphasis added). For a similar response, see *New Era Publications International v. Holt*, 873 F.2d 576, 584 (2d Cir. 1989).

69. *See* 17 U.S.C. § 102(b) (2000); Baker v. Selden, 101 U.S. 99, 103 (1879); Warner Bros. v. Am. Broad. Cos., 720 F.2d 231, 240 (2d Cir. 1983). In *Lee v. Runge*, Justice William Douglas commented that recognizing copyright over ideas would raise serious First Amendment problems. *See* 404 U.S. 887, 892–93 (1971). For an economic analysis of the dichotomy, see William M. Landes & Richard Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 347–48 (1989) (arguing that legal protection for ideas would increase the cost of creation and reduce the number of works created).

70. *See* Nimmer, *supra* note 36, at 1180.

71. *Id.* at 1192–93. Later on, Nimmer accepted that the fair-use doctrine has at least some power in reconciling the tension between copyright law and the First Amendment. *See* 8 CIS LAW REPRINTS 307, 335 (1984–85) (arguing on behalf of Gannett Company, *Los Angeles Times*, *Newsweek*, *The New York Times*, and the *The Washington Post*, as amici curiae in *Harper & Row Publishers, Inc.* in support of *The Nation*).

72. *Harper & Row Publishers, Inc.*, 471 U.S. at 556–57.

73. Eldred v. Ashcroft, 123 S. Ct. 769, 789 (2003).

74. *See* Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 146 (S.D.N.Y. 1968); Rosemont Enters. v. Random House, Inc., 366 F.2d 303, 307–08 (2d Cir. 1966).

Walt Disney v. Air Pirates.[75] Air Pirates admitted copying Disney's cartoon characters and their names in its counter-cultural comic book, the *Air Pirates Funnies*.[76] Air Pirates' defense was that its cartoons were parodies, and that its borrowing was entitled to the fair-use defense. The district court disagreed, issuing a preliminary injunction while dismissing a First Amendment objection to this injunction.[77] It reasoned that "[t]he determination that the defense of fair use could not be successfully asserted here would seem to resolve the further contention that the First Amendment works to prevent issuance of a preliminary injunction."[78] This case is just one example. Courts in other cases have used the fair-use defense to diffuse the tension between copyright law and free speech concerns, concluding that there is no conflict between them.[79]

In *Eldred*, the Supreme Court pointed to two more safeguards found within the CTEA.[80] *Eldred* hints that this is not a definitive resolution, however. In the majority's final comments on the First Amendment

75. Walt Disney v. Air Pirates, 345 F. Supp. 108, 116 (N.D. Cal. 1972), *aff'd in part, rev'd in part*, 581 F.2d 751 (9th Cir. 1978).

76. *See Walt Disney*, 581 F.2d at 752–53. The court was somewhat embarrassed in describing the cartoons, and adopted a commentator's description of "'a rather bawdy depiction of the Disney characters as active members of a free thinking, promiscuous, drug ingesting counterculture.'" *Id.* at 753 (quoting Kevin Wheelright, Comment, *Parody, Copyrights and the First Amendment*, 10 U.S.F. L. REV. 564, 571 (1976)).

77. *Walt Disney*, 345 F. Supp. at 115–16.

78. *Id*. at 115. Interestingly, the Ninth Circuit resolved the question by turning to the idea-expression dichotomy, not to fair use. *See Walt Disney*, 581 F.2d at 758.

79. *See, e.g.*, Roy Exp. Co. v. Columbia Broad. Sys., Inc., 672 F.2d 1095, 1099–1110 (2d Cir. 1982) (coupling the rejection with the alternative-avenue doctrine); Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1175–76 (5th Cir. 1980); Wainwright Sec., Inc. v. Wall Street Transcript Corp., 558 F.2d 91, 95 (2d Cir. 1977) (stating that the First Amendment/copyright conflict is solved by fair use); Keep Thomson Governor Comm. v. Citizens for Gallen Comm., 457 F. Supp. 957, 960 (D.N.H. 1978) (denying an injunction against the use of fifteen seconds of a song owned by one candidate in a gubernatorial race in New Hampshire in a political radio advertisement of another candidate where the song was followed by critical narration). *See also Triangle Publ'ns, Inc.*, 626 F.2d at 1181 (Brown, J., concurring); Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 778 F. Supp. 1247, 1252 (S.D.N.Y. 1991) ("The law, however, is clear that such first amendment concerns are subsumed within the fair use analysis of § 107."); Ass'n of Am. Med. v. Carey, 482 F. Supp. 1358, 1365 n.17 (N.D.N.Y. 1980) (rejecting the conflict argument in light of the belief that "[s]uch claims have traditionally been

80. These are 17 U.S.C. § 108(h) (2000) (allowing libraries, archives, and the like to reproduce, distribute, and display in digital form copies of certain published works during the extended twenty years for certain purposes), and *id.* § 110(5)(B), The Fairness in Music Licensing Act of 1998 ("FIMLA") (exempting small businesses from paying performance royalties on music played from licensed radio and television stations). Interestingly, the Court did not note that FIMLA has been found by the World Trade Organization ("WTO") to be inconsistent with the U.S.'s international commitments under the Trade-Related Aspects of Intellectual Property Rights ("TRIPS") agreement. *See infra* note 224.

argument, it concluded that "[t]o the extent such assertions raise First Amendment concerns, copyright's built-in free speech safeguards are *generally adequate* to address them."[81] This is intriguing language, and I think it should be read carefully. It implies that in some situations, the built-in safeguards might be inadequate. In fact, I would argue that this is one of the new directions of the conflict discourse in the post-*Eldred* era that we now enter; that is, this new direction seeks to identify the situations where the idea-expression dichotomy and the fair-use defense are inadequate.[82]

II. TWO CONFLICTS INSTEAD OF NONE

We can now turn to the distinction between the two kinds of conflict with respect to copyright law and the First Amendment: an internal conflict and an external one. The distinction is an attempt to define the subject matter of the denial of the conflict and to unravel what it is that the courts deny. The answer, surprisingly, is that often it seems that they do not know what it is that they are denying—they simply deny it. This Part begins by outlining the internal conflict and then the external one. I then argue that the latter is very often internalized too quickly within the former in two ways, which I call "mechanical internalization" and "substantive internalization." The First Amendment argument in *Eldred* was also internalized in both ways.

A. THE INTERNAL CONFLICT

The internal conflict is familiar to students of copyright, although it has not thus far been described as internal vis-à-vis an external conflict. The internal conflict can be described in at least two ways. First, it can be described as a conflict between two rival conceptions of copyright law. Borrowing the terms from Patterson and Lindberg, these are the "proprietary conception" of copyright law and the "regulatory conception."[83] The two conceptions differ in their theoretical

81. Eldred v. Ashcroft, 123 S. Ct. 769, 789 (2003) (emphasis added).

82. There are few pre-*Eldred* scholarly attempts of this sort. *See, e.g.*, Fiona Macmillan Patfield, *Towards a Reconciliation of Free Speech and Copyright*, *in* The YEARBOOK OF MEDIA AND ENTERTAINMENT LAW 199, 216–19, 222–23 (1996); Netanel, *supra* note 15, at 13–23 (discussing the limits of the dichotomy and fair-use defense); Tushnet, *supra* note 39, at 7–27 (same); Yen, *supra* note 39 (specifying the limits of the idea-expression dichotomy).

83. *See supra* note 21. Other possible titles are offered by Paul Goldstein, who calls those who hold the proprietary view "copyright optimists," and those who hold the regulatory conception yright pessimists." *See* PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: THE LAW AND THE LORE OF COPYRIGHT FROM GUTENBERG TO THE CELESTIAL JUKEBOX 15 (1994).

work" of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property.

JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT 130 (J.M. Dent & Sons Ltd. 1962) (1690). For a thorough discussion of Locke's theory, see JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 19, 137–252 (1988). *See also* RADIN, *supra* note 85, at 98–119 (criticizing Richard Epstein's defense of an absolute property-rights theory).

right.[87] This applies to intellectual property as well,[88] despite our strong intuition that something that we created is ours. The rhetoric of American copyright law is that it is not a natural right;[89] it is better understood as a legal construction. There are no metaethical reasons for thinking of it as a principle-based property. These rights (both real property and intellectual property) are best explained and understood as policy based and consequentialist: They aim to achieve certain (important) goals, but have no inherent value of their own. As we will see, holding a regulatory conception does not necessarily mean that there is agreement as to what these goals are.

The two conceptions of copyright law often dictate the same legal rules and lead to the same results, but, occasionally, they each dictate a very different outcome. The case of copyright protection for databases is an example. A proprietary conception will find the time, effort, and labor invested in the creation of a database sufficient to accord the creator of the database with copyright protection, whereas a regulatory view would insist on other elements, which usually are summed up in the requirement of originality.[90] Another important difference is that of moral rights. The personality-based understanding of copyright law supports, and, in fact, requires, strong protection of those aspects of the work that reflect the author's identity, whereas the regulatory conception is reluctant to

87. Jennifer Nedelsky points to the paradox of (real) property: It is the creation of the state, but is a symbol for the limited power of the government. *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 248 (1990).

88. Indeed, the lessons of real property can be helpful in structuring intellectual property. *See, e.g.*, Travis, *supra* note 38. We should be mindful of the many differences, however, chief among which is the different asset that is regulated. Land and chattels are important, but works of authorship bear upon the most precious human creation: knowledge and information, which, in turn, are fundamental components of our understanding of democracy. *See* Niva Elkin-Koren, *Cyberlaw and Social Change*, 14 CARDOZO ARTS & ENT L.J. 215 (1996). *See also* THE COMMODIFICATION OF INFORMATION (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002) (observing the process through which intellectual property works are treated by law as real property).

89. *See* Graham v. John Deere Co. of Kan. City, 383 U.S. 1, 8–9 (1966) (discussing Thomas Jefferson's rejection of a natural-rights theory of intellectual property rights in a patent case); White-Smith Music Co. v. Apollo Co., 209 U.S. 1, 15 (1907) ("[I]t is perfectly well settled that the protection given to copyrights in this country is wholly statutory."); Am. Tobacco Co. v. Wreckmeister, 207 U.S. 284, 291 (1907) ("In this country it is well settled that property in copyright is the creation of the Federal statute passed in the exercise of the power vested in Congress by the Federal Constitution . . . ."); Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 596, 598–99 (1834).

90. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) (finding that labor expended in making a phone directory was not sufficient to create copyright protection). For a discussion of the database debate, see Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L.J. 535 (2000).

acknowledge these rights.[91] This difference is especially apparent when the continental view of copyright law is contrasted with the American one.

When we consider, for example, the extension of the copyright term, it matters greatly whether we understand copyright under the proprietary view, in which case any term of protection should be considered a limitation thereupon, or whether we hold the regulatory view, in which case the term of protection should be measured and examined with the instrumental goal in mind.[92] Under current copyright law, the debate on the CTEA reflects the latter view—a regulatory conception of copyright law. The debate is thus an intra-regulatory one.

There are many other situations in which our theory of copyright makes a difference, and hence, it is crucial that we choose between the rival conceptions of copyright. The competition between the two conceptions mirrors the internal conflict; therefore, it is a conceptual conflict. Later on, we will see how the two conceptions are often confused, and that there is a gap between the (regulatory) rhetoric and the (proprietary) practice.[93]

2. The Intra-Regulatory Conflict

Within the regulatory conception, there is a second way to describe the internal conflict. It may be described as the familiar struggle between the intended goal of copyright law (to promote the progress of science) and the tools it creates and applies to achieve that goal (awarding authors legal protection). This type of internal conflict will be referred to as intra-regulatory conflict. However we understand copyright law, there is a tension at its deepest foundation on which the entire body of law is premised. First, we will look at the subject of copyright law and will outline a first form of the conflict: Does it focus on the individual or on the public? We will then look at the activity that copyright law focuses on and will outline a second form of the conflict: Does copyright law focus on the production or the use of knowledge?

The Individual v. the Public. The internal conflict in copyright law is evident in the few constitutional words that grant Congress the power to enact copyright legislation. Copyright's goal is of a public nature.

91. *See* 17 U.S.C. § 106A (2000) (rather limited in scope). *See also* Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(A)*, 77 WASH. L. REV. 985 (2002) (advocating the enactment of a federal right of attribution).

92. This question lies at the heart of the famous 1774 English case of *Donaldson v. Becket*, 98 Eng. Rep. 257 (K.B. 1774).

93. *See infra* Part III.B.2.

"Progress" is a cumulative endeavor,[94] and "progress of science" (whether we adhere to the contemporary meaning of the word "science" or the wider late eighteenth-century meaning (i.e., knowledge))[95] is a goal that can be plausibly attributed only to the public. It does not make much sense to read this statement, in its constitutional context, as an individualistic goal. The mechanism for achieving this public goal lies in turning to the individual, however. Individually aimed incentives will result in more works for the benefit of the public.

The emphasis on the public is pervasive throughout the history of American copyright law. Copyright originated in England, and in its infancy, it was entangled with censorship and the regulation of the book trade for quite a while. But by the time the American system incorporated copyright, it was a more mature scheme, void of the unfriendly company of censorship. The advancement of learning was the (public) goal of copyright law. James Madison, in referring to copyright and patents, wrote in *The Federalist No. 43* that "[t]he public good fully coincides in both cases, with the claims of individuals."[96] The courts agreed with this understanding, but clarified that there is a hierarchy in which the goal (the public's interest in the progress of knowledge) ranks higher than the means (the rights of authors): "'The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.'"[97] Congress held a similar view.[98]

94. Copyright law can benefit from the idea of progress, which was injected into copyright law at the time of its constitutionalization at the end of the eighteenth century. *See* JOHN BAGNELL BURY, THE IDEA OF PROGRESS: AN INQUIRY INTO ITS ORIGIN AND GROWTH (1932). The idea holds a particular understanding of the process in which knowledge is created. The process is seen as a gradual accumulation of knowledge through an intergenerational venture that aims at a better future for humanity. It is controlled by human beings and not predetermined by a supernatural power. For its influence on the shaping of copyright law, see Birnhack, *supra* note 53.

95. *See* WALTERSCHEID, *supra* note 45, at 125–26.

96. THE FEDERALIST NO. 43, at 217 (James Madison) (Buccaneer Books, Inc. 1992).

97. Mazer v. Stein, 347 U.S. 201, 219 (1954) (quoting United States v. Paramount Pictures, 334 U.S. 131, 158 (1948)). *See also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) ("The limited grant is a means by which an important public purpose may be achieved."); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975). In *Aiken*, the Court stated:

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.

Id. at 156.

98. The House Report on the 1909 Copyright Act provides the following explanation:

> [Copyright law is based] upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings. . . . Not primarily for the benefit of the author, but primarily for the benefit of the public . . . .

The end of promoting public progress is achieved by focusing on the individual (the author or inventor). This focus should not mislead us into confusing means with ends. The Constitution, the copyright laws over the past 213 years, and their judicial interpretations assume this means-ends relationship. The assumption of causality is in the spirit of Adam Smith's well known proposition, made at the time of the American Revolution:

> It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages. Nobody but a beggar chuses to depend chiefly upon the benevolence of his fellow-citizens.[99]

James Madison famously noted in *The Federalist No. 51* that aiming at the self-interest to achieve a public goal is based on the notion that men and women are not angels.[100] The Framers adopted this approach of "private vice"/"public good" as a working assumption.[101] In other contexts (e.g., the structure of the government), however, the Framers took a more Hobbesian, pessimistic approach, and thought that self-interests should be juxtaposed so that they could act as a check on each other.[102] Copyright law is based on the notion that the accumulation of self-interests will result in the public good; but unlike the constitutional separation of powers, it has no internal check.

This coexistence of private interests and a public interest does not necessarily create a conflict. The conflict occurs where the self-interest and the public good pull in opposite directions. The internal conflict in copyright law arises because the incentive offered to potential authors is control of their future works, which runs exactly counter to the public good that it purports to promote. Copyright law tolerates the conflict on the

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H.R. REP. NO. 2222, at 7 (1909).

99. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 15 (Edwin Cannan ed., Random House, Inc. 1994) (1776).

100. THE FEDERALIST NO. 51, at 262 (James Madison) (Buccaneer Books, Inc. 1992). For a thoughtful discussion of the Framers' channeling of the self-interest of the people to the benefit of the public, see Robert A. Goldwin, *Of Men and Angels: A Search for Morality in the Constitution*, *in* THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 1, 3 (Robert H. Horwitz ed., 1977) [hereinafter THE MORAL FOUNDATIONS].

101. *See* Martin Diamond, *Ethics and Politics: The American Way*, *in* THE MORAL FOUNDATIONS, *supra* note 100, at 39, 49.

102. For a comparison of the Framers' approach to that of Adam Smith's, see Richard Hoftstadter, *The Founding Fathers: An Age of Realism*, *in* THE MORAL FOUNDATIONS, *supra* note 100, at 73, 73–76. Hoftstadter observes that in the Framers' attempt to defeat self-interest by cross-checking it with the interests of other people, they undermined their own project, for they necessarily underwrote self-interest in attempting to control it. *See id.* at 85.

ground that the public is willing to advance its long-term goal by paying an immediate and small price.[103] This is Lord Macaulay's famous tax.[104]

Authors and publishers receive this payment: They benefit from the control that the law accords them with respect to their works. They each have a separate self-interest—an expectation to be compensated and a reliance on this expectation—and a feeling that something has been stolen from them when they are not adequately (in their view) rewarded. Under these circumstances, attempting to achieve a public goal by harnessing self-interest is bound to result in a conflict. Full adherence to the primacy of the public's goal dictates keeping the price as low as possible no more than is needed to provide authors with incentives to create. The authors and publishers, on the other hand, want their compensation to extend to as many activities as possible and to be as high as possible. Hence, there is an internal conflict in copyright law, a conflict that permeates this whole body of law.[105]

Those who take the side of the individual in this conflict might do so due to a proprietary conception of copyright law. They understand copyright to be a natural right, deriving from one's investment of labor (a Lockean rationale) or one's personality (a Hegelian rationale). Here, the internal conflict reflects the conceptual conflict between the regulatory conception and the proprietary conception of copyright. Those who take the individual's side in this conflict, however, might do so due to a distorted regulatory conception: They celebrate the tool and forget the goal that it was meant to serve. The CTEA seems to be such a distortion.[106]

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103. Tom Bell aptly called this an "indelicate imbalance." *See* Tom W. Bell, *Indelicate Imbalancing in Copyright and Patent Law*, *in* COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE 1 (Adam Thierer & Clyde Wayne Crews eds., 2002).

104. In his 1841 speech opposing a proposal to extend the copyright term beyond the life of the author, Lord Macaulay explained his objection to the extension:

> The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and salutary of human pleasures. . . . I admit, however, the necessity of giving a bounty to genius and learning. In order to give such a bounty, I willingly submit even to this severe and burdensome tax.

LORD MACAULAY, *Speech in the House of Commons, Feb. 5, 1841*, *in* SPEECHES BY LORD MACAULAY 164 (G.M. Young ed., 1979).

105. Recall Madison's comment in *The Federalist No. 43*, in which he stated that "[t]he public good fully coincides in both cases[] with the claims of individuals." MADISON, *supra* note 96. This equation—the relationship between the public interest and the interests of individuals—can be explained as a conclusion, or resolution, of the internal conflict, rather than a justification thereof.

106. As I show later, Congress, in debating CTEA, assumed a proprietary conception of copyright law. *See infra* text accompanying note 223.

In any case, the clear holding of *Eldred* is that drawing the lines of the internal conflict is a task for Congress, not the courts. As long as Congress remains faithful to the regulatory conception of copyright law and does not step outside its contours, the general holding of deference in *Eldred* seems in place. The difficulty is, of course, defining the contours of copyright law and the regulatory approach thereof when the proprietary conception keeps lurking underneath the surface.

Production v. Use/Access and Supply v. Demand. We have just seen the public goal of copyright law phrased in the constitutional language of promoting the progress of science. This is a rather general and vague expression. Today, in the posthegemonic (Western) world, where monarchs and religious institutions no longer exclusively control the store of human knowledge, there seems to be a consensus that in order for innovation to take place, more knowledge of better quality is required.[107] The second way in which the internal conflict of copyright law is apparent lies in the different and conflicting conceptions of the process by which progress (or innovation) is achieved—the most important phase of the desired progress. In other words, the internal conflict can be explained around the activity on which it focuses.

How does creation begin? How is it enhanced? We can say that one phase of the internal conflict emphasizes the role of the production or the creation of knowledge, and that the other phase emphasizes the use thereof, which prerequires dissemination of knowledge and access. I call these, respectively, the "production view" and the "use/access view." As in the individual/public version of the internal conflict, the production and use/access version can be understood to reflect either the conceptual conflict (between the proprietary conception and the regulatory conception) or the intra-regulatory conflict. In the latter sense, it is a competition between an emphasis on the intended goal of copyright law (the dissemination, access, and use of knowledge) and an emphasis on the instrument applied to achieve the goal (the right accorded to authors to control the use of their works).

107. There might be a tension between more (quantity) knowledge and better (quality) knowledge—a tension that is further apparent when juxtaposed with various First Amendment rationales. Some free speech theories, such as Alexander Meiklejohn's self-government theory, can be read to emphasize quality, whereas other theories, like John Stuart Mill's notion of truth-seeking in the marketplace of ideas, can be interpreted to emphasize quantity. *See* ALEXANDER MEIKLEJOHN, *Free Speech and Its Relation to Self-Government*, *in* POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 20–26 (1965); JOHN STUART MILL, ON LIBERTY 18 (Wordsworth Classics 1996) (1869). This distinction between quality and quantity, and their juxtaposition under the copyright and First Amendment contexts, requires elaboration that exceeds the scope of this Article.

Production and use are, of course, interdependent phases of the same process, but courts nevertheless seem to emphasize the former at the expense of the latter. They render the circle into a dichotomy. To borrow from the standard economic vocabulary, the first view (production) is interested in the supply, the other (use/access) in the demand. The supply comes from the potential proprietor, who is the author, the potential author, or the entity for which that person works,[108] and the demand is that of the public—a demand for disseminated and accessible information and knowledge so that the knowledge can be further used. Supply and demand are interrelated; in most cases, one derives from the other.

Some jurists and commentators, however, assume that demand for knowledge alone is not strong enough to trigger potential suppliers (the would-be authors) to enter and supply the market.[109] They observe that in a world without copyrights, there would be a market failure because copying would be permitted, and potential suppliers of intellectual works would be unable to recoup their investment in production. Thus, they are concerned that the demand for those works would not be fulfilled. The demand itself is not, if viewed as such, sufficient to act as a trigger for the suppliers to create new works. Copyright law is justified, accordingly, as correcting the short circuit between supply and demand—it offers incentives to create. The demand's failure to trigger the supply is attributed to the unique feature of intellectual property, and is based on economic and behavioral assumptions.

The "unique feature" is that knowledge is a public good; that is, once knowledge is created, it is almost impossible to exclude others from using it (unless the law creates legal means to exclude others, such as property rights). While the cost of creating a work might be high, the cost of reproduction is often low.[110] Another aspect of intellectual property as a public good is that the use of the knowledge by one party does not affect

108. *See* 17 U.S.C. § 201 (2000) (codifying the work-for-hire doctrine); New York Times Co. v. Tasini, 533 U.S. 483 (2001) (discussing the status of freelance authors in the context of the work-for-hire doctrine).

109. Landes and Posner point out that under a legal regime of copyright protection, "the decision to create the work must be made before the demand for copies is known." *See* Landes & Posner, *supra* note 69, at 327. In the text, I am referring to the market of knowledge in general, not to the market for a particular work. Indeed, Landes and Posner explain that in the absence of copyright protection, the "book probably will not be produced in the first place, because the author and publisher will not be able to recover their costs of creating the work" *Id*. at 328.

110. *Id*. at 326.

the same simultaneous use by others.[111] Thus, knowledge is both nonexcludable and nonrivalrous.

The "economic" prong of the assumption is that in order to achieve a common goal, individuals should be motivated to act in their own self-interests. We met this (Adam) Smith-like thought with the American spin just a short while ago.[112] It also can be described negatively: Without enabling (by according property rights) each one to pursue his or her self-interest, we will end up in a tragedy due to the problems of common action (e.g., costs of organization, negotiation, and externalities, such as free riding).[113] Put differently, the concern is that without legal rights, intellectual works will be copied due to the nonexcludable and nonrivalrous features of information and knowledge, and authors will not be rewarded. Thus, they will have no reason to create. This assumption is also based on the behavioral assumption.

The "behavioral assumption" is that for many potential authors, nonpecuniary rewards are insufficient incentives to produce knowledge. This assumption does not rest on empirical evidence, but it is widely assumed and I will not quarrel with it.[114] Nonpecuniary incentives include recognition, publicity, reputation among relevant reference groups, and more personal motivations, such as developing one's identity, self-fulfillment, aspiration for (spiritual) immortality, and the like. Some legal systems, as in civil law countries, do acknowledge nonpecuniary motivations and assume that they require their own set of legal protection through moral rights.[115] The American legal system, however, is skeptical of such claims and generally has refused to acknowledge personal motivations as worthy of copyright protection.[116] The extent to which that system has acknowledged nonpecuniary motivations has resulted in no

111. *See* Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 LOY. L.A. L. REV. 159, 170 (2002).

112. *See* SMITH, *supra* note 99, at 15.

113. For a similar idea with respect to real property, see Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244–45 (1968). Any comparison should take into consideration the unique characteristics of information.

114. A few scholars have raised some doubts. *See* BOYLE, *supra* note 26, at 19 ("To say that copyright promotes the production and circulation of ideas is to state a conclusion and not an argument."); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 324–27 (1970).

115. *See generally* Natalie C. Suhl, Note, *Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1203 (2002) (explaining the expansive nature of moral rights in European systems, which stands in contradistinction to their nature in the U.S.). *But see* Kwall, *supra* note 91 (supporting the recognition of moral rights in the U.S.).

116. *See, e.g.*, Vargas v. Esquire, Inc., 164 F.2d 522, 526 (7th Cir. 1947).

more than a minor, ancillary protection,[117] and even then, the moral rights that are recognized are translated into monetary meanings.[118] Under this skepticism, there is a need for an additional incentive, and that is found in the form of copyright protection.

These features and assumptions support the emphasis on the production of knowledge, and show that a use/access view of the creative process alone is inadequate. An extreme, exclusive use/access view has no answer to the short circuit between supply and demand. Adherents of economic analysis tend to ridicule the use/access view and envision it in an extreme form, as if the only alternative to the current copyright regime is a world without copyrights.[119] But no one seriously holds the use/access view in its caricaturized, zealous form. Those who hold the use/access view do recognize the necessity of the production of knowledge, but believe that the most important part in the knowledge process is its ultimate goal: what is done with the knowledge, that is, how it is used. They understand the unique features of intellectual property, and they share much of the economic/psychological assumptions; however, they also think that the economic view is not all that is to be found in the overall picture. They think that knowledge can be used in several ways, and that it has other purposes in addition to creating further knowledge. Knowledge is important also for its ability to serve democratic values.[120] Knowledge is a prerequisite for self-government, where citizens have to make informed decisions and participate on an equal basis in the collective political deliberation. These values reflect principles of political morality. These are not strange ideas. We often refer to them under another constitutional heading: the First Amendment. So the choice is not in the form of either/or. It is not a choice between having a copyright system or not; rather, it is a matter of degree. Both poles of the knowledge process are

117. The exceptions are the Visual Artists Rights Act of 1990 ("VARA"), to the Copyright Act, and state laws that have a somewhat wider effect. The most notable of these are the statutes of California (CAL. CIV. CODE § 987 (West 1995)) and New York (N.Y. ARTS & CULT. AFF. LAW § 1403 (McKinney 1984)).

118. *See* Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95 (1997) (interpreting moral rights as having economic interests attached to them).

119. See, for example, the now classic exchange between (then) Professor Stephen Breyer and (then) student Bary W. Tyerman in Breyer, *supra* note 114, at 284 (writing that his study provides a reason to "hesitate to extend [copyright] or strengthen it"); Bary W. Tyerman, *The Economic Rationale for Copyright Protection in Published Books: A Reply to Professor Breyer*, 18 UCLA L. REV. 1100, 1102 (1971) (assuming that Breyer was advocating the abolition of copyright); Stephen Breyer, *Copyright: A Rejoinder*, 20 UCLA L. REV. 75, 77, 80 (1972) (pointing out Tyerman's mistake).

120. *See* Benkler, *supra* note 12; Elkin-Koren, *supra* note 88; Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996).

vital, but the production phase is understood to be instrumental and secondary to the chief purpose of the process, which is the use of the knowledge.

This formation of the internal conflict of copyright law, which ran along the lines of the activity that is regulated by it, is parallel to the previous formation of the internal conflict, which ran along the lines of the subject of copyright law—the emphasis on the individual or on the public. Courts that struck the balance between the public and individual authors, and paid more attention to the public goal, tended to describe the goal of copyright law in terms of dissemination and use of knowledge.[121] Courts that struck the balance more in favor of the authors tended to describe it in terms of production, and downplayed the public goal of the dissemination of knowledge and its subsequent use. This can be understood as either taking a proprietary position (under the conceptual conflict), or (under the intra-regulatory conflict), being influenced by placing the means side of the legal formula in a position that is preferable to that of the goal.[122]

How is copyright conceived in *Eldred*? Interestingly, it is not easy to decipher or characterize the Court's conception of copyright in the light of its two-step response to the copyright argument raised by the plaintiffs. First, heavily relying on history, the Court reached the conclusion that the CTEA complies with the constitutional prescription of "limited [123] Second, the Court turned to examine whether the CTEA was a "rational exercise of the legislative authority."[124] Here, the Court pointed to a few of Congress' explanations[125] and opted for deference.[126] Once the Court

121. *See, e.g.*, Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (describing the goal of copyright law as "promoting broad public availability of literature, music and the other ar which refers to a use/access view). Also consider the majority opinion in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (describing the goal of copyright law as "society's competing interest in the free flow of ideas, information, and commerce," which are use/access terms). Judges who adhere to the side of the individual authors and emphasize the side of production tend to describe the goal of copyright law in a rather modest tone. Consider, for example, Justice Harry Blackmun's dissenting opinion in *Sony*, in which he described copyright's goal as "advanc[ing] public welfare." *Id*. at 477 (Blackmun, J., dissenting) (quoting Mazer v. Stein, 347 U.S. 201, 219 (1954)).

122. Patterson observes that a proprietary conception of copyright law speaks in terms of creation, whereas a regulatory conception (which he advocates) speaks in terms of dissemination. *See* Patterson, *supra* note 37, at 5–7.

123. *See* Eldred v. Ashcroft, 123 S. Ct. 769, 781 (2003).

124. *Id*.

125. The Court mainly mentioned the need to fit the standard European copyright term in order to ensure equal protection for American copyright owners in Europe. *Id.* For an interesting discussion of international influence on American copyright law, see Greame W. Austin, *Does the Copyright Clause Mandate Isolationism?*, 26 COLUM.-VLA J.L. & ARTS 17 (2002). The Court also mentioned

deferred to Congress, it did not elaborate on how it sees the issues. In this sense, the decision is rather thin (though it is definitely not thin with respect to the overall constitutional interpretation of copyright law).

B. THE EXTERNAL CONFLICT

Let us zoom out. The external view adopts a wider point of view than the internal one and is therefore capable of seeing a larger picture. Nevertheless, it is not (or rather, should not be) indifferent to the internal conflict. The external view does not see copyright law as an isolated area, but rather as part of the entire constitutional composition. It refuses to confine its observation to one area of the law and necessarily pays attention to the interaction among elements of the whole. The external view reflects our need for coherence and consistency among different legal spaces. It refuses to narrow its view to one area of law and searches for the implications of each legal category upon the other. The external view sets a check on legal compartmentalization, which is so ubiquitous in legal thought. It reminds us that classifying a legal question into a particular rubric should not be the end of the discussion, but rather an aid in our process of comprehension.[127]

Applying the external view to the study of copyright law immediately indicates at least some friction, if not a direct clash, between the First Amendment's command to not abridge speech on the one hand, and the Copyright (and Patent) Clause, which permits Congress to limit speech, on the other. Taking the external view requires that we pay attention to this tension, search for ways to explain its removal, or resolve it. In itself, the external view does not instruct us how to resolve (or dissolve) the conflict. This resolution will turn on the views and theories that we hold as to constitutional law in general and as to our conceptions of copyright law and the First Amendment in particular.

In fact, the early no-conflict narrative can be seen as an attempt to address the external conflict, turning to the language and history of the First Amendment and the Copyright Clause, and to constitutional structure. But it was an unproductive avenue. First and foremost, it assumes a rather narrow view of originalist interpretation—one that attaches cardinal

demographic, economic, and technological changes. *See Eldred*, 123 S. Ct. at 782. Compare this to the strong criticism offered by Justice Stephen Breyer in his dissent. *Id.* at 808–10 (Breyer, J., dissenting).

126. *See id.* at 781–83.

127. *See* DWORKIN, *supra* note 1, at 251–53 (warning against legal compartmentalization); Zimmerman, *supra* note 37, at 668–69 (discussing the outcome-determinative effect of classifying a copyright case into a property or speech case).

importance to the intentions of the Framers and the textual meaning of the Constitution. Even the originalists among us will find this avenue unhelpful in the case of copyright law due to the lack of direct historical evidence on its constitutionalization. So how should we address the external conflict? I think a serious effort to address the external conflict requires reaching a deep understanding of each of the conflicting fields, and then searching for common, substantive underlying theories.[128]

Eldred's attorney, Lawrence Lessig, raised a direct First Amendment argument. He argued that the CTEA limits speech, or—rephrased in the terms applied here—that the external conflict should be addressed. In light of the D.C. Circuit's blunt statement that "copyrights are categorically immune from challenges under the First Amendment,"[129] the conflict argument was placed under the spotlight; however, the Court avoided it, by internalizing it.

C. INTERNALIZING THE CONFLICT ARGUMENT

The distinction between the internal conflict and the external one, and their respective views, allows us to rephrase the conflict argument. The argument that there is a tension between copyright law and free speech is made from the vantage point of the external view; but the judicial response originates from an internal view. This is the internalization of the conflict discourse. This is the analytical point where the conflict is denied.

The judicial narrative told in response to the conflict argument insisted that copyright law and free speech live side by side in harmony. The early narrative replied to the conflict argument on its own terms. It was a reply that understood the conflict argument to be on the constitutional external level. It looked into some "overall" elements, such as constitutional history, text, and structure,[130] but this approach fails the test of interpretive theory.[131] The contemporary narrative, inasmuch as it is distinct from the early one, replies to the conflict argument in a more sophisticated manner. In the course of doing so, however, the contemporary narrative switches the level of the discussion from the external view to the internal one. It thus internalizes the conflict argument. This internalization takes two main forms, which I call "substantive internalization" and "mechanical internalization."

128. For an interesting discussion along this line, see Baker, *supra* note 39, at 899.
129. Eldred v. Reno, 239 F.3d 372, 375 (D.C. Cir. 2001).
130. *See supra* Part I.B.
131. *See* Birnhack, *supra* note 4, at 260.

Substantive internalization is achieved by placing the two legal regimes on the same normative plateau. This is the main effect of the shared-goal argument. Once we accept that both copyright law and the First Amendment share the same goal, the two regimes converge.[132] As a result of this convergence, taking the external view is simply redundant. The effect of the shared-goal argument is further strengthened and reinforced by the companion division-of-labor argument. The relationship between the two regimes is then escalated from one of harmony to one of interdependence.[133] This vision deemphasizes the elements of the two regimes that are less compatible. If we do not notice the incompatible areas and accept the normative convergence of the two fields, however, then we would have no reason to take the external view. That would be a waste of time.

It is important to note that substantive internalization is possible only if we hold an instrumental view of copyright law. Only when we understand and justify copyright law as a tool to achieve a goal can we plausibly talk of a shared goal of copyright law and other legal regimes. If we hold a proprietary view of copyright law (i.e., if we understand and justify it on the basis of a natural-rights theory), it is implausible that we would think of it as having a goal at all; instead, we would say that this proprietary view is an end in itself. Therefore, substantive internalization is more likely to occur in the Anglo-American legal tradition than in that of civil law countries. I will return to this transatlantic comparison later on.

Mechanical internalization takes a different route. It is achieved by giving a few copyright doctrines the role of carrying free speech concerns. This is the role that the contemporary narrative gives to the idea-expression dichotomy and the fair-use defense. The two doctrines are said to mitigate the conflict, leading to its successful elimination.[134] If so, we need not take

132. For an argument along these lines, see Tushnet, *supra* note 39, at 35–37.

133. *See supra* Part I.B.3.

134. *See, e.g.*, Eldred v. Ashcroft, 123 S. Ct. 769, 788–89 (2003); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985) (invoking both the dichotomy and the fair-use defense); New Era Publ'ns Int'l v. Holt, 873 F.2d 576, 584 (2d Cir. 1989) (same); Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1170 (9th Cir. 1977) (declaring that the idea-expression dichotomy "already serves to accommodate the competing interests of copyright and the first amendment"); Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 778 F. Supp. 1247, 1252 (S.D.N.Y. 1991) ("The law, however, is clear that such first amendment concerns are subsumed within the fair use analysis of § 107."); Quinto v. Legal Times of Wash., Inc., 506 F. Supp. 554, 560 (D.D.C. 1981) ("The distinction between ideas, news events, and factual developments, all of which are not copyrightable, and expressions of the same, which are copyrightable, serves to accommodate the competing interests of copyright and the First Amendment."); Walt Disney v. Air Pirates, 345 F. Supp. 108, 115 (N.D. Cal. 1972) ("The determination that the defense of fair use could not be successfully

the external view, for the internal mechanisms have already taken it into account. The doctrines are portrayed as ambassadors of good faith, acting within the territory of copyright law and representing the interests of the foreign land of the First Amendment. This form of internalization is mechanical, for it does not assume any convergence on a normative dimension. Hence, this form of internalization does not depend on our understanding of copyright law, and indeed, it is asserted both in Anglo-American law and in civil law countries.[135]

The recent controversy regarding the "other voice" version of *Gone with the Wind*, Alice Randall's, *The Wind Done Gone*, illustrates the complex relationship among the internal view, the external view, and the internalization of the latter. The plaintiffs, who are the owners of the copyright in the famous novel, sued Randall for copyright infringement. In deciding the appropriateness of an injunction, the Eleventh Circuit examined both the fair-use defense and the First Amendment. Under the heading "The Union of Copyright and the First Amendment," the court portrayed the relationship between copyright law and the First Amendment in terms of harmonious coexistence: "The Copyright Clause and the First Amendment, while intuitively in conflict, were drafted to work together to prevent censorship; copyright laws were enacted in part to prevent private censorship and the First Amendment was enacted to prevent public censorship."[136] In the terms adopted here, this is a substantive internalization, which alludes to the shared-goal argument and the division-of-labor argument, as well as to a particular interpretation of the history of the two fields. The court then added the mechanical internalization, turning to the idea-expression dichotomy and the fair-use defense.[137] Its discussion of the latter, however, was inspired by the court's given task of mitigating the conflict. The court instructed itself that "[a]s we turn to the analysis required in this case, we must remain cognizant of the First Amendment protections interwoven into copyright law."[138] The court indeed remained true to this instruction.[139] Phrased in the terms applied here, although the court internalized the conflict argument, it did

asserted here would seem to resolve the further contention that the First Amendment works to prevent issuance of a preliminary injunction."), *aff'd in part, rev'd in part*, 581 F.2d 751 (9th Cir. 1978).

135. *See* LUCIE GUIBAULT, ALAI STUDY DAYS, LIMITATIONS FOUND OUTSIDE OF COPYRIGHT LAW (1998), *available at* http://www.ivir.nl/publications/guibault/VUL5BOVT.doc (last visited Aug. 18, 2003).

136. SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1263 (11th Cir. 2001) (citations omitted).

137. *See id.* at 1263–64.

138. *Id*. at 1265.

139. The injunction issued by the district court was subsequently vacated.

not lose sight of the external view. This is a rather unusual approach and should be applauded. In most cases, the external view is internalized and then neglected. In the next Part, I will argue that both should be taken.

A few cases mention yet a third element of copyright law as an internal mechanism that takes care of free speech concerns: the constitutional mandate that the protection is for "limited times."[140] This internal copyright mechanism itself was at the heart of *Eldred*. Once again, however, the U.S. Supreme Court refused to address the external level directly; rather, it turned to the early narrative, speaking in its originalist tone. Then it turned to the shared-goal argument (substantive internalization), the idea-expression dichotomy, and the fair-use defense (mechanical internalization).

But the Court also added several comments to which we should pay attention. One comment is that "copyright's built-in free speech safeguards are *generally adequate* to address [First Amendment concerns]."[141] In other words, the idea-expression dichotomy and the fair-use defense are important devices that, in most cases, fulfill their task, but not always. This reading has two crucial implications. First, courts should inquire whether the dichotomy and defense do indeed support the First Amendment. If or when they fail to do so, the mechanical internalization fails, and courts should accord effective power to the First Amendment. Second, the fair-use defense is not merely a nicety of copyright law. It is tasked by the Constitution to represent free speech concerns within copyright law, and hence, it cannot be abolished or even narrowed. This is an important conclusion in light of new pressures on copyright law that insist that, due to new digital technology, the fair-use defense is, in many situations, obsolete.[142]

140. *See* U.S. CONST. art. I, § 8, cl. 8. According to the U.S. Supreme Court:

> [T]he limited grant is a means by which an important public purpose may be achieved. It 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.

Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1985) (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984)).

141. *See* Eldred v. Ashcroft, 123 S. Ct. 769, 789 (2003) (emphasis added).

142. More accurately, the argument is that the fair-use defense can be justified as a response to market failure. *See* Wendy J. Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the* Betamax *Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982). If it can, the argument continues, then when we can solve the market failure in a different manner (through digital technology, for example) there is no more room for fair use. This argument relies on a particular kind of market failure, however—one that occurs due to high transaction costs. This is a problem that digital technology can indeed solve. But market failure can also be the result of motivations unrelated to "the progress of science" (i.e., private censorship or attempts at cultural control). Gordon herself recognized these situations. *See id*. at 1608. Glynn Lunney offers a rereading of *Sony Corp. of Am. v. Universal*

Another important comment in *Eldred* is the explicit denouncement of a particular D.C. Circuit statement. The U.S. Supreme Court stated, "We recognize that the D.C. Circuit spoke too broadly when it declared copyrights 'categorically immune from challenges under the First Amendment.'"[143] In other words, there might be situations in which the First Amendment is relevant to copyright law. Hence, *Eldred* does not close the door on the conflict argument; rather, it redirects the discourse to other channels.

Lastly, the Court indicates, though in a rather general manner, the situations in which copyright law is not categorically immune: "But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."[144] In other words, if Congress does alter the traditional contours of copyright law, the First Amendment might be relevant. What are these situations? This is a question yet to be decided. Later on, I will suggest that the Digital Millennium Copyright Act ("DMCA") might be such a situation.[145]

Now that we recognize two conflicts—internal and external—instead of none, it is time to ask which view we should apply when approaching the relationship between copyright law and the First Amendment—the internal or the external? In what follows, I will argue that both views should be taken, for they serve as a constitutional check and a conceptual check on each other.

III. THE EXTERNAL VIEW AS CONSTITUTIONAL AND CONCEPTUAL CHECKS

The external point of view draws our attention to the underlying constitutional approach of the judicial narrative (i.e., its tendency toward originalist interpretation and its interest in the history of copyright law). In this Part, I will argue, first, that the external point of view is a constitutional imperative, in addition to being a convenient interpretive check on the narrative. I will then argue that the external view should be taken in

City Studios, Inc., 464 U.S. 417 (1984), which has often been read as the source of the fair-use-as-market-failure view in its narrow sense. Lunney concludes that *Sony* is concerned not with market failure, but with market success. *See* Glynn S. Lunney, Jr., *Fair Use and Market Failure:* Sony *Revisited*, 82 B.U. L. REV. 975, 1030 (2002). Gordon herself has recently refined her views. *See* Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives*, *in* THE COMMODIFICATION OF INFORMATION, *supra* note 88, at 149, 149.

143. *Eldred*, 123 S. Ct. at 789–90 (internal citations omitted).

144. *Id*. at 790.

145. *See infra* text accompanying note 168.

addition to the internal view. Both views, together, serve as a check on the conceptual consistency of copyright law.

A. CONSTITUTIONAL IMPERATIVE

We saw that the contemporary narrative refuses to take the external view. I called this process internalization, and we observed two ways in which it was put to use. One was a mechanical internalization that turned to copyright doctrines; the other was a substantive internalization that turned to a (flawed) understanding of the two regimes. We can now consider the constitutional meaning of this internalization. It limits the discussion of the conflict argument to the internal sphere of copyright. By refusing to consult the First Amendment, courts, de facto, defer to the "judgment of the Constitution,"[146] and more so to the judgment of the legislature.[147] *Eldred* is a clear example of this attitude. On the internal level, the Court deferred to Congress, and at the same time, it refused to acknowledge the external level by internalizing it. This attitude reflects a narrow conception of the role of the judiciary, and it reveals the absence of a robust theory of rights.

Under some constitutional theories, deference is not only a good result but is the only one permitted.[148] A strict originalist interpretation, for example, prohibits judicial interference with the balances that legislatures struck, presumably according to the Constitution. The debate regarding proper interpretive theory far exceeds the scope of this Article, but it is submitted that this ex ante deference to Congress is unfortunate.[149] It betrays the courts' role in the constitutional system as a check on the legislature.[150] Taking the position that there is no external conflict is

146. *See* Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1187 (5th Cir. 1979).

147. *See, e.g.*, Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 330 (S.D.N.Y. 2000) (elaborating on the engine metaphor and deferring to "Congress' goals of preventing infringement and promoting the availability of content in digital form"), *aff'd*, Universal City Studios, Inc. v. Corely, 273 F.3d 429 (2d Cir. 2001).

148. *See* Paul M. Schwartz & William Michael Treanor, Lochner's *New Millennium: Copyright Term Extension, Constitutional Law, and* Eldred v. Ashcroft, 112 YALE L.J. (forthcoming 2003).

149. Judicial deference to Congress in copyright law is sometimes attributed to copyright law's technological character. Courts believe they are incompetent to engage in fact-finding that would determine the influence of new technologies upon the law. For a clear statement of this approach, see *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 167–70 (1975) (Burger, C.J., dissenting). This is not the kind of motivation (in relation to judicial deference) to which I am referring in the text, although it suffers from the same flaws.

150. Douglas Baird was close to making a similar argument with respect to *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), and the right of publicity. He argued that "the Court must be prepared to police the balance that the states strike." *See* Douglas G. Baird, Note, *Human*

therefore dangerous. It might limit the view to one policy-based area, thereby necessarily excluding from the discussion the principle-based commitments of the legal system that are to be guarded by the judiciary.[151]

Once we reject this theory, deference to the legislature is no longer self-evident. An alternative theory of constitutional interpretation holds a different view of the role of the judiciary. It adopts a moral reading of the Constitution as the proper constitutional interpretation.[152] This theory, in turn, is related to a theory of rights. If there are principle-based rights involved in this conflict, we need to be aware of them so that we can protect these rights against unjust encroachments by utilitarian, policy-based considerations. This is the essence of rights, understood as trumps.[153] It is the judiciary's duty to stand on guard, identify the rights, and protect them.[154]

Under a moral reading of the Constitution, we should be careful to not internalize the external view before we are satisfied that the balance struck by the legislature does not abridge human rights, or, at least, that it does not do so without sufficient justification. In our context, this means that the mechanical internalization should not be an ex ante approach, but, at most, an ex post conclusion. Instead of adhering automatically to internal copyright doctrines (the idea-expression dichotomy and the fair-use defense), we should question their power and ability to carry out the role the legislature designated to them (assuming we can identify such a designation), and we should do our best to interpret and apply them in a manner that fulfills this constitutional task. Indeed, the *SunTrust Bank* decision does exactly that: It interpreted the fair use in a manner that reflects its First Amendment task.[155] The comment in *Eldred* on the "adequacy" of the idea-expression dichotomy and the fair-use defense, therefore, is an important step toward a more skeptical attitude of mechanical internalization. Future cases should take this comment seriously and question the power of copyright law's mechanisms to

Cannonballs and the First Amendment: Zacchini v. Scripps-Howard Broadcasting Co., 30 STAN. L. REV. 1185, 1209 (1978).

151. *See* DWORKIN, *supra* note 1, at 221–24 (discussing the distinction between policy-based considerations and principles).

152. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 7–15 (1996).

153. This is based, of course, on Dworkin's theory of rights. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi (1977); Ronald Dworkin, *Rights As Trumps*, *in* THEORIES OF RIGHTS 153 (Jeremy Waldron ed., 1984).

154. *See* DWORKIN, *supra* note 153, at 131–49, 185.

155. *See* SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1263 (11th Cir. 2001); *supra* text accompanying note 135.

accommodate First Amendment concerns. Indeed, the conclusion of those who questioned the power of the doctrines was that it was limited, and that although the doctrines manage to take care of some free speech concerns, in many cases, this is not always so because of inherent flaws in these doctrines.[156]

As for the substantive internalization, we should be asking whether the alleged conflict involves rights and principles, and if so, what their scope is. If and when we find that the conflict involves rights, we should ask how these rights interact with other rights (or interests) that are involved in the conflict. An exclusive internal view lacks the tools to identify a principle-based right. Freedom of speech, needless to say, is a natural candidate for such a status. So we must observe the constitutional level of the conflict (i.e., the external conflict). Few courts have addressed both kinds of conflicts without confusing them (although their methodology has not been articulated as such).[157] *SunTrust Bank* served as one rather rare example of nonconfusion.[158]

156. *See supra* text accompanying note 82.

157. *See, e.g.*, Wainwright Sec., Inc. v. Wall Street Transcript Corp., 558 F.2d 91, 95 (2d Cir. 1977). The court first addressed the internal conflict and resolved it by turning to the fair-use defense. *Id.* at 94–95. Only then did the court turn to a separate discussion of the external conflict; and there too, it found that the fair-use defense "takes care" of free speech concerns. *See id.* I disagree with the court's fair-use analysis and conclusion, but accept its methodology.

158. *See also* Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc., 445 F. Supp. 875 (1978), *aff'd on other grounds*, 626 F.2d 1171 (5th Cir. 1980). The case was about a rather mundane issue of comparative advertising; it did not involve a political speech issue that immediately raises free speech concerns. Nevertheless, it offers several interesting ways to go about the conflict. The divergence between the district court and the Fifth Circuit, and the disagreement within the latter, exemplifies the points argued here.

The facts of the case, in a nutshell, are that during television commercials for a new television guide, the copyrighted cover of the competing *TV Guide* was displayed. The natural route to explore the situation was the fair-use defense. The district court found the defense incapable of taking a proper account of the public's free speech concerns and accordingly turned to the First Amendment. *See id.* at 881. In other words, the court began with an internal view and then turned to an external one. On appeal, the Fifth Circuit disagreed. *See Triangle Publ'ns, Inc.*, 626 F.2d at 1172, 1178. It found the fair-use defense sufficient to produce the same result—a result favorable to the public's concern. The majority vigorously disagreed with the district court's methodology, however. Judge Brown, in one concurring opinion, refused to acknowledge any external view. He limited the discussion to copyright law. *Id.* at 1178–82 (Brown, C.J., concurring in part and dissenting in part). Within it, Judge Brown applied the fair-use doctrine without even recognizing its role in mediating the internal conflict (although his fair-use analysis itself is flawless). His zealous objection to examining the external view suffers from many flaws, however. He surrenders to conventional legal categorization without questioning it. Moreover, he refuses to question the power of the copyright doctrines to take care of the external conflict; rather, he takes them for granted. Additionally, he fails to take seriously the constitutional setting, with its crucial attention on rights and their protection by the judiciary. Judge Tate, in a separate concurrence, adopted the district court's methodology. *Id.* at 1184 (Tate, C.J., concurring). The alternative view walks in the right path. It begins the discussion within the contours

Another interesting case for our purposes is *Universal City Studios, Inc. v. Reimerdes*, which focused on the DeCSS program and the anticircumvention sections of the DMCA.[159] These sections prohibit the circumvention of technological measures that control access to a copyrighted work,[160] the manufacturing, importing, selling, or trafficking of such circumvention technology,[161] or the manufacturing, importing, selling, or trafficking of technology that is primarily designed to circumvent technology that protects a right of the copyright owner.[162] These prohibitions are subject to an enumerated list of exceptions.[163]

The facts of the case are well known and need only a short recital. The copyright owners in motion pictures successfully claimed that the defendant, a website operator, violated the DMCA, first, by posting DeCSS, a program that decrypts technological access-protection measures installed on DVDs and DVD players, and later, by linking to other sites that posted DeCSS.[164] The district court issued an injunction, and the Second Circuit affirmed. The case raised many questions of first impression regarding the anticircumvention rules of the DMCA, but here, we will focus on the First Amendment analysis in the decisions.

Judge Lewis Kaplan of the district court found that a computer program is covered by the First Amendment,[165] as did other courts.[166] Accordingly, Judge Kaplan engaged in a constitutional First Amendment review of the antitrafficking provision of the DMCA, finding that it is a

of copyright law, but does not think of these contours as impassable borders. It recognizes no "No Trespassing" signs as it draws more flexible contours around copyright. It consults the First Amendment, takes it seriously, and offers a methodology that recognizes the constitutional meaning of copyright law.

159. *See generally* Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294 (S.D.N.Y. 2000) (regarding the dispute over the posting of decryption software for DVDs), *aff'd*, Universal City Studios, Inc. v. Corely, 273 F.3d 429 (2d Cir. 2001).

160. 17 U.S.C. § 1201(a)(1) (2000).

161. *Id.* § 1201(a)(2).

162. *Id.* § 1201(b).

163. *See id.* § 1201(d)–(k). Also consider the classes of copyrighted works that the Librarian of Congress determines in a rulemaking proceeding under § 1201(a)(1)(B), (C).

164. *Universal City Studios, Inc.*, 111 F. Supp. 2d at 303, 308–09, 312–13. The suit was based on the antitrafficking section of the DMCA. *Id.* at 316 (citing 17 U.S.C. § 1201(a)(2)).

165. *Universal City Studios, Inc.*, 111 F. Supp. 2d at 327. The Second Circuit affirmed. Universal City Studios, Inc. v. Corely, 273 F.3d 429, 445–49 (2d Cir. 2001).

166. *See, e.g.*, Junger v. Daely, 2000 FED App. 0117P (6th Cir.), 209 F.3d 481, 485; Berenstein v. United States Dep't of State, 176 F.3d 1132, 1141 (9th Cir. 1999), *reh'g granted, opinion withdrawn*, 192 F.3d 1308 (9th Cir. 1999); DVD Copy Control Ass'n v. Bunner, 113 Cal. Rptr. 2d 338 (Cal. App. 2001) (labeling source code as "pure speech"), , 2003 WL 21999000 (Cal. Aug. 25 2003). Other courts agreed with Judge Kaplan. *See, e.g.*, United States v. Elcom Ltd., 203 F. Supp. 2d 1111, 1126–27 (N.D. Cal. 2002).

content-neutral regulation aimed at the functional nonexpressive elements of the computer program, and therefore subject only to intermediate scrutiny.[167] At first sight, this approach seems to be the end of the denial of the conflict argument. But is it, indeed, the long-awaited acknowledgement that there is a conflict between copyright law and the First Amendment, an acknowledgment that subjects copyright law to constitutional standards developed under the First Amendment? I would argue that the answer is no because of the context and content of the argument.

It is important to notice the context of the First Amendment argument. The DMCA has been aptly described as a para-copyright act, rather than a copyright act per se.[168] It does not accord direct protection to the work of authorship, but rather to the technology (which might or might not be copyrighted in itself) that protects the underlying copyrighted work. In post-*Eldred* terminology, we would say that the DMCA is not part of traditional copyright law; rather, it alters the contours of traditional copyright. This is not just a matter of classification; it implies that further First Amendment scrutiny is necessary.[169]

It is crucial to understand the content of the conflict argument made by the defendants in this case. It is not the traditional conflict argument discussed thus far. Defendants argued that the DMCA as applied to the dissemination of DeCSS violated their free speech rights.[170] The argument was that DeCSS, the program that the defendants posted or linked to on their website, is speech in itself; hence, any regulation thereof should be subject to a First Amendment review. They did not argue that their free speech rights were violated by the limitations imposed on access to the copyrighted work. In other words, their free speech interest lies with the use of their own speech, not the use of the copyright owner's speech.[171]

167. *See Universal City Studios, Inc.*, 111 F. Supp. 2d at 327–33. Again, the Second Circuit agreed. *See Universal City Studios, Inc.*, 273 F.3d at 449–53. The *Elcom* court applied a similar approach. *See* 203 F. Supp. 2d at 1128–29 (concluding that the DMCA does not target speech, but rather the nonexpressive elements of the code at stake, and accordingly, finding that it deserves only intermediate First Amendment scrutiny).

168. *See* H.R. REP. NO. 105–551, at 24 (1998).

169. *Cf.* Eldred v. Ashcroft, 123 S. Ct. 769, 790 (2003); *supra* text accompanying note 144. One district court, however, applied *Eldred* "as is" to one component of the DMCA: the subpoena to identify copyright infringers, codified as 17 U.S.C. § 512(h) (2000). *See* RIAA v. Verizon, 240 F. Supp. 2d 24, 39 (D.D.C. 2003).

170. *Universal City Studios, Inc.*, 111 F. Supp. 2d at 325.

171. *See also Elcom*, 203 F. Supp. 2d at 1111. In *Elcom*, the defendants made a similar argument regarding their software product, the Advanced eBook Processor, which circumvents the copy-control measures of Adobe eBook Reader. The court joined the *Universal City Studios* court in rejecting this kind of argument.

Judge Kaplan did not adhere to the constitutional imperative for which I argue here. Another of the defendants' arguments was that the use of DeCSS should not be prohibited so that (other) users can make noninfringing fair use of the underlying copyrighted works.[172] In other words, the argument was that the DMCA restricts fair use, and as a result, it is unconstitutional.[173] This argument, though it did not mention the First Amendment explicitly,[174] is much closer to the conflict argument we have seen thus far. It insists that the limiting effect of copyright law on free speech be taken into account. But Judge Kaplan had a short and clear response, and it was one of deference to Congress: "Congress struck a balance. The compromise it reached, depending upon future technological and commercial developments, may or may not prove ideal. But the solution it enacted is clear."[175] Later on in the decision, Judge Kaplan, after examining the legislative history of the DMCA, found that "the decision not to make fair use a defense to a claim under Section 1201(a) was quite deliberate,"[176] and concluded that "courts may not undo what Congress so plainly has done by 'construing' the words of a statute to accomplish a result that Congress rejected."[177] Notably, the Second Circuit was even more hostile to the fair-use argument, naming it "extravagant."[178]

The district court thus deferred to Congress, but not without noting the possibility of a constitutional challenge; that is, Congress' choice might contravene the Constitution.[179] The constitutional discussion that followed, however, addressed the First Amendment rights of the defendants in the use of their own speech (i.e., the DeCSS, and not the use of the copyrighted speech).[180] In other words, Judge Kaplan did not (despite his plan to do so) examine the DMCA's effect of limiting the use of the copyrighted speech by users under the First Amendment. Nor did the Second Circuit engage in

172. *See Universal City Studios, Inc.*, 111 F. Supp. 2d at 304, 321–22.

173. A similar argument was raised by the defendants in *Elcom*, 203 F. Supp. 2d at 1132–33, and rejected by Judge Whyte on a procedural ground. *See id.* at 1133 (arguing that facial attacks on a statute on an over-breadth ground is limited to situations where the statute regulates spoken words or expressive conduct).

174. In *Elcom*, 203 F. Supp. 2d at 1132, the First Amendment argument was explicit.

175. *Universal City Studios, Inc.*, 111 F. Supp. 2d at 304 (internal citations omitted).

176. *Id.* at 322. For a critical analysis of the legislative history of the DMCA, see David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA's Commentary*, 22 CARDOZO L. REV. 909 (2002).

177. *Universal City Studios, Inc.*, 111 F. Supp. 2d at 324.

178. *Universal City Studios, Inc.*, 273 F.3d at 458.

179. *Universal City Studios, Inc.*, 111 F. Supp. 2d at 324.

180. *See* discussion *supra* text accompanying note 170.

such a constitutional analysis.[181] The a priori deference to Congress fails to acknowledge the constitutional imperative, thus assimilating its new chapter in the no-conflict narrative.

Once we reject an originalist mode of interpretation, realize that the conflict argument entails a principle-based analysis and not just a policy-based one, and behold the comment in *Eldred* limiting its holding to the traditional contours of copyright law, it should be clear that the external view deserves separate attention and should not be internalized before due consideration. In addition, the DMCA, it is now clear, should be subject to First Amendment scrutiny.

B. CONCEPTUAL CHECK

We now turn to another concern that the internal/external distinction brings to our attention: the conceptual consistency of copyright law. Often, the conception of copyright, as the analysis of the no-conflict narrative reveals, is inconsistent with the general narrative of copyright law. Here, I will show how taking both points of view—the internal and the external—can serve as a conceptual check to ensure that we do not deviate from our understanding of copyright.

This is the argument in a nutshell: The effect of the substantive internalization of the conflict argument is that the discussion is limited to one legal area—copyright law. Despite the rhetoric of the regulatory conception of copyright law, which is the basis of the substantive internalization, the confinement of the discussion to a single legal regime enables proprietary notions to interfere with, and thus distort, the conceptual consistency. Taking the external view will constantly remind us of the regulatory conception and its underlying principles, and will block interference from the proprietary conception. It thus will serve as a conceptual safeguard. If, on the other hand, we hold only an external view and refuse to accept any kind of internalization, this might indicate a proprietary conception of copyright law (as is the case in some civil law jurisdictions), and there would be a gap between the regulatory rhetoric and the proprietary practice.

I demonstrate this argument through an analysis of the structure of the judicial narrative—the story's overall thread. The complaint is twofold. The first complaint is that the no-conflict narrative does not fit well within

181. The Second Circuit rephrased the argument as whether fair use is constitutionally required, but then asserted that the issue is beyond the scope of the lawsuit. *Universal City Studios, Inc.*, 273 F.3d at 458–59.

the best story we can tell about copyright law at large. The story of the denial, on which we have been focusing thus far, is a substory within the wider narrative of copyright law. These are not two isolated narratives. In analyzing either, we should go back and forth between them to see how they fit together. There is at least one point where the two must converge: That point is at their basic understanding of copyright law. It would be implausible if we understood copyright law in one way when discussing some aspects of it, and in a different way when considering the interaction of copyright law and free speech. The complaint is that while the general narrative of copyright law strongly adopts a regulatory conception, the effect of the no-conflict narrative—the internalization of the conflict discourse—is proprietary.

The second complaint is parallel to the first. It refers to the lack of consistency within the structure of the no-conflict narrative. The story begins as one based on a regulatory conception of copyright law and results in a proprietary setting. I will point to an explanation for this inconsistency. We will see that the premise is less regulatory than courts usually claim it to be, and that it has injections of a proprietary conception. Courts seem to confuse the premises of copyright law, despite their rhetorical celebration of the regulatory conception and the rejection of the proprietary conception.[182]

We will now engage in a thought experiment in which we will try to trace the putative development of the no-conflict narrative under each of the two conceptions of copyright law. I will apply the internal/external distinction to this discussion and will compare the American experience to an emerging European approach.

1. The Denial of the Conflict and Two Conceptions of Copyright Law

The Proprietary Route. What, then, is the sequence of the official no-conflict narrative? Let us consider the way the story would have developed under each of the rival conceptions of copyright law. The proprietary branch will cover our first inspection. For the time being, it does not matter whether we accept this conception or not, for I am trying to figure out the sequence, or logic, of a discussion that is premised on this conception. Under this conception, which justifies copyright on a deontological natural-rights basis, we cannot possibly conclude that

182. Real property suffers from a similar problem, and is also justified on both a utilitarian and a natural-rights basis. *See* NEDELSKY, *supra* note 87, at 247.

copyright law and the First Amendment share the same goal of promoting the public's knowledge.

Applying the terms of the internal/external distinction, it is implausible to hold a proprietary understanding of copyright law and simultaneously apply the substantive internalization of the conflict argument. First, the proprietary conception of copyright law is not teleological, by definition, so it has no "goal." Of course, this conception is not indifferent to its consequences and does not exclude other considerations as well—considerations that might, in turn, aim at particular goals. But the consequences, whatever they might be, are not intended. They are not part of a goal. In the absence of an intended goal, the shared-goal argument is irrelevant, and the substantive internalization, which is based on the shared-goal argument, cannot be made.

Second, the shared-goal argument identifies the goal as a public interest. The proprietary conception, however, does not address the public at all. It has a narrow view: It addresses only the relationship between an author and his or her creation, and does not take the public or any other possible players (like intermediaries) into account. The right stems from the author's creation of the work, that is, from the authorship. We can describe the same narrow view from its other end, beginning with the work. We would then say that the (natural) right stems from the work having an origin in the author, that is, from its originality. So even if we could rephrase the proprietary conception in a way that would identify a goal, it would not promote the public's knowledge.[183]

In the absence of a goal under the proprietary conception of copyright law, one cannot make the shared-goal argument or the substantive internalization. If we cannot identify a shared goal of copyright law and the First Amendment, then all we are left with is that which is not shared. The formulations of the two legal regimes clash as one strives to enable speech (the First Amendment) while the other limits it (copyright law). One regime views a long-term goal (copyright law), and the other is unwilling to suffer any limitation, not even in the short run, on speech (the First Amendment).[184] Without the shared-goal argument, and under a

183. This does not mean that originality reflects a proprietary conception of copyright. It is also important under the regulatory conception. The Supreme Court has said that originality is the "sine qua non" of copyright law. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991). For an elaborate discussion of originality, see David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1 (2001).

184. The Court repeated in other free speech contexts that it is unwilling to limit speech, even if the goal is to enhance speech in some other way. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 48–49 (1976).

proprietary conception of copyright law, all that remains is a conflict; that is, we have one person (a speaker) who is denied his or her right to speak in the name of an asserted property right held by another (the copyright owner).

A proprietary view would have to conclude that there is a direct clash between the two legal regimes. It might then search for ways to mitigate the conflict until it is satisfactorily resolved. One channel for resolution might be the mechanical internalization, that is, designating to copyright doctrines the task of resolving the conflict. If and when the conflict is not mechanically internalized, however, the proprietary view would have to make a choice: It must choose which is the preferred value.[185] It could not deny the conflict itself. We would then say that under a proprietary conception of copyright law, the conflict can be perceived only as external.

In most continental European countries, this observation is not just a thought experiment; it is becoming a reality. In those countries, the proprietary rationale of copyright is the preferred one, resulting in strong copyright protection to what is perceived as a "'sacred' bond between the author and his personal creation."[186] We would expect the conflict to be portrayed as external only. Until recently, the conflict argument was internalized, but only in a mechanical way.[187] As copyright expands, however, the internal devices cannot carry the burden any longer. As a result, there is an emerging approach in some European countries to portray the conflict argument as external. Bernt Hugenholtz explains that the reason for the late emergence of the conflict discussion was the weaker normative status of free speech in Europe. Human rights were not thought of as applicable to the private realm, and judicial review was not common (with the exception of Germany).[188] This situation has changed. Article 10 of the European Convention on Human Rights ("ECHR"), which secures freedom of expression, gains more strength. It states the right in a universal form ("everyone has the right") and elaborates what the right

185. The method of resolving the conflict, understood as property versus speech, reflects the philosophical position of value pluralism. If we operate under a pluralist position, we will choose the preferred principle. If we operate under a monist position, we will search for resolution on a deeper level. For a discussion of value pluralism rephrased in terms of incommensurability, see generally INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON (Ruth Chang ed., 1997).

186. *See* P. Bernt Hugenholtz, *Copyright and Freedom of Expression in Europe*, *in* EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION FOR THE KNOWLEDGE SOCIETY (Rochelle Cooper Dreyfuss et al. eds., 2001). Hugenholtz notes a gradual recognition of the conflict. *See id.* at 343, 348, 351–55 (surveying cases from German, Dutch, French, and European courts).

187. *See* GUIBAULT, *supra* note 135.

188. *See* Hugenholtz, *supra* note 186, at 344–45.

consists of ("freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers").[189] The possibility of judicial review[190] facilitated the emerging conflict discussion, and not surprisingly, the conflict is portrayed as external only. A Dutch case, discussing the missing pages of Anne Frank's diary, illustrates this situation.

Otto Frank, the father of Anne Frank, owned the copyright to her diary. Apparently, the worldwide publication of the diary was missing five pages that Mr. Frank had torn out and deposited in the hands of a friend, Mr. Cor Suijk. The missing pages contained what can be described as intimate thoughts, and, apparently, Anne Frank's wish that her diary not be published. Two Dutch newspapers, *Het Parool* and *De Volkskrant*, obtained the pages and published them. The Anne Frank Fund, the current owner of the copyright to the diary, sued the newspapers, claiming copyright infringement. A lower Amsterdam court refused to issue an injunction, expressing a preference for the freedom of speech rather than copyright law. The court of appeals overturned the decision.[191] It based its ruling on the fact that the five pages were unpublished, and on its interpretation of Article 10 of the ECHR. The court announced that free speech concerns might overcome copyright claims, but then found as a factual matter that the speech in this case was commercial because of its connection to (then) forthcoming biographies of Anne Frank.[192]

The judgment about the commercial nature of the newspapers' publication is surprising; but for our purposes here, what is interesting is the way in which the court defined the legal situation: copyright versus free speech—the former having been defined based on a background assumption of the proprietary view, and the latter having been defined based on a source external to the realm of copyright law. This is an external view of the external conflict.

189. Art. 10(2) reads:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

190. For a discussion on the complexity of judicial review in the European Union, see J.H.H. WEILER, THE CONSTITUTION OF EUROPE 26–29 (1999).

191. Anne Frank Fonds/B.V. Het Parool, Court of Appeal, Gerechtshof Te Amsterdam, July 8, 1999. I am indebted to Martijn DeKeizer for his assistance with obtaining and helping me understand the decision.

192. *Id.* at 12–13.

The European experience stands in illuminating contrast to the route that the American judicial narrative chose.[193] The continental European courts could not go all the way with the American approach, for that would have required taking a strong, substantive internalization in the spirit of the shared-goal argument. But the latter argument assumes a nonproprietary conception of copyright. How would an American court have addressed the case of the missing pages? It would be reasonable to expect that an American court would have turned to the fair-use defense,[194] and would have claimed that the defense is the mechanism through which copyright law embodies First Amendment concerns. Only an internal view would have been taken. Unlike the European approach, the American judicial narrative refuses to see an external clash and attempts to dissolve the tension rather than resolve it.

The way the courts address the conflict reveals the way in which copyright law is perceived. The American methodology of substantive internalization presupposes a regulatory conception, not a proprietary one.

The Regulatory Route. Having demonstrated that the proprietary conception does not best describe the American understanding of copyright law, we can turn to the other possible model. The alternative structure is premised on a regulatory conception of copyright law. If copyright law is justified on the basis of its desired goal, which is inherently connected to its anticipated consequence, it is not just plausible but expected that we would talk about this goal. This conception allows its holders to make the shared-goal argument. Whether this argument is correct or not is a separate issue, and whether it entails the further conclusion that there is no conflict between copyright and free speech is yet another issue. From the insistence of courts that the two areas do share a common goal, and from the way they address the question (unlike the European approach), we can infer that they adhere to a regulatory conception.

193. Another interesting comparison is with the legal response to the conflict argument in the United Kingdom, where the issue was first decided in the courts as late as 2001. *See generally* Ashdown v. Telegraph Group Ltd., 3 W.L.R. 1368 (2001) (analyzing the conflict between copyright and freedom of expression); Michael D. Birnhack, *Acknowledging the Conflict Between Copyright Law and Freedom of Expression Under the Human Rights Act*, 2003 ENT. L. REV. 24; Jonathan Griffiths, *Copyright Law After* Ashdown*: Time to Deal Fairly with the Public*, 2002 INTELL. PROP. Q. 240.

194. 17 U.S.C. § 107 (2000). In *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 554 (1985), the Court interpreted the defense to not favor the unauthorized use of unpublished material; but the statute was subsequently amended, and now instructs that "[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." § 107.

Courts do not shy away from the view that this is the proper conception of copyright law. The Anglo-American legal history of copyright supports the teleological, instrumental regulatory conception of copyright law. English courts got rid of the "copyright as natural rights" notion two years before American independence was won.[195] Some early state statutes echoed, in the preambles to their intellectual property section, a natural-rights language,[196] but this language was not adopted in the Constitution. The language of the supreme law of the land clarifies that copyright is an instrumental tool, a means to achieve a goal. The goal is "to promote the Progress of Science"[197] and the means is "by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings . . . ."[198] The U.S. Supreme Court adhered to this interpretation in 1834, when it rejected the natural-rights rationale.[199] The legislature followed and rejected the Lockean notion (that copyright is meant to secure the just deserts of the author) as a justification for copyright law.[200] The courts agreed numerous times. *Mazer v. Stein*[201] is a typical and an oft-quoted summary of the incentive theory:

> The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. . . . However, it is intended definitely to grant

195. *See* Millar v. Taylor, 98 Eng. Rep. 210 (K.B. 1769), *overruled by* Donaldson v. Becket, 98 Eng. Rep. 257 (K.B. 1774); BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 13–16 (1967) (discussing *Millar*); Zimmerman, *supra* note 37, at 690–91.

196. For example, the preamble of the 1783 Massachusetts Copyright Act states:

> Whereas the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons in the various arts and sciences: As the principal encouragement such persons can have to make great and beneficial exertions of this nature, must exist in the legal security of the fruits of their study and industry to themselves; *and as such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labour of his mind* . . . .

This preamble was reprinted in LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 187 (1968) (emphasis added). This language was adopted by Rhode Island and New Hampshire as well.

197. U.S. CONST. art. I, § 8, cl. 8.

198. *Id.*

199. *See* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 598 (1834). The Court distinguished between federal copyright, which was a statutory creature covering published works, and common law copyright, which covered unpublished works. This distinction remained in force until it was preempted by the 1976 Act. *See* 17 U.S.C. § 301 (2000).

200. *See* STUDY OF THE SENATE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS, 85TH CONG., AN ECONOMIC REVIEW OF THE PATENT SYSTEM (Comm. Print 1958). The review discusses patents, but the rejection of the natural-rights theory is common to all kinds of intellectual property. The legislative report on the Copyright Act of 1909 reads: "The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . ." H.R. REP. NO. 2222, at 7 (1909). *See also* OFFICE OF TECHNOLOGY ASSESSMENT, CONGRESS OF THE UNITED STATES, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION 37 (1986).

201. 347 U.S. 201 (1954).

> valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; to afford greater encouragement to the production of literary (or artistic) works of lasting benefit to the world. . . . The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts."[202]

Note that the philosophy behind the constitutional clause is economic, not moral. It reflects a clear instrumental approach to copyright law. The public welfare is cast in the case law (though not in *Mazer*) in terms that closely resemble First Amendment language: creation of information, dissemination thereof, and access to it.[203] In 1991, the U.S. Supreme Court rejected an offspring of the Lockean theory when it ruled that the labor invested in the compilation of facts is irrelevant to the copyrightability of a database.[204] The Court insisted that originality, and not "sweat of the brow," is the sine qua non of copyright law:[205] "The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.'"[206] But by this time, the rejection of the conflict argument was already a judicial fact unlikely to be revisited.[207]

Rejecting the conflict argument means that the result in a particular dispute is reached exclusively within the contours of copyright law. This means, quite often, that the right of the copyright owner is immune to the public's interests (i.e., those that are embodied in the First Amendment). The expression loses its status as speech and is rendered, instead, the exclusive status of property. Copyright law then governs the situation without competition from other legal categories.[208]

202. *Id*. at 219 (internal quotation marks omitted).

203. *See, e.g.*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 545–46 (1985) (referencing "harvest of knowledge" and "store of knowledge").

204. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991). The Court addressed the copyrightability of *The White Pages* phone directories. It recognized that an original selection or arrangement of facts could be protected, although the protection would be "thin." *Id.* at 348–49. The Court found that the directory discussed in *Feist* did not meet this standard. *Id*. at 363.

205. *See id.* at 346. This "wiping out" of the labor theory has one exception in American copyright law—VARA—which, following the Unites States' adherence to the Berne Convention, created limited moral rights. *See* 17 U.S.C. § 106(A) (2000).

206. *Feist Publ'ns, Inc.*, 499 U.S. at 349.

207. *Harper & Row* was decided in 1985, six years before *Feist*. Ironically, Justice O'Connor authored the opinion of the Court in both cases.

208. This is the effect of legal categorization in the context of this conflict.

Confusion. We have a story that begins with a regulatory conception and takes a no-conflict position based on this premise, but emerges with a proprietary result. This confusion can be explained in the following way: Judges err in that they are influenced by a proprietary conception and inject it into the discussion. It might be not only that they are influenced by the proprietary conception but also that they use it as a rhetorical device.[209] After all, there is a strong intuition that one owns what one has created, and that property is a sacred institution. I now turn to examine this suggestion.

2. Proprietary Footsteps in a Regulatory Narrative

There is some evidence of a proprietary influence on the judicial narrative's supposedly all-regulatory conception. These are footsteps of the proprietary premise.[210] Despite the judicial narrative's endless declarations of its regulatory conception, it is influenced by the proprietary conception.[211] Stewart Sterk in one work, and L. Ray Patterson and Stanley Lindberg in another, traced some of the main influences of the "just deserts" or proprietary conception in the shaping of copyright doctrines.[212] Sterk concluded that both an instrumental (regulatory conception) and just-deserts rhetoric have been invoked over the past 200 years, but that each captures only "a small slice of contemporary copyright reality."[213] Patterson and Lindberg concluded that the proprietary conception has influenced the development of copyright law, and that it is often confused with the regulatory one.[214] The following is not intended to be a comprehensive survey of this claim, for these authors have forcefully made this argument with a great deal of evidence. I cover only a sample of the rhetoric of the regulatory and proprietary conceptions.[215]

209. Proponents of the right of publicity also turn to a proprietary rhetoric. For a critical discussion, see Zimmerman, *supra* note 63, at 51.

210. This may seem anecdotal to the reader; however, these "slips," as I will point out, are located in some of the most important copyright-law decisions. They are often quoted by lower courts, casebooks, and law-review articles.

211. The same is true of real property. *See* NEDELSKY, *supra* note 87, at 8-9, 224 (calling this confusion "the myth of property").

212. *See* PATTERSON & LINDBERG, *supra* note 21; Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197 (1996). *See also* L. Ray Patterson, Folsom v. Marsh *and Its Legacy*, 5 J. INTELL. PROP. L. 431 (1998) (choosing *Folsom* as the worst intellectual property opinion ever written, and blaming it for turning copyright into a natural right).

213. *See* Sterk, *supra* note 212, at 1197.

214. *See* PATTERSON & LINDBERG, *supra* note 21, at 77, 88, 111–12.

215. Few commentators hold a property-based view of copyright. *See* Swanson, *supra* note 39, at 286 (arguing that because copyright is a property right, an analogy to the law of libel is wrong). *See also* Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108 (1990) (arguing that "a right to exclude in intellectual property is no different from the right to exclude

The *Mazer* case explains the economic philosophy, as we have seen, but that explanation had a closing addition: "Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."[216]

The "sacrificial days" is a reference to the notion of the "romantic author" and just deserts. These notions are closer to the proprietary conception than to the regulatory one.[217] There are other examples as well. Despite the (justified) total rejection of the natural-rights rationale, the no-conflict narrative often appeals to the rejected rationale. *Harper & Row* echoed an earlier U.S. Supreme Court decision:[218] "The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors."[219]

This can be read as an instrumental regulatory view of copyright, but I think it is better interpreted as a reference to the labor of the author that should be awarded per se, and not as a means to an end. The Court also detailed the labor that President Gerald Ford had put into the writing of his autobiography,[220] and mentioned the "extensive resources" that both authors and publishers invest.[221]

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in physical property"). Alfred Yen recognizes that copyright's history bears marks of natural law. *See* Alfred C. Yen, *Restoring the Natural Law: Copyright As Labor and Possession*, 51 OHIO ST. L.J. 517 (1990) (arguing that the discipline of economics alone fails to explain copyright, and advocating for the acceptance of natural law as the justification for the initial assignment of rights). Notably, this is a pre-*Feist* article.

216. *See* Mazer v. Stein, 347 U.S. 201, 219 (1954). Interestingly, *Harper & Row Publishers, Inc. v. Nation Enterprises* quoted the "economic philosophy" paragraph, but omitted the last "sacrificial days" sentence. *See* 471 U.S. 539, 558 (1985).

217. *See* BOYLE, *supra* note 26, at 118, 173.

218. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (stating a similar theory).

219. *Harper & Row Publishers, Inc.*, 471 U.S. at 546 (emphasis added).

220. According to the Court: "The book at issue here . . . was two years in the making. . . . Mr. Ford drafted essays and word portraits of public figures and participated in hundreds of taped interviews that were later distilled to chronicle his personal viewpoint." *Id.* at 546. Interestingly, the Supreme Court omitted the fact that President Ford was assisted by a professional writer, Trevor Armbrister, even though this fact was mentioned by the lower courts. *See* Harper & Row Publishers, Inc. v. Nation Enters., 220 U.S.P.Q. 210, 215–16 (S.D.N.Y. 1983). Ford himself acknowledged the assistance of Armbrister in his book. *See* GERALD R. FORD, A TIME TO HEAL: THE AUTOBIOGRAPHY OF GERALD R. FORD ix (1979).

221. *Harper & Row Publishers, Inc.*, 471 U.S. at 557. At first blush, this quote could be understood (also) as an expression of a regulatory conception, which is not indifferent to the means it applies to achieve its intended goal. A regulatory conception would take a more instrumental approach, however, and insist that the right is an incentive, and that it should be neither stronger nor weaker than needed to provide the proper incentive. The gap between the proprietary conception and the regulatory one, in this case, lies in the practical implications of the gap between "incentive" and "fair return." We may further assume that Ford's motivation to write the book was not only financial the detailing of his

The recent expansion of copyright law took place in Congress, so we turn first to the legislative branch, which in itself participates in authoring the official narrative. In 1998, President Bill Clinton signed two new acts that strengthened intellectual property copyrights. One of these acts was the DMCA,[222] and the other was the CTEA, which I will use for illustration. My purpose here is to show how proprietary thinking has found its way into the otherwise regulatory understanding of copyright law.

The CTEA won large support in Congress. The explanation turned on the need to bring copyright protection in the United States up to the European level. Without doing so, the legislators claimed, the American economy would lose hundreds of millions of dollars a year.[223]

Most of the debate turned not on the extension itself, however, but on companion legislation that was successfully joined to it: the Fairness in Music Licensing Act ("FIMLA").[224] FIMLA exempted certain restaurants and bars (according to their size and the equipment they used) from paying licensing fees for music played on radio and television. Those who supported FIMLA emphasized the interests of small businesses. The counter-image that the opponents of the law evoked was that of the small, struggling songwriter.[225] Those who opposed the addition to the Extension Act kept telling stories about hardworking artists, and more than once

efforts does not serve, merely, as a reference to the incentive theory—but implicated just deserts as well.

222. Pub. L. No. 105-304, 112 Stat. 2860 (1998).

223. Consider the comments made by Representatives Sensenbrenner (noting that the Act is "top priority for the entertainment industry"); Jackson-Lee (mentioning that the Act will create job opportunities and provide entertainment and enjoyment); Coble (arguing that the extension is "essential"); and McCollum (mentioning the impact of copyright products on the American economy). 144 CONG. REC. H9946, H9949–51 (1998).

224. *Id*. The Act is codified in scattered sections of the Copyright Act, but especially so in 17 U.S.C. § 110 (2000). The WTO found the following:

> [S]ubparagraph (B) of Section 110(5) of the U.S. Copyright Act does not meet the requirements of Article 13 of the TRIPS Agreement and is thus inconsistent with Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement.
>
> The Panel recommends that the Dispute Settlement Body request the United States to bring subparagraph (B) of Section 110(5) into conformity with its obligations under the TRIPS Agreement.

See WORLD TRADE ORGANIZATION, UNITED STATES: SECTION 110(5) OF THE U.S. COPYRIGHT ACT: REPORT OF THE PANEL §§ 7.1(b), 7.2 (June 15, 2000), *available at* http://docsonline.wto.org/DDFDocuments/t/WT/DS/160R-00.DOC (last visited Aug. 19, 2003).

225. *See* 144 CONG. REC. H1460 (1998) (statement of Rep. Scarborough); 144 CONG. REC. E2070 (1998) (statement of Rep. Gordon).

a strong proprietary conception ("this is about taking someone's property . . . just compensation"). Of course, the grant of power to Congress is only an authorization to enact copyright laws, not a duty.

The congressional debate illustrates the strong proprietary intuitions that are at stake when lawmakers shape the law. No wonder, then, that the courts operate in a similar mindset, especially when they search for legislative intent and defer to the legislature.

Eldred, as noted above, did not say much about the conception of copyright law, at least not directly. To the extent that one can decipher the subtext, it has a proprietary undertone. Thus, for example, the Court noted that "[t]he First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speech." It is a comment with a proprietary spirit because it assumes that people own their speech and can exclude others from using it. It thus assumes ex ante what the regulatory conception might have concluded ex post.

3. Intermediate Conclusion

We traced the structure of the official no-conflict narrative and examined both the internal consistency of the narrative and how it fits into

226. *See, e.g.*, 144 CONG. REC. H1461 (1998) (statement of Rep. Delahunt); 144 CONG. REC. H1472 (1998) (statement of Rep. Frank); 144 CONG. REC. H1460 (1998) (statement of Rep. Scarborough).

227. *See, e.g.*, 144 CONG. REC. H1457 (1998) (statement of Rep. Doggett) ("The songwriter's property is just that; it is property every bit as real as a trade name . . . . Music is the property of the songwriter who created it."); 144 CONG. REC. H1464 (1998) (statement of Rep. Hyde).

228. *See* 144 CONG. REC. H1475 (statement of Rep. Hyde).

the general narrative told about copyright law. We concluded that the proprietary conception, which views copyright as a natural right, could not be the premise of the no-conflict narrative because it would not make sense to hold both simultaneously. We also saw the way in which a proprietary conception would result in an external view, akin to the emerging European approach.

We noted the gap between the alternative regulatory conception of copyright law and the proprietary result of that very same narrative. How did this gap come into being? One answer might be that perhaps the shared-goal argument is simply wrong. A second possible answer goes to the motivation for the entire inquiry: Perhaps there is a conflict between copyright law and free speech, and thus, the no-conflict conclusion of the judicial narrative is wrong. We then examined a further possible answer: Perhaps the initial premise of the narrative is not as regulatory as it seems to be and as it is claimed to be. We have seen that it contains elements of the proprietary conception.

CONCLUSION

This Article investigated the constitutional dimension of the relationship between copyright law and the First Amendment in light of the recent Supreme Court decision in *Eldred v. Ashcroft*. This case is in line with a judicial tradition of denying the conflict between the two legal fields. It rejected the conflict argument by turning to its common historical cradle, to a proposition about the shared goal, and to several copyright mechanisms that are designated the task of accommodating First Amendment concerns.

In evaluating this response, I suggested that we focus on the constitutional dimension. The framework for the discussion laid out an important distinction. There are two kinds of conflict that reflect the battle between copyright and free speech. One is an internal conflict within copyright law. It can be portrayed as the subject of copyright law (the author versus the public) or as the activity at its core (i.e., is it the production of knowledge, or is it the way this knowledge is being used?). It can be further portrayed in a more general manner as a conflict between the goal of copyright law and the means it applies to achieve that goal. This portrayal of the internal conflict parallels the tension between two rival conceptions of copyright law: its regulatory and proprietary conception. The other kind of conflict is the external one. It sees two

separate bodies of law—copyright on the one hand and free speech on the other—and searches for their relationship.

Applying this distinction to the conflict discourse, we rephrased the conflict argument, including the one made in *Eldred*. It is an argument about the external conflict between copyright and the First Amendment; but the judicial response, *Eldred* included, has not always been on the same level. The contemporary no-conflict narrative responds to the conflict argument by turning to the internal conflict. It thus internalizes the discussion and limits it to the sphere of copyright law alone. The internalization takes two forms. One is substantive, and relies on the regulatory conception of copyright law, and the other is mechanical, and is detached from the conception of copyright.

I queried the constitutional effects of the internalization of the external view. I insisted that the external view is a constitutional imperative. It derives from our notion of rights and from our understanding of the judicial role in protecting rights against policy-based interests of the public. Courts should not defer to the legislature, at least not until they are satisfied that there are no rights involved, or, if there are rights, that they are taken seriously.

The internal/external distinction further served to examine the conceptual consistency of copyright law. I suggested that the external view can and should serve as a check on our understanding of copyright law. Although the substantive internalization relies on a regulatory conception of copyright law, once the external view is cast out, the discussion is narrowed to the ambit of copyright alone. Once this occurs, there is a risk that proprietary notions will distort the regulatory conception.

The external view should not be taken alone, however. When a court takes an exclusive external view, it reveals that it conceives of copyright law as proprietary in nature, as an incident of property. An exclusive external view, which carries an implicit negation of the internal conflict, signals that copyright law's purpose of promoting a public goal is forgotten; instead, such a position signals that the core attention of copyright law is understood to lie in the rights of the authors. By way of a thought experiment and through a comparison to the European approach, I showed that the internal view must be taken as well. By implication, one who neglects the internal view adopts a proprietary understanding of copyright law, which fits neither the American rhetoric nor its practice.

At the end of this critique, a methodology for approaching the conflict and ultimately resolving it emerges. The methodology should pass a

two-pronged test. Under the first prong, the free speech conception of copyright law should remain loyal to the general concept of copyright law. The second prong requires an account of copyright law that does not ignore its constitutional setting, including the First Amendment. The discussion should go back and forth between the internal and external levels of the discussion to ensure that the account we offer maintains these requirements.

Eldred itself includes several signals as to the future of the conflict discourse. The power of copyright mechanisms to take care of free speech concerns should not be taken for granted; instead, that power should be examined to see if it is adequate. Furthermore, if Congress alters the traditional contours of copyright law, free speech concerns should garner more attention. The fate of the DMCA, a most untraditional piece of copyright legislation, should be determined according to the road signs provided in *Eldred*.