Science, Creativity, and the Copyright Clause

NED SNOW[†]

The Constitution provides Congress the power to enact copyright laws in order "To promote the Progress of Science." Some statements by the modern Supreme Court may be interpreted to suggest that "the Progress of Science" is synonymous with creativity, and most scholars articulate the purpose of copyright law in terms of encouraging creative expressions. This is troubling, however, because not all creative expressions yield public knowledge; indeed, some yield public harm. For example, false statements of fact that are made to purposefully deceive are highly creative, but those statements inhibit the spread of knowledge and may lead to demonstrably harmful outcomes. Therefore, creativity does not always promote the progress of science.

This Article argues that the Copyright Clause's reference to the progress of science imposes a public-harm boundary on the type of creativity that copyright should encourage. As support for this argument, the Article relies on the plain meanings of "Progress" and "Science," past judicial interpretation of the Clause, copyright theory, and public-value themes in other intellectual property doctrines. The Article proposes that courts should deny copyright protection for expressions that are unlawful or, in other words, those that fall outside of First Amendment protection. It further contemplates that Congress might deny protection for some limited categories of expression that receive First Amendment protection. Finally, this Article responds to a counterargument that is based on free speech principles. The Article concludes that although creativity is essential to realizing the progress of science, the progress of science should once again require that creative works not be harmful to the public.

[†] Ray Taylor Fair Professor of Law, Associate Dean for Faculty Development and Scholarship, University of South Carolina School of Law. The Author thanks Derek Black, Josie Brown, Ray Carpenter, Nathan Cortez, Tessa Davis, Grant Hayden, Jeffrey Kahn, Joe Seiner, David Taylor, and Marcia Zug for their comments and insights that were helpful in drafting this Article.

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INTRODUCTION

What is the purpose of copyright law? Many scholars opine that the purpose is to incentivize authors' creative efforts.[1] Likewise, the modern Supreme Court has proclaimed that copyright law "is intended to motivate the creative activity of authors."[2] The reasoning that supports this conclusion is simple enough: Copyright law incentivizes authors to create works, and the public, in turn, benefits from having a wider variety of works to consume.[3] Thus, for many scholars and courts, the purpose of copyright law is to encourage authors' creativity.[4]

I disagree. As stated in the Constitution, the purpose of copyright law is "To promote the Progress of Science" or, in other words, to promote the progress of knowledge and learning.[5] Although creativity is important to realizing knowledge and learning, some creative expressions may thwart that end. Sometimes creativity promotes social regress rather than social progress. For instance, false assertions of fact that are knowingly made to deceive the public are certainly a product of a person's mind; they are entirely creative. Yet they do not further the public's knowledge and learning because the purpose of those false assertions is public deception. This example illustrates the tension that this Article addresses: in certain instances, creativity may contradict the progress of science. In those instances, should the author's individual interest in speaking creatively prevail, or should the public's interest in promoting the progress of knowledge and learning prevail?

My answer is that the public's interest must limit the scope of copyrightable creative expression. I argue that "Progress of Science" precludes protection for works that cannot reasonably be construed as promoting the public's interest in the progress of knowledge and learning. Although copyright should encourage a broad array of creative works, it should not encourage an unbounded array. In short, the public-oriented purpose of copyright law must constrain the scope of creative works that the law incentivizes.

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1. *See, e.g.*, Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1151 (2007) ("Creativity is universally agreed to be a good that copyright law should seek to promote . . . ."); *see also* discussion *infra* Part II.B.1 (reciting commentators who have characterized creativity as the purpose of copyright law).

2. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984); *see also* discussion *infra* Part II.A.1 (reciting case law that describes creativity as the purpose of copyright law).

3. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 13–14, 19 (2003).

4. *See* discussion *infra* Part II (analyzing judicial and scholarly statements indicating that creativity is the purpose of copyright law).

5. U.S. CONST. art. 1, § 8, cl. 8; Golan v. Holder, 565 U.S. 302, 324 (2012) ("The 'Progress of Science,' petitioners acknowledge, refers broadly to 'the creation and spread of knowledge and learning.'").

This conclusion is based on copyright theory, the language of the Copyright Clause, Supreme Court jurisprudence, and intellectual property doctrine.[6] With respect to copyright theory, the utilitarian rationale posits that in the absence of copyright protection, authors would underproduce creative works.[7] Thus, the marketplace would fail to produce enough creative works to meet consumer demand. However, creative works that are harmful to the public introduce negative externalities that result in an overproduction of harmful works.[8] This fact undermines the original justification for extending those works' copyright protection—their *under*production.[9] Accordingly, the utilitarian justification for extending copyright protection to harmful works is lacking.

With respect to the language of the Copyright Clause, "Progress of Science" implies a public-oriented purpose for copyright law. "Progress" suggests an advancement in, or betterment of, the public's state of affairs.[10] "Science" suggests the sort of knowledge and learning that is available to members of the public.[11] Early Supreme Court cases support this understanding and suggest that "Progress of Science" imposes a stringent public-benefit standard for copyrightability.[12] Importantly, at this same early period, the Court also recognized that a copyrightable work must demonstrate an author's individual creativity. In particular, the Court interpreted the Clause's reference to copyrightable "Writings" to imply a requirement of authorial creativity in a work.[13] Hence, these two aspects of constitutional eligibility for copyright protection—public benefit and creativity—were distinct. "Science" called for a public benefit; "Writings" called for authorial creativity.

By 1903, the Supreme Court relaxed the standard for a work to promote the progress of science in the seminal case, *Bleistein v. Donaldson Lithographing Co*.[14] The Court indicated that all expression should, as a

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6. *See* discussion *infra* Parts I, III.

7. *See* discussion *infra* Part III.B.

8. *See* discussion *infra* Part III.B.

9. *See* discussion *infra* Part III.B.

10. *See* discussion *infra* Part I.A.

11. *See* discussion *infra* Part I.A.

12. *See* Higgins v. Keuffel, 140 U.S. 428, 430–31 (1891) (denying copyright for expression on ink-bottle labels because the composition did not "have by itself some value as a composition" consistent with promoting the progress of science); Baker v. Selden, 101 U.S. 99, 105 (1879) (requiring works to demonstrate a "fixed, permanent, and durable character" to satisfy the Constitution's meaning of "Science"); *see also* discussion *infra* Part I.B.

13. The Copyright Clause states: "The Congress shall have Power . . . To promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . . ." U.S. CONST. art. 1, § 8, cl. 8. The Court has interpreted "Writings" in this Clause as requiring a copyrightable work to exhibit sufficient intellectual conception or, in other words, creativity. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) (requiring works to demonstrate "original intellectual conceptions of the author"); *In re* Trade-Mark Cases, 100 U.S. 82, 94 (1879) ("The writings which are to be protected are *the fruits of intellectual labor* . . . ."); *see also* discussion *infra* Part I.B.2.

14. 188 U.S. 239, 249 (1903).

constitutional matter, be copyrightable with only narrow and obvious exceptions.[15] *Bleistein* may be interpreted to suggest that expression fails to promote the requisite progress only if it poses a clear public harm. Notably, modern Supreme Court precedent is consistent with this interpretation.[16]

Other intellectual property doctrines support restricting the scope of copyrightable expression to public-oriented purposes. To begin with, copyright itself has several doctrines that are justified by a public-oriented purpose. The doctrines of fair use, idea-expression dichotomy, and useful article recognize that an underlying public purpose is relevant to defining the boundaries of protectable content.[17] Patent law is similarly relevant to this issue of a public-oriented purpose. Courts and scholars well recognize that the patent monopoly facilitates individual creativity for the purpose of furthering benefits to the public; however, patents do not exist solely to facilitate creativity.[18] Copyright law should be interpreted consistently with this overarching public-benefit theme that is found in both its own specific doctrines and patent law generally.

The practical implication of this interpretation of "Progress of Science" is that courts should deny copyright protection, on a constitutional basis, for expressions that pose an unmistakable public harm to society.[19] Such expressions are apparent in the limited categories of speech that do not receive First Amendment protection, including defamation, obscenity, and certain instances of fraud.

A further implication of this interpretation is that Congress may exercise public-oriented value judgments in defining the scope of copyright protection. Specifically, Congress may deny protection for a limited category of expressions that receive First Amendment protection but pose harms to the public, such as expressions that require criminal actions to create.[20] The scope of content-based categories for which Congress may deny protection is limited because of free-speech protections—the reason for the denials cannot be the message within the content of the expression.[21]

Unsurprisingly, these conclusions raise several issues that call for thoughtful discussion. This Article does not, however, purport to discuss all the issues. The scope of this Article is limited to the specific issue of whether an author's interest in exercising individual creativity or the public's interest in realizing a beneficial effect is the overriding purpose of copyright law. The Article does not address other issues that are relevant to its conclusion. These

15. *See id.* at 250.
16. *See* discussion *infra* Part II.A.
17. *See* discussion *infra* Part III.C.
18. *See* discussion *infra* Part III.C.
19. *See* discussion *infra* Part III.
20. *See* discussion *infra* Part III.D.
21. *See* discussion *infra* Part III.E.

other issues include the following: whether the initial phrase of the Copyright Clause, "To promote the Progress of Science," represents a limitation on Congress's exercise of its copyright power; whether that initial phrase applies to the eligibility of individual works; whether denial of protection because of a work's content violates the First Amendment; and whether specific works are in fact harmful to the public. I have written on these issues in other works.[22] In this Article, I only summarize these issues as they may arise in the discussion about the purpose of copyright law.

This Article proceeds in three Parts. Part I recites the history of the Copyright Clause. It examines the meaning and judicial treatment of the Clause through the mid-twentieth century. Part II sets forth the modern view that the purpose of copyright law is solely to encourage authors' creative efforts. Part III then argues that the purpose of copyright law is not merely to stimulate creativity of authors, but rather to produce a beneficial outcome for the public. The argument relies on theory, the Constitution, and copyright and patent laws for support. It posits that courts should deny protection for specific categories of expression that are unlawful, and that Congress may deny protection for certain expressions that pose clear public harms. Lastly, Part III responds to a counterargument that free speech rights may stand in opposition to my proposal.

I. HISTORY OF THE COPYRIGHT CLAUSE

The Constitution's Copyright Clause is part of the broader Intellectual Property Clause. The Intellectual Property Clause ("IP Clause") provides Congress both its copyright and patent powers. The IP Clause states: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[23] I argue that the copyright portion of the IP Clause gives rise to two distinct constitutional requirements for a work to receive copyright protection: an absence of public harm and the presence of individual creativity. Before setting forth this argument, I summarize three preliminary points that provide helpful background information for interpreting the IP Clause.

22. *See generally, e.g.*, NED SNOW, INTELLECTUAL PROPERTY AND IMMORALITY: AGAINST PROTECTING HARMFUL CREATIONS OF THE MIND (2022) [hereinafter SNOW, INTELLECTUAL PROPERTY AND IMMORALITY]; Ned Snow, *Barring Immoral Speech in Patent and Copyright*, 74 SMU L. REV. 163 (2021) [hereinafter Snow, *Barring Immoral Speech*].

23. U.S. CONST. art. 1, § 8, cl. 8.

First, both courts and commentators have adopted an originalist approach in their interpretation of the IP Clause.[24] They apply the meaning of the terms at the time of the Constitution's ratification.[25] This approach makes sense because "Science" and "Arts" often denote much narrower meanings in modern usage than they did at the Framing. Today, "Science" is often employed to mean a branch of study dealing with the physical world that involves observation and experimentation, such as physics and biology.[26] Similarly, "Arts" is often used to mean human activities that result in visual, auditory, or performance artwork.[27] Additionally, in defining "Arts," we think of skills necessary to produce paintings, literature, and music. At the Framing, however, "Science" suggested knowledge and learning, and "Arts" (in conjunction with "useful") suggested skill in a craft or profession.[28] Therefore, if courts were to interpret the Constitution's use of "Science" and "Arts" according to their modern meanings, then courts would be narrowing the scope of Congress's copyright and patent powers based solely on how the public has changed its usage of words over time. For this reason, courts and commentators examine the original meanings of the terms in the IP Clause.

The second point is that "Science" corresponds with Congress's power to legislate copyright laws, and "useful Arts" corresponds with Congress's power to legislate patent laws.[29] The reason for this correspondence is that the IP Clause adopts a parallel writing style: it employs a pair of nouns to state its purpose ("Science" and "useful Arts"), a pair of nouns to specify the sorts of creators ("Authors" and "Inventors"), and a pair of nouns to state the subject matters of

24. *See* Golan v. Holder, 565 U.S. 302, 322 (2012); Eldred v. Ashcroft, 537 U.S. 186, 192–93 (2003); Lawrence B. Solum, *Congress's Power To Promote the Progress of Science:* Eldred v. Ashcroft, 36 LOY. L.A. L. REV. 1, 5–6 (2002).

25. *E.g.*, *Golan*, 565 U.S. at 322; EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 116–18 (2002).

26. *See Science*, OXFORD ENG. DICTIONARY, https://www.oed.com/view/Entry/172672?redirected From=Science#eid (last visited Apr. 1, 2023) ("The intellectual and practical activity encompassing those branches of study that relate to the phenomena of the physical universe and their laws, sometimes with implied exclusion of pure mathematics.").

27. *See Arts*, OXFORD ENG. DICTIONARY, https://www.oed.com/view/Entry/11125?rskey=Ma66Oy &result=1#eid (last visited Apr. 1, 2023) ("[T]he various branches of creative activity, as painting, sculpture, music, literature, dance, drama, oratory, etc.").

28. For further explication of these terms, see discussion *infra* Part I.A.

29. *See Golan*, 565 U.S. at 324 ("Perhaps counterintuitively for the contemporary reader, Congress' copyright authority is tied to the progress of science; its patent authority, to the progress of the useful arts."); *Eldred*, 537 U.S. at 192–93 (recognizing that the copyright power corresponds to "the Progress of Science"); Graham v. John Deere Co., 383 U.S. 1, 5 (1966) (recognizing that the patent power corresponds to "the Progress of . . . useful Arts"); WALTERSCHEID, *supra* note 25 (linking "Science" with copyright and "useful Arts" with patent); Solum, *supra* note 24, at 12 ("[T]he structure of the Clause and its history of exposition makes clear the parallel structure that associates 'Science,' 'Authors,' and 'Writings' with the copyright power.").

protection ("Writings" and "Discoveries").[30] In each pairing of nouns, the first noun corresponds to the copyright domain, and the second noun corresponds to the patent domain: Authors produce Writings, which promote Science; Inventors produce Discoveries, which promote useful Arts.[31] Stated differently, in both the second and third pairings, the first instance of a noun unquestionably corresponds to copyright ("Authors" and "Writings"), while the second instance of a noun unquestionably corresponds to patent ("Inventors" and "Discoveries").[32] This pattern manifested in the second and third pairings suggests that the first pairing ("Science" and "useful Arts") must follow that same pattern: "Science" must correspond to copyright, and "useful Arts" to patent.[33] Hence, the meaning of "Science" concerns Congress's copyright power, and the meaning of "useful Arts" concerns its patent power.[34] This interpretation is well recognized by the modern Supreme Court and commentators.[35]

The third point concerns referents to different portions of the IP Clause. I employ specific labels to reference different portions of the IP Clause. The initial language of the IP Clause sets forth the purpose of the Clause ("To promote the Progress of Science and useful Arts"), which I refer to as the Progress Provision. The remainder of the IP Clause provides the means whereby Congress may accomplish that purpose, so I refer to it as the Means Provision. Finally, I refer to the language of the IP Clause that designates Congress's power to legislate copyright laws (within both the Progress Provision and the Means Provision) as the Copyright Clause.

Having explained these preliminary points, I now turn to the interpretation of the Copyright Clause as it relates to the progress of science and creativity. As discussed below in Subpart A, the plain language suggests that the "Progress of Science" implies a public-oriented purpose for copyright law. In Subpart B, I explain judicial treatment of the Clause as it relates both to this public purpose and to the creativity of an author up through the mid-twentieth century.

A. CONSTITUTIONAL LANGUAGE

The phrase "Progress of Science" indicates a public benefit that follows from knowledge and learning. This conclusion derives from the meanings of "Science" and "Progress." In this Subpart, I summarize the evidence that

30. *See* Solum, *supra* note 24, at 12 ("[T]he structure of the Clause and its history of exposition makes clear the parallel structure that associates 'Science,' 'Authors,' and 'Writings' with the copyright power.").

31. *See id.* at 11–12.

32. *See id.*

33. *See id.*

34. *See id.*

35. *See* sources cited *supra* note 29.

supports these meanings. A fuller account of the evidence is available in other works that I have published, which I note accordingly.

1. Science

The established meaning of "Science" in the Progress Provision is a concept that encompasses knowledge and learning. The modern Court and scholars agree with this interpretation. In *Golan v. Holder*, the Court observed that "Science" in the Progress Provision refers to "knowledge and learning."[36] Likewise, in *Eldred v. Ashcroft*, Justice Breyer wrote a dissent in which he noted an undisputed premise that "the Framers meant learning or knowledge" when they employed "Science" in the Progress Provision.[37] Academic commentators have voiced this same sentiment. Copyright scholar William Patry states: "The term 'science' as used in the Constitution refers to the eighteenth-century concept of learning and knowledge."[38] Professor Ray Patterson has similarly explained: "[T]he word *science* retains its eighteenth-century meaning of 'knowledge or learning.'"[39] Professor Lawrence Solum has further observed: "[T]here is general agreement that science was usually understood in a broader sense [than its modern usage], so as to include knowledge, especially systematic or grounded knowledge of enduring value. Thus, the meanings of 'learning' and 'science' would be closely related."[40] Therefore, it is well accepted by the Court and scholars that "Science" reflects a concept encompassing knowledge and learning.

My own study of the term "Science" is consistent with this conclusion. In another work, I have examined sources at the time of the Framing—including dictionaries, legislative history underlying the constitutional power, textual cues within the Progress Provision, and post-constitutional evidence—to conclude that "Science" means a field or discipline of study or knowledge.[41] This

36. 565 U.S. 302, 324 (2012) ("The 'Progress of Science,' petitioners acknowledge, refers broadly to 'the creation and spread of knowledge and learning.'"); *see also* Eldred v. Ashcroft, 537 U.S. 186, 212 n.18 (2003) (explaining the public benefit of copyright as "the proliferation of knowledge" that would "ensure[] . . . the progress of science" (quoting Am. Geophys. Union v. Texaco Inc., 802 F. Supp. 1, 27 (S.D.N.Y. 1992))).

37. *Eldred*, 537 U.S. at 243, 245 (Breyer, J., dissenting) (explaining the undisputed premise that by "'Science' . . . the Framers meant learning or knowledge").

38. 1 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 123 (1994).

39. L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 48 (1991).

40. Solum, *supra* note 24, at 51; *see also* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 295 (1988) ("[T]he perhaps primary objective of intellectual property [is] to 'promote the Progress of Science and useful Arts' by increasing society's stock of knowledge.").

41. *See generally* Ned Snow, *The Meaning of Science in the Copyright Clause*, 2013 BYU L. REV. 259. In that work, I examined the history of the Enlightenment that led to the adoption of the IP Clause, dictionaries of the time, legislative history of the IP Clause (including proposals by James Madison and Charles Pinckney), the

understanding is supported by the Oxford English Dictionary ("OED"), which sets forth a meaning of science at the time of the Framing (and in use today) when paired or contrasted with "art."[42] Under the OED, "science" is defined as the following: "A discipline, field of study, or activity concerned with theory rather than method, or requiring the knowledge and systematic application of principles, rather than relying on traditional rules, acquired skill, or intuition."[43] "Science" thus appears to capture a sort of knowledge that derives from a discipline, a field of study, or a system of analysis. "Science" is not based on mere intuition.

This meaning of "Science" suggests a public perspective of knowledge. A discipline, a field of study, or a systemic analysis suggests that the knowledge of "Science" is open for the public to learn from and augment. The knowledge can be studied by those in the public who seek understanding and is open for public view and comment. Tellingly, the Framers themselves lived through this sort of public exchange of knowledge that gave rise to societal advancement in the age of the Enlightenment.[44] The very Republic that the Framers were creating was a product of the Enlightenment's public knowledge.[45] Thus, the Framers would understandably have been seeking to promote this sort of public-oriented knowledge. To be sure, "Science" would not have signified a private understanding, such as personal intuition, nor would it have signified one person's individual exercise of intellectual thought. Rather, "Science" would have implied a public-oriented approach to gaining knowledge.[46]

2. Progress

The word "Progress" builds on this public perspective implied by "Science." The accepted understanding of "Progress" in the Progress Provision is advancement or improvement.[47] Solum has explained that "Progress of Science" means "*advances* in learning," such that "'To promote the Progress of Science' would be to encourage the advancement of science or scientific activity."[48] He further observes that "Progress of Science" implies "[a] focus on the results of scientific activity."[49] Patry echoes the point that the meaning of

sorts of works for which the public sought copyright protection between 1790 and 1800, and the text of the first Copyright Act in 1790.

42. *Science*, *supra* note 26.

43. *Id.*

44. *See* Snow, *supra* note 41, at 277–81.

45. *See id.*

46. For further discussion on the meaning of "Science" in the Copyright Clause, see Sean M. O'Connor, *The Overlooked French Influence on the Intellectual Property Clause*, 82 U. CHI. L. REV. 733, 811 (2015).

47. *See* sources cited *infra* notes 48–53.

48. Solum, *supra* note 24, at 45.

49. *Id.* at 45–46.

"Progress of Science" "focuses on encouraging particular results"—specifically, "what the public will learn."[50] Professor Jeanne Fromer observes that promoting the progress of science calls for laws to "encourage advancement in areas of systematic knowledge."[51] Historian Edward Waltersheid concludes that progress means "the idea of advancement in science and the useful arts, including through the efforts of writers and inventors in creating new writings and finding out new discoveries of a utilitarian nature."[52] In short, scholars agree that "Progress" means advancement or improvement.[53]

Of course, the meaning of "Progress" is relative to the meaning of "Science" in the Progress Provision. That is, the advancement or improvement that "Progress" implies is relative to the public-oriented knowledge that "Science" implies. This point is noteworthy because it means that the advancement or improvement inherent in "Progress" must be assessed from the public perspective that is inherent in "Science." In other words, the advancement or improvement that knowledge yields must be assessed according to a value system held by the public rather than a single individual. Therefore, "Progress of Science" suggests a better outcome for the public.[54]

B. CASE LAW

For more than 150 years, courts treated "Progress of Science"—or the Progress Provision generally—as requiring works to impart a public benefit in

50. 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3:6, Westlaw (database updated Sept. 2022).

51. Jeanne C. Fromer, *The Intellectual Property Clause's External Limitations*, 61 DUKE L.J. 1329, 1373–74 (2012).

52. Edward C. Walterscheid, *The Preambular Argument: The Dubious Premise of* Eldred v. Ashcroft, 44 IDEA 331, 374 (2004).

53. Further support for this interpretation exists in evidence from the constitutional convention and the writings of James Madison. For instance, one of Madison's four constitutional proposals, which resulted in the IP Clause, was "the advancement of useful knowledge." DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. Doc. No. 398, at 563 (Charles C. Tansill ed., 1st Sess. 1927). I have analyzed such evidence in another article, but I do not recite that evidence here. *See* Ned Snow, *Discrimination in the Copyright Clause*, 67 ALA. L. REV. 583, 597–601 (2016).

54. Professor Malla Pollack offers a different interpretation. She argues that "Progress" means a physical movement, spread, or distribution of knowledge. *See* 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, 755–56 (2001). Professor Pollack has argued for this interpretation based, in large part, on an examination of the eighteenth-century editions of the *Pennsylvania Gazette*, with the most common occurrence being the "progress of fire." *Id.* at 799, 809; *see also* Orrin G. Hatch & Thomas R. Lee, *"To Promote the Progress of Science": The Copyright Clause and Congress's Power To Extend Copyrights*, 16 HARV. J.L. & TECH. 1, 8–10 & 10 n.42 (2002) (agreeing with Professor Pollack's spread interpretation of "Progress"). In another work, I argue against this contrary interpretation. *See* Snow, *Barring Immoral Speech*, *supra* note 22, at 190–91. Essentially, the interpretation is problematic because it does not reflect the context of the Progress Provision. *Id.* The Provision does not give Congress a power to promote the progress of fire or travel. *Id.* Rather, the Provision indicates a power to promote the progress of science and useful arts, which conveys a very distinct meaning. *Id.*

order to receive copyright protection.[55] As discussed below, the Supreme Court initially recognized a stringent public-benefit requirement in the late nineteenth century.[56] At the same time, the Court separately recognized that "Writings" in the Means Provision of the Copyright Clause requires works to manifest original intellectual conception—in other words, creativity.[57] Then, in the early twentieth century, the Court relaxed the public-benefit requirement for judging whether a work promoted the progress of science.[58] Nevertheless, a public-benefit standard continued to exist into the mid-twentieth century. This Subpart sets forth that history.

1. The Public-Benefit Requirement

In 1829, Justice Thompson presided over the first case denying copyright to a work because it failed to satisfy the meaning of "Science" in *Clayton v. Stone*.[59] Thompson denied protection for a catalog of market prices because the catalog of prices did not reflect "a work of science,"[60] owing to the fact that such content failed to promote the progress of science.[61]

Decades later, in 1879, the Supreme Court in *Baker v. Selden* recited Thompson's reasoning in denying protection for an accounting form.[62] Although the Court in *Baker* denied protection on different grounds than in *Clayton*, the Court quoted extensively from *Clayton*:

> It would certainly be a pretty extraordinary view of the sciences to consider a daily or weekly publication of the state of the market as falling within any class of them. They are of a more fixed, permanent, and durable character. The term 'science' cannot, with any propriety, be applied to a work of so fluctuating and fugitive a form as that of a newspaper or price-current, the subject-matter of which is daily changing, and is of mere temporary use. Although great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way.[63]

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55. For a fuller discussion of this history, see Ned Snow, *The Regressing Progress Clause: Rethinking Constitutional Indifference to Harmful Content in Copyright*, 47 U.C. DAVIS L. REV. 1, 6–33 (2013).

56. *See* Baker v. Selden, 101 U.S. 99, 105 (1879) (quoting Clayton v. Stone, 5 F. Cas. 999, 1003 (C.C.S.D.N.Y. 1829) (No. 2872)).

57. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57–58 (1884); *In re* Trade-Mark Cases, 100 U.S. 82, 94 (1879).

58. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 242–43 (1903).

59. 5 F. Cas. 999, 1003 (C.C.S.D.N.Y. 1829) (No. 2872).

60. *Id.*

61. *Id.*

62. 101 U.S. 99, 105 (1879). *Baker* remains good law, as the modern Supreme Court has repeatedly relied on the case to articulate copyright rules. *See, e.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 350 (1991); Mazer v. Stein, 347 U.S. 201, 217 (1954).

63. *Baker*, 101 U.S. at 105–06.

The Court adopted the view that promoting industry in individual authors was not the same as promoting the progress of science. Works that were of temporary use—even if temporarily beneficial to the public—did not satisfy the meaning of "Science." To satisfy this meaning, a work would need to fall within a subject matter that was of a "fixed, permanent, and durable character."[64] To be sure, the Court endorsed the view that the progress of science required a work to provide a worthwhile public benefit.

Following *Baker*, the Court in *Higgins v. Keuffel* denied copyright protection for a written bottle label on the basis that the content had "no connection with the progress of science and the useful arts."[65] The Court explained its application of the Progress Provision as follows:

> A label on a box of fruit, giving its name as 'grapes,' even with the addition of adjectives characterizing their quality as 'black,' or 'white,' or 'sweet,' or indicating the place of their growth, as Malaga or California, does not come within the object of the [IP] clause. The use of such labels upon those articles has no connection with the progress of science and the useful arts. So a label designating ink in a bottle as 'black,' 'blue,' or 'red,' or 'indelible,' or 'insoluble,' or as possessing any other quality, has nothing to do with such progress. It cannot, therefore, be held by any reasonable argument that the protection of mere labels is within the purpose of the clause in question. To be entitled to a copyright the article must have by itself some value as a composition, at least to the extent of serving some purpose other than as a mere advertisement or designation of the subject to which it is attached.[66]

The Court thus ruled that the value of the label as a composition was lacking.[67] For an individual author, the composition on the label may have had value, but for the public, it did not.[68] This conclusion implicitly depended on the public's valuation of a composition.

In sum, *Clayton v. Stone*, *Baker v. Selden*, and *Higgins v. Keuffel* each indicated that the Progress Provision requires copyrightable expressions to provide a sufficiently valuable benefit to the public.

2. The Creativity Requirement

At the same time the Court subscribed to this public-benefit interpretation of the Progress Provision, the Court also articulated a constitutional requirement for individual authorial creativity under a different term in the Copyright Clause: "Writings." In 1879 and again in 1884, the Court interpreted "Writings" to mean

64. *Id.*
65. 140 U.S. 428, 430–31 (1891).
66. *Id.*
67. *Id.*
68. *See id.*

things that are "original."[69] In 1879—the same year that the Court explained the meaning of science in *Baker*—the Court decided the *Trade-Mark Cases*. In the *Trade-Mark Cases*, the Court interpreted Congress's provision of trademarks as not falling within the scope of the Copyright Clause (instead, Congress's provision of trademarks falls within the scope of the Commerce Clause).[70] In that context, the Court explained that "Writings" implies originality of expression.[71] The Court stated:

> And while the word *writings* may be liberally construed, as it has been, to include original designs for engravings, prints, &c., it is only such as are *original*, and are founded in the creative powers of the mind. The writings which are to be protected are *the fruits of intellectual labor*, embodied in the form of books, prints, engravings, and the like.[72]

The Court thus explained that the writings that receive copyright protection are those that are "original" and in particular "founded in the creative powers of the mind."[73] The Court further clarified that "[t]he writings to be protected are the fruits of intellectual labor."[74] In modern parlance, copyright protects the expression that follows from an author's creative efforts; in other words, creative output reflects the subject of protection.[75] Thus, the Court in the *Trade-Mark Cases* opined that "Writings" requires an author to be creative, and further, that creativity is the subject matter of protection.[76]

A few years later, in 1884, the Court decided *Burrow-Giles Lithographic Co. v. Sarony*.[77] In *Sarony*, the Court considered whether a photograph fell within the meaning of "Writings," such that the photograph could be eligible for copyright protection.[78] The Court held that a photograph was indeed a writing because "Writings" means all forms of expression that reflect "original

69. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58–59 (1884); *In re* Trade-Mark Cases, 100 U.S. 82, 94 (1879).

70. *In re Trade-Mark Cases*, 100 U.S. at 94–95.

71. *See id.* at 94.

72. *Id.*

73. *Id.*

74. *Id.*

75. For the sake of clarity, I note that creativity means an author's intelligent thought process that gives rise to ideas that are original to the author. Several commentators have explored the meaning and application of creativity in copyright law. *See generally, e.g.*, Christopher Buccafusco, Zachary C. Burns, Jeanne C. Fromer & Christopher Jon Sprigman, *Experimental Tests of Intellectual Property Laws' Creativity Thresholds*, 92 TEX. L. REV. 1921 (2014); Cohen, *supra* note 1; Jeanne C. Fromer, *A Psychology of Intellectual Property*, 104 NW. U. L. REV. 1441 (2010); Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945 (2006); Russ VerSteeg, *Rethinking Originality*, 34 WM. & MARY L. REV. 801 (1993).

76. 100 U.S. at 94.

77. 111 U.S. 53 (1884).

78. *Id.* at 56.

intellectual conception."[79] Similarly, "Authors" means "he to whom anything owes its origin; originator; maker."[80] As a result of these meanings, the Copyright Clause requires a work to demonstrate original intellectual conception, or in other words, creativity, to receive copyright protection. The Court thus reinforced that the creativity requirement—also known as the originality requirement—derives from the "Writings" term of the Clause.[81]

A final point to note about the *Sarony* case is that the Court alluded to the fact that the photograph fell within the meaning of the "Progress of Science."[82] The photographer had posed the subject, Oscar Wilde, and also selected and arranged Wilde's costume, the draperies, and other accessories.[83] In doing so, the trial court found that the photographer had created a picture that was "useful, new, harmonious, characteristic, and graceful."[84] Based on these findings, the Court concluded that the work was "of a class of inventions for which the Constitution intended that Congress should secure to him the exclusive right to use, publish and sell."[85] Presumably, the Court was referring to the sort of writings that would promote the progress of science. Although the Court did not provide any further analysis, it is noteworthy that the Court mentioned this point separately from its conclusion that the work was an original writing. Its separate analysis suggests two different inquiries—one for "Writings" and one for the "Progress of Science."

Thus, the *Trade-Mark Cases* and *Sarony* introduced the constitutional requirement for an author to exercise creativity. Individual creativity is necessary for expression to constitute a "Writing" within the meaning of the Copyright Clause. Notably, the Court introduced this requirement without reference to the "Progress of Science" within the Progress Provision.

3. The Bleistein *Standard*

In 1903, the Court decided *Bleistein v. Donaldson Lithographing Co*.[86] The issue was whether a lithograph used to advertise a circus should receive copyright protection.[87] Recall that in the 1891 case of *Higgins v. Keuffel*, the Court had stated that "a mere advertisement" could not qualify as a work that would promote the progress of science, and thereby an advertisement was

79. *Id.* at 58.
80. *Id.* at 57–58.
81. *See id.*
82. *See id.* at 60.
83. *Id.*
84. *Id.*
85. *Id.*
86. 188 U.S. 239 (1903).
87. *Id.* at 248.

ineligible for copyright protection.[88] Following this reasoning, the trial and appellate courts in *Bleistein* denied copyright protection on the grounds that the circus advertisement failed to promote the progress of science.[89] The Supreme Court, however, held otherwise.

a. The Progress Provision

The *Bleistein* Court analyzed the work under both the Progress Provision and the originality requirement.[90] The Court's analysis of the work under the Progress Provision was brief but unmistakable:

> We shall do no more than mention the suggestion that painting and engraving, unless for a mechanical end, are not among the useful arts, the progress of which Congress is empowered by the Constitution to promote. The Constitution does not limit the useful to that which satisfies immediate bodily needs.[91]

Here, the Court rejected the suggestion that only works serving a mechanical end could satisfy the meaning of "useful Arts" under the Progress Provision.[92] Immediately following the quoted passage, the Court cited to *Sarony* for its suggestion that the circus poster was "useful."[93] These points apparently were sufficient to demonstrate that the circus posters would satisfy the Progress Provision.

The Court's analysis in *Bleistein* significantly lowered the bar for satisfying any requirement of public benefit under the Progress Provision. The Court refused to analyze the circus posters under the "Science" term of that Provision, instead analyzing them under "useful Arts."[94] This was a clear departure from prior case law, which had interpreted "Science" as imposing a stringent requirement. The term "useful Arts" suggests that only some manifestation of utility suffices.[95] In other words, the Court treated the Progress Provision as requiring any sort of useful purpose. Obviously, that standard is much less demanding than the one articulated in *Baker* or *Higgins*.[96] Indeed, the Court in *Bleistein* appeared to treat the public benefit of a work as presumptively

88. 140 U.S. 428, 430–31 (1891) ("To be entitled to a copyright the article must have by itself some value as a composition, at least to the extent of serving some purpose other than as a mere advertisement . . . .").

89. *See Bleistein*, 188 U.S. at 252–53 (Harlan, J., dissenting).

90. *See id.* at 249–50 (majority opinion).

91. *Id.* at 249 (citing Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884)).

92. *Id.*

93. *Id.*

94. *See id.*

95. *Cf.* Baker v. Selden, 101 U.S. 99, 105 (1879); Higgins v. Keuffel, 140 U.S. 428, 430–31 (1891); Clayton v. Stone, 5 F. Cas. 999, 1003 (C.C.S.D.N.Y. 1829) (No. 2872).

96. *See Baker*, 101 U.S. at 105; *Higgins*, 140 U.S. at 430–31.

established.[97] Unless shown to be harmful, all works would seem to be beneficial to the public under the standard briefly set forth in *Bleistein*. Yet even with its less demanding application of the Progress Provision, the Court in *Bleistein* did not do away with the requirement that an individual work needed to satisfy the meaning of that Provision. *Bleistein* did not overrule *Higgins*. To be sure, the Court considered the issue of whether the circus posters were useful. And in contemplating the usefulness of the posters, the Court did not look to whether they reflected individual creativity of an author. Hence, the Court preserved the impliedly public orientation of the Progress Provision by merely considering whether the posters could be useful to the public.

b. Originality (Creativity)

Immediately after analyzing the work under the Progress Provision, the Court in *Bleistein* turned to the issue of originality.[98] The defendant had argued that the circus posters lacked originality because they were drawn from real life, and thus the author had not created the imagery from his own mind.[99] However, the Court rejected this argument and explained:

> The copy [of the real-life things] is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act. If there is a restriction it is not to be found in the limited pretensions of these particular works. The least pretentious picture has more originality in it than directories and the like, which may be copyrighted.[100]

The Court recognized that an author's individuality satisfies the requirement that a work exhibit originality (or, in other words, creativity).[101]

Thus, the Court's analysis of whether the circus posters satisfied the standard of the Progress Provision was distinct from its analysis of whether those circus posters satisfied the requirement for originality. Its former analysis suggests that all works have a presumptive public benefit, while the latter analysis suggests that all works presumptively have individual creativity. Both analyses suggest a presumption of copyrightability, and both analyses are distinct.

97. *See* 188 U.S. at 249.
98. *See id.* at 250.
99. *See id.* at 249.
100. *Id.* at 250.
101. *See id.*

c. Nondiscrimination Principle

After analyzing the circus posters under these constitutional requirements, the *Bleistein* Court provided a rationale for its adoption of a strong presumption in favor of recognizing copyright protection.[102] This rationale appeared in the Court's reasoning about whether the circus posters satisfied the statutory requirements for copyright protection.[103] Although the Court articulated the rationale in the context of the statutory requirements, the rationale is equally applicable to the constitutional presumptions that the Court applied.[104]

The Copyright Act of that time required a pictorial work to be "connected with the fine arts" to receive protection.[105] In holding that the circus posters were works of fine art, the Court warned against judges deciding the copyright eligibility of a work based on their own view of a work's value.[106] The danger, the Court explained, was that some works would surely miss appreciation.[107] In the Court's words:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appeal to a public less educated than the judge.[108]

This nondiscrimination principle that the Court articulated obviously has implications for judges determining whether a work promotes the progress of science. One judge's view of whether a work is sufficiently beneficial to the public introduces subjectivity into the copyright-eligibility inquiry. Individual value systems differ greatly. What one person considers inappropriate content, another may consider valuable literary thought. So, if a judge thinks a work is immoral, then that merely reflects one person's opinion. Under this nondiscrimination principle in *Bleistein*, one judge's opinion should not preclude copyright protection.

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102. *See id.* at 250–52.

103. *See id.* at 250.

104. *See id.* at 250–52.

105. *See id.* at 250. For a thought-provoking analysis of whether the Progress Provision includes the fine arts, see generally Barton Beebe, Bleistein*, the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319 (2017).

106. *See Bleistein*, 188 U.S. at 251–52.

107. *Id.* at 251.

108. *Id.* at 251–52.

Importantly, and relevant to the issue this Article considers, the Court in *Bleistein* recognized that there are limits to this principle of nondiscrimination.[109] The Court called for judges to refrain from assessing the value of a work "outside of the narrowest and most obvious limits."[110] Although the Court did not explicate the contours or examples of these narrowest and most obvious limits, such language sufficiently demonstrates that the principle of nondiscrimination is not without exception. Therefore, there is some room for a judge to decide copyright eligibility based on a work's value.

d. Courts After Bleistein

Case law subsequent to *Bleistein* supports the conclusion that *Bleistein* did not bar courts from denying copyright on the grounds that a work was harmful to the public. As a factual matter, works that were recognized as harmful did not receive copyright protection.[111] For instance, a month after *Bleistein*, the U.S. District Court for the Southern District of New York in *Barnes v. Miner* denied a copyright for a film that contained a depiction of a woman disrobing; the court explained that the depiction was not "of a nature to 'promote the progress of science.'"[112] Into the mid-twentieth century, courts held that works could not receive copyright protection for failing to promote the progress of science.[113] Furthermore, treatise writers after *Bleistein* observed that the Progress Provision calls for an examination of a work's moral character.[114] In short, courts and

109. *See id.* at 251.

110. *Id.*

111. *See* sources cited *infra* notes 113–14.

112. Barnes v. Miner, 122 F. 480, 489–90 (C.C.S.D.N.Y. 1903).

113. *See, e.g.*, Dane v. M. & H. Co., 136 U.S.P.Q. (BNA) 426, 429 (N.Y. Sup. Ct. 1963) ("Where a performance contains nothing of a literary, dramatic or musical character which is calculated to elevate, cultivate, inform or improve the moral or intellectual natures of the audience, it does not tend to promote the progress of science or the useful arts."); *cf.* Khan v. Leo Feist, Inc., 70 F. Supp. 450, 458 (S.D.N.Y. 1947) ("It cannot be seen that there was a purpose to corrupt the morals of hearers, or to stimulate thoughts or impulses which would otherwise be dormant."), *aff'd*, 165 F.2d 188, 192–93 (2d Cir. 1947) ("It seems exaggerated to hold that the rather cheap and vulgar verses would tend to promote lust."); Cain v. Universal Pictures Co., 47 F. Supp. 1013, 1018–19 (S.D. Cal. 1942) (upholding copyright despite disturbing scenes on grounds that the later scene "destroys all implications of immorality or impiety in the earlier scenes"); Paramore v. Mack Sennett, Inc., 9 F.2d 66, 68 (S.D. Cal. 1925) (recognizing valid purpose of seemingly salacious expression in order to uphold copyright); Simonton v. Gordon, 12 F.2d 116, 124 (S.D.N.Y. 1925) (upholding copyright protection on grounds that an "unnecessarily coarse and highly sensual" work purports to display actual conditions, and was portrayed in a way so as not to encourage lust).

114. Horace Ball is a good example. Ball was a leading treatise writer on copyright law during the mid-nineteenth century. *See generally* HORACE G. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY (1944). He explained:

> A composition of an immoral character cannot be protected by copyright. . . . When a suitor invokes the power of the court to protect him in the exclusive right to give public performances of a copyrighted dramatic or musical composition which is grossly indecent, panders to a prurient

commentators never portrayed *Bleistein* as negating the public-harm basis for denying copyright protection.

In sum, historical case law suggests that "Progress of Science" requires that works not be harmful to the public. Since *Bleistein*, courts have presumed that most, but not all, works satisfy this requirement.[115] At the same time, courts have held that works must manifest an author's creativity to be considered a writing under the Copyright Clause.[116] Courts have treated the two constitutional requirements for copyright protection—an absence of public harm and the presence of authorial creativity—as distinct constitutional inquiries.[117]

II. THE MODERN DEBATE

Some statements by the modern Supreme Court have called into question the distinctiveness of the progress of science inquiry from the creativity inquiry.[118] Furthermore, some modern scholars have adopted an interpretation of "Progress of Science" that rejects the traditional absence of public harm standard.[119] Their interpretation focuses on the creativity of an individual author, positing the purpose of copyright law to be the encouragement of creativity.[120] Under this view, all creative works cultivate society's culture, so value judgments about the content of individual works have no place in copyright law.[121] Accordingly, this view holds the constitutional purpose of copyright law to be the promotion of creativity without any consideration for a work's harmful effects on society. Under this modern view, if a work is creative in nature yet imposes social harm to the public, then it should be promoted.

In Subpart A, I recite the language from the Supreme Court that could be interpreted as reflecting this modern view. Yet the context of such language

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> curiosity, excites an obscene imagination or is otherwise calculated to corrupt the public morals, it is the court's duty to deny him relief upon the ground that such an exhibition or performance is inimical to "the progress of science and useful arts," which the Copyright Law was designed to promote.

Id. at 112; *see also* RICHARD ROGERS BOWKER, COPYRIGHT: ITS HISTORY AND ITS LAW 63, 86–87 (1912) ("There can be no copyright in an immoral book."); RICHARD C. DE WOLF, AN OUTLINE OF COPYRIGHT LAW 80–82 (1925) (explaining that "the law gives protection in general to all the writings of authors," while also noting that "[i]t is a recognized rule of copyright law, laid down in a number of decisions of the courts, that protection will not be accorded to works of a seditious or immoral character"); ARTHUR W. WEIL, AMERICAN COPYRIGHT LAW 189, 195–96 (1917) (observing broad subject matter of copyright and at the same time opining that "there can be no copyright in any blasphemous, seditious, or immoral, or libelous work").

115. *See, e.g.*, cases cited *supra* note 113.

116. *See, e.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345–47 (1991).

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

118. *See* discussion *infra* Part II.A.1 (analyzing cases requiring originality for copyright protection).

119. *See* discussion *infra* Part II.B.1 (reciting views of commentators that creativity is the purpose of copyright law).

120. *See* discussion *infra* Part II.B.1.

121. *See* discussion *infra* Part II.B.1.

counsels against an absolute rule precluding an inquiry into whether a work is harmful to the public. I also survey modern cases that interpret the Progress Provision as having a public-oriented focus. In Subpart B, I recite different scholarly views on the role of creativity. I note several scholars who view encouraging creativity as the purpose of copyright law and other scholars who seem to suggest that creativity is a mere condition for a public-oriented end.

A. SUPREME COURT CASES

1. Statements on Creativity

The most influential modern Supreme Court case dealing with the role of creativity in copyright law is *Feist Publications, Inc. v. Rural Telephone Service Co*.[122] The issue in *Feist* was whether a compilation of phonebook entries was copyrightable.[123] A phonebook company had taken information from its subscribers (names, towns, and telephone numbers) and then had listed that information alphabetically in its phonebook.[124] The Court held that the phonebook company's choices in this process failed to demonstrate the requisite level of creativity for copyright protection.[125] The Court explained that a work must demonstrate "a modicum of creativity" to be original, and that originality is a constitutional requirement.[126]

In its ruling, the Court emphasized the importance of this originality requirement. The Court explained: "The *sine qua non* of copyright is originality. . . . The originality requirement . . . remains the touchstone of copyright protection today. It is the very 'premise of copyright law.'"[127] This language, coupled with the Court's denial of a copyright for lack of creativity, suggests the central importance of creativity in copyright law.

Other language from Supreme Court cases further supports the notion that creativity is central to the purpose of copyright law. In *Sony Corp. of America v. Universal City Studios, Inc.*, the Court considered whether the defendant, Sony, was contributorily liable for the unauthorized recordings of copyrighted programs that users of the Sony Betamax machine had created.[128] Holding that Sony was not contributorily liable, the Court explained the broad purpose of copyright in terms of creativity:

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122. 499 U.S. 340 (1991).

123. *Id.* at 342.

124. *Id.* at 362.

125. *Id.* ("The end product is a garden-variety white pages directory, devoid of even the slightest trace of creativity.").

126. *Id.* at 346 ("[O]riginality requires independent creation plus a modicum of creativity . . . .").

127. *Id.* at 345, 347.

128. 464 U.S. 417, 419–20 (1984).

> [T]he limited grant [of intellectual property rights] 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.[129]

The language suggests that creativity is the central purpose of copyright: copyright "is intended to motivate the creative activity of authors."[130]

Finally, in *Fogerty v. Fantasy, Inc.*, the Court made similar comments. While considering the standards for awarding attorney's fees in a copyright suit, the Court stated:

> *Because copyright law ultimately serves the purpose of enriching the general public through access to creative works*, it is peculiarly important that the law's boundaries be demarcated as clearly as possible. Thus, a defendant seeking to advance meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious infringement claims.[131]

The Court observed that the purpose of copyright law is to give the general public access to creative works.[132]

The statements of these cases all indicate that creativity underlies the purpose of copyright law. Yet they should not be interpreted as suggesting that copyright fails to place any boundaries on creativity. Consider *Feist*'s statement that originality (and thereby creativity) is the "*sine qua non*" of copyright law.[133] A sine qua non represents an essential condition or an absolute necessity.[134] However, necessity does not imply sufficiency. Creativity can be both "the very premise of copyright law"[135] and subject to the restraint of not harming the public. Just as creative expression is insufficient to gain copyright protection where the expression is not fixed within a tangible medium,[136] creative expression may also be insufficient where the expression is harmful to the public. Indeed, none of the cases quoted above contemplated a work that was in

129. *Id.* at 429.

130. *Id.*

131. Fogerty v. Fantasy, Inc., 510 U.S. 517, 517–18 (1994) (emphasis added).

132. *See id.*

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

134. *See Sine Quo Non*, OXFORD ENG. DICTIONARY, https://www.oed.com/view/Entry/180079?redirectedFrom=sine+quo+non#eid (last visited Apr. 1, 2023) (defining sine quo non as "indispensable").

135. *See Feist*, 499 U.S. at 347 (referring to the "originality requirement" as "the touchstone" and "very premise" of copyright law (internal quotation marks omitted)).

136. *See* 17 U.S.C. § 102 (requiring works to be "fixed in any tangible medium of expression" to receive copyright protection).

any way harmful to the public.[137] Hence, the cases should not be interpreted to suggest that creativity is not subject to any boundaries or constraints.

A good statement that sets forth the role of creativity within the broader purpose of copyright may be found in the modern case of *Twentieth Century Music Corp. v. Aiken*.[138] There, the Supreme Court considered whether a restaurant had infringed a copyright to a song by publicly playing the song from publicly broadcasted radio waves.[139] In holding that the restaurant had not infringed, the Court explained the broad purpose of copyright as follows:

> The immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity *for the general public good*. 'The sole interest of the United States and the primary object in conferring the monopoly,' this Court has said, 'lie in the general benefits derived by the public from the labors of authors.'[140]

Although the Court stated that "artistic creativity" is the "ultimate aim" of copyright, that statement should not be interpreted in isolation. The Court indicated that artistic creativity is "for the general public good."[141] Further, it explained that the "primary object" of extending copyright protection is "the general benefits derived by the public."[142] Admittedly, these statements do not necessarily mean that creativity is subject to a public-benefit restraint, although they certainly allow for this interpretation.[143] It seems probable that the Court was recognizing that creativity was important insofar as it promotes benefits to the public.

2. Public-Focused Decisions

Two modern Supreme Court cases—*Eldred v. Ashcroft* and *Golan v. Holder*[144]—suggest that Congress's exercise of the copyright power must serve a public benefit.

In 2003, the Court in *Eldred v. Ashcroft* considered whether Congress acted within the scope of its power under the Copyright Clause when it enacted the Copyright Term Extension Act ("CTEA"), which extended the duration of

137. The *Feist* Court explained that "[t]he primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.'" *Feist*, 499 U.S. at 349. It did not refer to originality (or creativity) as the "primary objective of copyright." *See id.*

138. 422 U.S. 151 (1975).

139. *Id.* at 152.

140. *Id.* at 156 (emphasis added) (quoting Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)).

141. *Id.*

142. *Id.*

143. These statements of the *Aiken* Court may be interpreted to mean that all artistic creativity promotes "the general public good," or that all artistic creativity results in "general benefits" for the public. I do not intend to suggest that the quoted statements foreclose this contrary interpretation.

144. *See* Golan v. Holder, 565 U.S. 302 (2012); Eldred v. Ashcroft, 537 U.S. 186 (2003).

copyrights by twenty years (beginning in 1998).[145] As part of its analysis, the Court cited two reasons for construing the CTEA as a promotion of the progress of science: first, the extended duration could incentivize copyright owners "to invest in the restoration and public distribution of their works," and second, the extended duration would conform U.S. copyright laws to international standards.[146] Those reasons suggest benefits to the public: greater distribution of works to the public provides the benefit of public access, and conformance with international standards provides the public the benefits of international treaties.[147] Based on these two reasons, the Court concluded that "Congress' enactment of the CTEA provided a rational basis for the conclusion that the CTEA 'promote[s] the Progress of Science.'"[148]

In 2012, the Court in *Golan v. Holder* considered whether Congress had acted within its copyright power by extending copyright protection to works that had already passed into the public domain.[149] Like the Court in *Eldred*, the Court cited reasons that would benefit the public as justification for Congress's act.[150] In particular, the Court relied on the fact that extending copyright protection to works that had already passed into the public domain would incentivize their dissemination.[151] It expressly rejected the argument that Congress must exercise the copyright power solely to create new works.[152] In the Court's words: "Nothing in the text of the Copyright Clause confines the 'Progress of Science' exclusively to 'incentives for creation.'"[153] If the "Progress of Science" is exclusively focused on incentives for creation, then the purpose of copyright would seem limited to incentivizing creativity. Yet, as the Court explained, it includes incentives for dissemination. Accordingly, the creativity that the Clause fosters must serve the public interest.

Although *Eldred* and *Golan* do not definitively demonstrate that the Court views the "Progress of Science" as requiring works not to harm the public interest, they are certainly consistent with that interpretation. They suggest that the purpose of copyright law (and thereby the progress of science) has a public-benefit focus.

145. 537 U.S. at 193.
146. *Id.* at 205–08.
147. *See id.*
148. *Id.* at 213.
149. *Golan*, 565 U.S. at 324–27.
150. *See id.* at 325–26.
151. *Id.* at 325–27.
152. *See id.* at 325–26.
153. *Id.*

B. THE LITERATURE

As for copyright theory, modern scholars have prioritized individual creativity over public benefit. The reason for prioritizing individual creativity is that an assessment of public benefit calls for a value judgment, often moral in nature, about whether the content of expression is acceptable.[154] Thus, the view that copyright law exists to further creativity reflects a belief that the government should not be trusted to decide which sort of expression is appropriate for public consumption in the marketplace.[155] Let authors create whatever sorts of works they desire, and the market will decide whether the work is sufficiently valuable to create. Under this view, copyright exists to further creativity, and the free marketplace is the vehicle for value judgment.

Other variations of this general philosophy favoring individual creativity over public benefit exist in the literature. Some view the purpose of copyright as a means for authors to realize their own personality and self-actualization through their creative effort.[156] Under this personality and autonomy theory, the public's collective moral and social values should not shape or restrict the scope of copyright.[157] Viewed from this perspective, the progress of science essentially signifies the individual, self-fulfilled progress of an author. Progress is realized by copyright's ability to facilitate self-actualization.

In Subpart B.1 below, I summarize the arguments and rhetoric of scholars who appear to support this primacy view of creativity. In Subpart B.2, I call attention to scholarly works that are consistent with the distinct view that the progress of science contemplates restrictions on creativity.

1. Creativity as the Purpose of Copyright

In her influential article, *Creativity and Culture in Copyright Theory*, Professor Julie Cohen explains that "[c]reativity is universally agreed to be a good that copyright law should seek to promote."[158] She argues that copyright

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154. Professor Julie Cohen adeptly recognizes the approach of most copyright theorists:

> Both rights theorists and economic theorists are deeply suspicious of the role of value judgments about artistic merit in justifying the recognition and allocation of rights. They have therefore struggled mightily to articulate neutral, process-based models of progress that manage simultaneously to avoid enshrining particular criteria of artistic and intellectual merit and to ensure that the "best" artistic and intellectual outputs will succeed.

Cohen, *supra* note 1, at 1162.

155. *See id.* at 1162–63.

156. *See generally, e.g.*, Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81 (1998).

157. Professor Margaret Jane Radin has provided a detailed analysis of the relationship between property rights and personhood. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

158. Cohen, *supra* note 1, at 1151.

scholars should look to social science methodologies to better understand creative processes, calling for doctrinal changes that will facilitate those processes.[159] She views creativity as yielding cultural goods, and to the extent that those cultural goods cause knowledge systems to come under challenge, creativity yields progress.[160] Accordingly, Cohen argues that copyright should promote progress that is "non-teleological" in nature.[161]

Professor Roberta Rosenthal Kwall also writes about the central role of creativity in copyright law. She argues that "[f]rom its inception, United States' copyright law has been designed to calibrate the optimal level of economic incentive to promote creativity."[162] Based on this premise, Kwall argues that copyright law "should be shaped in response to all relevant forces motivating creativity," including noneconomic forces and, in particular, spiritual or inspirational forces.[163] In his well-recognized copyright treatise, Professor Paul Goldstein has explained that "the object of copyright" is "to encourage the production of the widest variety of literary and artistic expression."[164] And again: "The aim of copyright law is to direct investment toward the production of abundant information."[165] Similarly, Professor Neil Netanel has opined that "the Progress of Science" is "broadly understood to include all products of the mind."[166] He further explains that it now encompasses even the obscene.[167]

159. *Id.* at 1151–52.

160. *Id.* at 1168.

161. *Id.* at 1162; *id.* at 1177 ("Engagement with all of these resources [that directly inform creative processes] is essential to fleshing out a non-teleological account of the progress that artistic and intellectual creativity enables, and that copyright is supposed to promote.").

162. Kwall, *supra* note 75, at 1946.

163. *Id.* at 1947.

164. PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 2.2.1 (3d ed. 2005 & Supp. 2022-2), Westlaw.

165. *Id.*

166. NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 106 (2008).

167. *Id.*; *cf.* Flava Works, Inc. v. Gunter, 689 F.3d 754, 755 (7th Cir. 2012) ("[T]he prevailing view is that even illegality is not a bar to copyrightability."). For further scholarship, see, for example, Clark D. Asay, *Intellectual Property Law Hybridization*, 87 U. COLO. L. REV. 65, 68 (2016) ("Copyright law, conversely, seeks to foster original, creative expression."); Buccafusco et al., *supra* note 75, at 1921–24 (positing that the purpose of copyright law in the United States is to "encourage the production of new creative works," which they also define as "culturally valuable works"); Doris Estelle Long, *When Worlds Collide: The Uneasy Convergence of Creativity and Innovation*, 25 J. MARSHALL J. COMPUT. & INFO. L. 653, 657 (2008) ("When you think about copyright, it really is supposed to be about promoting creativity."); Christopher Jon Sprigman, *Copyright and Creative Incentives: What We Know (and Don't)*, 55 HOUS. L. REV. 451, 455 (2017) ("Fundamentally, we have copyright because we think it will push people to make new artistic and literary works."); Gregory N. Mandel, *To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity*, 86 NOTRE DAME L. REV. 1999, 1999 (2011) ("Intellectual property is the primary area through which the law seeks to motivate and regulate human creativity.").

By and large, copyright scholars characterize promotion of creativity as the purpose of copyright law.[168] Their comments suggest a simple philosophy: that creativity can only be good.

2. Creativity as an Element of Copyright

Not all scholars believe that creativity necessarily promotes the progress of science. Some scholars have described the role of creativity in copyright law with more nuanced language. Consider, for instance, the comments of Professor Andres Sawicki, who notes a distinction between the progress of science and creativity in his writing about whether the risk inherent in intellectual property fosters creativity[169]:

> IP's constitutionally mandated purpose—"promot[ing] the Progress of Science and useful Arts"—is not coextensive with promoting creativity. But creativity is nonetheless an essential ingredient in the work that inventors and artists do. We therefore need to understand how the IP system affects creativity in order to assess how well IP is furthering its constitutional purpose.[170]

Consistent with the rhetoric of the Supreme Court discussed in Subpart A above, Sawicki treats creativity as a necessary condition for promoting the progress of science, but not as coextensive with the progress of science.

Other scholars have similarly described the role of creativity in copyright law with caveats and restraints.[171] Professor Michael Madison has altogether challenged the premise that copyright should focus on creativity. He argues that copyright should instead focus on the sorts of knowledge that would benefit society:

> More—more creativity, more creative goods, more creators—is not necessarily better; more is merely different. More can be socially or individually harmful; more can be wasteful. . . . Copyright as creativity law

168. This is not to say that everyone agrees that creativity is the purpose of copyright law. Consider, for instance, Professor Aaron Fellmeth's argument that the purpose of copyright is not to facilitate creativity, but rather to facilitate productivity and recordation. Aaron X. Fellmeth, *Uncreative Intellectual Property Law*, 27 TEX. INTELL. PROP. L.J. 51, 86 (2019). As he explains: "[T]he goal of copyright law is to facilitate productivity in expressive works and their fixation in a tangible medium. The concern is with securing a sufficient quantity of expressive works for the public benefit, with no very significant interest in the quality of the resulting works." *Id.* Although his argument takes issue with creativity as the end of copyright, it still relies on the premise that more expression—of any kind—is desirable.

169. Andres Sawicki, *Risky IP*, 48 LOY. U. CHI. L.J. 81, 84 (2016).

170. *Id.*

171. *Cf.* Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 491–92 (1996) ("[C]opyright protects more extensively an individual's creativity and labor when invested in an entertaining work than when invested in a useful work or a non-work product. . . . The inevitable result of such protection is that we will have too many entertaining works, at the expense of having too little of everything else.").

> becomes a way of thinking about motivation, influence, and power, rather than a way of thinking about what sorts of things society wants to produce, preserve, share, and have access to. I argue that the concept of *knowledge* should be rehabilitated as an anchor for copyright . . . .[172]

Here, Professor Madison proposes altogether jettisoning creativity as the focal point of copyright law. Knowledge—the output of certain sorts of creative efforts—should be copyright's focus.[173]

Some scholars have further argued that courts and scholars should assess the progress of science in a way that is distinct from merely encouraging creativity. In particular, these scholars argue that progress must account for aspects of social welfare.[174] For instance, Professor Margaret Chon posits that intellectual property law should consider distributional effects.[175] She argues for

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172. Michael J. Madison, *Beyond Creativity: Copyright as Knowledge Law*, 12 VAND. J. ENT. & TECH. L. 817, 823–24 (2010).

173. Writings of other scholars are consistent with boundaries on creativity, although not explicitly so. Consider Professor Jeanne Fromer, who has stated:

> [T]he primary goal of patent and copyright law is to stimulate creativity *valuable to society* in their respective spheres. Thus, the protectability standards of patent and copyright law ought to stimulate creativity, so long as the works protected by each type of law fit the prototypical forms of creativity for that regime.

Fromer, *supra* note 75, at 1445. Fromer's reference to creativity that is "valuable to society" suggests that creativity that is not valuable to society is not within the domain of copyright law. Presumably, the "prototypical forms of creativity" for the copyright regime is the creativity that promotes progress in society. Professor Molly Shaffer Van Houweling has characterized the "primary justification" for copyright law as "encouraging the creation of expressive works *that benefit the public*." Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1539 (2005). What does it mean that works "benefit the public?" She does not explain, but instead offers the "crude logic" of copyright law to be "that creativity is good for society, that creativity needs encouragement, and that copyright provides this encouragement." *Id.* I agree with this statement insofar as the crudeness of the logic is due to the fact that the logic does not contemplate the few instances where creativity is *not* good for society.

174. Professor Madhavi Sunder has argued that the purpose of intellectual property laws should be viewed as much broader than an economic fix for underproduced goods. *See* MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 3 (2012) ("[I]ntellectual property laws shaped only by the narrow economic view that predominates today results in a crabbed understanding of culture and law's role in promoting culture. . . . [C]opyright and patent laws do more than incentivize the creation of more goods. They fundamentally affect human capabilities and the ability to live *a good life*."). Professor Yochai Benkler has also endorsed a broad conception of "Progress," explaining:

> The engine of Progress is the progress of knowledge. Knowledge itself, like Progress, advances through human agency and improves from one generation to the next in a process of accretion. It feeds technological innovation, which increases, the spread of material welfare and the development of better organizational and institutional arrangements, all of which feed back on each other. Over time, these together lead to the intellectual, moral, and aesthetic improvement of the human condition. This too was the basic structure of the idea that animated the passage of the Intellectual Property Clause.

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, 569–70 (2000).

175. Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2823 (2006).

employing global public goods—such as educational attainment, standard of living, and life expectancy—as a means for measuring progress.[176] Along that line of thinking, Professors Brett Frischmann and Mark McKenna have argued that "the IP Clause of the Constitution is open to a range of normative values whose advancement would constitute Progress."[177] They opine that intergenerational justice should be a priority in assessing progress.[178] Thus, for these scholars, encouraging creativity for its own sake (or the sake of producing more creative works in our culture) should not represent the overarching purpose of copyright law.

III. A RETURN TO THE PROGRESS OF SCIENCE

I propose that lawmakers and scholars once again recognize that the "Progress of Science" necessarily precludes harmful expression from receiving copyright protection. The focus of copyright should be to promote knowledge that is, according to the public's value system, beneficial to the public—not merely to facilitate individual creativity for the benefit of authors or to develop works that in some way affect culture (for better *or worse*). Nevertheless, courts should presume that most expression will promote knowledge that is beneficial to the public. This presumption fosters creativity, which is necessary, and even central, to promoting the progress of science. Indeed, there is significant overlap between creativity and the knowledge and learning that comprise science: only through creative thought can authors produce knowledge about various subject matters. Yet to interpret creativity as synonymous with the progress of science would ignore the fact that not all creative thought promotes public progress. Lawmakers should therefore not view creativity as the constitutional end of copyright law. They should deny copyright protection to works that unquestionably harm the public.

This Part sets forth the practicalities of and justifications for this proposal. Subpart A discusses its practical application—specifically, it explains the sorts of works for which lawmakers should and might deny copyright protection. Subpart B argues that the incentive theory of copyright justifies this proposal. Subpart C sets forth constitutional support, referring back to Part I's interpretations of the Progress Provision. Subpart D observes support in other intellectual property doctrines. Finally, Subpart E responds to a potential free speech counterargument.

176. *See id.* at 2832–33.
177. Brett Frischmann & Mark P. McKenna, *Intergenerational Progress*, 2011 WIS. L. REV. 123, 125.
178. *Id.*

A. PRACTICAL APPLICATION

What does this proposal mean in practice? What sorts of expressions should be denied protection on the grounds that they are too harmful to incentivize through copyright? Who would make that decision? These questions merit lengthy consideration, which I offer in another work.[179] Here, I only briefly summarize the answers, noting that the focus of this Article is the theoretical premise that a requirement precluding public harm limits the scope of copyrightable expression.

In response to the above questions, the scope of expression that necessarily fails to promote the progress of science consists of expression that is punishable by law. By definition, unlawful expression is harmful to the public, for its harmful effects are the reason that Congress or state legislatures have acted to deter their production. It would not make sense for copyright to incentivize the very expression that other laws punish. Importantly, such expression necessarily does not receive First Amendment protection.[180] Defamation,[181] obscenity,[182] certain instances of fraud,[183] child pornography,[184] and true threats of violence[185] are a few examples. Hence, the scope of expressive works that should fall outside the progress of science consists of those categories of speech that are so harmful to the public that the law punishes their expression, and correspondingly, are of such low value that the First Amendment does not protect them. I therefore propose, on constitutional grounds, that courts refrain from recognizing copyright protection for expressions that are punishable under law.[186]

This proposal raises the issue of which jurisdiction's law should define whether expression is unlawful for purposes of denying copyright. Given that copyright is a federal right, federal definitions of lawfulness apply. For federal

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179. *See* SNOW, INTELLECTUAL PROPERTY AND IMMORALITY, *supra* note 22.

180. *See generally, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (no protection for defamation); Miller v. California, 413 U.S. 15 (1973) (no protection for obscenity); Illinois *ex rel.* Madigan v. Telemktg. Assocs., 538 U.S. 600 (2003) (holding that there is no protection for fraudulent misrepresentations in fundraising).

181. *Dun & Bradstreet*, 472 U.S. at 749.

182. *Miller*, 413 U.S. at 15.

183. *Telemktg.*, 538 U.S. at 601.

184. New York v. Ferber, 458 U.S. 747, 747 (1982).

185. Virginia v. Black, 538 U.S. 343, 344 (2003).

186. Most unlawful expression is unlawful only if there is an action that accompanies the expression. Obscenity, for instance, is unlawful only if it is distributed or publicly performed. *See, e.g.*, 18 U.S.C. § 1461 (punishing the act of mailing obscene material). *But see id.* § 1460 (punishing possession of obscenity on federal property); *id.* § 1466A (punishing possession of obscene material that depicts "a minor engaging in sexually explicit conduct"). This simple fact suggests that copyright should be denied where one of the actions that constitutes a copyright right would constitute the unlawful act—namely the actions of reproducing, distributing, publicly displaying, or publicly performing the expression. *See* 17 U.S.C. § 106 (defining rights in a copyright).

obscenity statutes, this may require a national definition of obscenity.[187] Furthermore, expression should be denied protection if it is unlawful under the common law (for instance, the common law definition of defamation)[188] or under the statutory law of most states (for instance, most states punish misleading advertisements).[189] Simply put, where either federal law or most state laws hold expression to be unlawful, copyright should not incentivize that expression.

This proposal would require judges to deny copyright protection based on a lack of content value. Given this fact, would such denials violate the nondiscrimination principle discussed above in *Bleistein*—namely, that judges should not assess content value to determine copyrightability?[190] The answer is no: this proposal would not violate the nondiscrimination principle. To begin with, the judgment that these categories of speech are of low value is not based on the opinion of one judge. Rather, that judgment is based on well-established free speech jurisprudence. *Bleistein*'s caution against judicial subjectivity would not apply. In fact, because judges or juries must identify these categories of speech to enforce the laws that make them unlawful, the identification of these categories for the purpose of denying copyright protection would not introduce any more uncertainty than the law already contemplates. Moreover, because the law already punishes these categories of speech, denying them copyright protection would appear to fall within a narrow and obvious exception to the nondiscrimination principle. If there were ever an exception to the nondiscrimination principle—and *Bleistein* recognizes that there may be[191]—then speech that is punishable by law would surely fall within that exception.

Even for speech that receives First Amendment protection, I further propose that Congress may deny copyright protection for certain categories of expression. If Congress views certain categories as harmful to the public interest, then Congress should deny those categories copyright protection. The rationale is that some expression poses harm to the public sufficient to refrain from incentivizing its production, even though it receives First Amendment protection. For instance, Congress might deny protection for expression that requires the author to commit a violent act—say, a recording of a homicide that

187. *Cf.* United States v. Kilbride, 584 F.3d 1240, 1254 (9th Cir. 2009) ("[A] national community standard must be applied in regulating obscene speech on the Internet, including obscenity disseminated via email.").

188. *See* RESTATEMENT (SECOND) OF TORTS § 559 (AM. L. INST. 1977) ("A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.").

189. *See generally* CAROLYN L. CARTER, CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES (2009), https://www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf (outlining state consumer protection statutes).

190. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

191. *See id.* (recognizing that the nondiscrimination principle is not absolute, but subject to "the narrowest and most obvious limits").

the video creator commits. The creation of this expression, although protected by the First Amendment, poses a grave harm to the public.

Of course, the denial of copyright for such categories of expression that receive First Amendment protection must pass constitutional muster. Subpart E addresses the free speech implications of denying copyright to such categories of expression (and I more fully address the free speech issues in another article).[192]

B. THEORY

The utilitarian theory that underlies copyright law supports the argument that copyright law should not incentivize harmful expression. That theory, often referred to as the incentive theory, posits that copyright is necessary to incentivize the production of creative expression.[193] Without copyright, authors would not produce expression, owing to the fact that expression is nonexcludable (the author cannot easily exclude others from copying expression) and nonrivalrous (consumption of the expression by one consumer does not prevent consumption by another). In economics, this sort of good is referred to as a "public good."[194] As a public good, expression enables consumers to freeride, and consequently, the market fails to incentivize a level of production of expression sufficient to meet consumer demand.[195] Enter copyright law. Copyright provides authors an ability to exclude others from using their expression, which enables authors to set the price to use their expression at a level that is higher than the market would otherwise bear.[196] In the end, the public is (arguably) better off, given that the author produces more expression than the market would otherwise be able to incentivize.[197]

Relevant to this discussion is the fact that the incentive theory recognizes that copyright law serves as a means for providing a benefit to the public. Copyright provides the public with a solution to the market's failure to incentivize expression. One might argue, however, that this theory posits incentivizing all creative expression. Incentive theory does not usually differentiate between whether creative expression is good or bad for society. Rather, the marketplace—the public demand for creative expression—determines whether expression has value. Arguably, then, copyright would seem to apply equally to all creative expression, while the market responds to differences in quality.

192. *See* Snow, *Barring Immoral Speech*, *supra* note 22.
193. *See* LANDES & POSNER, *supra* note 3.
194. *See id.*
195. *See id.*
196. *See id.*
197. *See id.*

This interpretation of incentive theory is not correct. As noted above, the incentive theory recognizes that copyright is necessary because of a market failure: without copyright, the market fails to produce sufficient expression because it is a public good. Hence, the theory recognizes that market failures matter in deciding whether to recognize copyright protection. Where expression is harmful to the public, it often results in a negative externality.[198] For instance, deceitfully fraudulent expression may cause consumers to incorrectly value the expression. Pornographic expression may result in actors engaging in physically harmful acts against women. The market fails to account for the cost of these negative externalities, and as a result, the market overproduces the expression.[199] And where such negative externalities are sufficiently severe, it makes no sense to employ the law to incentivize their production. The market failure that leads to an overproduction of the expression (i.e., the negative externality) cancels the justification for extending protection to overcome a market failure that leads to an underproduction of the expression (i.e., the public-good nature of the work).[200] Hence, the incentive theory of copyright would seem to warrant against extending protection where an expressive work is harmful to the public.

Setting aside the economic terminology, a simpler explanation captures the reason for not extending copyright protection to works that are harmful to the public. Congress should deny protection to harmful works because copyright is "given by the public."[201] Through Congress, the public recognizes rights of exclusion in expression so that the public may benefit from the creation and dissemination of expression. Put simply, copyright has an instrumental end to benefit the public. If the expression is harmful to the public, then the public should not harm itself by extending the copyright.[202]

C. CONSTITUTIONAL ARGUMENTS

Three constitutional arguments support a public-focused interpretation of the Copyright Clause. Much of these arguments stem from the discussion in Part

198. *See* Ned Snow, *Moral Bars to Intellectual Property: Theory & Apologetics*, 28 UCLA ENT. L. REV. 75, 82–84 (2021).

199. *See id.*

200. *See id.*

201. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 392–93 (2006) ("A copyright, like a patent, is at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals and the incentive to further efforts for the same important objects.").

202. Professor Margaret Chon has argued for a postmodern interpretation of the Progress Provision that would require deconstructing the meaning of "Progress." *See generally* Margaret Chon, *Postmodern "Progress": Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97 (1993). Although I am not adopting a postmodern approach, I do agree with her that "the standard legal interpretations of this clause have maintained a cheery and uncritical trust in 'Progress' that ignores the dark side of reason." *Id.* at 100.

I. Hence, I merely summarize the three arguments, noting the support for each in Part I.

First, as discussed in Part I.A, the meanings of the terms "Progress" and "Science" suggest that copyright law should serve a purpose that benefits the public. "Progress" suggests societal advancement or improvement, and "Science" suggests a form of knowledge that is publicly accessible. Together, they suggest an interpretation that is instrumental in fulfilling a purpose that benefits the collective public.

Second, the presence of the Progress Provision in conjunction with the Means Provision (which together form the IP Clause) implies that the "Progress of Science" cannot mean only creativity. As discussed in Part I.B, the constitutional requirement for creativity derives from the "Authors" and "Writings" terms in the Means Provision. According to established constitutional cannon, each phrase of the Constitution must serve a distinct purpose.[203] In the IP Clause, "Progress of Science" must serve a purpose that is distinct from "Authors" and "Writings." If "Progress of Science" simply meant creativity, then the phrase would not add anything to the Means Provision; "Authors" and "Writings" would provide the same meaning. The IP Clause could have simply been stated as a power "To secure to Authors the exclusive Right to their Writings." This phrase would have been sufficient to ensure the production of creative works given that "Authors" and "Writings" give rise to the creativity requirement. If construed to require only creativity, then the Progress Provision would be unnecessary. Therefore, the phrase "Progress of Science" must have a meaning separate from creativity that is consistent with the historical sources discussed above—a meaning that suggests public benefit rather than mere authorial creativity.

Third, as noted in Part I, the modern Supreme Court interprets the IP Clause according to the original meanings of the terms in the Clause.[204] This fact is relevant because the Framers viewed knowledge and its progress through the lens of the Enlightenment.[205] As discussed in Part I.A.1, the Enlightenment understanding of "Progress of Science" reflects advancements in society that follow from public knowledge—not merely the personal intellectual achievement of the author.[206] The context of the Enlightenment at the time of

203. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed, that any clause in the constitution is intended to be without effect.").

204. *See* sources cited *supra* note 24.

205. *See* Snow, *supra* note 41, at 277–82 (arguing that the influence of the Enlightenment suggests a meaning of science that is based on reason and experience).

206. *See id.*; *cf.* Chon, *supra* note 202, at 99–100 ("We can infer from the term 'Progress of Science and useful Arts' an Enlightenment faith in *knowledge*, whether it be knowledge for its own sake or for other ends. Indeed, the existing metanarratives of intellectual property law draw heavily, both in style and in substance, from the intellectual tradition of the Enlightenment.").

the Framing suggests a Copyright Clause that is oriented toward benefiting the public through knowledge.

D. CONSISTENCY WITH IP DOCTRINES

The argument that public values control copyright's encouragement of creativity is consistent with other intellectual property doctrines. In Subpart D.1, I observe the interplay between individual creativity and a purpose that benefits the public within copyright law doctrines. In Subpart D.2, I observe a public-benefit focus in patent law. Although these observations do not speak directly to the issue of whether a public harm that follows from a work should preclude copyright protection, they suggest the existence of a public-benefit purpose in copyright generally.

1. Copyright Doctrines

Copyright doctrines support the broad principle that a public benefit should underlie copyright's promotion of creativity. I examine three doctrines that define the scope of copyright protection: the fair use, idea-expression, and useful article doctrines. In doing so, I observe the interplay between their purposes, which benefit the public, and their application, which rely on authorial creativity.

a. Fair Use

The rights of individual authors are subject to the fair use doctrine.[207] A member of the public may make any unauthorized use of an author's work so long as the use is deemed to be "fair."[208] This means that an author's personal interest in controlling his or her work must yield to the public's interest in using the work.[209] From this perspective, fair use would seem to be a doctrine that exists solely to provide a public benefit.

This is not to say, however, that fair use does not protect individual creativity. Several of the factors that courts consider in applying fair use rely on creativity elements. For instance, courts heavily weigh whether a user communicates a new meaning or message, which suggests that new creative

207. *See* 17 U.S.C. § 107 ("[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.").

208. *See generally* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

209. *See generally id.*

thought is important in the analysis (protecting the creativity of a fair user).[210] Also, courts examine the nature of the original work, where a use of a more creative work is less likely to be fair (protecting the creativity of the original author).[211] Likewise, courts examine whether the user replicated a substantial part of the original work, suggesting the importance of protecting the most creative parts of the original work.[212] Hence, the doctrine of fair use has certain elements that place high priority on the creativity of both the fair user and the original author.

While fair use prioritizes creativity, it also considers the public purpose of the use. In particular, the statute designates educational uses, news reporting, scholarship, research, criticism, and commentary as purposes that suggest fairness.[213] All these purposes suggest that a use's benefit to the public is an important factor. Specifically, educational uses are usually accessible by members of the public, news reporting involves the public as the intended audience, and scholarship and research are most often released for public consumption, as is criticism and commentary.

The upshot is that fair use promotes both public benefits and individual creativity. A public benefit is relevant in assessing the underlying purpose of a use, and individual creativity is relevant in applying several of the fair use factors. Public benefit and individual creativity are both present in judging whether a use is fair.

b. Idea-Expression

The idea-expression doctrine recognizes that copyright protection does not extend to an idea that underlies expression.[214] This doctrine exists so that the public may freely build upon ideas of others; it fosters public accessibility of ideas.[215] Hence, the public interest underlies copyright's exception to protection for the free copying of ideas.

At the same time, individual creativity plays an important role in applying the idea-expression doctrine. Discerning the line between an idea and its expression can present difficulties. For instance, does copyright protection extend to certain plot elements of a novel beyond the actual words used to

210. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578–79 (1994) ("The central purpose of [the fair use] investigation is to see . . . whether the [defendant's use] . . . adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'").

211. *See* § 107(2); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563 (1985) (distinguishing between factual works and works of fiction or fantasy in fair use second-factor analysis).

212. *See Harper*, 471 U.S. at 564–65.

213. § 107.

214. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349–50 (1991).

215. *See id.*

describe those plot elements? Courts struggle to identify the scope of protection in such circumstances.[216] In the absence of any specific formula for identifying where an idea ends and its expression begins, courts examine the extent of creativity in a work to determine its scope of protection.[217] A highly creative work, say, *The Cat in the Hat*, receives greater protection than a more generic work, say, *101 Facts About Cats*.[218] Creativity thereby influences the application of the idea-expression dichotomy. Thus, a public benefit underlies the idea-expression doctrine, while individual creativity influences the doctrine's application.

c. Useful Article

The useful article doctrine precludes copyright protection for useful articles.[219] For instance, a garbage can would not receive protection as a sculptural work. However, the design of a useful article may receive copyright protection if the design is conceptually separable from the utilitarian features of the article.[220] For instance, the design of a statuette that serves as a lampstand for a light that extends out of its top may receive copyright protection.[221] The statuette is conceptually separable from the utilitarian light. Notably, even if a design of a useful article is highly creative, the design will not receive copyright protection if it is not conceptually separable. For instance, a ribbon-shaped bicycle rack may reflect an author's creativity, but it does not receive protection because its shape is inseparable from its function.[222]

This doctrine exists to benefit the public. The doctrine is intended to prevent copyright protection for subject matter that falls within the domain of patent law.[223] Patent law extends monopoly protection to subject matter of a utilitarian nature, but only if certain criteria are met that are more stringent than the requirements for copyright protection.[224] If not for the useful article doctrine, a creator of a utilitarian object that is not patentable (for example, perhaps the

216. *See generally* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) ("Nobody has ever been able to fix that boundary, and nobody ever can.").

217. *See id.*

218. *Compare* Dr. Suess Enters. v. Penguin Books USA, Inc., 109 F.3d 1394, 1401 (9th Cir. 1997) (recognizing strong copyright protection in the children's storybook, *The Cat in the Hat*, to deny fair use for storybooks that used similar motifs to describe the O.J. Simpson murder trial), *with Feist*, 499 U.S. at 347–48 ("[A]ll facts[,] scientific, historical, biographical, and news of the day, . . . may not be copyrighted . . . .").

219. *See* 17 U.S.C. § 101 (excluding copyright protection for a "useful article" if the useful features cannot "be identified separately from, . . . [or] exist[] independently of, the utilitarian aspects of the article").

220. *See id.*; Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1010–12 (2017).

221. *E.g.*, Mazer v. Stein, 347 U.S. 201, 214 (1954).

222. *See* Brandir Int'l, Inc. v. Cascade Pac. Lumber Co., 834 F.2d 1142, 1147–48 (2d Cir. 1987).

223. *Cf. Star Athletica*, 137 S. Ct. at 1015 (recognizing some overlap between patent and copyright).

224. *See generally* 35 U.S.C. § 101 (requiring an invention to be novel and useful); *id.* § 103 (requiring an invention to be nonobvious).

object is not novel) could receive a monopoly over the object through copyright. This would unfairly deprive the public of a competitive market for the object. Hence, the basis for this doctrine is protection of the public interest.

Like the idea-expression dichotomy, the application of this doctrine presents difficulties in practice. Courts have struggled to identify whether an object's design is conceptually separable from its utilitarian features. In the absence of a discernible basis for judging the conceptual separability of aesthetic design from a utilitarian object, some courts have examined whether elements of utilitarian function have influenced the creator's creative process.[225] Hence, individual creativity has guided the analysis.[226]

This is all to say that a benefit to the public underlies the useful article doctrine, yet courts have looked to individual authors' creativity in applying it. The public interest controls the doctrine, with individual creativity playing an important role.

2. Patent Doctrines

Interpreting the IP Clause as requiring an assessment of a work's public benefit draws support from the patent power. As stated earlier, both the copyright and patent powers arise under the IP Clause,[227] and the Supreme Court has repeatedly looked to patent law in crafting copyright doctrine.[228] Furthermore, patent and copyright share a similar theoretical basis for their existence, both existing to incentivize certain sorts of works.[229] Given their doctrinal and theoretical similarities, it makes sense that they would both have a similar focus (either public benefit or individual creativity).

The IP Clause dictates the public orientation of patent law in the Progress Provision. The Provision's mandate that Congress promote the progress of useful arts limits Congress to employ the patent power only to promote the public interest.[230] The Supreme Court has explained this point in the case of *Graham v. John Deere Co.*:

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225. *See, e.g.*, *Brandir*, 834 F.2d at 1145.

226. Since *Brandir*, the Supreme Court has introduced a test that involves "imaginatively removing" the design element from the useful article and then assessing whether anything is "left behind" in one's imagination. *See Star Athletica*, 137 S. Ct. at 1012–14. This test seems to draw from the creativity of the judge or juror—not the author.

227. U.S. CONST. art. I, § 8, cl. 8.

228. *See, e.g.*, Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 936–37 (2005) (adopting inducement rule from patent law in crafting copyright doctrine); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 434–35, 441–42 (1984) (drawing from patent law's contributory infringement doctrine to promulgate a contributory infringement doctrine in copyright law).

229. *See* LANDES & POSNER, *supra* note 3.

230. *See* Graham v. John Deere Co., 383 U.S. 1, 5–6 (1966).

> The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. . . . Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must "promote the Progress of . . . useful Arts." This is the standard expressed in the Constitution and it may not be ignored.[231]

The Court suggested that the Provision's command to promote the progress of useful arts means that the patent system must promote the public benefit of "[i]nnovation, advancement, and things which add to the sum of useful knowledge."[232] Similarly, the Court noted that the patent monopoly must bring about "innovation, advancement or social benefit."[233] Hence, "the Progress of . . . useful Arts" implies a patent power that Congress may use only to benefit the public.[234]

In exercising its patent power, Congress has implemented criteria for obtaining a patent, and those criteria have a clear public focus. Specifically, an invention must not be obvious from the perspective of a person having ordinary skill in the relevant art, an invention must be novel, and an invention must serve a useful purpose.[235] Similarly, the patent application must adequately disclose the invention: the written description of the invention must enable a person in the field to make and use the invention, the inventor must disclose the best mode of making and using the invention, and the inventor must adequately describe the aspects of the invention being claimed.[236] Lastly, the claims must be sufficiently definite so as to give the public notice of the specific boundaries of the patent monopoly.[237] In short, all these requirements are intended to provide beneficial knowledge to the public.

Congress has also limited the subject matter that may receive a patent in an effort to benefit the public.[238] Inventions directed to the human organism cannot receive protection,[239] nor can inventions directed to either tax-avoidance schemes or nuclear weaponry.[240] Incentivizing these inventions or their

231. *Id.*
232. *Id.* at 6.
233. *Id.*
234. *Id.* at 5–6.
235. 35 U.S.C. §§ 101–103.
236. *Id.* § 112(a).
237. *Id.* § 112(b).
238. Professor David Taylor has examined concerns that would likely arise if Congress were to legislate moral considerations as criteria for patent eligibility. *See* David O. Taylor, *Immoral Patents*, 90 MISS. L.J. 271, 299–305 (2021). He argues that Congress should implement moral criteria for patent eligibility. *Id.* at 309–10.
239. Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 33(a), 125 Stat. 284, 340 (2011) ("Notwithstanding any other provision of law, no patent may issue on a claim directed to or encompassing a human organism.").
240. *Id.* § 14, 125 Stat. at 327–28.

commercial trade would not be in the public interest, so Congress has denied them protection.

Although Congress has limited subject matters of patent protection based on potential public harms that certain inventions could pose, modern courts have refrained from doing so.[241] Unlike in the past, modern courts do not consider potential public harm that an invention might pose to society.[242] This makes sense given the inherent uncertainty that surrounds whether an invention would be harmful to society. Inventions may serve a number of purposes: for example, a gun could be used to defend oneself or to commit an atrocity, and a machine might pollute the environment while also yielding great societal benefits. Indeed, the question of whether a purpose may pose net harmful effects to society is often debatable.[243] Hence, courts would encounter great difficulty in determining whether inventions are likely to result in public harms. Modern courts, therefore, refrain from denying protection based on an invention's potential to harm the public.

This fact, however, does not suggest that courts should refrain from denying copyright protection for unlawful expression. Although the law has established clear categories of expression that are unlawful to communicate, the law has not established clear categories of inventions that are unlawful to own or possess. Except in very rare circumstances, the law does not punish the possession or ownership of objects, devices, or articles, which are subject matters of inventions.[244] That said, it is possible that an inventor might attempt to patent unlawful actions as a process invention. If someone attempts to patent a method for torturing humans, a court might deny protection because the act fails to promote progress. Yet, as a practical matter, inventors simply do not file for patents on unlawful actions. Such patent filings seem to be limited to the realm of hypothetical discussion. Therefore, in contrast to copyright law's potential to incentivize unlawful expression, patent law does not seem to have the potential to incentivize an unlawful invention. For this reason, courts may act consistently by denying copyright protection for certain expressions while at the same time refraining from denying patent protection for any inventions.

In sum, patent doctrines demonstrate that patent law does not exist solely to encourage inventors to exercise their creative powers of the mind. Rather,

241. *See* Juicy Whip, Inc. v. Orange Bang, Inc., 185 F.3d 1364, 1367–68 (1999) (rejecting lack of social value as a basis for denying patent protection under the Patent Act's requirement that an invention be "useful").

242. *Compare id.*, *with* Lowell v. Lewis, 15 F. Cas. 1018, 1019 (C.C.D. Mass. 1817) (No. 8568) ("All that the law requires is, that the invention should not be frivolous or injurious to the well-being, good policy, or sound morals of society.").

243. *See, e.g.*, *Juicy Whip*, 185 F.3d at 1367 (listing deceptive products—such as cubic zirconium, synthetic fibers, and imitation gold leaf—which society values).

244. Possession of a controlled substance is an obvious example of such an exceptional circumstance. *See* 21 U.S.C. § 844(a).

patent law's encouragement of those creative efforts serves public-oriented goals. That which detracts from the public's overall benefit is not part of the patent system.[245] To be sure, Congress's patent power has a clear public focus. Therefore, if the patent power is in fact an analog to the copyright power, then the copyright power should have a public focus as well.

E. FREE SPEECH

If Congress were to deny copyright protection for certain content on the grounds that Congress believes the content to be harmful to the public, then Congress would be denying a financial benefit to authors based on the content of their speech. This triggers free speech concerns. Suppose, for instance, that Congress withheld copyright protection for any movie that portrayed teenage use of illicit drugs in a favorable light.[246] Arguably, the reason for withholding protection is in the public interest: favorable portrayals of teenage drug use might influence teenagers to engage in harmful drug use. Yet the denial might lead some movie producers to self-censor and refrain from making movies that portray drug use, owing to the movies' ineligibility for copyright protection.[247] Hence, Congress would be discriminating against content in a way that could threaten free speech by selecting content for copyright protection based on public values.

A speech issue thus exists if Congress prioritizes the public's interest in promoting the progress of science over the individual author's interest in exercising creativity. This is because the author's interest in exercising creativity includes the author's interest in speaking, for creativity often includes communicative thought, which is speech. In effect, promoting the public's value system over an author's creativity runs the risk of stifling an individual author's unpopular ideas.

This speech issue raises complexities. Owing to the extensive nature of those complexities, I have addressed the issue in a separate article and only summarize the main points here.[248]

To begin with, I interpret free speech law as requiring courts to uphold the speech interests of authors in evaluating any congressional denial of copyright protection that is based on public values. Copyright does not receive a First

245. *See, e.g.*, Alice Corp. v. CLS Bank Int'l, 573 U.S. 208, 216 (2014) ("Laws of nature, natural phenomena, and abstract ideas are the basic tools of scientific and technological work. Monopolization of those tools through the grant of a patent might tend to impede innovation more than it would tend to promote it, thereby thwarting the primary object of the patent laws." (internal quotations and citations omitted)).

246. *See* Snow, *Barring Immoral Speech*, *supra* note 22, at 201–02 (contemplating an example of Congress denying copyright for films that portray teen drug use).

247. *See id.* at 182 (discussing the self-censorship effect of denying copyright).

248. *See id.* at 163–222.

Amendment pass. At the same time, the Copyright Clause's express authorization for Congress to promote the progress of science through extending copyright does provide Congress discretion to choose which content to promote. The Clause appears to authorize some degree of content discrimination, and this is consistent with the First Amendment under certain circumstances. More specifically, First Amendment doctrine recognizes that some circumstances justify government extension of benefits in a way that might restrict speech production.[249] Consider the limited public forum doctrine: a limited public forum represents government resources (either physical or metaphysical in nature) that the government extends for the purpose of facilitating private speech that furthers a government program.[250] In extending the resource, the government may restrict the topics of discussion for that resource insofar as the restriction is viewpoint neutral and reasonable in light of the purpose of the government program.[251]

The system of copyright appears to represent a limited public forum.[252] Congress extends copyright protection to encourage speech that promotes the progress of science. Copyright represents an economic resource (monopoly rights over expression) that facilitates a certain sort of private speech. As a limited public forum, the resource of copyright may be denied for certain subject matters insofar as the denial is viewpoint neutral and reasonable in light of the purpose of promoting the progress of science. So, in the example cited above, denying copyright for movies that portray teenage drug use in a positive light would not be permissible under this doctrine: the denial would be viewpoint discriminatory, targeting speech that adopts a viewpoint in favor of teenage drug use.

As the example illustrates, the prohibition of viewpoint discrimination significantly limits Congress's discretion in denying copyright protection. The Court has recently explained the broad scope of viewpoint discrimination in two recent trademark cases: *Matal v. Tam* and *Iancu v. Brunetti*.[253] In *Tam*, the Court held that Congress's denial of trademark protection for marks that could "disparage" persons or groups violated the First Amendment.[254] The Court

249. *See, e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 573, 585–88 (1998) (holding constitutional "decency and respect" criterion for extension of grants for furthering the arts).

250. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829–30 (1995) (explaining that government may restrict speech in a limited public forum if the restriction is viewpoint neutral and furthers the purpose of the government program).

251. *See id.*

252. Much more can be, and has been, said on this premise that the copyright system represents a limited public forum. *See* Snow, *Barring Immoral Speech*, *supra* note 22, at 185–94 (discussing arguments for and against construing the copyright system as a limited public forum).

253. Matal v. Tam, 137 S. Ct. 1744, 1751 (2017) (plurality opinion); Iancu v. Brunetti, 139 S. Ct. 2294, 2297 (2019).

254. 137 S. Ct. at 1765.

explained that the reason for denying protection cannot be Congress's disagreement with, or offense at, the message of content.[255] Such a denial is viewpoint discriminatory.[256] Hence, denying protection for any marks that were disparaging represented viewpoint discrimination in violation of the First Amendment.[257] In *Brunetti*, the Court held that Congress's denial of trademark protection for marks that were "immoral" or "scandalous" violated the First Amendment.[258] The problem with those bars was that they allowed the government to impose its own viewpoint about whether content was moral or not.[259] Congress was exercising judgments about the message within content, which made it viewpoint discriminatory.[260]

Given these cases, any viewpoint-neutral bars to copyright protection must be limited in scope. The reason for denial cannot be disagreement with the message within the content (unless the content does not receive First Amendment protection). For example, Congress could not enact a bar to copyright protection "for imagery that portrays nudity." The ostensible reason for such a denial would be Congress's belief that the public should not view nudity. The bar would represent Congress's disagreement with the message that nudity should be portrayed, so the bar would be viewpoint discriminatory.

On the other hand, Congress could deny protection to works that are sexually explicit in a manner that is intended to cause a sexual response in its audience. It is well documented that consumption of such content leads to various social harms, including decreased sexual satisfaction, increased likelihood of divorce, increased likelihood of casual sexual encounters by adolescents, and increased occurrences involving sexual aggression.[261] Denying protection because of these consumptive effects would represent a disagreement not with the specific message within the pornographic content, but rather with the effects that follow from the content.[262] Furthermore, production of such

255. *See id.* at 1751 ("Speech may not be banned on the ground that it expresses ideas that offend.").

256. *See id.*; *id.* at 1763 ("Giving offense is a viewpoint.").

257. *See id.* at 1763.

258. *See* 139 S. Ct. at 2297.

259. *See id.* at 2299–2300.

260. *See id.* at 2297.

261. *See generally, e.g.*, Samuel L. Perry & Cyrus Schliefer, *Till Porn Do Us Part? A Longitudinal Examination of Pornography Use and Divorce*, 55 J. SEX RSCH. 284 (2018); Jochen Peter & Patti M. Valkenburg, *Adolescents and Pornography: A Review of 20 Years of Research*, 53 J. SEX RSCH. 509 (2016) (finding that pornography use was strongly correlated to permissive sexual attitudes, gender stereotyping, earlier experimentation with sexual intercourse, increased experience with casual sex, and higher instances of sexual aggression); Dolf Zillmann & Jennings Bryant, *Pornography's Impact on Sexual Satisfaction*, 18 J. APPLIED SOC. PSYCH. 438 (1988).

262. Although I rely on the effects of speech as a viewpoint-neutral basis for denying protection, I do not adopt the reasoning of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). There, the Court upheld the constitutionality of a local zoning ordinance that prohibited adult-film theaters "from locating within 1,000

content often involves committing violent acts against women.[263] In an attempt to refrain from promoting such violent acts, Congress may deny copyright protection. The denial would be viewpoint neutral because the reason for denial would not be disagreement with the message of pornography.

In summary, when deciding whether to extend copyright protection to certain content, Congress must still respect free speech protections for authors. The First Amendment prevents public values from always taking priority over an author's individual creativity. Specifically, Congress may not deny copyright protection for creative works of an author simply because the public disagrees with the author's specific creative idea. However, Congress may deny protection where the content is not protected by the First Amendment (such as defamation, libel, and obscenity), or where the reasons for denial are not based on the message within the content. The public's interest in promoting the progress of science may be upheld where viewpoint-neutral reasons exist to deny protection.

CONCLUSION

Authors must exercise creativity to produce expressive works that promote the progress of science. Creativity is a means—indeed, it is *the* means—to realizing the end of copyright law. It is the sine qua non of copyright law, but creativity is not the purpose of copyright law. Creativity is not the progress of science. The progress of science is distinct from creativity in one important respect: whereas creativity must be measured from the individual values of an author, the progress of science must be measured from the collective values of the public. Public values are necessary to assess whether copyright has promoted the progress of science. If creative efforts contradict those values, then copyright fails in fulfilling its purpose. That is to say, creative works that are harmful to the public do not promote the progress of science. Thus, public values define whether a work fulfills the purpose of copyright, independent of whether the work is creative.

The text and history of the Copyright Clause support this distinction between the progress of science and creativity. "Progress" suggests an advancement in or betterment of the public's state of affairs, and "Science"

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feet of any residential zone, single- or multiple-family dwelling, church, park, or school." *Id.* at 43. Although the ordinance specifically noted that it was restricting businesses that sold, rented, or showed "sexually explicitly materials," the Court deemed the zoning ordinance to be content neutral. *Id.* at 44, 48. Judges and academics alike have criticized the Court's reasoning. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 334–38 (1988) (Brennan, J., concurring in part); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 484–91 (1996). My argument, by contrast, does not rely on the premise that copyright denial of pornographic content would be content neutral. I argue that the denial is content based but viewpoint neutral, consistent with the limited public forum doctrine.

263. *See* Ann Bartow, *Copyright Law and Pornography*, 91 OR. L. REV. 1, 46 (2012).

suggests the sort of knowledge and learning that is available to members of the public.[264] Early Supreme Court cases treat the progress of science as imposing a stringent public-oriented standard for copyright protection.[265] That standard necessitated a cognizable public benefit. At the same time, the Court recognized that individual works must demonstrate an author's creativity.[266] The two aspects of constitutional eligibility for copyright protection were, therefore, distinct.

In 1903, the Court changed its approach in the seminal case of *Bleistein v. Donaldson Lithographing Co*.[267] The Court significantly relaxed the progress of science standard.[268] Its introduction of the nondiscrimination principle suggested that works would be presumed to benefit the public, outside of exceptional circumstances that were narrow and obvious.[269] Cases subsequent to *Bleistein* confirm this understanding, where courts held that most works promoted the progress of science, with the exception of pornographic works.[270]

Statements by the modern Supreme Court have called into question whether a public-harm boundary to copyright eligibility exists.[271] Yet the modern Court's emphasis on creativity should not be misconstrued as precluding public values from informing whether a work promotes the progress of science.[272] Indeed, the Court's general interpretation of the Copyright Clause as public-focused weighs against construing "Progress of Science" as equivalent to authorial creativity.[273]

I propose that "Progress of Science" should provide boundaries for the creativity that copyright encourages.[274] To receive copyright protection, creative works should not be harmful to the public. More specifically, courts should deny protection for expression that is unlawful, such as obscenity, child pornography, and slander.[275] Congress might also deny protection for some limited categories of speech that receive First Amendment protection, if the reason for denial is motivated by the harm to the public caused by the work and not the message within the speech.[276] These limited categories of speech for which courts should,

264. *See* discussion *supra* Part I.A.
265. *See* discussion *supra* Part I.B.1.
266. *See* discussion *supra* Part I.B.2.
267. 188 U.S. 239 (1903).
268. *See* discussion *supra* Part I.B.3.
269. *See* discussion *supra* Part I.B.3.
270. *See* discussion *supra* Part I.B.3.
271. *See* discussion *supra* Part II.A.1.
272. *See* discussion *supra* Part II.A.1.
273. *See* discussion *supra* Part II.A.2.
274. *See* discussion *supra* Part III.
275. *See* discussion *supra* Part III.A.
276. *See* discussion *supra* Part III.E.

and Congress may, deny copyright protection would be consistent with principles of free speech.[277]

This proposal draws support from copyright theory.[278] Under copyright's utilitarian theory, the reason for extending copyright is to prevent the free marketplace from underproducing creative works.[279] However, creative works that are harmful to the public introduce negative externalities that result in an *over*production of the works.[280] This scenario undermines the original justification for extending copyright protection—an *under*production of creative works.[281] Moreover, the public provides authors the copyright monopoly, so where that monopoly serves an interest that is harmful to the public, the public should not extend copyright protection.

This understanding that "Progress of Science" restricts creativity according to a public value system reflects a consistent theme in intellectual property law.[282] Copyright doctrines such as fair use, idea-expression dichotomy, and useful article all recognize that an underlying public purpose is relevant in defining the boundaries of copyright eligibility.[283] Patent law is also well recognized in facilitating individual creativity for the purpose of furthering benefits to the public.[284] Given this strong recognition that intellectual property doctrines exist to further the public interest, the purpose of extending copyright protection cannot be to facilitate creativity independent of any public values.

Copyright's encouragement of creativity must conform to the minimal, but decisive, boundaries that follow from the progress of science.

277. *See* discussion *supra* Part III.E.
278. *See* discussion *supra* Part III.B.
279. *See* discussion *supra* Part III.B.
280. *See* discussion *supra* Part III.A.
281. *See* discussion *supra* Part III.A.
282. *See* discussion *supra* Part III.C.
283. *See* discussion *supra* Part III.D.1.b.
284. *See* discussion *supra* Part III.D.2.