

Winter 2013

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Christina Mulligan

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## Recommended Citation

66 S.M.U. L. Rev. 157 (2013)

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# TECHNOLOGICAL INTERMEDIARIES AND FREEDOM OF THE PRESS

Christina Mulligan\*

## ABSTRACT

*Recent scholarship has argued that the constitutional guarantee of freedom of the press refers to speech-disseminating technology, such as the printing press, rather than to the institutional press. This Article argues that to protect the free press rights of authors, technological intermediaries such as presses and internet and online service providers must be afforded greater protection than authors for publishing and disseminating sanctionable speech. Unless intermediaries are granted near-complete immunity, the government will be able to censor authors collaterally by threatening to punish intermediaries for authors' speech, forcing intermediaries to restrain what the government cannot directly.*

*Specifically, this Article explores the longstanding, symbiotic relationship between liberty of the press and copyright law, and argues that, even if copyright protections are generally consistent with the Free Speech Clause, they may violate the Free Press Clause when they motivate collateral censorship of non-copyright-infringing speech.*

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## I. INTRODUCTION

RECENT scholarship has argued that the Free Press Clause<sup>1</sup> of the First Amendment protects freedom of the “press-as-technology” rather than freedom of the “press-as-industry.”<sup>2</sup> This freedom is not limited to printing presses specifically, but extends to the press’s “modern equivalents” as well.<sup>3</sup> Eugene Volokh explains that freedom of the press “was generally seen as the right to publish using mass technology, as opposed to the freedom of speech, which was seen at the time [of the framing era] as focusing more on in-person speech.”<sup>4</sup> Edward Lee similarly argues, “At its core, the freedom of the press was designed to protect speech technology.”<sup>5</sup>

Volokh and Lee’s characterization echoes Supreme Court jurisprudence. In 1948, the Court noted, “We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.”<sup>6</sup> Then in 1978, Chief Justice Burger stated in his concurrence in *First National Bank of Boston v. Bellotti*, “It is not strange that ‘press,’ the word for what was then the sole means of broad dissemination of ideas and news, would be used to describe the freedom to communicate with a large, unseen audience.”<sup>7</sup>

Despite the vast theoretical reach of the Free Press Clause, its role in judicial opinions has been limited in practice because it is seen as largely redundant to the Free Speech Clause.<sup>8</sup> David A. Anderson, for example, noted that “[t]he press is protected from most government censorship,

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1. “Congress shall make no law . . . abridging the freedom . . . of the press.” U.S. CONST. amend. I.

2. See Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 463 (2012); see also David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 446–47, 446 n.90 (2002) (“The concept of press as journalism cannot claim a historical pedigree. . . . To the generation of the Framers of the First Amendment, ‘the press’ meant ‘the printing press.’ It referred less to a journalistic enterprise than to the technology of printing and the opportunities for communication that the technology created.”); Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 315–16, 339–56 (2008) (arguing the “press” referred to the printing press and that “freedom of the press” was designed to protect “speech technology”).

3. See Volokh, *supra* note 2, at 462.

4. *Id.* at 464.

5. Lee, *supra* note 2, at 345.

6. *United States v. Paramount Pictures*, 334 U.S. 131, 166 (1948); see also *Lovell v. City of Griffin*, 303 U.S. 444, 452 (“The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.”).

7. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 800 n.5 (1978) (Burger, C.J., concurring).

8. Volokh, *supra* note 2, at 477.

libel judgments, and prior restraints not because it is the press but because the Speech Clause protects all of us from those threats.”<sup>9</sup> Indeed, Supreme Court cases frequently refer to freedom of speech and the press interchangeably or inconsistently.<sup>10</sup> After an extensive survey of free press cases from the twentieth century, Volokh concluded that “the Court considers the same rules to apply interchangeably under both the Free Speech Clause and the Free Press Clause.”<sup>11</sup>

If the same rules apply under the Free Speech Clause and the Free Press Clause, one might rightly ask whether there is any value in determining where one right ends and the other begins. Radio, film, and television “fit more naturally in lay English within the term ‘speech’ rather than ‘press.’”<sup>12</sup> On the other hand, radio, film, and television technologies are properly characterized as “speech technology,” capable of reaching massive numbers of people.<sup>13</sup> Counter-intuitively, they qualify as the press, alongside newspapers, books, and handbills.<sup>14</sup> But if there is no difference in practice between speech and press rights, why even bother to correct the understanding of presses?

The importance of distinguishing between speech and press does not lie within the law’s treatment of a speaker or author.<sup>15</sup> The treatment of a speaker on a soapbox and the author of a handbill under the First Amendment is identical.<sup>16</sup> Although some sources suggest “mass communication” (as distinct from the press corps) might be more protected than in-person speech, the evidence for this view is limited and has not been embraced by courts.<sup>17</sup>

Rather, the importance of the Free Press Clause lies within the law’s treatment of technology owners and manufacturers. The party who builds

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9. Anderson, *supra* note 2, at 430.

10. Compare, e.g., *Lovell*, 303 U.S. at 452 (characterizing non-journalist pamphleteers as being protected by liberty of the press), with *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 268, 300 (1964) (characterizing signers of a published advertisement as exercising their free speech rights). See also *Martin v. City of Struthers*, 319 U.S. 141, 149 (1943) (striking down an ordinance limiting distribution of handbills as being “in conflict with the freedom of speech and press”); *Jamison v. Texas*, 318 U.S. 413, 414 (1943) (striking down an ordinance prohibiting distribution of handbills as violating free press rights); *Schneider v. New Jersey*, 308 U.S. 147, 160–65 (1939) (striking down an ordinance limiting distribution of circulars as violating both free speech and free press rights).

11. Volokh, *supra* note 2, at 514; see also *id.* at 476–77 (suggesting how the coextensive speech and press rights may have developed).

12. Volokh, *supra* note 2, at 477.

13. *Id.* at 506–15.

14. *Id.*

15. Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1036 (2011).

16. Anderson, *supra* note 2, at 430; David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 88, 118–19 (1975) (arguing the Press Clause is and should be construed as redundant to the Speech Clause); Volokh, *supra* note 2, at 514.

17. See David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 521–27 (1983) (discussing how the Quebec Address, Cato’s Letters, the views of James Madison, and other writings suggested more expansive understandings of free press rights existed during the founding era); Volokh, *supra* note 2, at 508 (noting that Justice Powell’s concurrence in *Branzburg v. Hayes*, 408 U.S. 665, 724 (1972), implicitly embraced the view that “a person who gathers information for future mass communication would get a privilege of some unspecified force”).

a printing press and lets anyone use it on a first-come, first-serve basis is not engaging in any expressive activity. Nonetheless, to protect the free press interests of those who endeavor to express themselves using technology of mass communication, technologists and technology must be subject to protection, for which there is no direct equivalent under the Free Speech Clause.

This Article explores the scope of the Free Press Clause as applied to non-speaking technologists and to speech-facilitating technology. It takes as a given that the free press refers to freedom of the press-as-technology, rather than the press-as-industry.<sup>18</sup> Also, for ease of comprehension, the term "speaker" is used to refer to any party expressing themselves, either orally or in writing, regardless of whether their actions are protected under the Free Speech Clause or the Free Press Clause. Where it is necessary to indicate under which clause a speaker is protected, it is specified.

Particularly, this Article considers how collateral censorship of speakers, via technologies of mass communication, threatens liberty of the press and how protections from those practices should be applied to communication technologies. Parts II and III consider prohibitions on prior restraints and discuss how rules that create incentives for collateral censorship effect a prior restraint of speech. Part IV evaluates how existing liability regimes for speech intermediaries can fail to sufficiently protect free press rights, and suggests an alternative method for allocating liability for illegal speech. Finally, Part V proposes a relationship between the Free Press Clause and copyright law, specifically considering the constitutionality of § 512 of the Digital Millennium Copyright Act.<sup>19</sup>

## II. HISTORY OF LIBERTY OF THE PRESS AND PRIOR RESTRAINTS

Alexander Hamilton wrote in the Federalist Papers, "What signifies a declaration that 'the liberty of the press shall be inviolably preserved?' What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion?"<sup>20</sup> Despite Hamilton's hyperbole, his statements were generally accurate. At the time of the founding, "the outerlimits of liberty of the press were ill-defined and improperly understood."<sup>21</sup>

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18. For a more complete discussion over the meaning of the Free Press Clause, see generally Anderson, *supra* note 2; Lange, *supra* note 16; Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975); Potter Stewart, "Or of the Press", 26 HASTINGS L.J. 631 (1975); Volokh, *supra* note 2; West, *supra* note 15.

19. 17 U.S.C. § 512 (2006).

20. Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 IND. L. REV. 295, 320 (2001) (quoting THE FEDERALIST NO. 84, at 513–14 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

21. *Id.* at 320 & n.178 (citing LEONARD LEVY, EMERGENCE OF A FREE PRESS 348 (1985)) ("The First Amendment's injunction, that there shall be no law abridging the freedom of speech or press, was boldly stated if narrowly understood.").

Nonetheless, certain elements of freedom of the press were and still are clear. There is “wide-spread consensus” that “[l]iberty of the press must mean, at a bare minimum, no prior restraint.”<sup>22</sup> In his work throughout the 1960s, Leonard Levy argued for a slightly more expansive view of the founders’ understanding of the Free Press Clause (while specifying that he believed there was no obligation to follow their interpretation).<sup>23</sup> Specifically, he concluded that in addition to prohibiting prior restraints on publication, the Clause also forbade “any Congressional regulation of the press, whether by means of a licensing act, a tax act, or a sedition act.”<sup>24</sup> Levy’s position countered the previously popular view that “freedom of the press was one of the key reforms for which the American Revolution had been fought.”<sup>25</sup> Indeed, David A. Anderson later criticized Levy’s conception of the Free Press Clause as being too narrow and lamented that Levy’s writings had “dominated discussion of [F]irst [A]mendment history” since their publication.<sup>26</sup>

Regardless of its breadth, scholars agree that at a minimum the Free Press Clause forbids prior restraints on publication.<sup>27</sup> But the contours of “prior restraint” are themselves murky.<sup>28</sup> English common law held that “equity will not enjoin a libel,”<sup>29</sup> and this view prevailed in America during the nineteenth and early twentieth centuries.<sup>30</sup> Injunctions were prohibited even after a final judgment was issued and a party was found guilty of libel.<sup>31</sup> Although many courts only cited the English maxim when refusing to issue an injunction,<sup>32</sup> a number explicitly acknowledged

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22. Meyerson, *supra* note 20, at 320–21; *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931) (“In determining the extent of the constitutional protection [of liberty of the press], it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication.”).

23. LEONARD LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 1 (1960).

24. LEONARD LEVY, *FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON*, at lv–lvii (Leonard Levy ed., 1966).

25. Anderson, *supra* note 17, at 494 (citing JAMES SMITH, *FREEDOM’S LETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 424–30 (1956)); see also ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 21 (1964) (“The First Amendment was written by men . . . who intended to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible in the United States of America.”); Smith, *supra*, at 427 (“[O]ne of the objects of the American Revolution was to abolish the common law restriction on liberty of the press, especially on political discussion.”).

26. Anderson, *supra* note 17, at 495. Anderson argued that “[t]he Quebec Address[,] ‘Cato’s Letters,’ the writings of several American editors and other dissenters, and the views of Madison himself all suggest that broader theories [than the Blackstonian view of liberty of the press] were indeed abroad in the land.” *Id.* at 523; see also *id.* at 523–33 (describing this evidence).

27. Meyerson, *supra* note 20, at 295.

28. *Id.* at 296.

29. *Id.* at 308–11 (describing the refusal to enjoin defamatory statements in England).

30. *Id.* at 324–30 (discussing attempts to enjoin specific publications); *id.* at 334–35 (discussing attempts to enjoin newspapers).

31. Meyerson, *supra* note 20, at 334–35.

32. *Id.* at 329 n.233 (listing several cases in which courts “merely cited the equitable rule without mentioning the constitutional interest in free expression”).

a relationship between the common law rule and liberty of the press.<sup>33</sup>

In 1931, the Supreme Court decided *Near v. Minnesota ex rel. Olson*, holding that an injunction barring a newspaper from publishing or distributing "a malicious, scandalous or defamatory newspaper, as defined by law" violated the federal constitution.<sup>34</sup> However, *Near* failed to articulate a general definition of a "prior restraint."<sup>35</sup> Was an injunction after final judgment a *prior* restraint? When did legislative and executive action qualify?

Thomas Emerson proposed a typology of prior restraints in 1955, which included licensing schemes, injunctions, laws that forbade particular communication absent compliance with standards specified in legislation, and situations where "the restraint appears more indirect or secondary to some other immediate objective."<sup>36</sup> This final type of restraint occurs, "for example, where political views or other forms of expression are used as a test for holding an office or position of influence."<sup>37</sup>

Michael I. Meyerson attempted to define prior restraint by trying to articulate permissible, subsequent punishments for speech.<sup>38</sup> Focusing on the importance of separation of powers in the federal system, he suggested a recipe for creating constitutional, subsequent punishments for illegal speech.<sup>39</sup> "First, the legislature enacts a general law, defining the prohibited speech."<sup>40</sup> Speech must then be communicated and action

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33. See Meyerson, *supra* note 20, at 325-30 (citing *Brandreth v. Lance*, 8 Paige Ch. 24, 26 (N.Y. Ch. 1939) (stating it could not assume jurisdiction "without infringing upon liberty of the press")); see also *Willis v. O'Connell*, 231 F. 1004, 1010 (S.D. Ala. 1916); *Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co.*, 171 F. 553, 556 (M.D. Ala. 1909); *Montgomery Ward & Co. v. S.D. Retail Merchs.' & Hardware Dealers' Ass'n*, 150 F. 413, 418 (D.S.D. 1907); *Balliet v. Cassidy*, 104 F. 704, 706 (D. Or. 1900); *State ex rel. Liversey v. Judge of Civil Dist. Court*, 34 La. Ann. 741, 742 (La. 1882) (holding that an injunction against publishing was unconstitutional); *Howell v. Bee Publ'g Co.*, 158 N.W. 358 (Neb. 1916); *Marlin Firearms Co. v. Shields*, 64 N.E. 163, 166 (N.Y. 1902) (enjoining libels violates freedom of the press and the right to a jury trial); *Flint v. Hutchinson Smoke Burner Co.*, 19 S.W. 804, 805 (Mo. 1892) (enjoining libels would violate freedom of the press and the right to a jury); *N.Y. Juvenile Guardian Soc'y v. Roosevelt*, 7 Daly 188, 188 (N.Y. Ct. Com. Pl. 1877) (issuing a temporary injunction against an alleged libel would violate the New York Constitution's guarantee of freedom of speech); *Life Ass'n of Am. v. Boogher*, 3 Mo. App. 173, 176-77 (1876) (stating that issuing an injunction would violate the Missouri Constitution's guarantee of free speech); *Strang v. Biggers*, 252 S.W. 826, 826 (Tex. Civ. App.—Dallas 1923, no writ).

34. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 712, 722-23 (1931).

35. Meyerson, *supra* note 20, at 338; see also John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 434 (1983) ("Moreover, continuing uncertainty as to what is actually meant by 'prior restraint' and the accelerating tendency to invoke that phrase in a wide variety of dissimilar cases have undermined whatever usefulness the doctrine may have had in explaining or predicting results.").

36. Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 655-56 (1955); see also Jeffries, *supra* note 35, at 421 (describing Emerson's article as one of the "most influential" at defining prior restraints). Emerson believed the third and fourth types of prior restraint had less potential for abuse and were not always unconstitutional. Emerson, *supra*, at 671.

37. Emerson, *supra* note 36, at 656.

38. Meyerson, *supra* note 20, at 339.

39. *Id.*

40. *Id.*

brought against the speaker by the executive branch or private action.<sup>41</sup> Finally, the judiciary must rule “on the legality of the communication.”<sup>42</sup>

With this structure in mind, Meyerson defined prior restraint in two parts:

(1) A “prior restraint” occurs whenever judges or executive branch personnel are authorized to take notice of specific expression intended for communication, rather than that which has actually been communicated; (2) For those rare cases when the Constitution permits the regulation of expression before it is communicated, a “prior restraint” also occurs if the judiciary can initiate enforcement or the executive can make a final determination of illegality.<sup>43</sup>

Supreme Court cases discussing prior restraints in different contexts paint a similar picture. For example, *Freedman v. Maryland* considered a statute that required films to be approved by a board of censors before being shown.<sup>44</sup> The Court held that

a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if . . . the burden of proving that the film is unprotected expression must rest on the censor. . . . [and] the exhibitor [is] assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film.<sup>45</sup>

Notably, the Court insisted that the procedure “assure a prompt final judicial decision.”<sup>46</sup> *Near* and *Freedman* fit two common fact patterns in “prior restraint” cases—cases that consider injunctions against publication and cases where parties are required to acquire licenses or permission before speaking or publishing.<sup>47</sup> However, there are other ways to effect prior restraints on the press.

### III. COLLATERAL CENSORSHIP AS PRIOR RESTRAINT

There are more opportunities to censor “the press” than to censor “speech” alone. In-person speech involves speakers, listeners, and whoever controls the location the speech takes place in. Speaking through tools of mass communication—in other words, exercising one’s freedom under the Free Press Clause—however, necessarily involves a greater

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41. *Id.*

42. *Id.* at 339–40.

43. *Id.* at 340.

44. *Freedman v. Maryland*, 380 U.S. 51, 52–53 (1965).

45. *Id.* at 58–59.

46. *Id.* at 59.

47. See *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (disallowing an injunction on publishing the classified study entitled “History of U.S. Decision-Making Process on Viet Nam Policy,” better known as the “Pentagon Papers”); *Lovell v. City of Griffin*, 303 U.S. 444, 451–53 (1938) (holding that a statute requiring permission from the Griffin City Manager before distributing literature violated liberty of the press); see also Emerson, *supra* note 36, at 655–56 (describing licensing and injunctions as forms of prior restraint and licensing systems as “the clearest form”).



number of intermediaries. Traditionally, these intermediaries are labeled “publishers” and “distributors,” or “publishers” and “secondary publishers.”<sup>48</sup> Justice Scalia highlighted the opportunity intermediaries provide would-be censors in his concurrence in *McConnell v. FEC*:

An author may write a novel, but he will seldom publish and distribute it himself. A freelance reporter may write a story, but he will rarely edit, print, and deliver it to subscribers. To a government bent on suppressing speech, this mode of organization presents opportunities: Control any cog in the machine, and you can halt the whole apparatus. License printers, and it matters little whether authors are still free to write. Restrict the sale of books, and it matters little who prints them. Predictably, repressive regimes have exploited these principles by attacking all levels of the production and dissemination of ideas.<sup>49</sup>

In light of the opportunities that intermediaries—and specifically technologies of mass communication—provide to censors, the constitutionally permissible punishments for presses and their modern-day equivalents should differ from the permissible punishments for original speakers. This is needed to guarantee speakers-through-the-press the same constitutional freedoms as in-person speakers.<sup>50</sup>

Take for example a law that would punish both the author and publisher for writing and publishing defamatory statements against an elected official. Assume the publisher is a vanity press that will publish anything that an author pays it to and that the author has written a nondefamatory book criticizing a politician. Although the book is truthful, the vanity press may see that the book criticizes a politician, and out of an abundance of caution and desire to avoid litigation, decline to publish the book.<sup>51</sup> When a speaker and the owner of a technology of mass communication share the same liability, a censoring effect can result if the technology owner refuses to publish the speech out of concern for its own well-being, especially when it lacks the same positive incentives to communicate as the original speaker.<sup>52</sup>

Meyerson coined the term “collateral censorship” to describe this phenomenon.<sup>53</sup> “Collateral censorship occurs when one private party *A* has the power to control speech by another private party *B*, the government threatens to hold *A* liable based on what *B* says, and *A* then censors *B*’s

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48. See Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293, 309–11 (2011).

49. *McConnell v. FEC*, 540 U.S. 93, 251 (2003) (Scalia, J., concurring in part, dissenting in part), *overruled by* *Citizens United v. FEC*, 558 U.S. 50 (2010); see also Lovell, 303 U.S. at 452 (“Liberty of circulating is as essential to [freedom of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value.” (quoting *Ex parte Jackson*, 96 U.S. 727, 733 (1877))).

50. See Michael I. Meyerson, *Authors, Editors, and Uncommon Carriers: Identifying the “Speaker” Within the New Media*, 71 NOTRE DAME L. REV. 79, 117 (1995).

51. *Id.*

52. *Id.*

53. *Id.* at 113.

speech to avoid liability.”<sup>54</sup> Because *B* has an interest in promoting her own speech that *A* lacks, *A* will likely be more willing to censor *B* than *B* would be to self-censor.<sup>55</sup>

Collateral censorship can take two forms. In one, the censoring party tries to deter the speaker through punishment.<sup>56</sup> For example, to avoid the creation of a hostile work environment, an employer might forbid certain forms of speech and punish employees who disobey.<sup>57</sup> While the prohibited speech is punished after it is uttered, the employer does not directly have the power to prevent the speech from occurring beforehand.<sup>58</sup>

In other circumstances, a censoring party has the power to directly prevent speech from ever being communicated, despite attempts by the speaker to reach an audience.<sup>59</sup> This is the case with intermediaries such as publishers and distributors, or conceived differently, technologies of mass communication such as presses.<sup>60</sup> When the vanity press refuses to print an author’s work out of fear of liability or prosecution, the author’s speech is prevented, even over her objections.<sup>61</sup> This constitutes a prior restraint on her speech. Depending on the nature of the law, the author may have considerable difficulty finding a printer for her book, effectively denying her the ability to exercise her rights under the Free Press Clause.

Importantly, the censor’s actions in a collateral censorship situation are motivated by a desire to avoid legal liability, not by a private preference.<sup>62</sup> A wholly private press may choose not to print any material without raising First Amendment concerns.<sup>63</sup>

Courts have not explicitly recognized collateral censorship as a category of behavior that raises First Amendment concerns.<sup>64</sup> However, this phenomenon has been acknowledged without being named. In addition to Justice Scalia’s comment in *McConnell*, the Supreme Court decision *Smith v. California* also considered the role of intermediaries in the dissemination of speech.<sup>65</sup> There, a bookseller was convicted under a local ordinance that made it unlawful “for any person to have in his possession

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54. J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2298 (1999).

55. *Id.*

56. *Id.* at 2297–98.

57. *Id.*

58. *Id.*

59. Wendy Seltzer dubbed this phenomenon “prior restraint by proxy.” See Wendy Seltzer, *Free Speech Unmoored in Copyright’s Safe Harbor: Chilling Effects on the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171, 177, 199–200 (2010) (citing Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 65 (2006)).

60. See Balkin, *supra* note 54, at 2298.

61. *Id.*

62. *Id.*

63. See *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

64. See Balkin, *supra* note 54, at 2298. No state or federal cases appearing on Westlaw as of June 2, 2013, have used the term “collateral censorship” in any context.

65. *Smith v. California*, 361 U.S. 147, 148–49 (1960).

any obscene or indecent writing, (or) book . . . in any place of business where . . . books . . . are sold or kept for sale.”<sup>66</sup> The Court struck down the ordinance, recognizing that imposing strict liability on the bookseller would result in his “tend[ing] to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature.”<sup>67</sup> The Court was concerned with the problem of collateral censorship—that the bookseller would censor others’ speech by refusing to sell books in order to avoid his own criminal liability.<sup>68</sup> The bookseller’s incentive to over-censor would also be compounded by a “scaling” problem.<sup>69</sup> In other words, as the number of potential books to distribute increased, the bookseller would lose his ability to both comply with the law and keep his bookshop open.<sup>70</sup> Because a bookseller could only read a small number of the books he might sell, he would not be able to make an individualized decision about most books based on their actual content.<sup>71</sup> “The bookseller’s limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public’s access to forms of the printed word which the State could not constitutionally suppress directly.”<sup>72</sup> Although *Smith* did not specify when a distributor could constitutionally be punished for selling offensive material, the common law of torts provides that distributors “are generally not held liable for the content they distribute unless they know or have reason to know of its tortious or illegal nature.”<sup>73</sup> As in *Smith*, distributors are “under no duty to examine” the material they offer for sale.<sup>74</sup> Although the law does not distinguish between different types of distributors, “no one seems to have sued a library for defamation in [the twentieth] century[.]” and “no American appears ever to have recovered for defamation from a bookseller or distributor not controlled by the primary publisher.”<sup>75</sup>

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66. *Id.* at 148 (quotation marks omitted).

67. *Id.* at 153.

68. *Id.* at 153–54.

69. A scaling problem occurs when legal compliance “doesn’t scale” as the number of tasks a party must undertake to successfully comply increases. For example, it would be possible for the bookseller to personally review ten books, but not ten thousand, before putting them on sale. Similarly, as the number of some types of patents increases, inventors cannot sort through them all to make sure they are not accidentally violating them. Some legal requirements which are feasible when faced with a small number of “inputs” can become impossible to comply with as the information a party must process increases. See generally Christina Mulligan & Timothy B. Lee, *Scaling the Patent System*, N.Y.U. ANN. SURV. AM. L. (forthcoming) (manuscript at 8).

70. *Id.*

71. *Smith*, 361 U.S. at 153.

72. *Id.* at 153–54.

73. Davis S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 397–98 (2010) (citing *Tacket v. General Motors Corp.*, 836 F.2d 1042, 1046–47 (7th Cir. 1987); RESTATEMENT (SECOND) OF TORTS § 581(1) (1977)).

74. RESTATEMENT (SECOND) OF TORTS § 581(1) cmt. d.

75. Loftus E. Becker, Jr., *The Liability of Computer Bulletin Board Operators for Defamation Posted by Others*, 22 CONN. L. REV. 203, 227 (1989).

#### IV. INTERMEDIARY LIABILITY AND FREEDOM OF THE PRESS

Collateral censorship occurs any time an intermediary—someone between an author and her audience—faces liability for an author's speech.<sup>76</sup> Often this intermediary controls a technology of mass communication, such as a printing press, a television network, or a webpage that users can post content on, such as YouTube or Facebook.<sup>77</sup> When, if ever, are laws that motivate collateral ownership constitutionally permissible?

Section A of this Part examines existing models of intermediary liability and how those models sometimes encourage collateral censorship and fail to embody the values of a free press. Drawing from this analysis and related scholarship, Section B proposes a method for understanding speaker and intermediary liability that limits the potential for collateral censorship, is technology-neutral, and is consistent with the values of the Free Press Clause.

##### A. THE OLD MODEL: PUBLISHER AND DISTRIBUTOR LIABILITY

Under traditional defamation law, publishers and speakers were generally liable for libel, while distributors only faced liability if they knew or had reason to know they were distributing defamatory content.<sup>78</sup> Thus, publishers had significant incentive to pressure authors to skirt around potentially illegal material, but distributors were relatively protected, as was the bookseller in *Smith v. California*.<sup>79</sup> From a “least cost avoider” perspective of allocating liability, as well as one concerned with fundamental fairness, this model was somewhat intuitively appealing when a publisher chose and edited the material it printed. Unlike the bookseller in *Smith* and other distributors, publishers who edited material might not suffer from a scaling problem. They would presumably be able to check all submissions for defamatory or obscene content because, by assumption, they already had the resources to read every published piece for other reasons, such as to check grammar and improve the writing style.<sup>80</sup>

However, as technologies of mass communication changed, the previously clear distinction between publishers and distributors diminished.<sup>81</sup> In particular, websites that host outside content could be seen as publishing someone's work, distributing someone's work, or both.<sup>82</sup>

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76. Balkin, *supra* note 54, at 2298.

77. Wu, *supra* note 48, at 299–300.

78. See Ardia, *supra* note 73, at 397–98.

79. *Smith v. California*, 361 U.S. 147, 154–55 (holding bookseller not liable for selling an obscene book).

80. See Ardia, *supra* note 73, at 397 (“The theory behind [publisher] liability is that a publisher has the knowledge, opportunity, and ability to exercise editorial control over the content of its publications.”); *id.* at 398 (“The key distinction in the common law between a publisher and distributor is that a publisher inherently has knowledge of the content it is publishing, while a distributor does not.”).

81. See Wu, *supra* note 48, at 313–14.

82. See *id.*

Two early cases involving defamation on the Internet suggested that publisher liability would be imposed on online service providers if the provider exercised editorial control over the offending speech.<sup>83</sup> In *Cubby v. CompuServe Inc.*, the court determined that an online service provider, CompuServe, was merely a distributor of the content on its bulletin boards.<sup>84</sup> The court noted the defamatory content's publisher "upload[ed] the text of [the content] into CompuServe's data banks and ma[de] it available to . . . subscribers simultaneously. CompuServe ha[d] no more editorial control over such a publication than does a public library, book store, or newsstand."<sup>85</sup> The court also acknowledged the scaling problem inherent in imposing publisher liability on CompuServe by stating "it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so."<sup>86</sup>

In contrast, *Stratton Oakmont, Inc. v. Prodigy Services Co.* declared the online service provider, Prodigy, a publisher of defamatory content that appeared on one of its bulletin board.<sup>87</sup> In the court's view, the "critical issue" in the case was whether Prodigy "exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper."<sup>88</sup> Relying on the reasoning in *Cubby*, Prodigy argued that it was impracticable for board moderators to manually review all postings for defamatory content because of the volume—about 60,000 a day at the time of the decision.<sup>89</sup> Prodigy conceded, however, that board moderators could remove content that violated its guidelines.<sup>90</sup>

Despite the reality that Prodigy's staff could not read every posted message, the court distinguished Prodigy from CompuServe on two grounds.<sup>91</sup> First, Prodigy "held itself out to the public and its members as controlling the content of its computer bulletin boards."<sup>92</sup> Second, Prodigy used an "automatic software screening program" and instituted guide-

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83. Ardia, *supra* note 73, at 406-08.

84. *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991).

85. *Id.* (footnote omitted).

86. *Id.* ("Obviously, the national distributor of hundreds of periodicals has no duty to monitor each issue of every periodical it distributes." (quoting *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 139 (2d Cir. 1984))).

87. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at \*4 (N.Y. Sup. Ct. 1995), *superseded by statute*, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *as recognized in* *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 52 N.E.2d 1011 (N.Y. 2011).

88. *Id.* at \*3.

89. *Id.*

90. *Id.*

91. *Id.* at \*4.

92. *Id.* Prodigy "held itself out as an online service that exercised editorial control over the content of messages posted on its computer bulletin boards, thereby expressly differentiating itself from its competition and expressly likening itself to a newspaper." *Id.* at \*2. In one article, it stated,

We make no apology for pursuing a value system that reflects the culture of millions of American families we aspire to serve. Certainly no responsible newspaper does less when it chooses the type of advertising it publishes, the

lines that bulletin board moderators were required to enforce.<sup>93</sup> The court concluded that based on the use of automatic screening and by empowering moderators to delete messages for “offensiveness” and “bad taste,” Prodigy was exercising editorial control over its messages and qualified as a publisher of bulletin board content, rather than a distributor.<sup>94</sup> “Prodigy’s conscious choice, to gain the benefits of editorial control, has opened itself to a greater liability than CompuServe and other computer networks that make no such choice.”<sup>95</sup>

*Cubby* and *Stratton Oakmont* together implied that two providers, engaged in exactly the same behavior, could be held to wildly different standards of liability based on whether they exerted any degree of control, automatic or manual, over the content that reached their subscribers.<sup>96</sup> Consequently, online service providers had the incentive to ignore obscenity or tortious speech that appeared on their bulletin boards to avoid liability for any illegal speech that they failed to locate.

House Representatives Christopher Cox and Ron Wyden sought to change these incentives by proposing an amendment to the Communications Decency Act,<sup>97</sup> which was codified as 47 U.S.C. § 230.<sup>98</sup> Section 230 aimed to protect “‘good samaritan’ blocking and screening of offensive material.”<sup>99</sup> It stated, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>100</sup> It further specified that service providers would not be liable for “restrict[ing] access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable” or “enabl[ing] or mak[ing] available to information content providers or others the technical means to restrict access” to such

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letters it prints, the degree of nudity and unsupported gossip its editors tolerate.

*Id.* (quotation marks omitted).

93. *Id.* at \*4.

94. *Id.*

95. *Id.* at \*5.

96. *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 137 (S.D.N.Y. 1991); *Stratton Oakmont*, 1995 WL 323710, at \*4.

97. The Supreme Court ruled that portions of § 223 of the Communications Decency Act violated the First Amendment in *Reno v. ACLU*, but § 230 was not altered in that decision. See 521 U.S. 844, 883 (1997). For a more detailed discussion of the Communications Decency Act’s history, see Robert Cannon, *The Legislative History of Senator Exon’s Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51 (1996) (cited in *Ardia*, *supra* note 73, at 409 n.178).

98. See *Ardia*, *supra* note 73, at 410. Section 230 lists among its policy objectives, “to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services” and “to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.” 47 U.S.C. § 230(b)(3), (4) (2006); see also *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (“Congress enacted § 230 to remove the disincentives to selfregulation created by the *Stratton Oakmont* decision.”).

99. 47 U.S.C. § 230(c) (2006).

100. *Id.* § 230(c)(1).

material.<sup>101</sup> Cases that followed generally agreed that § 230 granted immunity to distributors of sanctionable speech as well as publishers.<sup>102</sup>

Section 230 grants greater protection to technology intermediaries on the Internet than is recognized for publishers and distributors of printed materials.<sup>103</sup> The New York Times is liable as a publisher for the letters to the editor it chooses to run in its print edition, but under § 230, it is not liable for online comments that appear on NYTimes.com.<sup>104</sup>

Section 230 created such extensive statutory protection for service providers that any inquiry about the constitutional limits of intermediary liability on the Internet was all but cut off.<sup>105</sup> But to what degree would the Free Press Clause protect internet speech technologies in the absence of § 230? What protections should it provide to other speech-disseminating technologies, old and new, that are not covered?

*Cubby*, *Stratton Oakmont*, and *Smith* all tried to delineate when liability would be appropriate, but these decisions failed to fully address the threat of collateral censorship and to intelligibly distinguish between different types of intermediaries.<sup>106</sup>

*Cubby* and *Stratton Oakmont* illustrate the difficulty in distinguishing between publishers and distributors.<sup>107</sup> Traditionally, the distinction was easy because publishers *made* copies and distributors moved those copies around. However, hinging the distinction on “copying” is problematic in a digital environment. Being the party that copied a work was once a rough proxy for having the kind of intimate, editing relationship with a work that publisher liability tried to capture. In the absence of “copying” being a useful distinction, the courts had a more difficult time locating the *sine que non* that distinguished a publisher from a distributor.

The distinction between publisher and distributor on the Internet could have been made well, but it was not, largely because the determination

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101. *Id.* § 230(c)(2). Subparagraph B technically states that providers shall not be held liable for “any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).” However, it is accepted that “paragraph (1)” should have referred to the material described in subparagraph A. *See Id.* § 230 n.1.

102. *See Zeran*, 129 F.3d at 332 (holding distributor liability “is merely a subset, or a species, of publisher liability, and is therefore also foreclosed by § 230”); *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998) (“Any attempt to distinguish between ‘publisher’ liability and notice-based ‘distributor’ liability and to argue that [s]ection 230 was only intended to immunize the former would be unavailing.”); *Barrett v. Rosenthal*, 146 P.3d 510, 519 (Cal. 2006) (“Given that ‘distributors’ are also known as ‘secondary publishers,’ there is little reason to believe Congress felt it necessary to address them separately. There is even less reason to suppose that Congress intended to immunize ‘publishers’ but leave ‘distributors’ open to liability . . .”).

103. *See* 47 U.S.C. § 230(b).

104. *Id.* § 230(c)(2).

105. *See generally id.* § 230.

106. *Smith v. California*, 361 U.S. 147, 172 (1959); *Cubby, Inc. v. Compuserve Inc.*, 776 F. Supp. 135, 144 (S.D.N.Y. 1991); *Stratton Oakmont Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at \*7 (N.Y. Sup. Ct. 1995), *superseded by statute*, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *as recognized in Shiamili v. Real Estate Grp. of N.Y., Inc.*, 952 N.E.2d 1011 (N.Y. 2011).

107. *Stratton Oakmont*, 1995 WL 323710, at \*7; *Cubby*, 776 F. Supp. at 144.

that Prodigy should be liable as a publisher was flawed.<sup>108</sup> In *Stratton Oakmont*, the judge noted that Prodigy screened messages, both personally and automatically, and exercised the rights to eliminate messages that it found objectionable according to its guidelines.<sup>109</sup> For these reasons, the judge found that Prodigy was acting more like a publisher than a distributor.<sup>110</sup> But distributors make these kinds of “include or exclude” judgments all the time. The classic distributor is a newsstand or a bookstore.<sup>111</sup> Bookstores and newsstands can choose to be family-friendly or racy, to only stock publications that they believe are well-written or popular, or to only stock publications that deal with certain topics, such as travel or science fiction. Making these choices is inherent to being a bookstore or a newsstand. There are simply too many writings in the world to sell, so a bookstore must decide “yay or nay.” Prodigy did the same thing by empowering board leaders to delete messages, but not to change the content of a message.<sup>112</sup> In this respect, Prodigy was acting more like a distributor because it was not actively editing the speech of others, as many publishers do.<sup>113</sup>

But even if the *Stratton Oakmont* court had conceived of Prodigy’s liability in this way, it is hardly clear that distributor liability is sufficiently speech-protective to satisfy the First Amendment. Although *Smith* did not specify what a distributor must know to face liability for distributing illegal works,<sup>114</sup> tort law requires a distributor to “kn[o]w or ha[ve] reason to know” of a work’s tortious or illegal nature before facing liability.<sup>115</sup> But as the Fourth Circuit recognized in *Zeran v. America Online*, a § 230 case, simply requiring parties to notify a distributor of allegedly defamatory or illegal content creates speech-chilling incentives for high-volume distributors and motivates aggrieved parties to notify those distributors and claim defamation “[w]hensoever one [i]s displeased with the speech of another party.”<sup>116</sup>

Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information’s defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. . . . [T]he sheer number of postings on interactive computer services would create an impossible burden in the Internet context. . . . Because service providers would be subject to liabil-

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108. *Stratton Oakmont*, 1995 WL 323710, at \*4.

109. *Id.* at \*4–5.

110. *Id.* at \*4.

111. *See, e.g., Smith*, 361 U.S. at 148.

112. *Stratton Oakmont*, 1995 WL 323710, at \*4. Moreover, Prodigy and CompuServe’s editorial power was actually quite similar. “While CompuServe may decline to carry a given publication altogether, in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication’s contents.” *Cubby*, 776 F. Supp. at 140.

113. *See Stratton Oakmont*, 1995 WL 323710, at \*5.

114. *Smith*, 361 U.S. at 152–53.

115. *Zeran v. Am. Online, Inc.* 129 F.3d 327, 331 (4th Cir.1997).

116. *Id.* at 333.



ity only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not.<sup>117</sup>

*Zeran* ultimately held that America Online was shielded from liability under § 230, but its analysis of the speech-chilling risks of distributor liability is not limited to online service providers.<sup>118</sup> *Zeran* highlighted the scaling problem distributors face, which the Court in *Smith v. California* also expressed concern about.<sup>119</sup> When only notice is needed to put an intermediary at risk of liability, an intermediary with a low staff-to-content ratio will be incentivized to stop distributing content because it will lack the necessary resources to make informed decisions about each piece of allegedly illegal speech.<sup>120</sup> This problem can occur with off-line publishers as well as distributors and online intermediaries. Self-publishing outfits, for instance, print everything from high school newspapers to radical groups' manifestos to local interest books. As printing becomes technologically easier, fewer staff members need to participate in the printing process. One can easily imagine a printer where some publications are never seen or read by its staff.

The automatization of printing raises a scaling problem for publishers as well as distributors. This is particularly problematic for publishers, who do not even need notice of illegal speech to be liable for it. The original theory behind publisher liability was that "a publisher has the knowledge, opportunity, and ability to exercise editorial control over the content of its publications."<sup>121</sup> But more and more often that is no longer true.

The publisher and distributor categories of speech are not sufficiently speech-protective. Protecting speech technologies requires not treating publishers as speakers and not forcing distributors to withhold publications upon a mere peppercorn of notice that a work contains illegal speech.

#### B. A NEW MODEL: SPEAKER AND PRESS LIABILITY

Numerous scholars have proposed alternative approaches for intermediary liability.<sup>122</sup> Michael I. Meyerson suggested, in an online context, only finding liability when a service provider "has had a high 'degree of . . . involvement' in the illegal speech."<sup>123</sup> Felix Wu supports intermediary immunity except when "intermediaries are actually original speakers, and have the incentives of original speakers"<sup>124</sup> and when "the liability being

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117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 331.

121. See Ardia, *supra* note 73, at 397.

122. See Meyerson, *supra* note 50, at 123; Wu, *supra* note 48, at 379.

123. Meyerson, *supra* note 50, at 123 (footnote omitted) (quoting Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, 2 FCC Rcd. 2819, 2820 (1987)).

124. Wu, *supra* note 48, at 349.

imposed on the intermediary is not one that could be sensibly imposed on the original speaker,"<sup>125</sup> such as holding an intermediary liable for inducing illegal speech.<sup>126</sup>

Jack Balkin considered the constitutionality of collateral censorship in an employment setting. His essay discussed employer liability for maintaining a hostile work environment—or, rather, for permitting its employees to engage in a variety of speech and actions that together create a hostile environment.<sup>127</sup> Balkin addressed collateral censorship in a more general context: person-to-person speech in an office does not raise free press concerns, and employers are not technologies of mass communication.<sup>128</sup> Nonetheless, Balkin's reasoning can be analogized to technology intermediaries.<sup>129</sup>

Balkin reframed the collateral censorship issue, claiming that "[t]he question we should ask is whether it makes sense, given the purposes of a regulatory regime, and the kind of harm that the legislature has a right to prevent, to treat the private censor and the private speaker as the 'same speaker' for purposes of First Amendment law."<sup>130</sup> Balkin did not suggest that the censor and speaker must literally be engaging in the same speech, but appealed to principles of *respondeat superior*—that is, where "the law is entitled to treat [the two parties] as if they were one, and to hold the first liable for what the second does."<sup>131</sup> Balkin identified three relevant considerations that could justify collateral censorship: the censor's right to control the speech of the private speaker, whether the censor and speaker are collectively producing a harm or danger of harm, and the censor's ability to mitigate the harm caused by the speaker.<sup>132</sup> Ultimately, in Balkin's view, "collateral censorship is most acceptable from a First Amendment standpoint when vicarious liability is most acceptable, and it is least acceptable from a First Amendment standpoint when vicarious liability is least acceptable."<sup>133</sup>

The views of Balkin, Meyerson, and Wu, as well as the judges and justices who decided *Smith*, *Cubby*, *Stratton Oakmont*, and the § 230 cases, all point towards a view of intermediary liability that is technology-independent and that fits neatly within the Free Press Clause.<sup>134</sup> It also jetti-

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125. *Id.* at 297.

126. *Id.* at 344–45. Notably, Wu is not claiming that liability is appropriate when liability cannot be "sensibly" imposed on the original speaker because the original speaker is difficult to identify or locate. *See id.* at 344–49.

127. Balkin, *supra* note 54, at 2297–98.

128. *Id.*

129. *Id.* at 2295.

130. *Id.* at 2300.

131. *Id.*

132. *Id.* at 2301.

133. *Id.*

134. *Smith v. California*, 361 U.S. 147, 147 (1959); *Cubby, Inc. v. Compuserve Inc.*, 776 F. Supp. 135, 137 (S.D.N.Y. 1991); *Stratton Oakmont v. Prodigy Servs. Co.*, 1995 WL 323710, at \*1 (N.Y. Sup. Ct. 1995), *superseded by statute*, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *as recognized in Shiamili v. Real Estate Grp. of N.Y.*,

sons the outmoded distinction between publishers and distributors.<sup>135</sup>

There are two relevant parties in free press cases: the speaker and the press. By censoring the press, one censors the speaker. As a result, prior restraints on the press are not allowed. But by subjecting presses to subsequent liability, presses can again be motivated by the government to suppress a speaker's communication prior to its publication and distribution. In the context of a technology intermediary, such as presses and web hosts, collateral censorship takes the form of an actual, physical restraint on speech. It is not that the press cows the speaker into silence with a threat. Rather, the speech is cut off unilaterally by the press even over the objectives of the speaker. This violates the speaker's most fundamental freedom granted by the Free Press Clause—freedom from prior restraint.

This result seems intuitively wrong in the classic publisher scenario, in which an editor sits with an author to edit and review a work, and a publisher employs a fact-checking department to make sure that a work is correct and up to the publisher's standards. But this concern can be abated by abandoning the labels of speaker, publisher, and distributor. In the context of the Free Press Clause, there are speakers and presses. And sometimes a party can be both.

Channeling Balkin and Wu, when a publisher and an author are engaged in a collective endeavor, are both speaking, or are literally the same person, collateral censorship is not a problem because in those situations the publisher is acting as *both* a speaker and a press. Because the publisher has the same motivations as the speaker, collateral censorship is not a significant concern.

In contrast, self-publishing houses, bookstores, newsstands, and websites such as YouTube.com or Blogger.com, are not acting as speakers when they print, distribute, or host others' content. They are acting solely as presses. They may make some choices about the content they distribute, just as the bookstore can choose what books to carry, and the host or the self-publishing house can limit, for whatever reasons, the kind of content it disseminates. But because they are not actively engaged in creating and editing the speech, they should not be liable as speakers.

Aside from when a press is also acting as a speaker, there is another circumstance where liability can appropriately be imposed on a press without raising Free Press Clause concerns. This circumstance occurs when a press receives actual notice that certain speech has been adjudicated by a court to be illegal or unprotected.<sup>136</sup> In these circumstances,

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Inc., 952 N.E.2d 1011 (N.Y. 2011); Balkin, *supra* note 54, at 2297; Meyerson, *supra* note 50, at 80; Wu, *supra* note 48, at 394.

135. *Smith*, 361 U.S. at 147; *Cubby*, 776 F. Supp. at 137; *Stratton Oakmont*, 1995 WL 323710, at \*1; Balkin, *supra* note 54, at 2297; Meyerson, *supra* note 50, at 80; Wu, *supra* note 48, at 394.

136. This proposal was inspired by Michael I. Meyerson's suggestion for common carrier liability, which he drew from an FCC rule. Meyerson suggested, "Carriers who by law or contract serve only as 'conduits' for the speech of others [sh]ould only be responsible for distributing the speech of another if they have 'actual notice' that the speech has previously been adjudicated illegal or unprotected." Meyerson, *supra* note 50, at 122.

because the underlying speaker has no right to make the speech, and because there is no risk of overbroad censoring, liability on presses will not violate the Free Press Clause. This liability might be styled as “modified distributor liability.” Whereas traditional distributor liability merely requires notice that speech is illegal, modified distributor liability would require notice that a court had judged the speech to be illegal or unprotected.

Granting greater protection to presses than to speakers initially seems perverse. It is the speaker who is adding her voice to the world, and yet she is subject to greater sanction by the government than the technologies that copy and spread the speech. However, it is only by granting immunity to speech technologies that speakers exercising their free press rights will enjoy the same degree of freedom of expression as those exercising their rights to engage in person-to-person speech under the Free Speech Clause.

## V. “NOTICE-AND-TAKEDOWN,” COPYRIGHT, AND FREEDOM OF THE PRESS

### A. COPYRIGHT AND THE FIRST AMENDMENT

Although equity will not enjoin a libel, courts will enjoin a copyright violation.<sup>137</sup> The copyright statute plainly permits courts to “grant temporary and final injunctions . . . to prevent or restrain infringement of a copyright.”<sup>138</sup> Considering the longstanding ban on prior restraints of speech, the availability of not just final, but also preliminary injunctions, in copyright cases is curious. Often when people use others’ copyrighted works, they use them to communicate. This is particularly the case with derivative works, where an author uses part or all of a copyrighted work to make a new work. Yet, even highly expressive, new works are sometimes suppressed. In 2009, the Southern District of New York enjoined the dissemination of an entire novel because it was an unauthorized sequel to J.D. Salinger’s *Catcher in the Rye*.<sup>139</sup> The book cannot be distributed in the United States to this day.<sup>140</sup>

Indeed, despite the promise of liberty of the press in England and the First Amendment in American law, preliminary injunctions in copyright

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137. See 17 U.S.C. § 502(a) (2006).

138. *Id.*

139. See *Salinger v. Colting*, 641 F. Supp. 2d 250, 269 (S.D.N.Y. 2009), *vacated*, 607 F.3d 68 (2d Cir. 2010). The Second Circuit vacated the trial court’s decision in *Salinger* because they had issued a preliminary injunction under the standard used for copyright cases in the Second Circuit prior to the Supreme Court’s ruling in *eBay, Inc. v. MercExchange LLC*, 547 U.S. 388, 390 (2006). 607 F.3d at 74–75, 84. In light of *eBay*, the Second Circuit vacated the injunction, but saw “no reason to disturb the District Court’s conclusion . . . that Salinger is likely to succeed on the merits of his copyright infringement claim.” *Id.* at 83. Several months later, Colting settled the case, agreeing to a permanent injunction of the book in the United States. See Permanent Injunction and Final Order on Consent at 1, *Salinger v. Colting*, No. 09-CIV-05095-DAB (S.D.N.Y. Dec. 14, 2010), ECF No. 55.

140. See Permanent Injunction and Final Order on Consent at 1, *Salinger v. Colting*, No. 09-CIV-05095-DAB (S.D.N.Y. Dec. 14, 2010), ECF No. 55.

cases have been commonplace since the early days of copyright in England and throughout most of the United States' history, except during the first fifty years or so of the nation's existence.<sup>141</sup> The Supreme Court has repeatedly expressed comfort treating copyright cases as distinct from other cases implicating expressive values.<sup>142</sup> In *Harper & Row Publishers, Inc. v. Nation Enterprises*, the Court explained "that copyright's idea/expression dichotomy 'strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.' . . . [T]he Framers intended copyright itself to be the engine of free expression."<sup>143</sup> In the 2003 decision *Eldred v. Ashcroft*, the Court clarified how it perceived the relationship between copyright and the First Amendment.<sup>144</sup> "The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles."<sup>145</sup> According to the Court, copyright law contains "built-in First Amendment accommodations" including the idea/expression distinction and the fair use defense.<sup>146</sup> These safeguards are "generally adequate" to address First Amendment concerns in copyright law.<sup>147</sup> "[F]urther First Amendment scrutiny is unnecessary" where "Congress has not altered the traditional contours of copyright protection."<sup>148</sup>

It is unclear whether the "traditional contours" language actually means that the Court will recognize limits to the copyright power.<sup>149</sup> In the 2012 decision *Golan v. Holder*, the Court held that extending copyright protection to works already in the public domain would not violate the traditional contours of copyright.<sup>150</sup> *Golan* described the traditional contours of copyright protection as being the idea/expression dichotomy and the fair use defense,<sup>151</sup> implying that no copyright law could violate the First Amendment unless one or the other were eliminated.

Despite the Supreme Court's apparent belief that copyright law is consistent with the First Amendment, the relationship between copyright law

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141. Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 151-58 (1998). Lemley and Volokh argued that preliminary injunctions should be more limited in copyright cases, for the same reasons that motivate the ban on injunctions in other speech cases. *Id.* at 209-10. Specifically, Lemley and Volokh argue that ex parte temporary restraining orders should always be forbidden and that preliminary injunctions should be prohibited "in cases involving nonliteral copying." *Id.* at 210.

142. *Id.* at 158-59.

143. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556, 558 (1985) (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 203 (2d Cir. 1983)).

144. *Eldred v. Ashcroft*, 537 U.S. 186, 221-22 (2003).

145. *Id.* at 219.

146. *Id.* at 219-20.

147. *Id.* at 221.

148. *Id.*

149. *Id.*

150. *Golan v. Holder*, 132 S. Ct. 873, 890-91 (2012).

151. *Id.*

and technologies of mass communication, or presses, has yet to be explicitly explored by the Court.<sup>152</sup> The Court stated in *Eldred*, “copyright’s limited monopolies are compatible with free speech principles.”<sup>153</sup> But even if the general grant of exclusive rights to copyright owners is beyond the First Amendment, whether presses and online service providers can be regulated in the name of copyright protection is a different issue because restraints on technologically intermediaries have effects far beyond the area of speech they aim to regulate. A regulatory regime that required printers to have a license from the government would be a prior restraint on the press, regardless of whether the purpose of the licensing regime was to ensure copyrights were respected or that obscenity was not published. Because the law would require all printers to acquire a license, all unlicensed publishing, no matter how harmless, would be illegal. Such regulations of technological intermediaries are also substantially overbroad: by seeking to curtail one kind of speech or content, they end up curtailing many others.<sup>154</sup> Thus a regulation of technologies of mass communication should rarely be deemed constitutional. While the *purpose* of a regulation may be purely to protect copyrights, the *effects* will often have substantial implications for speech that do not fall into the “copyright exception” to traditional First Amendment reasoning.

A number of recent additions to the Copyright Act are aimed at technology intermediaries, rather than copyright infringers directly. The Audio Home Recording Act, passed in 1992, required producers of digital audio recording devices to incorporate the Serial Copy Management System, a type of copy protection, into their products and forbade circumvention of the system.<sup>155</sup> The Digital Millennium Copyright Act (DMCA), signed into law in 1998, took the direct regulation of technological intermediaries further.<sup>156</sup> The anti-circumvention provisions prohibit circumventing a technical protection mechanism (TPM)<sup>157</sup> that controls access to a copyrighted work and creating tools to facilitate

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152. *Id.*

153. *Eldred*, 537 U.S. at 190.

154. “A law may be invalidated as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’” *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

155. 17 U.S.C. § 1002(a), (c) (2006).

156. *Id.* § 1201(a)–(b).

157. TPMs act like fences around content that control who can access the material and how the material can be used. TPMs can require an owner to type in a password or code to access material, or can “tether” a device or piece of content to another computer on the internet that is controlled by the copyright owner. “Tethered” works have to “call home” and check with another source to determine whether access is permitted before granting it to a user. (iTunes movies have this characteristic. In order to play a rented movie, the account that purchased it must be signed in to iTunes. When a person signs in, his or her computer connects to Apple, and Apple’s computers validate the account’s password, permitting the movie to be played.) TPMs can also limit functionality, such as by preventing someone from printing a paper copy of an ebook, or by only allowing someone to access a work for a certain period of time. See JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET AND HOW TO STOP IT* 104–05 (2008).

circumvention.<sup>158</sup>

## B. NOTICE-AND-TAKEDOWN AS COLLATERAL CENSORSHIP

The DMCA also included a section, codified as 17 U.S.C. § 512, which provides some immunity to internet and online service providers that transmit copyrighted material over the internet, store copyright infringing material at the direction of a user, or link to infringing material.<sup>159</sup> In order to qualify for the § 512 safe harbor, those who store or link to content must “not have actual knowledge” of particular acts of infringement, be unaware of “facts or circumstances from which infringing activity is apparent,” and “act[] expeditiously to remove, or disable access to, the material” when they gain such knowledge or awareness.<sup>160</sup> The service provider must also not “receive a financial benefit directly attributable to the infringing activity” nor have “the right and ability to control” the infringing activity.<sup>161</sup> In other words, § 512 immunizes hosts such as YouTube, which often display copyright-infringing content uploaded by a user, and search engines such as Google that link to content containing copyright infringing material.

In return for this immunity, service providers must remove allegedly-infringing material or links if asked.<sup>162</sup> In the case of a service provider, such as YouTube, that stores material at the direction of users, the provider must notify the user that material has been taken down.<sup>163</sup> A user then has the option to give “counter-notice” that the material is not infringing, in which case the material can be restored.<sup>164</sup> Notably, search engines do not have to notify parties that their material has been removed from the engine’s search index, and the DMCA does not articulate any counter-notification procedures for restoring links.<sup>165</sup>

Section 512 bears some resemblance to distributor liability rules and to § 230 of the CDA, which itself does not grant immunity for publishing copyright-infringing content.<sup>166</sup> However, unlike in § 230, intermediaries may be liable if they continue to host or link to content after receiving notice that it is allegedly infringing.<sup>167</sup> As with distributors, online service providers are not required to comb through the material they host on others’ behalf in search of copyright violations.<sup>168</sup> This distributor-style

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158. 17 U.S.C. § 1201(a)–(b).

159. *Id.* § 512.

160. *Id.* § 512(c)(1)(A).

161. *Id.* § 512(c)(1)(B).

162. *Id.* § 512(c).

163. *Id.* § 512(g).

164. *Id.* § 512(g).

165. *See id.* § 512(g) (specifying restoration and counter-notification procedures for material stored with a service provider, but not for material discoverable through information-location tools).

166. Section 230 provides, “Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.” 47 U.S.C. § 230(e)(2).

167. 17 U.S.C. § 512(c).

168. *Id.*

immunity is particularly deserved in the case of copyright infringement because a host cannot tell from viewing content alone whether it is infringing. Material is only copyright-infringing if the owner has not given permission for it to be copied. As a result, identical content uploaded by two different parties could be legal in one case and copyright-infringing in another. While there are certainly some hallmark characteristics of infringement, requiring a service provider to independently determine whether everything it hosts is not infringing would require crippling burdensome factual investigations. YouTube, for instance, would have to determine whether the contents of every video was copyrighted by someone other than the uploader, ask uploaders whether they have permission to use the content, and possibly locate and ask original copyright owners if uploaders could not sufficiently verify their claimed rights. If bookstore owners cannot read every book to determine if they are obscene, YouTube's employees cannot check every video for potential copyright infringement. Indeed, it would be mathematically impossible—approximately seventy-two hours of new video are uploaded to YouTube.com every minute.<sup>169</sup>

The circumstances that led to § 512's passage were quite different than those that led to § 230. Arguably, even without § 230, courts would have developed sensible rules about online service providers and tortious speech. *Cubby* construed CompuServe as a distributor rather than a publisher, despite the fact that it did recopy the allegedly defamatory speech.<sup>170</sup> Traditionally, "re-publishing" would have subjected a party to publisher liability.<sup>171</sup> But the *Cubby* court sensibly realized that, at least on the Internet, copying was not the *sine qua non* of publishing.<sup>172</sup>

Section 512 developed due to content providers pushing a different conception of liability in a copyright infringement context. Although *Cubby* recognized that the recopying of content on different computers did not necessarily qualify as "re-publishing," the Ninth Circuit held in 1993 that a digital copy in a computer's random access memory (RAM) constituted prima facie copyright infringement.<sup>173</sup> The Ninth Circuit's decision, *MAI Systems Corp. v. Peak Computer Inc.*, was very controversial.<sup>174</sup> However, when Bill Clinton's Working Group on Intellectual Property released its *White Paper* suggesting changes to the copyright statute in 1995, the paper expressed the view that the *MAI Systems* holding reflected a noncontroversial and correct interpretation of the law.<sup>175</sup> According to the *White Paper*, any unauthorized, digital use of a copyrighted work constituted infringement because loading a digital copy into

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169. *Statistics*, YOUTUBE.COM, <http://www.youtube.com/yt/press/statistics.html> (last visited May 9, 2013).

170. *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 141 (S.D.N.Y. 1991).

171. *Id.* at 139.

172. *Id.* at 140.

173. *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993).

174. JESSICA LITMAN, *DIGITAL COPYRIGHT* 91, 96 (2006).

175. *Id.* at 94–95.



a computer's RAM was actionable under the copyright statute.<sup>176</sup> As a result, the *White Paper* argued that copyright owners had the right to control whether and how someone read, listened to, or viewed a digital work, even though copyright did not allow copyright holders to exert the same control over the use of non-digital works.<sup>177</sup>

The *White Paper* and *MAI Systems* were a problem for internet and online service providers.<sup>178</sup> Internet service providers constantly make copies as they transmit data over the Internet.<sup>179</sup> Similarly, hosting services feared they would be directly liable for the copyright-infringing actions of their users.<sup>180</sup> When it became clear that the DMCA would not pass without the support of internet and online service providers and telephone companies, content providers and service providers negotiated the inclusion of § 512.<sup>181</sup>

Due to the controversy over the copyright-infringing status of digital copies, the immunity granted to technology intermediaries in § 512 may never have developed in the case law. Arguably, § 512 has provided a great benefit to service providers compared to the likely alternatives in the absence of any immunity-granting legislation. Nonetheless, § 512 puts in place an incentive system that results in the exact kind of collateral censorship that raises Free Press Clause concerns.

The notion that § 512 violates the Free Press Clause finds support in the Supreme Court's reasoning in *Bantam Books, Inc. v. Sullivan*.<sup>182</sup> *Bantam Books* considered a Rhode Island statute that created a commission directed "to educate the public concerning any [literature] . . . containing obscene, indecent or impure language, or manifestly tending to . . . corrupt[ ]" the young.<sup>183</sup> When a majority of the Commission's members declared a book objectionable, it would "notify a distributor on official Commission stationery that certain designated books or magazines distributed by him had been reviewed" and declared objectionable.<sup>184</sup> A distributor was also notified that "[c]opies of the lists of 'objectionable' publications were circulated to local police departments."<sup>185</sup> Although no books were seized or banned and no person prosecuted, the Court ob-

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176. See, e.g., INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 65-66 (1995) [hereinafter *WHITE PAPER*], available at <http://www.uspto.gov/web/offices/com/doc/ipnii/>. For an alternate theory of how digital copies should be treated by copyright law, see Aaron Perzanowski, *Fixing RAM Copies*, 104 Nw. U. L. REV. 1067, 1087-1107 (2010).

177. LITMAN, *supra* note 174, at 94-95 (citing *WHITE PAPER*, *supra* note 176, at 19-130).

178. *Id.* at 93 (describing the reaction of online service providers to the Green Paper, the draft that was revised to become the White Paper).

179. *Id.* at 95.

180. *Id.*

181. *Id.* at 127-28, 134-35.

182. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70-71 (1963).

183. *Id.* at 59.

184. *Id.* at 61.

185. *Id.* at 62-63.

served that “the Commission deliberately set about to achieve the suppression of publications” through “the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation.”<sup>186</sup> Although the distributor was “‘free’ to ignore the Commission’s notices, in the sense that his refusal to ‘cooperate’ would have violated no law[,] . . . [p]eople do not lightly disregard public officers’ thinly veiled threats to institute criminal proceedings against them.”<sup>187</sup> The Court expressed concern about the way the Commission’s system “obviate[d]” the criminal process and eliminated “the safeguards of the criminal process.”<sup>188</sup> It finally concluded that Rhode Island had

subject[ed] the distribution of publications to a system of prior administrative restraints, since the Commission [was] not a judicial body and . . . [did] not follow judicial determinations that such publications may lawfully be banned. . . . [The Court had previously] tolerated such a system only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of [such a] restraint.<sup>189</sup>

Section 512 immunizes service providers if they remove content as soon as they receive notice, properly given under the terms of the statute.<sup>190</sup> Although notice-givers can theoretically face liability for knowingly misrepresenting that content is infringing,<sup>191</sup> in practice these suits are rare and the “knowing” standard is difficult to meet.<sup>192</sup> As a result, there is very little motivation for a person not to send a takedown notice for content they do not like. Although the notice-and-takedown system’s purpose was to take down possible *copyright* violations, the lack of procedural safeguards or punishment for sending completely bogus notices means that in practice, notices can be issued for entirely speech-suppressing purposes.

Just as the book distributor in *Bantam Books* responded to the Commission’s notices, so too do online service providers respond to individualized takedown notices. Although the service providers are free to ignore the notices, they open themselves up to liability if they do.<sup>193</sup> The notice-and-takedown system similarly obviates the safeguards for speech in actually bringing a copyright infringement lawsuit. Although courts grant preliminary injunctions in copyright cases quite freely, the process is still tremendously more speech-protective than the notice-and-takedown system. As a threshold matter, to obtain a preliminary injunction against the hosting of copyrighted content, the copyright owner would need to make a *prima facie* showing that she owned the copyright to the

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186. *Id.* at 67.

187. *Id.* at 68.

188. *Id.* at 70.

189. *Id.*

190. 17 U.S.C. § 512(c) (2006).

191. *Id.* § 512(f).

192. See Seltzer, *supra* note 59, at 221–25.

193. 17 U.S.C. § 512(g)(2)(c).

content being hosted.<sup>194</sup> This safeguard alone would prevent almost all of the takedown notices sent that are completely bogus and unrelated to any arguably copyright-infringing behavior.

Because procedural safeguards are largely absent, bogus notices are commonplace. For example, in late 2011, when the public was debating the proposed Stop Online Piracy Act (SOPA), blogger Michael Masnick wrote a blog post about why SOPA should not be passed.<sup>195</sup> He later discovered that the post had been removed from Google's search results.<sup>196</sup> The "anti-piracy" firm Armovore, on behalf of a pornography company, Paper Street Cash, had sent a notice to Google, asking for it to remove the link to Masnick's webpage, supposedly because the page was infringing Paper Street Cash's copyrights.<sup>197</sup> As previously discussed, Google did not have any legal obligation to notify Masnick that the link to his page had been removed.<sup>198</sup> There was nothing even arguably infringing in the post or user comments, and Google eventually put the blog post back in its search index.<sup>199</sup> After Masnick wrote about the takedown, Armovore reached out to "accept full responsibility for the mistake" and insist that while that takedown was an automated keyword-based effort, they now only do manual takedowns.<sup>200</sup> Masnick accepted the takedown as an honest mistake, rather than as an attempt to silence his opposition to SOPA.<sup>201</sup>

But perhaps the clearest examples of how the notice-and-takedown system can be abused are from the past two presidential elections. In mid-July of 2012, Mitt Romney put a campaign ad on YouTube, criticizing President Obama's relationship with campaign donors.<sup>202</sup> The ad juxtaposed a clip of Obama singing one line from Al Green's song, "Let's Stay Together," with news headlines describing Obama's rewarding of campaign donors and lobbyists.<sup>203</sup> The "Let's Stay Together" music publisher, BMG, issued a takedown notice for the video, and it was automatically

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194. *Salinger v. Colting*, 607 F.3d 68, 79–80 (2d Cir. 2010).

195. Mike Masnick, *Key Techdirt SOPA/PIPA Post Censored by Bogus DMCA Takedown Notice*, TECHDIRT (Feb. 27, 2012, 10:30 AM), <http://www.techdirt.com/articles/20120223/15102217856/key-techdirt-sopapipa-post-censored-bogus-dmca-takedown-notice.shtml>.

196. *Id.*

197. *Id.*

198. See 17 U.S.C. § 512(g) (specifying restoration and counter-notification procedures for material stored with a service provider, but not for material discoverable through information-location tools).

199. Mike Masnick, *Company That Issued Bogus Takedown Notice Says It Was All a Mistake, Apologizes*, TECHDIRT (Feb. 28, 2012, 12:28 PM), <http://www.techdirt.com/articles/20120228/09424117897/company-that-issued-bogus-take-down-says-it-was-all-mistake-apologizes.shtml>.

200. *Id.*

201. *Id.*

202. See *Political Payoffs and Middle Class Layoffs*, YOUTUBE (July 16, 2012), <http://www.youtube.com/watch?v=giajeW6xPnI>.

203. *Id.*; Timothy B. Lee, *Music Publisher Uses DMCA to Take Down Romney Ad of Obama Crooning*, ARS TECHNICA (July 16, 2012, 6:59 PM), <http://arstechnica.com/tech-policy/2012/07/major-label-uses-dmca-to-take-down-romney-ad-of-obama-crooning/>.

removed.<sup>204</sup> The takedown appeared to be politically motivated because many copies of original videos of Obama singing the song at first remained visible.<sup>205</sup> But, as Mike Masnick snarked, “[i]t appears that someone pointed out to BMG’s lawyers that *this looks really bad*,” and takedowns were issued to the original videos as well.<sup>206</sup> Just two days later, YouTube took the unusual step of restoring all of the videos,<sup>207</sup> despite the fact that under the DMCA, it would lose legal immunity if it did not keep the videos down for at least ten days following a counternotice.<sup>208</sup>

YouTube’s decision was a departure from its behavior four years prior, when John McCain campaign ads were taken down.<sup>209</sup> The McCain campaign had used news clips in their ads, and takedown notices were issued by CBS, Fox, NBC, and the Christian Broadcasting Network.<sup>210</sup> Even after receiving a counternotice from the McCain campaign claiming fair use, YouTube was required to keep the video down for a minimum of ten days to retain its immunity from suit.<sup>211</sup> So when the McCain campaign pleaded with YouTube to restore the video sooner, YouTube responded in a detailed letter, explaining:

Because of the DMCA’s structure, an abusive takedown notice may result in the restriction of non-infringing speech during the statutory 10-day waiting period. . . .

Some have suggested that YouTube mitigate abuse by performing a substantive legal review of every DMCA notice we receive prior to processing a takedown. For a number of reasons, this is not a viable solution. . . . [A] detailed substantive review of every DMCA notice is simply not possible due to the scale of YouTube’s operations. . . . No number of lawyers could possibly determine with a reasonable level of certainty whether all the videos for which we receive disputed takedown notices qualify as fair use.

More importantly, YouTube does not possess the requisite information about the content of user-uploaded videos to make a determination as to whether a particular takedown notice includes a valid claim of infringement. The claimant and the uploader, not YouTube, hold all of the relevant information in this regard, including the actual source of any content used, the ownership rights to that content,

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204. Lee, *supra* note 203.

205. Mike Masnick, *Even Obama Is a Pirate: BMG Issues New Takedown on Original Obama Singing Al Green Clip*, TECHDIRT (July 17, 2012, 2:05 PM), <http://www.techdirt.com/articles/20120717/13500819733/bmg-doubles-down-issues-takedown-original-clip-obama-singing-al-green.shtml>.

206. *Id.*

207. Steve Friess, *YouTube Restores Romney’s Ad Despite Rights Claim*, POLITICO (July 19, 2012, 4:07 PM), <http://www.politico.com/news/stories/0712/78739.html>.

208. 17 U.S.C. § 512(g)(2)(C) (2006).

209. See Seltzer, *supra* note 59, at 171–73.

210. *Id.* at 172.

211. *Id.* at 172–73.

and any licensing arrangements in place between the parties.<sup>212</sup>

Although YouTube made an exception for Mitt Romney in 2012, back in 2008, it claimed that restoring the McCain campaign's ad early, while not investigating other potential abuses, simply would not be fair.<sup>213</sup> "We try to be careful not to favor one category of content on our site over others, and to treat all of our users fairly, regardless of whether they are an individual, a large corporation or a candidate for public office."<sup>214</sup>

YouTube's letter summarizes the problem with subjecting speech intermediaries like YouTube to liability for their user's copyright infringement. Because YouTube cannot check each video, its only viable business option is to take down every video when a takedown notice is received, no matter how spurious the accusation. Moreover, uploaded videos often do not even include enough information for YouTube to determine whether copyright infringement occurred without knowing what content is copyrighted or licensed by whom. Although a user can get a video restored between ten and fourteen days after sending a counternotice, unless the original notifier seeks a court order against the alleged infringer,<sup>215</sup> the content is still restrained for a substantial period of time.

From the perspective of potential to restrain speech, the DMCA certainly appears to create the same harms as distributor liability. It creates the same incentives as the Commission did in *Bantam Books*, except instead of a commission, Congress and copyright owners together force intermediaries to censor their users or risk their business. Although intermediaries would likely be threatened with civil copyright suits instead of criminal prosecution, the distinction is irrelevant to the First Amendment. The Court explained in the libel case, *New York Times v. Sullivan*, "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute."<sup>216</sup>

#### C. USING THE FREE PRESS CLAUSE TO PROTECT INTERMEDIARIES FROM COPYRIGHT LIABILITY

"[I]nformal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief."<sup>217</sup> Notice-and-Takedown creates precisely this type of informal censorship. Yet, the Supreme Court has been clear that copyright law is not generally subject to First Amendment challenges, despite numerous scholars' attempts to argue for a greater

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212. Letter from Zahavah Levine, Chief Counsel, YouTube, to Trevor Potter, Gen. Counsel, McCain-Palin 2008, at 1-2 (Oct. 14, 2008), available at <http://wendy.seltzer.org/media/youtube-letter-20081014.pdf>.

213. *Id.* at 2-3.

214. *Id.*

215. 17 U.S.C. § 512(g)(2)(C) (2006).

216. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) (footnote omitted).

217. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

role for the First Amendment in copyright.<sup>218</sup>

Nevertheless, there is room within the Supreme Court's existing jurisprudence to argue that the Free Press Clause compels a different result for copyright-related laws that target presses and their equivalents, rather than original speakers. *Harper & Row*, *Eldred*, and *Golan* all dealt with cases involving the scope of the exclusive rights granted in the copyright statute.<sup>219</sup> They involved portions of the copyright statute that affected what speakers could do, and did not involve parts of the law that targeted technologies of mass communication, such as presses or websites.<sup>220</sup>

The *Eldred* majority stated, "in the Framers' view, copyright's limited monopolies are compatible with free speech principles."<sup>221</sup> And as a general matter, this is correct. But the long relationship between copyright's limited monopolies and liberty of the press suggests that the Framers believed copyright law could not be used to regulate the printing press and channels of mass communication.<sup>222</sup> While the exclusive monopolies of copyright are generally constitutional, the relationship between recent technology-focused additions to the copyright statute and the Free Press Clause are a very different matter.

Indeed, as Edward Lee pithily explained, "Copyright was born with freedom of the press, not against it."<sup>223</sup> The history of copyright in England shows that, rather than copyright being an exception to the notion of free speech, the replacement of press licensing with copyright allowed for the birth of liberty of the press as we understand it today.<sup>224</sup>

In the seventeenth century, England restricted the number of printing presses and required presses to be licensed by the government.<sup>225</sup> The Printing Act of 1662 explicitly limited the number of master printers in England to twenty and the number of presses each master printer could own to two.<sup>226</sup> Notable figures at the time championed the notion of "liberty of the press" throughout the period, including Samuel Hartlib, John Lilburne, Henry Robinson, and William Walwyn.<sup>227</sup> John Milton, a one-time censor, advocated for unlicensed printing "that left truth to be sorted out in debate."<sup>228</sup> John Locke and Daniel Defoe also argued for a

218. See, e.g., NEIL WEINSTOCK NETANEL, *COPYRIGHT'S PARADOX* (2008); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004); Lemley & Volokh, *supra* note 141; Seltzer, *supra* note 59; see also Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004).

219. See *Golan v. Holder*, 132 S. Ct. 873, 891 (2012); *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985).

220. See *Golan*, 132 S. Ct. at 873; *Eldred*, 537 U.S. at 219; *Harper & Row*, 471 U.S. at 541–42.

221. *Eldred*, 537 U.S. at 219.

222. Lee, *supra* note 2, at 329.

223. *Id.* at 330.

224. *Id.* at 318.

225. *Id.* at 322–23.

226. *Id.* at 323.

227. *Id.* at 324; Meyerson, *supra* note 20, at 303–04.

228. Lee, *supra* note 2, at 324; see also LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 114 (1968).

system of authors' rights in their works, rather than for continued regulation of the presses.<sup>229</sup>

When the last Printing Act lapsed in 1695, the Stationers (guild members who'd held a monopoly on printing) fruitlessly campaigned for regulation of presses to be restored, citing the evils of "literary piracy" as justification.<sup>230</sup> Meyerson argues that the "reasons given for permitting the licensing law to lapse were far more practical than philosophical," citing the licensing system's ineffectiveness and the licensors' tendency to succumb to bribery.<sup>231</sup> In contrast, historian Adrian Johns states that in letting the Printing Act lapse, Parliament "saw itself as upholding Protestant liberty and countering monopolies."<sup>232</sup> According to Johns, Locke's "arguments played a major role in the Commons' debates surrounding the [Printing Act], repudiat[ing] it not only for imposing licensing—which he, like Milton, saw as a legacy of popery—but for fostering monopolies."<sup>233</sup>

Regardless of Parliament's motivations, "the expiration of the [Printing] Licensing Act quickly became perceived as a monumental victory for freedom of the press."<sup>234</sup> Those who had benefited from the Printing Act continued to campaign for a revival of the licensing system, or for some substitute regime.<sup>235</sup> In 1710, Parliament enacted what is retroactively recognized as the first copyright act, granting authors an exclusive right to publish their works for fourteen years, renewable for another fourteen, or twenty-one years if a book was already in print.<sup>236</sup> England's first copyright law was effectively a less-restrictive alternative to the restraints that had previously existed on the printing press.<sup>237</sup>

The creation of copyright law thus allowed freedom of the press to take hold.<sup>238</sup> Although eliminating printer licensing created the opportunity for increased literary piracy, other values, later labeled as freedom of speech and of the press, came to trump concerns about piracy.<sup>239</sup> Blackstone, for instance, famously described the right in his commentaries.<sup>240</sup>

Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press, but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and

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229. Lee, *supra* note 2, at 325.

230. *Id.*

231. Meyerson, *supra* note 20, at 305.

232. ADRIAN JOHNS, PIRACY 42 (2009).

233. *Id.*

234. Meyerson, *supra* note 20, at 305.

235. JOHNS, *supra* note 232.

236. Statute of Anne, 8 Ann., c. 19 (1710). The statute also preserved the "printing patent," a right to publish a work that was granted by the sovereign. *Id.*; PATTERSON, *supra* note 228, at 78–80, 143.

237. Lee, *supra* note 2, at 318.

238. *See id.* at 330 ("Copyright was born with freedom of the press, not against it.").

239. *Id.* at 319.

240. 4 WILLIAM BLACKSTONE, COMMENTARIES \*152.

since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.<sup>241</sup>

In light of the Printing Acts' relationship to the Stationers' Company, Blackstone's commentary has important implications for regulations of technology—namely, that prior restraints are problematic, regardless of whether the purpose of the law is to prevent sedition, blasphemy, libel, or “literary piracy.” Blackstone did not appear to recognize a distinction between regulations to prevent piracy and to prohibit other kinds of speech.

The relationship between copyright and freedom of the press continued to be visible during the founding era of the United States.<sup>242</sup> Prior to the addition of the Bill of Rights to the Constitution, Antifederalists feared that the power to “promote the Progress of Science and useful Arts”<sup>243</sup> would grant Congress the power to curtail freedom of the press.<sup>244</sup> Antifederalist Robert Whitehill noted his concern: “Congress [will] have a power to destroy liberty of the press . . . They have a power to secure to authors the right of their writings. Under this, they may license the press, . . . and under licensing the press, they may suppress it.”<sup>245</sup> Federalist James Iredell countered that an amendment protecting freedom of the press was unnecessary because “Congress will have no other authority over [liberty of the press] than to secure to authors for a limited time an exclusive privilege of publishing their works.”<sup>246</sup>

Whether or not Congress would have had the power to regulate presses under the Copyright Clause in the absence of the Bill of Rights, the argument over the Copyright Clause illustrates that the Free Press Clause was conceived of as having the potential to limit the measures proposed in the name of “promot[ing] the Progress of Science.”<sup>247</sup> The Copyright Clause grants Congress the power to “secur[e] for limited Times to Authors . . . the exclusive Right to their . . . Writings.”<sup>248</sup> Although granting exclusive rights to authors was viewed as consistent with the First Amendment, other types of regulations on copying technologies—such as licensing printers in the name of curtailing copyright infringement—were plainly incompatible with freedom of the press.<sup>249</sup>

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241. *Id.* (footnote omitted).

242. Lee, *supra* note 2, at 331–32.

243. U.S. CONST. art. I, § 8, cl. 8.

244. Lee, *supra* note 2, at 334.

245. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES, PENNSYLVANIA 454 (Merrill Jensen ed., 1976) (cited in Lee, *supra* note 2, at 334).

246. JAMES IREDELL, ANSWERS TO MR. MASON'S OBJECTIONS TO THE NEW CONSTITUTION (1788), in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 360–61 (Paul Leicester Ford ed., Brooklyn 1888), available at [http://files.libertyfund.org/files/1670/Ford\\_1338.pdf](http://files.libertyfund.org/files/1670/Ford_1338.pdf) (cited in Lee, *supra* note 2, at 335).

247. U.S. CONST. art. I, § 8, cl. 8.

248. *Id.*

249. Edward Lee has argued elsewhere that the Audio Home Recording Act of 1992 violates the Free Press Clause, and that the anti-circumvention provisions of the DMCA present a more difficult case. See Edward Lee, *Guns and Speech Technologies: How The*



The DMCA's notice-and-takedown system is also a regulation of the press that goes beyond the grants of exclusive rights that are consistent with the First Amendment. Just as intermediary liability can motivate collateral censorship in other contexts, the notice-and-takedown system creates incentives to silence protected, non-copyright-infringing speech without due process. Because of these incentives, the constitutionally appropriate treatment of speech-disseminating technologies should be identical whether the target of regulation is copyright infringement or other regulable speech. Specifically, service providers should be immune from liability for carrying another speaker's copyright infringing-content, unless given notice that the content has been adjudicated infringing by a court.

## VI. CONCLUSION

To protect the rights of speakers using technologies of mass communication and avoid the pernicious effects of collateral censorship, intermediaries utilizing communication technologies must be largely immune from both prior and subsequent punishment for disseminating illegal speech. Only then will the rights of person-to-person speakers, acting under the Free Speech Clause, be coextensive with the rights of speakers using technology to spread their ideas under the Free Press Clause.

Specifically, several changes to the law must be made. First, publisher and distributor liability must be jettisoned, in favor of a rubric that asks whether a party is a speaker or a press. Parties that are only acting as presses, whether online or elsewhere, must be granted immunity for disseminating speech unless it has been adjudicated illegal or unprotected by a court. Second, the Supreme Court must acknowledge that regulations of speech-disseminating technologies in the name of copyright protection can run afoul of the Free Press Clause due to their censoring effect on non-copyright-infringing speech.