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# COPYRIGHT CRIME AND PUNISHMENT: THE FIRST AMENDMENT'S PROPORTIONALITY PROBLEM

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ABSTRACT

*The United States is often considered to be the most speech-protective country in the world. Paradoxically, the features that have led to this reputation have created areas in which the United States is in fact less speech protective than other countries. The Supreme Court's increasing use of a categorical approach to the First Amendment has created a growing divide between the U.S. approach to reconciling copyright and free expression and the proportionality analysis adopted by most of the rest of the world.*

*In practice, the U.S. categorical approach to the First Amendment minimizes opportunities for judicial oversight of copyright. Consequently, as corporations lobby for ever-increasing penalties and enforcement mechanisms, the United States has fostered one of the world's least speech-friendly criminal copyright regimes. The United States is exporting that regime, including its presumption that copyright is unrelated to freedom of expression. Instead of exporting flawed presumptions, the United States should reintegrate proportionality concepts into First Amendment doctrine to examine the proportionality of sanctions for speech that has functionally been deemed unprotected by the First Amendment.*

## INTRODUCTION

The United States is often considered more speech-protective than any other country. The First Amendment requires the government to recognize

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that the remedy for bad speech is more speech, not punishment.[1] Only a few categories of speech are historically not subject to First Amendment protection.[2] Paradoxically, however, the Supreme Court's First Amendment doctrine, which is usually very speech-protective, has created substantive areas where the United States is less speech-protective than other nations.

The United States, unlike other constitutional regimes, uses a tiered approach to constitutional analysis, familiar to many as the choice between strict scrutiny, intermediate scrutiny, and rational basis review.[3] First Amendment doctrine offers a striking example of this tiered approach. With the exception of content-neutral speech regulations and areas covered by intermediate scrutiny,[4] speech is either categorically protected in the United States or not protected at all.[5] When speech falls into a category that is not protected, courts effectively abdicate judicial review of legislative sanctions.[6]

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1. *See* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."); *President Obama's Remarks at the U.N. General Assembly*, CNN (Sept. 25, 2012, 10:53 AM), http://news.blogs.cnn.com/2012/09/25/president-obamas-prepared-remarks-at-the-u-n-general-assembly ("[I]n a diverse society . . . the strongest weapon against hateful speech is not repression, it is more speech—the voices of tolerance that rally against bigotry and blasphemy, and lift up the values of understanding and mutual respect. I know that not all countries in this body share this particular understanding of the protection of free speech—we recognize that.").

2. *See* United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (listing the following categories of exceptions to First Amendment protection: "incite[ment of ] imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called 'fighting' words, child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent" (citations omitted)).

3. Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 296–97 (1992).

4. *See generally* Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 788–89 (2007) (articulating the development of intermediate scrutiny and the categories included within its analysis); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 48–50 (1987) (explaining the Court's content-neutral jurisprudence).

5. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1767 (2004) (noting that "questions about the involvement of the First Amendment in the first instance are often far more consequential than are the issues surrounding the strength of protection"); Sullivan, *supra* note 3, at 296 (observing that the tiered system, "[w]hen applied in its strong bipolar form, such a two-tier system functions as a de facto categorical mode of analysis despite its nominal use of balancing rhetoric"). *But see* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 397 (2009) (observing that First Amendment doctrine represents a blending of categorical and balancing approaches).

6. *See infra* text Part III.A.

Copyright law is a casualty of the First Amendment's on-off switch.[7] By contrast, courts around the world increasingly balance copyright against fundamental rights, including speech.[8] This Article identifies the paradox that, at least in copyright law, the United States is less solicitous of speech interests than other countries and international courts. The lack of speech protection in U.S. copyright jurisprudence results in large part from the American use of categorical review in free speech analysis.[9] This Article partakes in comparative constitutionalism by comparing the U.S. approach to that of other countries and international bodies.

The First Amendment's on-off switch provides minimal judicial oversight of the copyright regime in the United States.[10] Consequently, over the last two decades the United States has fostered one of the world's least speech-friendly criminal copyright regimes. This Article contributes to the sparse but growing literature on criminal copyright by addressing the role free trade agreements play in propagating the U.S. criminal copyright standard internationally.[11]

Part I of this Article compares the proportionality analysis that most of the world's constitutional courts use when reviewing laws implicating fundamental rights with the Supreme Court's tiered framework of review in First Amendment doctrine. Part II discusses how U.S. tiered review has functionally placed copyright law outside of First Amendment analysis, while international courts and other institutions have acknowledged that copyright laws can affect and impinge on free speech rights. This Article examines the differences between the United States and international approaches, and concludes that the divide between them is growing.

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7. *See* Golan v. Holder, 132 S. Ct. 873, 891 (2012) (concluding that Congress may take works out of the public domain and restore copyright protection, noting that "nothing in the historical record, congressional practice, or our own jurisprudence warrants exceptional First Amendment solicitude"); *see also* Michael Birnhack, *The Copyright Law and Free Speech Affair: Making-up and Breaking-up*, 43 IDEA 233, 236, 296–98 (2003) (discussing "the need to relocate the [copyright] conflict discourse in a constitutional framework").

8. *See infra* Part II.

9. *See infra* Part II.

10. *See Golan*, 132 S. Ct. at 890–91 (refusing to apply heightened First Amendment scrutiny to the withdrawal of works from the public domain and clarifying that weak review applies to all copyright claims except when Congress alters "the 'traditional contours' of copyright protection," meaning "the 'idea/expression distinction' and the 'fair use' defense"); Eldred v. Ashcroft, 537 U.S. 186, 221 (2003) (refusing to apply heightened scrutiny to the Copyright Term Extension Act, which lengthened copyright's term length).

11. *See generally* Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 WASH. U. L. Q. 835, 837–38 (1999) (analyzing criminal copyright infringement in light of the No Electronic Theft (NET) Act); Geraldine Szott Moohr, *Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws*, 54 AM. U. L. REV. 783, 785–87 (2005) (exploring cost-benefit analysis as a method to defining the overcriminalization of copyright law).

Part III addresses some of the problems created by the U.S. approach. There has been insufficient judicial oversight of copyright law in the United States to prevent its expansion, especially in the criminal realm. As a consequence of ever-increasing penalties and expansive criminal enforcement mechanisms, the U.S. copyright regime now raises substantial speech concerns. The regime can be overbroad, can result in collateral censorship, can give rise to chilling effects, and can allow for prior restraints on speech.

Part IV explores how the United States is attempting to export its copyright regime internationally in free trade agreements, and the recent rejection of those efforts in Europe through popular protest. Finally, in Part V, this Article uses the example of criminal copyright law to identify pathologies of the categorical approach and offer a suggestion. The United States' current efforts to export criminal copyright enforcement, along with a presumptively categorical approach to reconciling copyright and speech, conflict with public intuitions about free speech held by people around the world. Instead, courts should take the opposite tact and reintegrate elements of proportionality analysis into First Amendment jurisprudence. Doing so would provide a more complete and nuanced understanding of freedom of expression and return the United States to its position as the most speech-protective country in the world.

## I. PROPORTIONALITY ANALYSIS VERSUS THE CATEGORICAL APPROACH

Most of the world's constitutional courts employ a balancing test when reviewing laws that implicate the protection of fundamental rights.[12] The balancing test, referred to as proportionality analysis, is triggered by a prima facie showing of rights infringement[13] and resembles a weaker version of strict scrutiny. Proportionality analysis involves four steps. First, the court examines whether the government has a legitimate purpose for the law.[14] Second, it examines whether the means employed are rationally related to that legitimate purpose.[15] Third, it deploys a least-restrictive-means test to ensure that the law does not curtail the fundamental right any more than is necessary.[16] Finally, the court balances the benefits of the narrowly

12. *See* Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 74 (2008) ("By the end of the 1990s, virtually every effective system of constitutional justice in the world . . . had embraced the main tenets of [proportionality analysis].").

13. *Id.* at 75.

14. *Id.*

15. *Id.*

16. *Id.*

tailored law against the costs incurred by the infringement of the right, given the facts of the case.[17]

Under proportionality analysis, courts may end up balancing one fundamental right against another. A court typically considers how seriously a given right has been implicated by a case and balances the depth of this incursion against the strength of the government's invoked interest.[18] The more extensive the government's incursion into the core of a given right, the more serious the government's purpose must be.[19] Sometimes the government invokes the protection of one right as justification for encroaching on another.[20] The court then weighs the two rights, considering the strength of the right protected and the severity of government encroachment onto the right being impinged.[21]

The United States, by contrast, uses a tiered system of review for rights violations.[22] The court chooses which type of review to apply: strict scrutiny, intermediate scrutiny, or rational basis review.[23] Each tier, at least on first blush, contains elements of a balancing test; strict scrutiny, for example, requires that regulations be narrowly tailored to a compelling government interest.[24] But as the U.S. tiered doctrine has developed, the tiers have become increasingly rigid.[25] Strict scrutiny, especially in First Amendment doctrine, is now famously close to being "fatal in fact."[26] As a consequence, U.S. courts often do not balance rights against each other; in-

17. *Id.* at 75–76.

18. Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 837 (2011).

19. *Id.*

20. *See id.* (comparing a court's ability to recognize a person's consumption of child pornography as free expression, while allowing the government to regulate the sexual exploitation of children against the protection of political protest from state regulation).

21. *Id.* at 837–38 (finding that the right to free expression in child pornography is minimal in comparison to the right of political speech, which is considered a fundamental right).

22. *Id.* at 836, 838; *see also* Bernhard Schlink, *Proportionality in Constitutional Law: Why Everywhere but Here?*, 22 DUKE J. COMP. & INT'L L. 291, 297 (2012) (explaining that generally, the United States protects rights categorically but also uses a "means-end analysis that is more-or-less through proportionality analysis").

23. Mathews & Sweet, *supra* note 18, at 836.

24. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010).

25. Mathews & Sweet, *supra* note 18, at 837.

26. Gerald Gunther, Foreword, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). *But see* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795–96, 844 (2006) (pointing out that in *Adarand Constructors v. Pena*, 515 U.S. 200, 237 (1995), the Supreme Court "wish[ed] to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact,'" and showing that strict scrutiny is not always deadly, but that it is "most fatal in the area of free speech").

stead, their decisions frequently turn on which standard of review they choose to apply.[27]

### *A. The First Amendment's Categorical Approach*

The Supreme Court's approach to the First Amendment is a noted example of U.S. constitutional exceptionalism and the U.S. preference for tiered review.[28] In fact, the Supreme Court initially created strict scrutiny in a First Amendment case.[29] Justices Felix Frankfurter and Hugo Black differed over whether the Court should use a balancing test or an absolutist approach to free speech.[30] The Court created strict scrutiny as a way to reconcile these two approaches.[31] Strict scrutiny, as it was first introduced, functioned as a weighted balancing test. It thus represented a compromise between absolutism and balancing.[32] Strict scrutiny as originally formulated allowed the court to perform a balancing test, but put a heavy thumb on the scale in favor of the importance of free speech.[33] Therefore, early forms of strict scrutiny more closely resembled proportionality analysis.[34]

Strict scrutiny, however, evolved from being a proportionality test to more of an on-off switch.[35] Content-based regulations of speech are now all subject to strict scrutiny and, therefore, are almost always found to be unconstitutional.[36] As many know, however, the First Amendment does not unconditionally protect all speech. The Court has developed ways to deviate from the tiered review's protective framework in order to arrive at the conclusion that some speech is not protected.[37]

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27. *See infra* Part II.

28. *See supra* note 5 and accompanying text.

29. *See* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 361–80 (2006) (discussing the "Birth of the Compelling State Interest Test and Strict Scrutiny" as part of the First Amendment jurisprudence in 1963, when used in three opinions written by "high-protectionist Justices Brennan and Goldberg").

30. *Compare* Konigsberg v. State Bar of California, 366 U.S. 36, 61 (1961) (Black, J., dissenting) (discussing the absolutist approach), *with* Dennis v. United States, 341 U.S. 494, 524–25 (1951) (Frankfurter, J., concurring in judgment) (discussing the balancing test of "competing interests").

31. Siegel, *supra* note 29, at 375.

32. *Id.*

33. *Id.* at 376.

34. *See* Mathews & Sweet, *supra* note 18, at 841 (noting that "[a]s we found with respect to earlier versions of strict scrutiny, American judges considered [proportionality analysis] to be inherent parts of the judicial repertoire").

35. *See supra* notes 4–5 and accompanying text.

36. *But see* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2728–29, 2731 (2010) (upholding a content-based speech regulation under strict scrutiny because national interest in combating terrorism was sufficiently important and law was narrowly tailored to further that important end).

37. *See* Mathews & Sweet, *supra* note 18, at 836.

The following are a few examples of how the Court arrives at a non-speech-protective decision within current First Amendment doctrine. The Court is often uncomfortable applying a pure tiered review, even in the First Amendment context.[38] First, there are some areas of law that clearly apply to speech but are not covered by the First Amendment, such as securities regulation, antitrust law, and bans on criminal solicitation.[39] Once the Court finds itself in a topic covered by the First Amendment, one approach it uses to get around the First Amendment is to label certain activities unexpressive, and thus not subject to First Amendment protection.[40] Another way courts get around strict scrutiny to subject speech regulation to light intermediate scrutiny.[41] A third approach to circumventing the First Amendment is to determine that the government regulation at hand is in fact content-neutral, not content-based; this triggers intermediate scrutiny.[42] A final approach creates whole categories of speech that are recognized as unprotected, even though they are also recognized as speech.[43] Thus, the substance of a First Amendment decision usually involves following a series of rules, logical or not, that categorize both the type of regulation and the type of expression, rather than weighing the strength of the speaker's speech right against the strength of the governmental interest.[44]

I do not want to overstate my claim as to the First Amendment's categorical nature; within intermediate scrutiny cases, for instance, the Court is likely to engage in real balancing of speech and other values.[45] The trou-

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38. The Court's multiplying approaches to taking speech outside of First Amendment protection exemplify what Mathews and Sweet call the pathology of doctrinal instability. Mathews & Sweet, *supra* note 18, at 836–37. Doctrinal instability occurs when U.S. courts find themselves needing to escape from the bifurcated results created by tiered review. *Id.* at 847. Mathews and Sweet posit that courts then create intermediate tiers of review to engage in more subtle judicial reasoning resembling proportionality analysis, such as intermediate scrutiny. *Id.* at 846–47.

39. *See* Schauer, *supra* note 5, at 1771.

40. *See* Cohen v. California, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting) (noting that "Cohen's absurd and immature antic, in my view, was mainly conduct and little speech," and not covered by the First Amendment); United States v. O'Brien, 391 U.S. 367, 376–78 (1968) (creating the test for determining when conduct is expressive, but finding that the government could constitutionally regulate the burning of a draft card).

41. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 661–62 (1994) (finding that the "appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech").

42. Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48–49 (1986).

43. *See supra* note 2 and accompanying text.

44. *See* Schauer, *supra* note 5, at 1769 (noting that "[w]hen the First Amendment does show up, the full arsenal of First Amendment rules, principles, standards, distinctions . . . becomes available"); Sullivan, *supra* note 3, at 296 (observing that outcomes can be determined at the threshold of determining which test is applied, "[b]ut this is not real balancing").

45. *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 533–35 (2001) (weighing the public interest in disclosure against the privacy harms done to the victim of a wiretap and finding protection under intermediate scrutiny); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173,

bling phenomenon I identify here, however, is that when language falls into one of the categories of speech that is covered by the First Amendment but receive no First Amendment protection—such as fraud, true threats, or obscenity—proportionality analysis can allow foreign and international courts to be more speech-protective than the U.S. categorical approach conventionally permits.[46] Proportionality analysis does not guarantee more protection, but "[y]ou simply cannot do everything with boxes that you can do with balancing."[47]

Today's Supreme Court is particularly enamored with the categorical approach in its First Amendment cases.[48] In recent cases, the Court has adhered to the "historical and traditional categories" of exceptions to First Amendment protection, refused to apply a balancing test to create new exceptions, and applied strict scrutiny.[49] The Court explained that the "vast realm of free speech and thought always protected in our tradition can still thrive, and even be furthered, by adherence to those categories and rules."[50]

The two-tiered and categorical approach to First Amendment protection has some distinct advantages.[51] Formalism is highly speech-protective when courts use it to refuse to create new categories of unprotected speech,

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183–84 (1999) (finding that the promotion of legal gambling constitutes commercial speech protected by the First Amendment and thus subject to intermediate scrutiny); *see also* Sullivan, *supra* note 5, at 297 (pointing out that in contrast to strict scrutiny and rationality review, "intermediate scrutiny is an overtly balancing mode").

46. *But see* Heidi Kitrosser, *Containing Unprotected Speech*, 57 FLA. L. REV. 843, 869–78 (2005) (proposing a containment strategy for regulations applied to unprotected speech that requires courts to ask whether the content-based regulation of unprotected speech relates substantially to harm at which the larger unprotected category is directed, and whether the regulation threatens speech not likely to be restricted through the general category).

47. Sullivan, *supra* note 3, at 308–09 (discussing the practical differences between the categorization and balancing techniques).

48. *See id.* at 306 (noting the "active controversy" over categorization and balancing in constitutional law).

49. United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (noting that "content-based restrictions on speech have been permitted, as a general matter, only when confined to the few 'historic and traditional categories'" (quoting United States v. Stevens, 559 U.S. 460, 468 (2010))); *Stevens*, 559 U.S. at 470 ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits."); Ashcroft v. Free Speech Coal., 535 U.S. 234, 246 (2002) (refusing to extend the First Amendment exception for child pornography to digital child pornography).

50. *Alvarez*, 132 S. Ct. at 2544.

51. *See* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 128 (1991) (Kennedy, J., concurring in judgment) (explaining that "[t]he case before us presents the opportunity to adhere to a surer test for content-based cases and to avoid using an unnecessary formulation, one with the capacity to weaken central protections of the First Amendment"); *see also* GEOFFREY R. STONE, PERILOUS TIMES 396–410 (2004) (discussing the unprecedented First Amendment activity for the Supreme Court as a result of the Cold War, specifically focusing on the significance of *Dennis v. United States*).

as the Supreme Court has recently done.[52] By creating categories of protected and unprotected speech, categorical analysis also gives rise to fewer borderline cases, and thus operates as a more predictable and less costly system for most defendants.[53]

The Court's preference for categorical analysis is supported by substantial historical examples of the inherent flaws of balancing tests. First Amendment doctrine once required balancing. Under the "clear-and-present-danger test," courts were required to make an inquiry into the "imminence and magnitude of the danger said to flow from the particular utterance" and balance the "character of the evil" and likelihood of its occurrence "against the need for free and unfettered expression."[54] The use of this test to defeat First Amendment claims in the 1950s gave First Amendment balancing a bad reputation among U.S. speech advocates.[55]

The United States, however, has not always been against balancing. Additionally, the First Amendment today may not be as categorical as the current Court assumes it to be.[56] The current Court's reliance on formalism neglects to consider historical nuances of First Amendment application.[57]

In the past, the Court has circumvented First Amendment formalism in several ways. It has reached within unprotected categories of speech to refine the boundaries of historically prohibited categories of speech.[58] It has banned regulation of speech within the unprotected categories when the regulation was done for a purpose unrelated to why those categories of

52. *See Stevens*, 559 U.S. at 470–72; *Alvarez*, 132 S. Ct. at 2544.

53. *See, e.g.*, Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2733–35 (2011) (applying *Stevens* in an easy and straightforward manner, and firmly rejecting a balancing test as "startling and dangerous," holding instead that the categorical approach is better because it clearly articulates the details of the obscenity exception to the First Amendment).

54. Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 842–43 (1978). The clear-and present-danger test was established in *Dennis v. United States*, 341 U.S. 494 (1951), which found that the government could regulate Communist speech advocating the overthrow of the government at some indistinct time in the future. *Id.* at 515–17.

55. *See, e.g.*, Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1428–49 (1962) (arguing that the clear-and-present danger balancing test has been over applied and overused); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 249–50 (1961) (claiming that the *Dennis* opinion, which argued against an absolutist interpretation of exceptions to First Amendment rights, was predicated on an erroneous conception of the absolutist interpretation).

56. Mathews & Sweet, *supra* note 18, at 813–14.

57. *Id.*

58. New York Times Co.v. Sullivan, 376 U.S. 254, 269 (1964) (explaining that "libel can claim no talismanic immunity from constitutional limitations"); *see also* Miller v. California, 413 U.S. 15, 18–20, 23–24 (1973) (observing that obscenity is not constitutionally protected, but recognizing the need for "standards . . . used to identify obscene material").

speech were banned.[59] In addition, the Court has rejected the state's use of "any way deemed necessary" to go after speech that did fall into one of the unprotected categories.[60]

On the surface, current First Amendment doctrine seems to require tiered review combined with an analysis of categorical exceptions to First Amendment protection.[61] At a closer glance, however, this makeshift two-prong approach is disintegrating, which demonstrates a possible inherent doctrinal instability.[62] It thus may be time to develop a less ad hoc approach to the regulation of speech that falls into an unprotected category.

Courts forego First Amendment formalism in favor of balancing tests in a number of areas. The most prominent example is the Supreme Court's expansion of its use of intermediate scrutiny.[63] When the Court wants to balance speech against other values, it employs intermediate scrutiny. The *John Doe* standard developed by lower courts, which is used to protect anonymous speakers from having their identity revealed in frivolous lawsuits, is an example of the regular use of a balancing test.[64] The *John Doe* standard requires courts to balance the speaker's First Amendment rights against the strength of the plaintiff's prima facie case, among other factors.[65] Trademark jurisprudence also contains a balancing test that involves free speech.[66]

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59. R.A.V. v. St. Paul, 505 U.S. 377, 383–84 (1992) (finding that even though the government can regulate true threats and fighting words, it cannot designate a content-based subcategory for regulation within categorically unprotected speech).

60. Stanley v. Georgia, 394 U.S. 557, 559–63 (1969) (rejecting the idea that since obscenity is not constitutionally protected, states are free to deal with it in "any way deemed necessary").

61. *See* Sullivan, *supra* note 3, at 301 (noting that "[t]wo-tier review, like overtly taxonomic or categorical analysis . . . uses classification at the threshold to cut off further serious debate . . . . Intermediate scrutiny requires far more evaluative work after the threshold has been crossed.").

62. *See* Mathews & Sweet, *supra* note 18, at 837.

63. *See* Blocher, *supra* note 5, at 391–92 (referring to intermediate scrutiny as "the Test That Ate Everything").

64. *See generally* Lyrissa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 B.C. L. REV. 1373, 1374–1384 (2009) (describing the evolution of the *John Doe* standard and the First Amendment doctrines created to protect the anonymity of Internet speech in libel suits).

65. *Id.* at 1376–77 ("[C]ourts are beginning to converge on a set of standards to balance the right to speak anonymously with the rights of those injured by the defamatory anonymous speech."); *see also* Jocelyn Hanamirian, *The Right To Remain Anonymous: Anonymous Speakers, Confidential Sources and the Public Good*, 35 COLUM. J.L. & ARTS 119, 120 (2012) (stating that courts must "'balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity'" (quoting Dendrite Int'l, Inc. v. Doe, No. 3, 775 A.2d 756, 760–61 (N.J. Super. Ct. App. Div. 2001))).

66. Mark Bartholomew & John Tehranian, *An Intersystemic View of Intellectual Property and Free Speech*, 81 GEO. WASH. L. REV. 1, 41–44 (2013).

In recent years, however, the Court has further entrenched First Amendment formalism and the categorical approach.[67] That formalism has surprising consequences with respect to the First Amendment's relative protectiveness of categorically unprotected speech. A purely formalistic approach to the First Amendment runs the danger of rejecting all speech that falls into a historically unprotected category, without considering the circumstances or proportionality of the state's response to the speech.[68] Even categorically unprotected speech can have at least some value; moreover, it can be used as a vehicle for restricting protected speech.[69]

### *B. International Free Speech and Proportionality Analysis*

In contrast to the United States, most other countries use proportionality analysis to examine restrictions on speech rights.[70] Proportionality analysis sometimes requires balancing speech against other rights, which can lead to excessive judicial deference to legislatures.[71] For borderline cases, however, proportionality analysis can be more protective than categorical analysis because it *always* requires balancing the purpose of regulations against the right of the speaker to speak.[72] There are no categories of speech that fall outside of the balancing test entirely, with the exception of four types of expression that states are actively required to prohibit.[73]

Article 19 of the International Covenant on Civil and Political Rights ("ICCPR") exemplifies the international use of proportionality analysis to protect freedom of expression.[74] Article 19 protects the right to freedom of expression, including the "freedom to seek, receive and impart information

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67. *See supra* Part I.

68. *See* Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 997, 1027–44 (2012) (arguing that the Court should take a penalty-sensitive approach to speech analysis).

69. Kitrosser, *supra* note 46, at 848.

70. Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalsim*, 107 MICH. L. REV. 391, 396–97 (2008).

71. T. Jeremy Gunn, *Deconstructing Proportionality in Limitations Analysis*, 19 EMORY INT'L L. REV. 465, 483–487 (2005).

72. *Id.* at 470 (citing Soering v. U.K., 161 Eur. Ct. H.R. (ser. A) at 110 (1989)).

73. U.N. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 80, U.N. Doc. A/HRC/20/17 (June 4, 2012) (by Frank La Rue) [hereinafter La Rue 2012] (referencing report A/66/290). States are required under international law to prohibit the following: child pornography; incitement to genocide; incitement to discrimination through advocacy of national, racial, or religious hatred; and incitement to terrorism. *Id.*

74. International Covenant on Civil and Political Rights, art. 19(2), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR], *available at* http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx. The ICCPR, as ratified by the Senate, is non-self-executing and therefore is not binding law in the United States.

and ideas of all kinds."[75] The Article 19 right applies to all media, including the Internet.[76] It is explicitly subject, however, to "certain restrictions."[77]

Any restrictions on freedom of expression under Article 19 are subject to a three-part test familiar to courts around the world.[78] The three-part test mandates that any speech restriction must be provided for by law, protect a legitimate interest, and be both necessary and the "least restrictive means" required to protect that interest.[79] The three-part test is a form of proportionality analysis.

Courts around the world have applied this three-part test when addressing exceptions to freedom of expression; this application can be seen in two regional human rights treaties.[80] The European Court of Human Rights ("ECHR") has explained that exceptions to freedom of expression "must be narrowly interpreted and the necessity for any restrictions must be convincingly established."[81] The Inter-American Court of Human Rights has noted that a restriction on freedom of expression "must be so framed as not to limit the right . . . more than is necessary."[82]

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75. *Id.*

76. Molly Land, *Toward an International Law of the Internet*, 54 HARV. INT'L L.J. 1, 4 (forthcoming 2013), *available at* http://ssrn.com/abstract=2177993.

77. ICCPR, *supra* note 74, art. 19(3). The restrictions include "(a) [f]or respect of the rights or reputations of others; (b) [f]or the protection of national security or of public order (ordre public), or of public health or morals." *Id.*

78. Gunn, *supra* note 71, at 467–68 (describing how the proportionate measure must be satisfied by three criteria).

79. ICCPR, *supra* note 74, art. 19(3); *see also* U.N. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 24, U.N. Doc. A/HRC/17/27 (May 16, 2011) (by Frank La Rue) [hereinafter La Rue 2011], http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf.

80. *See, e.g.*, Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 10.2, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221 (entered in force Sept. 3, 1953), *available at* http://www.echr.coe.int/Documents/Convention_ENG.pdf; Organization of American States, American Convention on Human Rights art. 13.2, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, *available at* http://www.hrcr.org/docs/American_Convention/oashr4.html; Organization of African Unity, African Charter on Human and Peoples' Rights art. 9, June 27, 1981, 1520 U.N.T.S. 217, *available at* http://www.achpr.org/instruments/achpr/; *see also* Sunday Times v. United Kingdom, App. No. 6538/74, 2 Eur. H.R. Rep. 245, ¶ 49 (1979) (requiring the law to be accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct"); Lingens v. Austria, App. No. 9815/82, 8 Eur. H.R. Rep. 407, ¶¶ 39–40 (1986) (holding that there must be a "'pressing social need'" for the speech restriction, the reasons given must be "'relevant and sufficient,'" and the restriction must be proportionate to the aim pursued (internal citations omitted)).

81. Thorgeirson v. Iceland, App. No. 13778/88, 14 Eur. H.R. Rep. 843, 865 (1992).

82. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 5, ¶ 46 (Nov. 13, 1985), *available at* http://www1.umn.edu/humanrts/iachr/b_11_4e.htm.

The United States is an outlier, as compared to the rest of the world, in using a predominantly categorical approach to speech rights.[83] Usually, the categorical approach means that the United States is more speech-protective than other countries because most speech regulation is subject to strict scrutiny, which is usually fatal-in-fact.[84] But for the liminal cases, the categorical approach can be less protective than a universal balancing test.[85] Comparatively, the United States is underprotective of categorically rejected speech.[86] Once a category of speech has been deemed unprotected, the United States allows liability for all speech within the boundaries of that categorical carve-out.[87] The United States fails to provide judicial oversight over the type and scope of sanctions applied to unprotected speech.[88]

## II. COPYRIGHT AS A CARVE-OUT, OR WEIGHED AGAINST SPEECH

Copyright law is an example of one such carve-out.[89] First Amendment doctrine has been notoriously blind to the speech problems created by copyright law.[90] Intellectual property and the First Amendment "pull in opposite directions."[91] As a speech restriction, copyright law "restricts [one] from writing, painting, publicly performing, or otherwise communicating what [one] please[s]."[92]

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83. *See* Gardbaum, *supra* note 70, at 397.

84. *See* Sullivan, *supra* note 3, at 295–96.

85. *See id.* at 295 (discussing how categorical and balancing approaches have oscillated in First Amendment law).

86. Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917, 918 (2009).

87. *Id.*

88. *See* Coenen, *supra* note 68, at 994 ("[S]ome forms of expression warrant neither total immunization against nor total exposure to the threat of government-sponsored sanction.").

89. *See* Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies*, 67 WASH. & LEE L. REV. 831, 833–35 (2010) (describing the conflict between the Copyright Clause and the First Amendment as the threat of possible copyright infringement action, which may impermissibly deter free speech).

90. For criticisms of the U.S. approach to copyright law and free speech, see Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 165–69 (1998) (describing the significance of *Harper & Row, Publishers, Inc. v. Nation Enterprises*, and its effect on enjoining free speech); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 37–39 (2001) (explaining that although the Constitution's Copyright and Patent Clause explicitly empowers Congress to enact a copyright statute, copyright is still vulnerable to First Amendment challenge); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 12–30 (2002) (commenting on the four principal explanations for copyright law's insulation from First Amendment review); and Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 553–55 (2004) (identifying other examples of speech-protective limits of copyright).

91. Bartholomew & Tehranian, *supra* note 66, at 3.

92. Lemley & Volokh, *supra* note 90, at 165–66.

Rather than recognizing the speech implications of copyright law in the two recent decisions of *Eldred v. Ashcroft*[93] and *Golan v. Holder*,[94] the Supreme Court instead applied "only a mild form of rational basis review" to copyright policy. As long as "Congress has not altered the traditional contours of copyright protection," copyright policy is effectively found to be categorically immune from First Amendment scrutiny.[95] Petitioners urged the Court in *Eldred* to find that an extension of the copyright term was unconstitutional under intermediate scrutiny, but the Court refused to apply intermediate scrutiny to copyright policy to find the term extension disproportionate.[96] The Court also refused to review copyright policy under a "congruence and proportionality" standard that it had established in cases addressing Section 5 of the Fourteenth Amendment.[97]

The First Amendment thus treats copyright policy with a strikingly formalistic approach.[98] The Court has held that copyright regulation is content-neutral and usually subject to a weak rational basis review, so it is not scrutinized under the First Amendment.[99] Functionally, *Eldred* and *Golan* put most copyright regulations outside of First Amendment protection, as though copyright questions were an unprotected category of speech.[100]

By contrast, foreign and transnational courts and institutions explicitly weigh copyright laws against free expression rights.[101] Multiple European national courts have weighed copyright protection against the right of freedom of expression and information guaranteed in Article 10 of the ECHR.[102]

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93. 537 U.S. 186 (2003).

94. 132 S. Ct. 873 (2012).

95. *Eldred*, 537 at 221; *see* Bartholomew & Tehranian, *supra* note 66, at 10 (quoting *Golan*, 132 S. Ct. at 890–91).

96. *Eldred*, 537 U.S. at 199–208.

97. *Id.* at 217–18.

98. NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 170 (2010) (calling the intersection of First Amendment and copyright doctrine "judicial formalism at its worst").

99. *Eldred*, 537 U.S. at 193–94; NETANEL, *supra* note 98, at 59 (rejecting the ad hoc balancing of social costs and benefits with regard to content-based regulations).

100. *Golan*, 132 S. Ct. at 844; *Eldred*, 537 U.S. at 193–94.

101. *See* Antoine Buyse, *Copyright vs Freedom of Expression Judgment*, ECHR BLOG (Jan. 22, 2013), http://echrblog.blogspot.in/2013/01/copyright-vs-freedom-of-expression.html (noting that the European Court of Human Rights held that "a conviction or any other judicial decision based on copyright law, restricting a person's or an organisation's freedom of expression, must be pertinently motivated as being necessary in a democratic society, apart from being prescribed by law and pursuing a legitimate aim").

102. *See id.* (citing Plesner Joensen v. Louis Vuitton Malletier SA, [2011] E.C.D.R. 14 (Neth.)). In 1997, the Austrian Supreme Court explicitly acknowledged the conflict between copyright and free expression, under Article 10(2) of the ECHR. Oberster Gerichtshof [OGH] [Supreme Court] Dec. 1997, docket No. 4 Ob 361/97, 9 ENTSCHEIDUNGEN DES ÖSTERREICHISCHEN OBERSTEN GERICHTSHOFES IN ZIVILSACHEN [SZ] (Austria), *reprinted in* 1998 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 896–98 (1998)(Ger.). In 2001, after the UK had

In 2013, the ECHR held that copyright must be balanced against the right to freedom of expression established in Article 10.[103] The ECHR did not perform a balancing test because it found that French judicial authorities had done so properly.[104] The ECHR explained that national courts will be granted broad deference in balancing conflicting rights and interests, such as the right to property and the right to free expression, especially where the speech involved is commercial in nature.[105] The court, however, recognized the applicability of Article 10's freedom of expression to a copyright case.[106] The ECHR explained that while freedom of expression is subject to exceptions, any exception must be strictly interpreted and the reason for it must be convincingly established.[107]

From an international perspective, two non-U.S. institutions have, using proportionality analysis, recently recognized that copyright enforcement can impermissibly impinge on free speech. In 2009, the Constitutional Council of the French Republic subjected the new French copyright enforcement regime, the HADOPI, to constitutional review.[108] The Council held that the regime of graduated response, also known as three strikes, must be subject to judicial oversight because it implicated users' privacy and speech rights. The French Parliament may lay down laws to reconcile property with freedom of expression, but such laws must be proportionate to their purpose.[109] Furthermore, the Council found that in view of the guarantee of freedom of expression and the proportionality requirement, the French Parliament was not at liberty to vest its power in an administrative authority outside of judicial review.[110] The Court found that the proposed

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imported several sections of the ECHR into domestic law, the British Court of Appeal acknowledged that "rare circumstances can arise where the right of freedom of expression will come into conflict with the protection afforded by the Copyright Act." Ashdown v. Telegraph Group Ltd, [2001] EWCA (Civ) 1142, [45] (Eng.).

103. Ashby Donald and Others v. France, App. No. 36769/08, Eur. Ct. H.R. (5th Section) at ¶40 (2013).

104. *Id.* ¶¶ 42, 43.

105. *Id.* ¶ 39 (noting the increased deference to lower courts when the speech is commercial speech); *id.* ¶ 40 (noting that it is difficult to balance conflicting rights, and thus the margin of appreciation—the degree of deference to the domestic court—is important).

106. *Id.* ¶ 34 (recognizing the applicability of Article 10 to the copyrighted photographs at issue).

107. *Id.* ¶ 38(i).

108. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-580DC, June 10, 2009, Rec. 107 (Fr.), *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/2009/decisions-par-date/2009/2009-580-dc/decision-n-2009-580-dc-du-10-juin-2009.42666.html. English version available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2009580DC2009_580dc.pdf.

109. *Id.* ¶ 15 ("Any restrictions placed on the exercising of such freedom must necessarily be . . . proportionate to the purpose it is sought to achieve.").

110. *Id.* ¶ 16.

legal process and burdens of proof were not adequately protective of the free expression right.[111]

Similarly, the United Nations Special Rapporteur on Freedom of Opinion and Expression, Frank La Rue, found that certain copyright enforcement policies disproportionately harm speech rights.[112] The Special Rapporteur is appointed by the United Nations Secretary General to report and advise on rights violations.[113] In 2011, La Rue found that although expression "may be legitimately restricted under international human rights law," any restrictions, including copyright enforcement, must be subject to the Article 19 three-part test.[114] The report expressed alarm at "proposals to disconnect users from Internet access if they violate intellectual property rights."[115] Such proposals would violate Article 19's proportionality requirement. The report also expressed concern over the Anti-Counterfeiting Trade Agreement ("ACTA"), a copyright enforcement agreement.[116] La Rue remained "watchful about the treaty's eventual implications for intermediary liability and the right to freedom of expression."[117]

There is thus a growing divide between the United States' approach to reconciling copyright and free expression, and the approach used by other countries.[118]

## III. FLAWS IN THE U.S. APPROACH

Focusing on the nature of the free speech regime instead of copyright's judicial exceptionalism illuminates a striking feature of the U.S. approach: in the United States, once a category of speech falls outside of the First Amendment's protection, the legislature may apply any variety of sanctions, functionally unchecked by judicial scrutiny.[119] The First Amendment

111. *Id.* ¶¶ 17–19. A later review of the revised HADOPI laws, which involved a court system, found that due process had adequately been established and free speech rights were no longer disproportionately violated. *Id.*

112. La Rue 2011, *supra* note 79.

113. *Id.*

114. *Id.* ¶ 24.

115. *Id.* ¶ 49.

116. *Id.* ¶ 50.

117. *Id.*

118. This Article is not the first to observe that the United States and other countries approach copyright differently. In attempting to explain the discrepancy between the U.S. and European treatment of copyright and free speech, Birnhack focused on the different theoretical foundations for copyright regimes in different countries, namely the United States internal approach, which uses fair use and other doctrinal safety valves to reconcile free speech and copyright, and the European external approach, which weighs copyright against other values. Birnhack, *supra* note 7, at 297. This Article focuses, instead, on the different features of applicable free speech regimes.

119. *See* Coenen, *supra* note 68, at 994 (discussing the "penalty-neutral" approach to free speech adjudication in the United States, where speech is "either protected, in which case it may

generally does not distinguish between civil and criminal liability, or between degrees of severity of sanctions for categorically unprotected speech—it is a "penalty-neutral" approach.[120]

A proportionality analysis of speech, by contrast, is sensitive to whether a regulation is criminal or civil. In both 2011 and 2012, La Rue expressed deep concern over the criminalization of online expression.[121] The 2011 Special Rapporteur's report stated that "[i]mprisoning individuals for seeking, receiving and imparting information and ideas can rarely be justified as a proportionate measure to achieve one of the legitimate aims under article 19 [of the ICCPR]."[122] Indeed, criminalization is problematic as an enforcement method because a state's restriction "must be proven as necessary and the least restrictive means required to achieve the purported aim."[123]

As a result, courts will always be more skeptical of the criminalization of speech than of civil sanctions.[124] Furthermore, the international intuition is that human rights law protects the "vertical relationships" between the state and individuals more strongly than private "horizontal relationships" between individuals.[125] Thus, criminalization of speech is particularly suspect because it directly involves the enforcement power of the state against the individual. Criminalization also invokes the powerful stigma of official state disapproval, which is far stronger in criminal law than, for example, a system of agency-administered fines.

The U.S. approach to the First Amendment does not take into account differences between criminal and civil sanctions.[126] This feature of First Amendment doctrine has remained relatively overlooked because the Court often throws out civil speech laws and, thus, has not needed to consider ex-

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not be punished, or unprotected, in which case it may be punished to a very great degree"); *see also* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1517 (1998) (observing that the First Amendment does not generally "impose[] limits on the severity of punishment for speech that the government is entitled to criminalize").

120. *See supra* note 119 and accompanying text.

121. La Rue 2012, *supra* note 73, ¶ 64; La Rue 2011, *supra* note 79, ¶ 34.

122. La Rue 2011, *supra* note 79, ¶ 36.

123. *Id.* ¶ 69.

124. *Id.*

125. P. Bernt Hugenholtz, *Copyright and Freedom of Expression in Europe*, *in* THE COMMODIFICATION OF INFORMATION 247–48 (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002); Affaire Tolstoy Miloslavsky C. Royaume-Uni [Tolstoy Miloslavsky v. United Kingdom], 20 Eur. H.R. Rep. 442 (1996).

126. *See* Coenen, *supra* note 68, at 994–96 (explaining that "the standard method of First Amendment analysis is *penalty-neutral*" and, when the Court "has flirted with penalty-sensitive review, [it] has proceeded in an ad hoc manner").

plicitly whether criminal speech sanctions are more problematic than civil ones.[127]

In the United States, most speech regulation is not permissible even in the civil context.[128] As a consequence, First Amendment doctrine, unlike international freedom of expression, fails to decry the criminalization of speech as disproportionate to all but the most serious government aims.[129] While states within the United States have repealed their criminal libel laws, no clear First Amendment rule tells states they cannot criminalize libel if they define it in line with the definitions sanctioned in First Amendment case law.[130]

In fact, the Supreme Court, in dicta, has made observations that equate criminal and civil sanctions.[131] The Court observed that "the [f]ear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute."[132] Some forms of civil regulation can create "hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law."[133] The Court then concluded that "[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," effectively equating civil and criminal liability.[134]

Despite this statement of equivalence, the Court has struggled with an intuition that criminal prosecution is more problematic than civil sanctions.[135] This discomfort is an instance of the doctrinal instability created by the First Amendment's categorical approach.[136] In one case, the Court observed that "a law imposing criminal penalties on protected speech is a stark example of speech suppression."[137] In another case, the Court clarified that a First Amendment holding permitting administrative sanctions of

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127. *See id.* at 994 (describing First Amendment litigation as a "winner-take-all affair").

128. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (reviewing the case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

129. *See supra* note 119 and accompanying text.

130. Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 NW. U. L. REV. 731, 751–53 (2013).

131. *New York Times Co.*, 376 U.S. at 277–78.

132. *Id.* at 277.

133. *Id.* at 278 (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

134. *Id.* at 277. The civil libel law at issue had produced damages that were one thousand times the maximum fine under a comparable criminal statute, and the Court pointed out that "criminal-law safeguards," such as an indictment, proof beyond a reasonable doubt, and double jeopardy, would not be available to a defendant in a civil action. *Id.* at 277–78.

135. *See* Dombrowski v. Pfister, 380 U.S. 479, 486 (1965) (stating that "criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms").

136. *Id.*

137. Ashcroft v. Free Speech Coal., 535 U.S. 234, 244 (2002).

speech might not extend to criminal prosecutions.[138] The Court also noted its "greater tolerance of enactments with civil rather than criminal penalties."[139] Further, the Court has reasoned that when a case did not involve a criminal statute, the consequences of its decision were "not constitutionally severe."[140]

The Supreme Court came closest to recognizing that criminal sanctions might be more problematic than civil sanctions in *Reno v. American Civil Liberties Union*.[141] In *Reno*, Justice Stevens stated several times that criminal sanctions are more troubling than civil sanctions.[142] Concluding that the statute at hand was not narrowly tailored, the Court explained that "the risk of criminal sanctions 'hovers over each content provider, like the proverbial sword of Damocles.'"[143] Criminal statutes are problematic because of the harsh penalties they carry, as well as the social stigma that accompanies a criminal conviction.[144] The severity of punishment creates an "increased deterrent effect" that, "coupled with the 'risk of discriminatory enforcement' of vague regulations, poses greater First Amendment concerns than those implicated by . . . civil regulation."[145] This language, however, seems to be in direct tension with the Court's language from *New York Times Co. v. Sullivan*[146] equating civil sanctions of speech with criminal sanctions.[147]

The lack of a clear rule disfavoring the criminalization of speech is a perversity of the United States' deviation from proportionality analysis. Because speech is categorically either in or out of the First Amendment's protection, the Court rarely reaches whether the sanctions themselves are appropriate.[148] The only specific sanction that receives close First Amend-

138. FCC v. Pacifica Found., 438 U.S. 726, 750 (1978) (explaining that the Court had "not decided . . . that this broadcast would justify a criminal prosecution").

139. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498–99 (1982).

140. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 589 (1998).

141. 521 U.S. 844 (1997) (holding that full First Amendment protection extends to speech on the Internet).

142. *Id.* at 872.

143. *Id.* at 882 (quoting ACLU v. Reno, 929 F. Supp. 824, 855–56 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997)).

144. *Id.* at 872 ("In addition to the opprobrium and stigma of a criminal conviction, the [Communications Decency Act of 1996] threatens violators with penalties including up to two years in prison for each act of violation.").

145. *Id.* (citing Denver Area Ed. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996)).

146. 376 U.S. 254 (1964).

147. *Id.* at 277–78.

148. *See supra* note 127 and accompanying text.

ment scrutiny is the use of prior restraints.[149] Notably, even prior restraints are not scrutinized in the copyright enforcement context.[150]

### *A. Judicial Abdication and the Political Economy of Intellectual Property*

The First Amendment thus does not distinguish between criminal and civil liability once a category of speech is outside of its protection.[151] Copyright policy functionally has been found to be outside the scope of First Amendment protection, subject only to weak rational basis review unless Congress tampers with the First Amendment "safety valves" of fair use or the idea-expression dichotomy.[152] Because most copyright policy is effectively outside of First Amendment scrutiny, the U.S. legislature has been able to ratchet up speech-restricting copyright enforcement measures unchecked by judiciary review.[153]

Tiered review can permit judicial abdication to the legislature.[154] This claim may be counterintuitive to those who see proportionality analysis as deferential, and tiered review as more protective. By leaving copyright policy outside of judicial scrutiny, however, the Court defers to Congress on the statutory details of copyright law.[155] This deference is a consequence of a First Amendment system that regularly allows for only all-or-nothing review.[156] If the Court had decided to subject copyright to more than rational

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149. Lemley & Volokh, *supra* note 90, at 169–70. "Prior restraints" are defined as "preliminary injunctions, not permanent injunctions." *Id.* at 169 (emphasis omitted).

150. *Id.* at 174–75.

151. *See supra* note 129 and accompanying text.

152. *See* Eldred v. Ashcroft, 537 U.S. 186, 218–21 (2003) (finding that copyright can be reconciled with the First Amendment and thus subjected only to rational basis review because it contains the internal safety valves of idea-expression dichotomy and fair use doctrine; because it was enacted close-in-time with the First Amendment; and because copyright is the "engine of free expression").

153. *See id.* at 204–08 (stating that the Court is "not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be").

154. Mathews & Sweet, *supra* note 18, at 838.

155. These statutory details of copyright law are referred to in the literature as "policy levers." *See* Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE L.J. 1575, 1649 (2002) (noting that "[a]ll intellectual property rights regimes . . . have certain policy levers in common, wielded to a greater or lesser extent"). Bartholomew and Tehranian suggest that copyright's lack of deference to the First Amendment partially may be because copyright is mainly statutorily dictated. *See* Bartholomew & Tehranian, *supra* note 66, at 71–78, 90 (explaining that statutes can close off "avenues for addressing expressive concerns"); *see also* Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543, 1578 (2010) (noting that common law is more adaptable because it uses standards instead of rules).

156. *See* Bartholomew & Tehranian, *supra* note 66, at 72 (observing that "judges operating within the freedom of the common law appear better able to preserve a broad theoretical land-

basis review, it might have found itself regularly deciding many parameters of copyright policy.[157] Instead, by functionally placing copyright outside of the First Amendment, the Court left all speech-related details for Congress to decide.[158]

In *Eldred*, the Supreme Court considered the constitutionality of the Copyright Term Extension Act. Rather than examining whether the increased copyright term was disproportionately restrictive of freedom of expression, the Court explicitly deferred to Congress, explaining that "it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives."[159] When the Court in *Golan* considered whether Congress could take works out of the public domain and reinstate copyright protection, the Court reiterated that Congress may do what it wants with copyright policy, as long as it does not alter the "traditional contours" of copyright protection and impinge on fair use or the idea-expression dichotomy.[160]

The consequence of judicial deference to Congress's choices on copyright policy details is that the political economy of copyright lawmaking remains unchecked by the judiciary in the United States.[161] Unchecked copyright law-making tends to disproportionately protect rights holders at the expense of second-generation users and authors.[162]

Political economists explain the stunning recent expansion of U.S. copyright law through "public choice" theory.[163] Intellectual property creators and owners, which are often large corporations, receive high economic rents through copyright protection.[164] But copiers, who are often dispersed individuals, receive only a competitive advantage.[165] The costs of organization are thus higher and the benefits of organization lower for those protecting the public domain than for those desiring more copyright protection.[166]

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scape, whereas statutory analysis restricts judicial autonomy"); Balganesh, *supra* note 155, at 1578 (noting that courts have greater discretion when dealing with standards as opposed to rules).

157. *See* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429–31 (1984) (stating that Congress has the "institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by . . . new technology").

158. *Id.*

159. Eldred v. Ashcroft, 537 U.S. 186, 212 (2003).

160. Golan v. Holder, 132 S. Ct. 873, 890 (2012) ("We then described the 'traditional contours' of copyright protection, *i.e.*, the 'idea/expression dichotomy' and the 'fair use' defense.").

161. Lemley & Volokh, *supra* note 90, at 174–75.

162. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY 1–5 (2004) (tracing the expansion of intellectual property protection, specifically focusing on the scope of copyright law).

163. *Id.* at 10–13, 16–17.

164. *Id.* at 14–15.

165. *Id.*

166. *Id.* at 14–15.

Without checks from the judiciary, this has resulted in an upward ratchet of statutory growth.[167]

Criminal copyright law and enforcement measures, while infrequently discussed, are particularly problematic examples of U.S. copyright expansion, from a free speech perspective. The United States criminalizes low levels of copyright infringement, and employs speech-threatening enforcement mechanisms, including the seizure of websites. The United States has, in recent years, attempted to export its criminal standard and enforcement measures worldwide.[168] In addition, the United States has recently attempted to apply its criminal enforcement across borders to citizens of other countries—where infringement is not similarly criminalized—resulting in several recent extradition cases.[169]

Criminal copyright law was first enacted in the United States in 1897.[170] For the next century, the underlying distinction between civil and criminal copyright law was that criminal law punished commercial-level infringement, while civil law punished individual infringement for non-commercial purposes.[171] In 1997, the No Electronic Theft Act ("NET Act")[172] altered this distinction.[173] Under the NET Act, an infringer no

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167. *But see* Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804, 808 (2008) ("The public choice accounts developed in IP scholarship to explain the strengthening of IP law over the last thirty years suggest that such a countermobilization is highly unlikely, or even impossible. How, then, can we account for the new A2K mobilization and its apparent successes?").

168. *See generally* Margot E. Kaminski, *An Overview and the Evolution of the Anti-Counterfeiting Trade Agreement*, 21 ALB. L.J. SCI. & TECH. 385 (2011) (arguing that ACTA was developed to maximize international intellectual property standards, without opportunity for fair negotiations amongst all interested countries); Susan K. Sell, *The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play* (June 9, 2008), http://www.twnside.org.sg/title2/intellectual_property/development.research/SusanSellfinalversion.pdf (arguing that the United States exerts a strong influence on international IP framework development in its quest for higher global IP standards).

169. *See, e.g.*, Complaint, United States v. O'Dwyer, No. 10 Mag. 2471 (S.D.N.Y. Nov. 5, 2010), *available at* http://www.scribd.com/doc/100259020/U-S-v-O-Dwyer-SDNY-1-Sealed-Complaint. In the Complaint, a citizen of the United Kingdom, Richard O'Dwyer, was charged with conspiracy to commit copyright infringement and criminal copyright infringement for owning and operating TVShack.net and TVShack.cc. *See id.* ¶¶ 1–4. As a result, the United States successfully obtained an extradition order in British courts to bring O'Dwyer to the United States for trial; however, the case settled. *Richard O'Dwyer 'Happy' U.S. Copyright Case Is Over*, BBC NEWS (DEC. 6, 2012), http://www.bbc.co.uk/news/uk-england-20636626.

170. Act of Jan. 6, 1897, ch. 4, 29 Stat. 481.

171. *See, e.g.*, Geraldine Szott Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 B.U. L. REV. 731, 735–36 (2003) (distinguishing between civil and criminal provisions in copyright law); Note, *The Criminalization of Copyright Infringement in the Digital Era*, 112 HARV. L. REV. 1705, 1706–07 (1999) [hereinafter Note] (explaining that the 1897 Act "introduced the paradigm of differentiating criminal from civil copyright violations based upon whether the infringement was pursued for purposes of commercial exploitation").

172. No Electronic Theft Act (NET), Pub. L. No. 105-147, 111 Stat. 2678 (1997).

longer requires a commercial motive and need not infringe at a commercially significant level to be found criminally liable for copyright infringement in the United States.[174]

The current criminal copyright standard is two-pronged: one prong targets infringement of any amount if done for private financial gain; and the second punishes infringement over a certain threshold amount, when done willfully but without a requirement of financial or commercial motive.[175] The first prong of the statute, which requires a financial motive but no threshold amount of infringement, may at first seem to trace past legal requirements that infringement be of a commercial nature.[176] It is, however, a lower hurdle. The financial motive in the first prong need not require a sale; it is satisfied by the "receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works."[177] Thus, in order to criminally infringe copyright under the statute, a user need only expect to receive something of value, including other copyrighted works.[178] This definition targets file sharing of any amount.

Both prongs of current U.S. criminal copyright law sweep into realms traditionally occupied by civil copyright law.[179] The first prong's "financial motive" targets all intentional exchanges of infringing works, even where a user receives only one work from another user.[180] The second prong's low statutory threshold ($1,000 of infringement in a 180-day period, regardless of motive) threatens to criminalize routine infringement that has been seen as personal use or fair use, such as photocopying books for educational purposes.[181] Moreover, prosecutors have indicated that they are willing to prosecute excerpting.[182] Fair use is a defense to criminal copyright in-

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173. The NET Act was prompted by *United States v. LaMacchia*, in which the United States District Court for the District of Massachusetts found that copyright infringement lacking a commercial motive could not be prosecuted under criminal law. 871 F. Supp. 535, 544–45 (D. Mass. 1994).

174. No Electronic Theft Act § 2(a).

175. *Id.*; 17 U.S.C. § 506(a)(2) (2010).

176. 17 U.S.C. § 506(a)(1) (2010).

177. *Id.* § 101 (defining the term "financial gain").

178. *Id.* § 506(a)(1).

179. Moohr, *supra* note 171, at 739.

180. U.S. DEP'T JUSTICE, COMPUTER CRIME AND INTELLECTUAL PROP. SECTION, CRIM. DIV., PROSECUTING INTELLECTUAL PROPERTY CRIMES 54 (3d ed. 2006) [hereinafter PROSECUTING MANUAL] ("For example, federal prosecutors have successfully charged 'commercial advantage or private financial gain' in cases where defendants ran a closed peer-to-peer file-trading network that required new users to contribute pirated material in order to join.").

181. Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 WASH. U. L. Q. 835, 868–69 (1999).

182. *See* PROSECUTING MANUAL, *supra* note 180, at 38 (discussing potential prosecution for reproduction of partial portions of a work).

fringement, but the statutory definitions of the two criminal infringement offenses may restrict the scope of findings of what constitutes fair use.[183]

The current international standard for criminal copyright resembles an earlier stage of U.S. law. The international standard established in the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") requires criminalization of copyright infringement only when it is "willful" and done on a "commercial scale."[184]

The United States and China recently disputed the meaning of "commercial scale."[185] The United States proposed that "commercial scale" must encompass the activities of both those engaging in activities for a "financial return," no matter how small their operations, and those who infringe at a "sufficient extent or magnitude," regardless of motive.[186] This proposal noticeably attempted to read the international standard to reflect current U.S. criminal copyright law. A World Trade Organization ("WTO") Dispute Settlement Panel rejected the U.S. argument that criminal copyright covers all infringement except for *de minimis* use,[187] and refused

183. Fair use analysis is statutorily defined and consists of four prongs: the purpose and character of the work, the nature of the copied work, the amount and substantiality of the copying, and the effect on the work's value. 17 U.S.C. § 107 (2010). These low standards potentially restrict court findings of fair use in cases of infringement over $ 1,000, and when somebody has exchanged one work for another. *See, e.g.*, Loren, *supra* note 181, at 869 (pointing out that determining "criminal copyright infringement" will be difficult "when the defendant's use is not motivated by commercial advantage or private financial gain"). The statutory definitions of criminal copyright infringement appear to map onto behavior that has traditionally been deemed fair use. *Id.*

184. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights art. 61, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPS Agreement] ("Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.").

185. *See generally* Report of the Panel, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009) [hereinafter China IP Panel Report] (discussing the thresholds for which the United States claims "China has not provided for criminal procedures and penalties to be applied in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale"); *see also* Miriam Bitton, *Rethinking the Anti-Counterfeiting Trade Agreement's Criminal Copyright Enforcement Measures*, 102 J. CRIM. L. & CRIMINOLOGY 67, 71–72 (2012) (noting the rapid pace at which "[c]riminal law has been embedding itself into intellectual property law," as well as "difficulty and opposition" resulting from the "unique characteristics of intellectual properties"); Peter K. Yu, *The TRIPS Enforcement Dispute*, 89 NEB. L. REV. 1046, 1056 (2011) (citing TRIPS Agreement art. 61).

186. China IP Panel Report, *supra* note 185, at § 7.480.

187. *Id.* at § 7.551–7.553.

to provide a definition of "commercial scale." Instead, the WTO Dispute Settlement Panel found that the United States provided insufficient evidence to demonstrate what "commercial scale" meant "in the specific situation of China's marketplace."[188] The panel also refused to reach whether "commercial scale" requires that states criminalize infringement over a certain amount, done without a for-profit motive. Thus the panel confirmed that United States criminal copyright law goes beyond the international requirement that states criminalize commercial scale infringement. Instead of criminalizing only commercial scale infringement, the U.S. definition criminalizes noncommercial personal use infringement.[189]

Numerous scholars have criticized the expansion of U.S. criminal copyright law, exploring its lack of moral underpinnings.[190] They have argued that the costs are too high and benefits too uncertain.[191] They have criticized the expansion as a psychologically ineffective enforcement tactic.[192] They have even criticized the criminal copyright standard under the Copyright Clause, concluding that overly broad copyright criminalization undermines the constitutional purpose of copyright law.[193]

### *B. Speech Problems with Criminal Copyright*

Although numerous scholars have noted that criminal copyright raises speech problems, these problems have not been discussed at length.[194] Per-

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188. *Id.* at § 7.614.

189. *See* Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J. L. & TECH. 469, 516 (2011) (referring to the current criminalization standard in copyright law as reaching "non-commercial copyright infringement"); Moohr, *supra* note 11, at 800 (referring to the NET Act as targeting personal use infringement).

190. STUART P. GREEN, THIRTEEN WAYS TO STEAL A BICYCLE: THEFT LAW IN THE INFORMATION AGE 253–57 (2012) (concluding copyright offenders are not "sufficiently culpable to justify criminalization"); Bitton, *supra* note 185, at 72; Moohr, *supra* note 171, at 735; *see also* Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 501, 510 (2004) (discussing white-collar crimes and the difficulties of identifying both harms and victims).

191. Moohr, *supra* note 11, at 807–08.

192. *See* Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219, 224–25 (1997).

193. *See* Note, *supra* note 171, at 1718 ("The mere threat of criminal penalties could chill the very activities that the Copyright Clause is intended to promote."); *see generally* Diane L. Kilpatrick-Lee, *Criminal Copyright Law: Preventing a Clear Danger to the U.S. Economy or Clearly Preventing the Original Purpose of Copyright Law?*, 14 U. BALT. INTELL. PROP. L.J. 87, 118 (2005) (concluding that the evolution of copyright law and the punishments go beyond its original purpose and what is necessary to deter infringement).

194. *See, e.g.*, I. Trotter Hardy, *Criminal Copyright Infringement*, 11 WM. & MARY BILL RTS. J. 305, 306 (2002) (explaining that criminal copyright is perceived by the general public as restricting free speech and other paramount rights); Bitton, *supra* note 185, at 83 ("Criminalizing copyright law also implicates First Amendment rights."); Loren, *supra* note 181, at 861 (noting that copyright policy implicates "special concerns" that include "the inherent tension with the val-

haps the lack of scholarly analysis has been due to under enforcement of the NET Act.[195] In 2008, however, Congress enacted the Priority Resources and Organization for Intellectual Property Act ("PRO-IP Act") to increase criminal enforcement, and the speech problems have since become more apparent, prompting further academic discussion.[196]

Since the PRO-IP Act, criminal copyright enforcement efforts both inside and outside of the United States have increased. It can be difficult to ascertain precise numbers, because the government combines its assessment of copyright enforcement with other kinds of intellectual property ("IP") enforcement in its data collection.

The U.S. government, however, has highlighted its general increase in IP enforcement since the PRO-IP Act.[197] Since 2009, United States Immigration and Customs Enforcement ("ICE") and Homeland Security Investigations ("HIS") of IP-related cases are up 71%, arrests are up 159%, and convictions are up 103%.[198] The FBI has increased IP-related arrests by 68% since 2010.[199] In each year since 2009, Assistant United States Attorneys have charged approximately 170 criminal IP cases, representing a 14% increase in the number of defendants charged per year prior to 2009.[200] Of the 202 IP defendants sentenced in 2012, over half received prison terms, with over 40 defendants receiving sentences of longer than one year in pris-

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ues embodied in the First Amendment that are present when people are given a monopoly over expressive works"); Manta, *supra* note 189, at 516 (explaining that criminal copyright might pose a particularly difficult problem because of the "possible chilling effect on expressive activities"); Moohr, *supra* note 11, at 789 n.14 (noting that "the First Amendment also plays a role in copyright doctrine, preventing the rights granted to authors from restricting the public's right to free speech"); Note, *supra* note 171, at 1718 ("The mere threat of criminal penalties could chill the very activities that the Copyright Clause is intended to promote.").

195. *See* Eric Goldman, *A Road to No Warez: The No Electronic Theft Act and Criminal Copyright Infringement*, 82 OR. L. REV. 369, 377 (2003) (noting that no convictions were made during the first eighteen months after the NET Act's enactment).

196. PROTECT IP Act of 2011, S. 968, 112th Cong § 4 (2011); Grace Pyun, *The 2008 PRO-IP Act: The Inadequacy of the Property Paradigm in Criminal Intellectual Property Law and Its Effect on Prosecutorial Boundaries*, 19 DEPAUL J. ART TECH. & INTELL. PROP. L. 355, 377–78 (2009). *See generally* Christopher J. Buccafusco & Jonathan S. Masur, *Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Law* 1–4 (University of Chicago Coase-Sandor Inst. for Law & Econ., Research Paper No. 649, 2013), *available at* http://ssrn.com/abstract=2297488 (discussing the scope and enforcement of IP laws and their expansion in the use of criminal sanctions to deter IP violations).

197. *See, e.g.*, U.S. INTELL. PROP. ENFORCEMENT COORDINATOR, 2013 JOINT STRATEGIC PLAN ON INTELLECTUAL PROPERTY ENFORCEMENT 1 (2013) [hereinafter 2013 Joint Strategic Plan].

198. *Id.*

199. *Id.* at 21.

200. *Id.* at 21, 44. *See also* Ryan Rufo, *Below the Surface of the ACTA: The Dangers That Justify New Criminal Sanctions Against Intellectual Property Infringement*, 39 AIPLA Q.J. 511, 530 (2011) (describing a report estimating that "17.53% of total Internet traffic in the United States infringed intellectual property rights").

on.[201] International cooperation between national law enforcement agencies has also increased, as U.S. agencies cooperate with agencies in Canada, Mexico, and international bodies, such as INTERPOL.[202] The United States has highlighted several extradition efforts related to copyright crimes.[203]

In addition to building enforcement infrastructure, the PRO-IP Act created new civil and criminal forfeiture provisions.[204] The United States has been using these provisions, founded on its underlying standard for criminal copyright law, to seize and forfeit websites ex parte, and without subsequently going to trial.[205] Operation in Our Sites, a coordinated effort between multiple U.S. law enforcement agencies, resulted in the government seizure of more than 1,700 website domain names since 2010 and the seizure of substantial monetary assets.[206] Project Fake Sweep, nominally a trademark enforcement operation, has also seized over 300 websites engaged in distributing allegedly pirated copyrighted works.[207]

There are at least five distinct speech problems with enforcing a standard for criminal copyright infringement that extends broadly enough to include noncommercial personal use. The first is a First Amendment due process problem: there is no protection from prior restraints in copyright law and, therefore, the government can use and has used criminal copyright procedures to take speech down ex parte and before trial.[208] The second is a collateral censorship problem: when governments go after the intermediar-

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201. 2013 Joint Strategic Plan, *supra* note 197, at 44.

202. *Id.* at 25.

203. *Id.* at 26, 30.

204. Pyun, *supra* note 196, at 356.

205. Mike Masnick, *Website Censored by Feds Takes Up Lamar Smith's Challenge: Here's Your 'Hypothetical,'* TECHDIRT (Jan. 10, 2012), http://www.techdirt.com/articles/20120110/11395317367/website-censored-feds-takes-up-lamar-smiths-challenge-heres-your-hypothetical.shtml. Most famously, the United States charged Kim Dotcom and his associates with both direct criminal copyright infringement and accomplice liability, and forfeited their domain names. *See* Drew Olanoff, *Here's the Full 72 Page Megaupload DOJ Indictment*, THENEXTWEB (Jan. 20, 2012, 12:12 AM), http://thenextweb.com/insider/2012/01/20/heres-the-full-72-page-megaupload-doj-indictment/. The U.K. citizen Richard O'Dwyer was also charged with both conspiracy to commit copyright infringement, and criminal copyright infringement, for owning and operating TVShack.net and TVShack.cc. Both domain names were seized. *See supra* note 169.

206. 2013 Joint Strategic Plan, *supra* note 197, at 20.

207. *Id.* at 65.

208. Lemley & Volokh, *supra* note 90, at 158–65; Rubenfeld, *supra* note 90, at 3. Although it has not yet had an opportunity to consider the constitutionality of civil *in rem* forfeiture, the Court has been careful to distinguish between criminal and civil forfeiture proceedings. *See* Alexander v. United States, 509 U.S. 544, 553–54 (1993) (explaining that the criminal forfeiture provision at issue was after trial, and therefore not a prior restraint); *Id.* at 559 (Souter, J., concurring in part and dissenting in part) (distinguishing that this case concerned criminal forfeiture, not civil forfeiture).

ies, as the United States has through criminal copyright enforcement, intermediaries often become overcautious and censor user speech.[209] Third, overcriminalization pushes intermediaries into private ordering out of fear of enforcement, which promotes privatized censorship and reduces transparency.[210] Fourth, criminalizing low-level infringement impinges on an Internet user's right to receive information.[211] And fifth, a low criminal standard permits arbitrary enforcement, which can be used to punish other kinds of speech the government does not like, and can cause chilling effects.[212]

The combination of a low underlying criminal copyright standard and a lack of First Amendment scrutiny allows the government to employ criminal procedures that, when applied to speech, resemble prior restraints.[213] In the name of criminal copyright enforcement, the United States has used pre-indictment seizures to seize the domain names of websites prior to trial.[214] The low standard of criminal infringement eases the probable cause requirement, providing low hurdles for the government's ability to obtain a warrant to seize an entire website domain.[215]

Seizing an entire site implicates the speech rights of more than the accused; it also censors all other users who speak through the website, regardless of whether they are copyright infringers.[216] The tool of civil asset forfeiture, created by the PRO-IP Act of 2008, does not even require probable cause.[217] Civil asset forfeiture is problematic, but it may be less significant than critics have deemed in this area because of how easy it is to show

209. *See infra* note 219 and accompanying text.

210. Derek Bambauer, *Orwell's Armchair*, 79 U. CHI. L. REV. 863, 867–68 (2012).

211. *See infra* note 228 and accompanying text.

212. *See infra* note 231 and accompanying text.

213. Timothy B. Lee, *How the Criminalization of Copyright Threatens Innovation and the Rule of Law*, *in* COPYRIGHT UNBALANCED: FROM INCENTIVE TO EXCESS 55, 55–74 (Jerry Brito ed., 2012).

214. *See, e.g.*, Mike Masnick, *Breaking News: Feds Falsely Censor Popular Blog for over a Year, Deny All Due Process, Hide All Details . . .*, TECHDIRT (Dec. 8, 2011, 8:29 AM), http://www.techdirt.com/articles/20111208/08225217010/breaking-news-feds-falsely-censor-popular-blog-over-year-deny-all-due-process-hide-all-details.shtml (discussing a pre-indictment seizure of a website domain for over a year before trial).

215. *See* Mike Masnick, *Feds Tie Themselves in Legal Knots Arguing for Domain Forfeiture in Rojadirecta Case*, TECHDIRT (May 16, 2012, 10:22 AM), http://www.techdirt.com/articles/20120516/05031118941/feds-tie-themselves-legal-knots-arguing-domain-forfeiture-rojadirecta-case.shtml (arguing that the government "could easily seize and forfeit any search engine domain or any website that allows public comments, merely by asserting that a link in a search result or a link in a comment led to infringing material").

216. Christina Mulligan, *Technological Intermediaries and Freedom of the Press*, 66 SMU L. REV. 101, 120–21 (2013).

217. Pyun, *supra* note 196, at 387.

probable cause of low-level criminal infringement and thus obtain a pre-indictment seizure warrant.

The second speech problem raised by the low criminal copyright standard is collateral censorship.[218] How liable websites are for criminal copyright infringement that occurs through them is unclear. Even if prior restraint problems are solved, an overly broad criminal standard still creates a specter of criminal liability for an intermediary for *de minimis* behavior or even accidental behavior. The specter of criminal liability encourages collateral censorship by the intermediary against the user.[219] Intermediaries are not invested in content in the same way users are, so a fear of criminal liability can cause intermediaries to take down user material out of an excess of caution. Criminal copyright liability is a real threat for online intermediaries: the U.S. government has charged online intermediaries with both direct criminal infringement and aiding and abetting criminal infringement.[220]

The third speech problem is related: threatening to charge online intermediaries with criminal infringement, whether direct or secondary, can push them into more opaque private ordering regimes with less due process for Internet users. This scenario arises out of the same natural caution that causes collateral censorship. If an online intermediary fears criminal enforcement, one thing it can do to protect itself is to make a bargain with content owners to show good intent. The PRO-IP Act established a system wherein content owners consult with the Department of Justice about bad actors.[221] In the United States, content owners and Internet Service Providers ("ISPs") have entered into a bargain, with encouragement from the U.S. IP Enforcement Coordinator: the copyright alert system. The copyright alert system is a private agreement, in which ISPs promise to slow down In-

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218. *See* Michael I. Meyerson, *Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" with the New Media*, 71 NOTRE DAME L. REV. 79, 116 (1995); *see also* J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2298 (1999).

219. United States courts have also recognized the problem of collateral censorship, although without calling it by that name. The 1959 case of *Farmers Educational and Cooperative Union v. WDAY*, 360 U.S. 525 (1959), beautifully outlines the problem. In the context of the FCC's must-carry rules, a local radio station could not take down a candidate's speech just because they judged it to be libelous. That station, however, also could not be held liable for libel. The court stated:

> Quite possibly, if a station were held responsible for the broadcast of libelous material, all remarks even faintly objectionable would be excluded out of an excess of caution. Moreover, if any censorship were permissible, a station so inclined could intentionally inhibit a candidate's legitimate presentation under the guise of lawful censorship of libelous matter.

*Id.* at 530.

220. *See supra* note 205 and accompanying text.

221. *See* Priority Resources and Organization for Intellectual Property Act of 2008, Pub. L. 110-403, 122 Stat. 4256 (codified as amended at 15 U.S.C. §§ 8101 et seq. (2012)), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-110publ403/pdf/PLAW-110publ403.pdf.

ternet speeds if copyright infringement is found.[222] Privately ordered regulation such as this is problematic because citizens have trouble identifying and protesting it, and thereby engaging in the process of governance.

The fourth speech problem raised by the overcriminalization of copyright infringement is that it impinges on the Internet user's right to receive information, recognized in both international and U.S. law. The Supreme Court noted that "the Constitution protects the right to receive information and ideas."[223] This right "is fundamental to our free society."[224] The right to receive information is linked to a right to personal intellectual breathing space,[225] and "the right to be free from state inquiry into the contents of [one's] library."[226] Copyright enforcement involves examining the contents of one's library.[227] Criminalizing a *de minimis* level of infringement, with a low showing of intent, allows the state—in addition to private actors—to partake in the examination of any content a user might have.[228] Such criminal copyright infringement often appears in proposed U.S. laws as a justification for state surveillance or network management.[229] The U.S. network neutrality provisions contain carve-outs for monitoring and managing illegal content, explicitly including copyright infringing material.[230]

Finally, overcriminalization gives rise to the problem of arbitrary enforcement. Arbitrary enforcement chills speech; this reasoning is often used to justify the First Amendment's overbreadth and vagueness doctrines. A vague statute "delegates basic policy matters to policemen, judges, and

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222. *See* Lisa Richwine, *Internet Providers to Act Against Online Pirates*, REUTERS, July 7, 2011, http://www.reuters.com/article/2011/07/07/us-internet-piracy-idUSTRE7667FL20110707 (reporting that certain U.S. ISPs will post warning messages and throttle internet speeds should they discover their customers illegally downloading copyrighted films).

223. Stanley v. Georgia, 394 U.S. 557, 564 (1969).

224. *Id.*

225. Rubenfeld, *supra* note 90, at 24–25, 28.

226. *Stanley*, 394 U.S. at 565.

227. *See* Lemley & Volokh, *supra* note 90, at 166 (observing that copyright law "seriously restricts speakers' ability to express themselves the way they want" and therefore should be subject to First Amendment scrutiny).

228. *See generally* Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981, 981 (1996) (discussing "digital monitoring of individual reading habits for purposes of so-called 'copyright management' in cyberspace"); *see also* Paul Ohm, *The Rise and Fall of Invasive ISP Surveillance*, 2009 U. ILL. L. REV. 1417, 1452 (2009) (discussing the proper balance between ISP surveillance and user privacy).

229. Emil Protalinski, *After Denouncing SOPA and PIPA, How Can Facebook Support CISPA?*, ZDNET (Apr. 12, 2010, 8:07 AM), http://www.zdnet.com/blog/facebook/after-denouncing-sopa-and-pipa-how-can-facebook-support-cispa/11700 ("CISPA also includes portions about protecting intellectual property . . . If an IP thief is considered a threat to cyber security, then his website, or where he posted the content, could technically be blocked by CISPA.").

230. *Open Internet*, FCC, http://www.fcc.gov/openinternet (last visited Jan. 17, 2014) ("[N]othing in the rules prohibits reasonable efforts by a broadband provider to address copyright infringement or other unlawful activity.").

juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[231] Broad criminalization has the same practical consequences: if everybody is a criminal, the state can choose whom to prosecute at will. This discretion allows states to prosecute citizens for copyright infringement as punishment for other behavior or speech that they cannot otherwise prosecute.

In Russia, for example, the government has arrested a series of noted dissidents not for political speech but ostensibly for copyright infringement.[232] In the 1990s, the United States Trade Representative made a decision not to ask for IP enforcement in China because it feared that IP enforcement would be used as a guise for political repression.[233] In the United States, the prosecution of Aaron Swartz under the overly broad Computer Fraud and Abuse Act ("CFAA") was viewed by many as retribution for his involvement in the Stop Online Privacy Act ("SOPA") protests.[234] Overcriminalization of speech allows a government to go after any of its citizens to prevent behavior that cannot itself be criminalized, creating the same problem recognized by the Court when a state carved out particular subcategories for enforcement within an otherwise unprotected category of speech.[235] Beyond permitting bad government behavior, the "risk of discriminatory enforcement" can create chilling effects.[236]

Many copyright scholars implicitly assume copyright "piracy" is one-to-one infringement done in lieu of a purchase, and consequently refuse to include piracy within the scope of free speech protections.[237] But the international legal standard defines "piracy" simply as copyright infringement.[238] Unchecked criminal copyright enforcement presents many of the same speech problems as its civil counterpart.

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231. Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (noting that an overly inclusive criminal standard raises the same concerns discussed in the vagueness doctrine).

232. Mike Masnick, *Russian Officials Abusing Copyright Law—with Microsoft's Help—to Intimidate Gov't Critics*, TECHDIRT (Sept. 13, 2010, 8:47 AM), http://www.techdirt.com/articles/20100912/12440610969.shtml.

233. Yu, *supra* note 185, at 1085.

234. Jacob Sloan, *Did the Government Target Aaron Swartz over His Role in Defeating SOPA?*, DISINFORMATION (Jan. 28, 2013), http://www.disinfo.com/2013/01/did-the-government-target-aaron-swartz-over-his-role-in-defeating-sopa.

235. R.A.V. v. St. Paul, 505 U.S. 37, 384 (1992).

236. Reno v. ACLU, 521 U.S. 844, 872 (1997).

237. *See* Lemley & Volokh, *supra* note 90, at 211–12 (explaining that piracy is an "[e]asy" case, and First Amendment due process should not apply where a defendant has made "identical or nearly identical copies of the plaintiff's works, and there is no claim of fair use but only some other copyright defense"); Tushnet, *supra* note 90, at 567 ("I have no free speech right to download entire works for which I could readily pay.").

238. *See* TRIPS Agreement, *supra* note 184, at 342 ("'[P]irated copyright goods' shall mean any goods which are copies made without the consent of the right holder . . . which are made di-

The secondary effects of overcriminalization of copyright infringement are an important discussion; however, there are also speech-related problems with the underlying standard itself. Insofar as there is agreement that copyright overlaps with speech, principles generally used in other speech areas should be applied. A speaker's intent is often central to the state's ability to punish that speech.[239] Usually, the state cannot assume the intent of a speaker, but instead, must demonstrate that intent. Free speech protection often requires the state to establish that a speaker has particularly malicious intent, or intends that his or her speech will produce harmful consequences.[240]

One prong of the U.S. criminal copyright standard requires only that the infringer intend to break the law, with no motivation of financial gain.[241] This is a low level of intent that might be met, for example, by showing that the original copyrighted work had an FBI warning explaining that copyright infringement is a criminal offense. That low level of intent is not reconcilable with historical concerns about intent in free speech jurisprudence.[242] To be speech protective in the area of criminal copyright, which is so often analogized to theft, the standard might require that the infringer intends to engage in theft rather than speech.

Free speech principles also suggest that for speech to be regulated, it must have particularly harmful consequences.[243] The "substantive evil must be extremely serious" for free speech protection not to apply.[244] Courts should be wary of impinging upon "speech that . . . creates no victims."[245]

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rectly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right.").

239. *See* Anjali Dalal, *Protecting Hyperlinks and Preserving First Amendment Values on the Internet*, 13 U. PA. J. CONST. L. 1017, 1069 (2011) (advocating that "applying the doctrine developed in *Sullivan*, courts should demand an intent-based standard that requires plaintiffs to show that defendants possessed the requisite *mens rea* to facilitate illegal behavior").

240. *See* Virginia v. Black, 538 U.S. 343, 365 (2003) (rejecting the state's use of cross burning as prima facie evidence for intent to intimidate, because the provision "blurs the line between these two meanings of a burning cross"); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (the speech must be "directed to inciting or producing imminent lawless action"); New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964) (requiring a showing of actual malice on the part of the reporter for liability to attach to statements made).

241. No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997); 17 U.S.C. § 506(a)(1)(B) (2012).

242. *See supra* notes 174–178 and accompanying text.

243. *See* Landmark Commc'ns v. Virginia, 435 U.S. 829, 842 (1978).

244. *See* Bridges v. California, 314 U.S. 252, 263 (1941) (establishing a "working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished").

245. Ashcroft v. Free Speech Coal., 535 U.S. 234, 236 (2002).

The U.S. criminal copyright standard targets copyright infringement done with the expectation of the receipt of anything of value, regardless of the scale of infringement and the level of harm to the rights holder.[246] The second prong of the U.S. standard targets infringement done with no malicious motivation, but at a certain scale: $1,000 of aggregate infringement in 180 days. That is not "serious" harm, especially when the $1,000 value estimate is made with an assumption that copyright infringing goods should be valued at full market value.[247] This low standard is justified by the aggregate harm to the industry. In the speech context, however, individuals should not be punished for the aggregate harm done to an industry; they should be punished only for the harm they themselves create.

## IV. THE EXPORTATION OF THE U.S. CRIMINAL COPYRIGHT STANDARD

United States criminal copyright law is speech-restrictive, and the United States is exporting it. Using the weight of its cultural and economic power, the United States is in the process of foisting its version of criminal copyright law on the rest of the world.[248] Between 1997 and the present, the United States has entered into a number of bilateral and plurilateral free trade agreements that provide a criminal standard more similar to the NET Act than to the current international standard established in TRIPS.[249]

United States free trade agreements, like U.S. law, deviate from the international requirement that countries criminalize copyright infringement done on a "commercial scale." Instead, similar to U.S. law, the free trade agreements split criminal copyright into two parts. The first offense criminalizes infringement done for "commercial advantage or private financial gain," with private financial gain often defined as the "receipt of anything of value."[250] The second offense criminalizes "significant infringement" with no motivation of financial gain.[251]

Appendix I shows the extent to which the Office of the United States Trade Representative has achieved its agenda. The United States currently

246. No Electronic Theft (NET) Act § 2(a), Pub. L. No. 105-147, 111 Stat. 2678 (1997); 17 U.S.C. § 506(a)(1)(B) (2012).

247. Goldman, *supra* note 195, at 426–27.

248. Sell, *supra* note 168, at 10–12.

249. *Id.* at 8.

250. 17 U.S.C. §§ 101, 506(a)(1)(A) (2012).

251. *Id.* § 506(a)(1)(B). This second definition mimics but does not precisely export its U.S. equivalent, which penalizes willful reproduction or distribution of over $1,000 in 180 days. *Id.* Using the term "significant infringement" instead of this statutory threshold could give other signatory states more autonomy, or could result in a lower threshold for criminal infringement with no for-profit motive than even the NET Act standard.

has free trade agreements with twenty countries.[252] Most of these agreements contain detailed intellectual property provisions, including provisions on criminal copyright law.[253] The three free trade agreements and two regional agreements examined as examples in the appendix do show some variation, depending on the pushback from the negotiating countries.[254] Columbia represents the most stringent criminal standard, followed by Australia, which resisted the insertion of "private" before "financial gain."[255] Chile achieved several important concessions in its negotiations, including a footnote explicitly leaving out *de minimis* infringement, no matter the motive.[256] The Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA") contains a particularly stringent standard, criminalizing "willful infringements that have no direct or indirect motivation of financial gain, provided that there is more than a *de minimis* financial harm."[257]

While international law currently does not explicitly criminalize aiding and abetting copyright infringement, the United States recently put forward provisions in the ACTA criminalizing aiding and abetting copyright infringement by companies.[258] This addition targets website owners, as evidenced by recent prosecutions of website owners by U.S. authorities. It can be expected to appear in future free trade agreements.[259] The United States also exports prior-restraint-like seizure procedures.[260] Free trade agreements and the ACTA both contemplate the pre-trial seizure and forfeiture of materials, likely including websites, used during infringement.[261]

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252. *Free Trade Agreements*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, http://www.ustr.gov/trade-agreements/free-trade-agreements (last visited Jan. 17, 2014).

253. *Trade Agreements*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, http://www.ustr.gov/trade-agreements (last visited Jan. 17, 2014).

254. *See infra* Appendix.

255. *See infra* Appendix.

256. *See infra* Appendix.

257. *See* Dominican Republic-Central America-United States Free Trade Agreement, Ch. 15, art. 26(a), Aug. 5, 2004 [hereinafter CAFTA], *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file934_3935.pdf (last visited Jan 29, 2014).

258. Anti-Counterfeiting Trade Agreement, art. 23(4) [hereinafter ACTA], *available at* http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf (last visited Jan. 29, 2014).

259. *See supra* Part I.

260. *See infra* Part V.

261. *See, e.g.*, U.S.-Australia Free Trade Agreement, ch. 17, art. 26(b), May 18, 2004, 431.6.M.1248 [hereinafter Australia FTA], *available at* tp://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text; U.S.-Chile Free Trade Agreement, ch. 17, art. 22(c), June 6, 2003, 421.6.M.1026 [hereinafter Chile FTA], *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text; ACTA *supra* note 258, at arts. 25(1), 25(3).

The exportation of U.S. criminal copyright law not only exports both a substantive criminal standard and enforcement mechanisms, it also transfers the U.S. understanding of the nexus between copyright and free expression: that copyright law receives no speech scrutiny. This approach is increasingly out of line with the public intuition about copyright and free speech.

The U.S. population does not appear to believe that intellectual property crimes are morally wrong.[262] By recent industry estimates in 2011, over 17% of U.S. Internet traffic is IP-infringing.[263] One-third of the U.S. population under 30 finds sharing music acceptable; one-quarter of Internet users aged 30-49 engage in file sharing; and 12% of users over 50 file share.[264]

The nature of intellectual property and the ways in which it differs from real property also contribute to the moral ambiguity of IP infringement.[265] While Congress may repeatedly use the analogy of real property theft,[266] the general public is ambivalent about equating copyright to property.[267] People have instincts about property, obtained from decades of personal experience with ownership rights in tangible objects and face-to-face transactions.[268] Intellectual property infringement, however, often involves intangible objects and an aggregate harm rather than face-to-face transactions and individualized harm, and is therefore not intuitively perceived as morally equivalent to real property theft.[269] Appreciating the aggregate effect of one's actions does not come naturally, so infringers rarely feel guilty for these actions.[270]

People appear to have a strong speech intuition that is invoked by excessive copyright enforcement. Recent protest movements in the United States and abroad successfully galvanized millions by describing copyright enforcement as "censorship."

Two recent mass protest movements show how the public's speech intuition has been harnessed to criticize copyright enforcement. The SOPA was the latest in a series of copyright enforcement bills that proposed block-

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262. Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 238 (2002); Hardy, *supra* note 194, at 306–08; Pyun, *supra* note 196, at 390–91; *see also* Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219, 225 (1997) (discussing the moral judgments of people in the United States and how such judgments shape law-related behavior).

263. Rufo, *supra* note 200, at 530.

264. *Id.*

265. Hardy, *supra* note 194, at 326; Moohr, *supra* note 171, at 766.

266. *See* Manta, *supra* note 189, at 473 (noting that policymakers rely on the property analogy and theft analogy).

267. Hardy, *supra* note 194, at 326.

268. *Id.* at 332.

269. *Id.* at 332, 338.

270. *Id.* at 338.

ing domain name service ("DNS") to websites alleged to be bad actors.[271] DNS-blocking functionally shuts down a website, although users in the know can easily route around the blockage.[272] To obtain a court order to block U.S.-directed sites, the United States Attorney General would allege criminal copyright infringement or facilitation of criminal copyright infringement.[273]

From November 16, 2011, the first day of House hearings on the SOPA, to January 18, 2012, a growing coalition of political insiders and popular outsiders used the Internet and the cause of preventing censorship to rally U.S. citizens against the SOPA legislation.[274] Activists, not lawyers, proposed the censorship framework.[275] The censorship framing reflected a popular intuition that enforcement encroached on speech rights, not a legal argument that SOPA violated the First Amendment.[276] The coalition was able to point to existing examples of web censorship done in the name of copyright enforcement, such as the yearlong takedown of the music blog Dajaz1.com.[277]

The first popular protest against SOPA occurred in November 2011, on the eve of the first House hearings. Advocates from Fight for the Future proposed calling the day "American Censorship Day" and encouraged sites to adopt "stop censorship" banners.[278] Four million people visited the

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271. *See* Yochai Benkler, *Seven Lessons from SOPA/PIPA/Megaupload and Four Proposals on Where We Go from Here*, TECHPRESIDENT (Jan. 25 2012), http://techpresident.com/news/21680/seven-lessons-sopapipamegauplaod-and-four-proposals-where-we-go-here; *see also* David G. Robinson, Following the Money: A Better Way Forward on the PROTECT IP Act, 24 (Sept. 18, 2011) (unpublished manuscript), *available at* http://ssrn.com/abstract=1930013.

272. *Id.* at 2.

273. James Temple, *Stop Online Piracy Act Would Stop Online Innovation*, SFGATE (Nov. 2, 2011, 4:00 AM), http://www.sfgate.com/business/article/Stop-Online-Piracy-Act-would-stop-online-2324440.php.

274. *See* Susan K. Sell, *Revenge of the "Nerds": Collective Action Against Intellectual Property Maximalism in the Global Information Age*, 15 INT'L STUD. REV. 67, 68–69, 72 (2013) (providing a list of SOPA's opponents). *See generally* EDWARD LEE, THE FIGHT FOR THE FUTURE: HOW PEOPLE DEFEATED HOLLYWOOD AND SAVED THE INTERNET—FOR NOW 2–4 (2013) (describing how people organized the largest Internet protest in history, plus the largest single-day demonstration on the streets of twenty-seven countries of the European Union).

275. *See* Cindy Cohn, Address at the Yale Law School Information Society Project (Feb. 14, 2013), *available at* http://ylsqtss.law.yale.edu:8080/qtmedia/isp/ISPCohen021413_s.mov (explaining that Fight for the Future advocates, not attorneys, proposed labeling SOPA "censorship").

276. *Id.* A First Amendment argument was later suggested by academics. *See* Laurence H. Tribe, The "Stop Online Piracy Act" (SOPA) Violates the First Amendment 1–4 (Dec. 6, 2011) (unpublished manuscript), *available at* http://www.scribd.com/doc/75153093/Tribe-Legis-Memo-on-SOPA-12-6-11-1 (listing several provisions of SOPA that violate the First Amendment).

277. Masnick, *supra* note 205.

278. Parker Higgins, *American Censorship Day Is This Wednesday—And You Can Join In!*, ELECTRONIC FRONTIER FOUNDATION (Nov. 10, 2011), https://www.eff.org/deeplinks/2011/11/american-censorship-day-wednesday-and-you-can-join.

AmericanCensorship.org site on the day of the hearing, and multiple companies joined in the protest.[279]

As of January 18, 2012, however, eighty members of Congress still supported SOPA and only thirty-one opposed it.[280] That same day, more than 15,000 websites went dark in a coalition-organized protest of SOPA; Google and Craigslist featured censorship bars on their homepages.[281] Over five million signatures supported Google's online petition against SOPA.[282] By Friday of that week, Congress shelved SOPA and its Senate counterpart, the Protect IP Act ("PIPA").[283]

The defeat of SOPA roused a transnational coalition that had already been fighting against another significant copyright enforcement effort, the ACTA.[284] Negotiated outside of existing international institutions as a large trade agreement, ACTA attempted to ratchet up international copyright, trademark, and patent standards and enforcement measures, including border measures and criminal enforcement.[285] Eight participating countries, including the United States, signed ACTA in October 2011.[286] The European Union and its member states had not yet signed ACTA when SOPA failed in the United States.[287]

On January 26, 2012, twenty-one member states of the EU, including the UK, signed ACTA.[288] In the three days leading up to signature, protests similar to the anti-SOPA protests broke out across Europe. In Poland, crowds of thousands of young people gathered, many holding up banners protesting censorship.[289] Some put tape over their mouths to signify their

279. Sell, *supra* note 274, at 76.

280. Josh Constine, *SOPA Protests Sway Congress: 31 Opponents Yesterday, 122 Now*, TECHCRUNCH (Jan. 19, 2012), http://techcrunch.com/2012/01/19/sopa-opponents-supporters.

281. Sell, *supra* note 274, at 77.

282. *Id.*

283. Jonathan Weisman, *Antipiracy Bills Delayed After an Online Firestorm*, N.Y. TIMES, Jan. 21, 2012, at B6.

284. Adam Clark Estes, *SOPA Stopped for Now, Anti-Censorship Activists Turn to ACTA*, THE WIRE (Jan. 26, 2012, 10:20 AM), http://www.thewire.com/technology/2012/01/sopa-stopped-now-anti-censorship-activists-turn-acta/47892/.

285. Kaminski, *supra* note 168, at 401–10.

286. David Kravets, *US Signs ACTA*, ARSTECHNICA (Oct. 4, 2011, 5:00 PM), http://arstechnica.com/tech-policy/2011/10/us-signs-international-anti-piracy-accord.

287. *Id.*

288. Charles Arthur, *ACTA Protests Break Out as EU States Sign Up to Treaty*, THE GUARDIAN (Jan. 27, 2012, 4:43 PM), http://www.guardian.co.uk/technology/2012/jan/27/acta-protests-eu-states-sign-treaty.

289. *Thousands March in Poland over ACTA Internet Treaty*, BBC NEWS EUROPE (Jan. 26, 2012, 10:40 AM), http://www.bbc.co.uk/news/world-europe-16735219.

fears.[290] As more of Europe considered adopting ACTA, protests mounted.[291] In Croatia, demonstrators carried banners reading, "Stop internet censorship."[292] In Warsaw, banners read "Down with censorship" and "Free internet."[293] Protests also occurred in Paris, Budapest, and Prague.[294] One article hypothesized that Eastern European countries and Germany were particularly sensitive about the intertwined history of state enforcement and surveillance.[295]

A coalition of insiders and outsiders harnessed the power of the Internet under the framework of "censorship" to stop the ACTA treaty in Europe.[296] In 2012, the European Parliament rejected the ACTA, and it died in Europe when the European Court of Justice refused to hear claims.[297]

These examples show that people around the world mobilized to protest copyright enforcement under the banner of free speech. The First Amendment approach to copyright has diverged not only from the international approach, but also from these popular intuitions about copyright and speech. Congress formed the current U.S. criminal copyright law with no judicial scrutiny and at odds with what the public sees as speech rights. The United States is using its strengths to export that law, and the international public is beginning to visibly push back.

## V. PATHOLOGIES OF THE CATEGORICAL APPROACH

The story of criminal copyright and the First Amendment provides an important point of comparison between the categorical approach to constitutional analysis and proportionality review. Categorical analysis can, in borderline cases, foster a divide between the popular understanding of rights and judicial protection. When there is an imbalance between the leg-

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290. Vanessa Gera, *ACTA Protests in Poland: Groups Fear Copyright Treaty Will Lead to Censorship*, HUFFINGTON POST (Jan. 24, 2012, 2:51 PM), http://www.huffingtonpost.com/2012/01/24/acta-protests-poland_n_1229110.html.

291. Charles Arthur, *ACTA Criticised After Thousands Protest in Europe*, THE GUARDIAN (Feb. 13, 2012, 2:37 PM), http://www.guardian.co.uk/technology/2012/feb/13/acta-protests-europe.

292. *Id.*

293. *Id.*

294. *Id.*

295. *See id.* (observing that "the accord has sparked concerns, especially in Eastern European countries as well as in Germany which is sensitive about its history with the Gestapo and Stasi secret police, over online censorship and increased surveillance").

296. *See* Mike Palmedo, *Mapping of Web Space Around the ACTA Debate*, INFOJUSTICE.ORG (Jan. 3, 2013), http://infojustice.org/archives/28226.

297. Margot Kaminski, *Positive Proposals for Treatment of Online Intermediaries* 5–6 (Program on Info. Justice and Intellectual Prop., Am. Univ. Wash. Coll. Law, Research Paper No. 2012-05, 2012), *available at* http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1029&context=research.

islature and the judiciary, the legislature may exploit that imbalance until the popular understanding of speech rights is broader than the judicial understanding.[298] Categorical analysis can thus give rise to a gap between popular perception and judicial doctrine on fundamental rights.

The categorical approach to the First Amendment fails to permit courts to step in when the state criminalizes speech that should be subject to lesser sanctions. The U.S. doctrinal lack of sensitivity to the scope of penalties, and whether they are administered by the state or a private actor, is a consequence of categorical reasoning.[299]

When categorical reasoning is combined with a complicated statutory regime, judges are particularly likely to abdicate analysis and defer to the legislature. Statutory regimes leave less room for judicial discretion in balancing rights, because such discretion is constrained by potential conflict with the legislature.[300] Copyright law is the perfect storm, where a detailed statutory regime meets categorical reasoning.

I do not claim that proportionality analysis is always more speech-protective. For non-borderline cases, categorical analysis protects more speech because it protects speech until that speech falls into a clearly delineated unprotected category.[301] Proportionality analysis, by contrast, requires that courts balance speech against other rights or government purposes—it does not dictate that speech always trumps other rights.[302] Thus, when foreign courts weigh copyright against speech, the strength of the European justifications for copyright can in fact trump speech concerns, especially where a court views the speech claim as weaker because the speech at hand is commercial.[303] But proportionality analysis is more speech-protective of unprotected speech, in its ability to permit judicial review and prevent judicial abdication over categorically unprotected speech.[304]

I also do not claim that the United States is alone in having an overeager legislature on copyright matters. Other countries have criminal copyright standards that overcriminalize.[305] In those countries subject to proportionality analysis, however, courts provide a mechanism for challenging the

298. *See supra* Part I.A.

299. *But see* Coenen, *supra* note 68, at 1000 n.32 (taking the position that penalty-sensitive free speech analysis need not result in a proportionality analysis, but rather that this failure to distinguish between levels of sanctions is a result of the categorical approach, and thus antithetical to it).

300. Balganesh, *supra* note 155, at 1578.

301. *See supra* Part I.A.

302. *See supra* Part I.B.

303. *See, e.g.*, *supra* note 103.

304. *See supra* Part I.B.

305. *See infra* Appendix.

enforcement of those laws and a framework for evaluating whether they are disproportionate as speech regulation.

The recent example of the ECHR's consideration of the Pirate Bay application, described by the court as one of the world's largest file sharing services on the Internet, shows how other courts examine the proportionality of criminal copyright sanctions that have gone effectively unexamined in the United States.

Two founders of the Pirate Bay application were convicted in Sweden of crimes in violation of the Copyright Act, sentenced to prison, and fined several million Euros.[306] The ECHR recognized that the convictions interfered with the right to freedom of expression.[307] It found, however, that the convictions were prescribed by law and pursued a legitimate aim.[308] The court then weighed the applicant's interest in freedom of expression against the state's interest in protecting the rights of copyright-holders.[309] It found that the Swedish state benefits from a wide margin of appreciation—a deferential standard of review—because it was balancing competing interests.[310] The ECHR concluded that the prison sentence and award of damages could not be regarded as disproportionate, in large part because the applicants had not taken any action to remove torrent files despite having been urged to do so.[311] Thus it declared the application inadmissible as ill founded.[312] Notably, however, the court appeared to consider the fact that other enforcement measures had not worked, before declaring the prison sentence proportionate.[313]

The scope of U.S. criminal copyright law demonstrates several failings of the categorical approach with regard to speech that falls outside of the First Amendment. Judicial abdication through categorical reasoning has permitted an overactive legislature to pass disproportionately punitive laws impacting speech.[314] Courts have few doctrinal options to use to declare copyright criminalization disproportionate. Unscrutinized criminalization allows state surveillance and other speech-related abuse. This disproportionate standard has begun to collide with public speech intuitions.[315] Efforts to spread the U.S. criminal regime internationally will fail if the re-

306. Neij v. Sweden, App. No. 40397/12, Eur. Ct. H.R., (Feb 19, 2013), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-117513.

307. *Id.*

308. *Id.*

309. *Id.* at 10–11.

310. *Id.*

311. *Id.* at 11–12.

312. *Id.*

313. *Id.*

314. *See supra* Part I.

315. *See supra* Part III.

gime continues to be seen by the public as impinging on free speech. Other regimes that use proportionality analysis should scrutinize the U.S. approach to criminal copyright law, recognizing that it contains implicit assumptions about the relationship between copyright and freedom of speech.

The United States itself may want to adopt features of proportionality analysis for speech that is currently considered outside the First Amendment's protection. This would not be as inconsistent with current doctrine as it might first seem. The Supreme Court recognized in *Reno* that criminalizing speech is problematic,[316] and recognized in *Stanley v. Georgia*[317] that a state cannot use all enforcement methods at its disposal, even against categorically unprotected speech.[318]

In cases where a legislature criminalizes speech that is categorically rejected from the First Amendment's protection, U.S. courts should look closer to enforcement standards, instead of abdicating scrutiny. Courts could give credence to the notion that criminalization is itself worth inspecting, even for categorically unprotected speech. Rather than employing ad hoc reasoning, courts could look, even within rational basis review, to how First Amendment doctrine maps onto existing bodies of pertinent law, such as criminalization theory, which describes when governments should criminalize acts instead of subjecting them to civil sanctions. The Supreme Court has peered within categorically unprotected speech before, but with no apparent principles. Using principled balancing, U.S. courts could examine whether and when criminalization is constitutionally permitted.

There may be additional places in U.S. speech law for proportionality principles; this Article begins a larger project to determine when and where they might apply.

## VI. CONCLUSION

A surprising situation has developed in which the United States has established a primitive copyright–free speech interface that it is now exporting to the rest of the world. The free speech approach used in other countries is, perhaps unexpectedly, more adept at handling copyright law. The U.S. exportation of its criminal copyright standard is also an exportation of its understanding that copyright enforcement should not be balanced against speech.

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316. *See* Reno v. ACLU, 521 U.S. 844, 886 (1997) ("[W]e presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it.").

317. 394 U.S. 557 (1969).

318. *Id.* at 559–60.

The United States might take advantage of the insights from proportionality analysis by importing a structured form of balancing back into First Amendment doctrine. It is not the position of this Article that the First Amendment import balancing tests wholeheartedly, as many elements of the categorical approach are highly speech protective. Importing balancing to analysis of speech currently abandoned by the First Amendment, however, could solve the problems addressed in this Article. For the moment, the United States is becoming the clear world outlier on copyright enforcement, and this is indicative of a larger pathology in the way the United States handles free speech.

## Appendix. Piracy Statutes

| | Willful? | For Profit? | Scale of Offense | Remedies | Pre-trial Seizure and Forfeiture | Aiding and Abetting |
|---|---|---|---|---|---|---|
| TRIPS[319] | Yes. | Unclear: "piracy . . . on a commercial scale" | Commercial scale | Imprisonment and/or monetary fine, "consistently with the level of penalties applied for crimes of a corresponding gravity" | No. Criminal forfeiture only. Seizure and forfeiture shall be available as a "remed[y]" (presumably after a trial and thus criminal forfeiture not civil), in "appropriate cases" where infringement was the "predominant use" of material. | None |
| U.S. Law: NET Act;[320] PRO-IP of 2008.[321] | Yes. | None. Just infringement of more than $1,000 in 180 days. Where there is a motive and no minimum, it is for commercial advantage or private financial gain, where private financial gain includes the receipt of anything of value. | One work is enough. | Imprisonment and fines | Yes, established in the PRO-IP Act Sec. 2323.[322] "any property used, or intended to be used, in any manner . . . to commit or facilitate the commission of an offense" | Removed from copyright law in 1976; however, federal aiding and abetting statute (18 U.S.C. §2) has been applied. |

319. TRIPS Agreement, *supra* note 184.

320. No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997).

| | Willful? | For Profit? | Scale of Offense | Remedies | Pre-trial Seizure and Forfeiture | Aiding and Abetting |
|---|---|---|---|---|---|---|
| ACTA[323] | Yes. | "at least those carried out as commercial activities for direct or indirect economic or commercial advantage" | "commercial scale," but includes "indirect economic . . . advantage" | "imprison-ment as well as monetary fines sufficiently high to provide a deterrent . . . consistently with the level of penalties applied for crimes of a corresponding gravity" | Probably: "its competent authorities have the authority to order the seizure of . . . any related materials and implements used in the commission of the alleged offence"[324] and "its competent authorities have the authority to order the forfeiture or destruction of all counterfeit trademark goods or pirated copyright goods."[325] No word of these forfeitures being after trial. | States must crimina-lize aiding and abetting of copyright infringe-ment.[326] Legal persons (compa-nies) must be held liable for criminal infringe-ment and aiding and abetting.[327] |

321. Prioritizing Resources and Organization for Intellectual Property (PRO-IP) Act of 2008, Pub. L. No. 110-403, 112 Stat. 4256, *available at* http://www.gpo.gov/fdsys/pkg/PLAW-110publ403/pdf/PLAW-110publ403.pdf.

322. *Id.* § 206(a) (quoting Section 2323 of the PRO-IP Act).

323. *See supra* note 258, at art. 23(1).

324. *Id.* at art. 25(1).

325. *Id.* at art. 25(3).

326. *Id.* at art. 23(4).

327. *Id.* at art. 23(5).

| | Willful? | For Profit? | Scale of Offense | Remedies | Pre-trial Seizure and Forfeiture | Aiding and Abetting |
|---|---|---|---|---|---|---|
| CAFTA [328] | Yes. | None, and need not be significant in size. "[W]illful infringe-ments that have no direct or indirect motivation of financial gain, provided that there is more than a *de minimis* financial harm." | "commer-cial scale includes significant willful infringe-ments of copyright or related rights, for purposes of commercial advantage or private financial gain, as well as willful infringe-ments that have no direct or indirect motivation of financial gain, provided that there is more than a *de minimis* financial harm" | "imprisonment or monetary fines, or both, sufficient to provide a deterrent to future acts of infringement" | "its judicial authorities shall have the authority to order the seizure of suspected counterfeit or pirated goods, any related materials and implements that have been used in the commission of the offense, any assets traceable to the infringing activity, and any documentary evidence relevant to the offense. Each Party shall provide that items that are subject to seizure pursuant to any such judicial order need not be individually identified so long as they fall within general categories specified in the order." | None. |

328. CAFTA, *supra* note 257.

| | Willful? | For Profit? | Scale of Offense | Remedies | Pre-trial Seizure and Forfeiture | Aiding and Abetting |
|---|---|---|---|---|---|---|
| FTA-Australia [329] | Yes. | None, if "significant wilful infringements . . . that have no direct or indirect motivation of financial gain"[330] | "[C]ommercial scale" is defined as including "willful infringements for the purposes of commercial advantage or financial gain."[331] Note that this does not include private financial gain, but does define financial gain broadly as including indirect gain. | Imprisonment and monetary fines "sufficiently high to provide a deterrent to infringement" | Probably: "judicial authorities shall have the authority to order the seizure of suspected . . . goods, any related materials and implements that have been used in the commission of the offence"[332] | No aiding and abetting |

329. Australia FTA, *supra* note 261.
330. *Id.* at art. 26(a)(i).
331. *Id.* at art. 26(a)(ii).
332. *Id.* at art. 26(b).

| | Willful? | For Profit? | Scale of Offense | Remedies | Pre-trial Seizure and Forfeiture | Aiding and Abetting |
|---|---|---|---|---|---|---|
| FTA-Chile[333] | Yes. | None, if significant infringement "significant aggregate monetary value, calculated based on the legitimate retail value of the infringed goods"[334] | "[C]ommercial scale" is defined as including infringement done "for a commercial advantage or financial gain." Note that this is not private financial gain. Crucial footnote 34 excludes *de minimis* infringements and mentions prosecutorial discretion.[335] | "Imprisonment and/or monetary fines that are sufficient to provide a deterrent to future infringements and present a level of punishment consistent with the gravity of the offense"[336] | Probably: "judicial authorities have the authority to order the seizure of suspected . . . pirated goods . . . assets legally traceable to the infringing activity. . . and implements that constitute evidence of the offense.[337] | No aiding and abetting |

333. Chile FTA, *supra* note 261.
334. *Id.* at art. 22(a)(ii).
335. *Id.* at art. 22(a)(i) n.34.
336. *Id.* at art. 22(b).
337. *Id.* at art. 22(c).

| | Willful? | For Profit? | Scale of Offense | Remedies | Pre-trial Seizure and Forfeiture | Aiding and Abetting |
|---|---|---|---|---|---|---|
| FTA – Columbia[338] | Yes. | None, if significant infringement "significant willful . . . infringements that have no direct or indirect motivation of financial gain" and "willful infringements for purposes of commercial advantage or private financial gain"[339] | "Commercial scale" but defined as "significant" OR infringements done "for purposes of . . . private financial gain," effectively getting rid of "commercial scale."[340] | "Imprisonment as well as monetary fines sufficient to provide a deterrent to future infringements"[341] | Probably: "judicial authorities shall have the authority to order the seizure of suspected . . . pirated goods, any related materials and implements that have been used in the commission of the offense". Using the word "suspected" indicates this is pre-trial. | No aiding and abetting |

338. U.S.-Columbia Free Trade Agreement, ch. 16, Nov. 22, 2006, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text.

339. *Id.* at art. 26.

340. *Id.*

341. *Id.* at art. 27(a).