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# Reconstructing the Contours of the Copyright Originality and Idea- Expression Doctrines Regarding the Right to Deny Access to Works

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# RECONSTRUCTING THE CONTOURS OF THE COPYRIGHT ORIGINALITY AND IDEA-EXPRESSION DOCTRINES REGARDING THE RIGHT TO DENY ACCESS TO WORKS

*By: Michael D. Murray**

ABSTRACT

*Access to innovative scientific, literary, and artistic content has never been more important to the public than now, in the digital age. Thanks to the digital revolution carried out through such means as super-computational power at super-affordable prices, the Internet, broadband penetration, and contemporary computer science and technology, the global, national, and local public finds itself at the convergence of unprecedented scientific and cultural knowledge and content development, along with unprecedented means to distribute, communicate, and access that knowledge.*

*This Article joins the conversation on the Access-to-Knowledge, Access-to-Medicine, and Access-to-Art movements by asserting that the copyright restrictions affecting knowledge, innovation, and original thought implicate copyright's originality and idea-expression doctrines first and fair use doctrine second. The parallel conversation in copyright law that focuses on the proper definition of the contours of copyright as described in the U.S. Supreme Court's most recent constitutional law cases on copyright*—Feist, Eldred, Golan, *and* Kirtsaeng—*interprets the originality and idea-expression doctrines as being necessary for the proper balance between copyright protection and First Amendment freedom of expression. This Article seeks to join together the two conversations by focusing attention on the right to access published works under both copyright and First Amendment law.*

*Access to works is part and parcel of the copyright contours debate. It is a "first principles" question to be answered before the question of manipulation, appropriation, or fair use is contemplated. The original intent of the Copyright Clause and its need to accommodate the First Amendment freedom of expression support the construction of the contours of copyright to include a right to access knowledge and information. Therefore, the originality and idea-expression doctrines should be reconstructed to recognize that the right to deny access to published works is extremely limited if not non-existent within the properly constructed contours of copyright.*

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## I. INTRODUCTION

Access to innovative scientific, literary, and artistic content has never been more important to the public than now, in the digital age.[1] Thanks to the digital revolution carried out through such means as super-computational power at super-affordable prices, the Internet, broadband penetration, and contemporary computer science and technology, the global, national, and local public finds itself at the convergence of unprecedented scientific and cultural knowledge and content development, along with unprecedented means to distribute, communicate, and access that knowledge.[2]

Nevertheless, members of the public at the local, national, and global level also enjoy unprecedented means to copy, manipulate, appropriate, and exploit innovative scientific, literary, and artistic con-

1. *See, e.g.*, Alina Ng, *Rights, Privileges, and Access to Information*, 42 LOY. U. CHI. L.J. 89, 115–16 (2010) (analyzing right to access issue under property law and economics); *see also* Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 109–29 (2002–2003).

2. *See* Jerome H. Reichman & Ruth L. Okediji, *When Copyright Law and Science Collide: Empowering Digitally Integrated Research Methods on a Global Scale*, 96 MINN. L. REV. 1362, 1365–68, 1476 (2012) (The work "trace[s]" the contradictory measures in copyright and related laws that have "increasingly impeded upstream scientific investigation" and thereby complicated the exploitation of downstream applications of research results. By over-extending the protection of scientific information and data, these laws have made it harder for all investigators "to build upon, rework, or further elaborate upon the contributions of others and to harness the astounding research potential of digital information technologies to their fullest extent."); Anthony E. Varona, *Toward a Broadband Public Interest Standard*, 61 ADMIN. L. REV. 1, 3–5 (2009); Peter K. Yu, *Bridging the Digital Divide: Equality in the Information Age: Forward*, 20 CARDOZO ARTS & ENT. L.J. 1, 29–31 (2002).

tent.[3] The risks presented by this appropriation and exploitation have led the courts and legislators of many nations and international bodies to make unprecedented, legally sanctioned changes in the ability to access content—many of which impose restrictions on the free access to content.[4] The Access-to-Knowledge, Access-to-Medicine, and Access-to-Art movements have arisen to challenge this trend.[5]

Patent law has been blamed for its allowance of rights holders, including non-practicing entities, to tie up technology and the means for innovation in both thickets of asserted rights and by "trolling" activities that abuse and dissuade competitors from drawing and building on patented discoveries and inventions.[6] Copyright law has the potential to quash innovation through its allowance of overly expansive definitions of rights, overly restrictive views of fair use for research and education, and through national and international laws that fail to properly govern digital-rights management and database-protection regimes.[7]

This Article joins the conversations on the Access-to-Knowledge, Access-to-Medicine, and Access-to-Art movements and the copyright contours debate by asserting that the copyright restrictions affecting knowledge, innovation, and original thought implicate copyright's

3. Lateef Mtima, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, 112 W. VA. L. REV. 97, 98–100 (2009); Jerome H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51, 67 (1997) (noting the problem of increased abilities to copy data as early as 1997).

4. Ann Bartow, *Electrifying Copyright Norms and Making Cyberspace More Like a Book*, 48 VILL. L. REV. 13, 16–17, 63–64 (2003); June M. Besek, *Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts*, 27 COLUM. J.L. & ARTS 385, 392, 447, 467–70, 476–77 (2004); Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. REV. 1095, 1097–98, 1103–04, 1109 (2003); Nicolo Zingales, *Digital Copyright, "Fair Access" and the Problem of DRM Misuse*, 2012 B.C. INTELL. PROP. & TECH. F. 1, 2, 6–7 (2012).

5. *See generally* James Boyle, *Foreword: The Opposite of Property?*, 66 LAW & CONTEMP. PROBS. 1, 1–6 (2003); Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1333–34, 1339–41 (2004); Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804, 820–21 (2008); Molly Beutz Land, *Protecting Rights Online*, 34 YALE J. INT'L L. 1, 1–3 (2009).

6. *See* David Fagundes & Jonathan S. Masur, *Costly Intellectual Property*, 65 VAND. L. REV. 677, 686–705 (2012); Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117, 2118–21 (2013); Mark A. Lemley, *Software Patents and the Return of Functional Claiming*, 2013 WIS. L. REV. 905, 906–10 (2013).

7. *See* Gwen Hinze, *Brave New World, Ten Years Later: Reviewing the Impact of Policy Choices in the Implementation of the WIPOWipo Internet Treaties' Technological Protection Measure Provisions*, 57 CASE W. RES. L. REV. 779, 780–81, 797–99 (2007); Jerome H. Reichman & Paul F. Uhlir, *Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist Intellectual Property Environment*, 66 LAW & CONTEMP. PROBS. 315, 321, 338–41 (2003); John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 B.Y.U. L. REV. 1201, 1204–05, 1209–14 (2005); Peter K. Yu, *Anticircumvention and Anti-Anticircumvention*, 84 DENV. U. L. REV. 13, 34–40, 58–63 (2006).

originality and idea-expression doctrines *first* and fair use doctrine *second*. The current conversation in copyright law that focuses on the proper definition of the contours of copyright as described in the United States Supreme Court's most recent constitutional law cases on copyright—*Feist*,[8] *Eldred*,[9] *Golan*,[10] and *Kirtsaeng*[11]—interpret the originality and idea-expression doctrines as being necessary for the proper balance between copyright protection and First Amendment freedom of expression. First Amendment law protects a right to expression along with a right to access knowledge and information. One objective of this Article is to link the contours debate to the access debate.

The major copyright fair use cases—*Sony*,[12] *Harper & Row*,[13] and *Campbell*[14]—preceded this discussion on the contours of copyright. Copyright fair use, as applied to creative works, has properly been the subject of much attention by content providers, potential users who would draw upon or exploit that content, consumers of content, and the courts, but the fair use analysis has been skewed toward an analysis of "use" that tends to contemplate the manipulation, appropriation, or exploitation of the work.[15] This Article asserts that the contours of copyright discussion should focus more precisely on access. Access to works is part and parcel of the contours debate. It is a "first principles" question to be answered before the question of manipulation, appropriation, or fair use is contemplated. The originality and idea-expression doctrines should be reconstructed so that the rights to allow or deny access to works are defined in a more limited manner according to the original intent and on-going public policy of the copyright clause, which is the balancing of First Amendment free-

8. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

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

10. Golan v. Holder, 132 S. Ct. 873 (2012).

11. Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351 (2013).

12. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

13. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

14. Campbell v. Acuff–Rose Music, Inc., 510 U.S. 569 (1994).

15. The debate here is rich and deep. For representative contributions, see Mark Bartholomew & John Tehranian, *An Intersystemic View of Intellectual Property and Free Speech*, 81 GEO. WASH. L. REV. 1 (2013); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions*, 1978–2005, 156 U. PENN. L. REV. 549, 623 (2008); Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 85 U. COLO. L. REV. 53 (2014); Michael J. Madison, *A Pattern Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004); Michael D. Murray, *What is Transformative? An Explanatory Synthesis of the Convergence of Transformation and Predominant Purpose in Copyright Fair Use Law*, 11 CHI.-KENT J. INTELL. PROP. 260 (2012); Neil W. Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011); Neil W. Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 11–14, 20–23 (2001) [hereinafter *Locating Copyright*]; Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012);

dom of expression and the related doctrines of the right to access knowledge and information.

This leads to the thesis of this Article: If the meta-theory of the copyright clause carried out through the originality and idea-expression doctrines is to promote and protect dissemination of and access to the ideas and information in the content of works, and not directly to promote and protect rights maximization, monopoly power, and merchandizing of owners and creators of works, and if this meta-theory is required for copyright to coexist with the First Amendment of the United States Constitution, then the supposed right to deny access to published works is not within the contours of copyright.

## II. Access Is a Constitutional Issue

Access to the content of published works is a constitutional issue under two provisions of the Constitution: art. I, § 8, cl. 8—"To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"[16] (the "Copyright Clause"); and the First Amendment—"Congress shall make no law . . . abridging the freedom of speech, or of the press";[17] (the "Free Speech Clause").

The Copyright Clause is meant to benefit and enrich the public with knowledge, culture, and all that can be gained from expressive works.[18] This is the primary and most important purpose for the copyright protection established in the Constitution.[19] The Copyright Clause is not intended primarily and directly to reward and enrich authors, artists, and rights holders.[20] Copyright in the United States is not a quid pro quo system.[21] It is true that the protections of copyright do work to benefit rights holders, and some rights holders make a lot of money from their copyrighted expressive works.[22] But the bundle of rights contemplated, construed as being part of the copyright, is conceived of and designed for the edification, education, and enrichment of the public and not primarily the artist.[23]

16. U.S. Const. art. I, § 8, cl. 8.

17. U.S. Const. amend. I.

18. Golan v. Holder, 132 S. Ct. 873, 888–89 (2012); *see also* Eldred v. Ashcroft, 537 U.S. 186, 211–15 (2003).

19. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984); *see also* Mazer v. Stein, 347 U.S. 201, 219 (1954).

20. *See Sony*, 464 U.S. at 429; *see also* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); *see also* Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932); Michael H. Davis, *Extending Copyright and the Constitution: "Have I Stayed Too Long?"*, 52 Fla. L. Rev. 989, 1011 (2000).

21. *Eldred*, 537 U.S. at 214.

22. *See* C. Edwin Baker, *First Amendment Limits on Copyright*, 55 Vand. L. Rev. 891, 900–02 (2002); *see also* Steven J. Horowitz, *Copyright's Asymmetric Uncertainty*, 79 U. Chi. L. Rev. 331, 337–42 (2012).

23. *Sony*, 464 U.S. at 431–32; *Twentieth Century Music*, 422 U.S. at 156; *Mazer*, 347 U.S. at 219.

The United States Supreme Court continues to construe and reconstruct the contours of copyright based on this doctrine and public policy. The vehicle most often employed is not the definitions of copyrightable subject matter in 17 U.S.C. §§ 101 and 102, but the originality and idea-expression doctrines promulgated under the Copyright Clause and 17 U.S.C. § 102. The originality doctrine in copyright achieves the constitutional requirement to accommodate the First Amendment by requiring original work—not copied—originating with the author claiming copyright.[24] This ensures that copyright protects and encourages new expression—not copied, repeated expression.[25] New ideas, new expression, new information, and new arts and creations further the First Amendment public policy that calls for new speech, new contributions to the dialogue, fresh thoughts, and new approaches that are protected to ensure a free exchange of ideas.[26] Copied, repeated, republished expression does not satisfy these goals of copyright and the First Amendment.[27]

The idea-expression doctrine prevents the enforcement of copyright over ideas.[28] An author has no rights at all to control or limit the use of ideas under the copyright scheme.[29] The ideas in works can be perceived, studied, borrowed, taken, adapted, and expressed for the benefit of the public without restriction by copyright much in the way that the First Amendment largely prevents the restriction or censorship of ideas in open and robust communication.[30]

The meta-policy of the originality doctrine, the idea-expression doctrine, and the First Amendment is to allow access to knowledge, information, and cultural works for the education and edification of the populous to promote progress of science and arts and to benefit the public.[31] Copyright requires originality—not copied and repeated ex-

24. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345–47 (1991).

25. *Id.*; *cf.* Campbell v. Acuff–Rose Music, Inc., 510 U.S. 569, 579 (1994) (finding the value of transformative works in their new expression).

26. *See generally Eldred*, 537 U.S. at 218–19; Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

27. *See generally Eldred*, 537 U.S. at 218–19, 221; *Harper & Row*, 471 U.S. at 558, 560.

28. Baker v. Selden, 101 U.S. 99, 104–05 (1879), *superseded by* 17 U.S.C. § 102; *see* Richmond Homes Mgmt. v. Raintree, Inc., 862 F. Supp. 1517, 1524 (W.D. Va. 1994) (recognizing that 17 U.S.C. § 102 supersedes the holding in *Baker*).

29. *See Harper & Row*, 471 U.S. at 549; Robert Kasunic, *Preserving the Traditional Contours of Copyright*, 30 COLUM. J.L. & ARTS 397, 401–05 (2007); Jessica Litman, *Reforming Information Law in Copyright's Image*, 22 U. DAYTON L. REV. 587, 604 (1997); *Locating Copyright*, *supra* note 15, at 11–14.

30. *See* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 166–69 (1998); Neil W. Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 227–33 (1998) [hereinafter *Democratic Principles*]; Neil W. Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 325 (1996).

31. *See generally Harper & Row*, 471 U.S. at 558–60; Fogerty v. Fantasy, Inc., 510 U.S. 517, 526 (1994); Sid & Marty Krofft Television Prods., Inc. v. McDonald Corp., 562 F.2d 1157, 1170 (9th Cir. 1977); *Democratic Principles*, *supra* note 30, at 231–32

pression—and requires the free trade in ideas.[32] The First Amendment seeks free trade in ideas and unrestricted expression. Neither system—copyright or First Amendment—is a reward system or a quid pro quo system, nor is it directly tied to benefitting speakers, authors, artists, and inventors.[33] Instead, we have a system that indirectly benefits speakers, authors, artists, and inventors as it directly benefits the public. Both the policy of copyright and the policy of the First Amendment argue in favor of access to creations.

## III. Access is a "First Principles" Question to be Answered Before Questions of Use

Many of the comments on the presentations of this Article have revolved around the question of use. Principally, how are we able to separate access from use? Is there no logical way to consider access without manipulation, control, and potential copying?

My answer is that access is a "first principles" question to be answered before the questions of manipulation, appropriation, misuse, or fair use are contemplated. Jumping to "use" is a typical exercise in copyright law issues because copyright deals with copying. But the question of access for the benefit of the public can and should be answered separately from any rights of the public to copy, manipulate, appropriate, and otherwise make additional uses other than access to the works. Access precedes use in the analysis here because the design of and public policy supporting copyright should consider access to works before it addresses the exploitation of the contents by either the initial author and creator or by secondary persons accessing the work.

As discussed in Section II above, the law of copyright finds its constitutional support and its doctrinal implementation through granting access to works and creating incentives and opportunities for greater and greater numbers of works for the public to access.[34] Just as an open and robust dialogue in the free trade and marketplace of ideas is the foundational principle of the First Amendment, so is access to the foundational good to be achieved of the copyright scheme.[35] The public cannot benefit from, be educated by, be enriched by, or be influ-

n.48; Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 Emory L.J. 393, 395–97 (1989).

32. *See generally* Michael D. Murray, *Copyright, Originality, and the End of the Scènes à Faire and Merger Doctrines for Visual Works*, 58 Baylor L. Rev. 779 (2006).

33. *See generally* Michael D. Murray, *DIOS MIO: The KISS Principle of the Ethical Approach to Copyright and Right of Publicity Law*, 14 Minn. J.L. Sci. & Tech. 89 (2013).

34. *See supra* text accompanying notes 19–31.

35. *See supra* text accompanying notes 26, 30, and 31.

enced in any way by works as to which the public has no access.[36] Without access the goals of these copyright and First Amendment policies fail.

I pause to clarify one more point that also has been raised in comments directed to this Article: I am not suggesting or arguing a limitation on authors' rights not to publish their works. True, the law has changed in this country, and in conformity with the international Berne Convention system, the United States has removed the necessity of publication in order to obtain copyright protection; in short, no publication is required, which in practical terms means that diary-writers, closet novelists, and recreational painters need not worry about a lack of copyright to preclude their otherwise unpublished works from being copied and exploited. I also am not arguing in favor of a concept of access for the public's benefit that breaks down our existing rules supporting privacy and the sanctity of one's home, office, or studio; and whether or not these locations are subject to privacy protection is a question for another day. My assertion here is that the contours of copyright, in order to conform to the constitutional requirements of the Copyright Clause and the First Amendment, must first define the access principle and then consider further rights of authors and creators against the public's appropriation, exploitation, and misuse of the contents of works.

## IV. The Supreme Court's Succession of Cases on Contours

In the nearly four decades following the passage of the 1976 Copyright Act, the Supreme Court and lower federal courts dealt with the question of manipulation and use of content. The Supreme Court in particular wrote a succession of cases on the *use* of copyrighted works in the 1980's and early 1990's—*Sony*,[37] *Harper & Row*,[38] and *Campbell*[39]—that wrestled with the concepts of exploitation, manipulation, appropriation, misuse, and fair use of the contents of works. Although these cases enjoy the priority of timing, they do not supersede the question of this Article: the proper construction of the contours of copyright with regard to *access* to works. The more recent succession of cases on contours began with *Feist*[40] and continued to *Eldred*,[41] *Golan*,[42] and *Kirtsaeng.*[43] These cases wrestle not with manipulation and

36. *See generally* Robert A. Kreiss, *Accessibility and Commercialization in Copyright Theory*, 43 UCLA L. Rev. 1 (1995) (developing a theory of the requirement of accessibility to works from the point of commercialization of the works).

37. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

38. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

39. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

40. Feist Publ'ns Pubs. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

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

42. Golan v. Holder, 132 S. Ct. 873 (2012).

43. Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351 (2013).

use of contents of works but with the concept of copyright itself by working to define the proper contours of copyright protection.

### A. *Feist*

*Feist* is the most logical starting point for this Section because it began the recent line of cases on the proper contours of copyright. Its facts are not particularly apt for an access-to-works discussion because the case involved the originality and idea-expression doctrines and how they are to be interpreted in the context of a compilation of uncopyrightable facts (telephone numbers and other information printed in telephone directories)—in other words, could a telephone directory be found to be an original and "creative"[44] copyrightable compilation and arrangement of uncopyrightable facts and ideas? Originality is the sine qua non of copyright.[45] Originality is the constitutionally required element mandating new, fresh, not copied, expressive works as the subject matter of copyright.[46] It is this definition of originality that promotes the understanding of the American copyright scheme as an "engine of free expression."[47]

The *Feist* Court discussed free expression and copyright in the context of explaining the rationale and justification of the idea-expression doctrine.[48] The doctrine holds that ideas found in works are to be freely copied, used, and exploited. Only the expression of the ideas—meaning the particular, original, wording, depiction, and expression of the ideas created by the author—is protected in copyright.[49] In order to forestall any argument that this is an unwelcome and ill-conceived balance for authors and creators, the Court emphasized that the copyright scheme in general and the originality and idea-expression doctrines in particular are expressly and intentionally created to promote

44. "Creative" is in quotation marks because it appears that the Court used the term "creative" incorrectly in *Feist* as a synonym for originality. *Feist*, 499 U.S. at 345. The Court stated that creativity is a sine qua non requirement of concept—true enough—but it allowed for a minimal degree of creativity, *id.* at 345, a requisite level that is extremely low, *id.*, only requiring a "slight amount of creativity," *id.* at 345, 359, stating that any minimal "creative spark" will suffice, no matter how crude, humble, or obvious it might be. *Id.* at 345. The vast majority of works produced are not created with a minute stroke of authorship that would suggest comparison to the duration of a spark. And there are few actual crude, humble, or obvious "sparks" in most actions of authorship and formation of works (welding of sculptures and wiring of electronic-based works notwithstanding). Therefore, the metaphoric use of "spark" in connection with the words "crude," "humble," "obvious," "minimal," and "low-level creativity" seems instead to be completely tied to the romantic notice of inspiration—and connected to the incorrect view that creativity in copyright means inspired, inventive, innovative, and novel—not creativity as creation and authorship.

45. *Id*. at 345, 348.

46. *Id.* at 348–49.

47. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

48. *Feist*, 499 U.S. at 349–50.

49. *Id.* at 348–49.

the progress of science and art.[50] Reward to the creator for the fruits of her labors is not the basis for the scheme. Use of any and all of the ideas in works is anticipated, desired, and encouraged—it is not only fair and just, but required. The Court stated, "[C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."[51]

Underlying facts and information may be copied "at will."[52] In referencing the watershed case *Baker v. Selden*,[53] the Court said, "The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be obtained without incurring the guilt of piracy of the book."[54] The originality and idea-expression doctrines are "the means by which copyright advances the progress of science and the useful arts."[55]

This is a key point upon which I build my thesis. The design of the contours of copyright relies on the policy of access to information in the arts and sciences. If access is denied or cut-off, or made practically inaccessible through onerous barriers, then the primary purpose of the copyright scheme is unfulfilled. Denial of access is not just ill-advised, it is not within the conception of the contours of a copyright. Access to the information and expression in works meets not only the goals of the copyright clause but it allows copyrights coexistence with the First Amendment, as discussed in the Sections on *Eldred* and *Golan* below.

### B. *Eldred*

In *Eldred*, the Supreme Court discussed the contours of copyright in the face of a challenge to Congress's extension of copyright terms for works already under copyright protection.[56] Two challenges were asserted: first, that the constitutional copyright power requires the terms of protection to be limited, and Congress had allegedly ignored this restriction and put into motion a system of potentially perpetual copyright—one that might grant an unlimited term for copyrights or an unlimited succession of terms of years.[57] Second, and more apropos to the topic of this Article, the challengers asserted that the First Amendment requires the cultivation and maintenance of a public domain for access, education, edification, and communication under the First Amendment, and extensions of copyright rob the public domain

50. *Id.* at 345–46, 349; Eldred v. Ashcroft, 537 U.S. 186, 189, 211 (2003); Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 5, 6 (1966).
51. *Feist*, 499 U.S. at 349–50.
52. *Id.* at 350.
53. Baker v. Selden, 101 U.S. 99, 104–05 (1879), *superseded by* 17 U.S.C. § 102.
54. *Feist*, 499 U.S. at 350 (quoting *Baker*, 101 U.S. at 103).
55. *Id.* at 350.
56. Eldred v. Ashcroft, 537 U.S. 186, 192–93 (2003) (identifying challenges to the Copyright Term Extension Act).
57. *Id.* at 193.

of works that properly, under their initial terms of protection, should fall into the public domain.[58] In rejecting these arguments, the Court addressed the issue not by focusing on the use of the contents and expression of copyrighted works, but how the First Amendment is accommodated through the originality, idea expression, and fair use doctrines.[59]

*Eldred* continues *Feist*'s development of the concept that the copyright scheme is an engine of expression:[60] "'The primary objective of copyright' is '[t]o promote the Progress of Science.'"[61] "The 'constitutional command,' we have recognized, is that Congress, to the extent it enacts copyright laws at all, create a 'system' that 'promote[s] the Progress of Science.'"[62]

The Court specifically described a system, not any particular required form for the system, while emphasizing, as it did, that a particular length of term or length of extension of a term of protection is not constitutionally mandated or prohibited as long as the system promotes the progress of the arts and sciences.[63] The Court reminded us that even a profit-making motive to exploit the copyright within its term is perfectly compatible with the system.[64] This is because the term of copyright controls who gets to exploit, use, and manipulate the contents of the creations. The term of copyright never has addressed nor has it ever limited or answered the first principles question of who should receive access to works before consideration of any resulting exploitation, use, or manipulation. As the Court stated, "[C]opyright gives the holder no monopoly on any knowledge. A reader of an author's writing may make full use of any fact or idea she acquires from her reading."[65] This certainly is an acknowledgment that the Court expects and anticipates access to works.

With regard to the First Amendment challenges to the term extension action, the Court specified that the Copyright Clause and the First Amendment were passed within a few years of each other, and the copyright scheme was developed in accordance with and to accommodate the requirements of the First Amendment.[66] Specifically, the idea-expression doctrine and the fair use doctrine were developed to accommodate free expression requirements.[67] The idea-expression

58. *Id.*
59. *Id.* at 198.
60. *Id.* at 217 (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985)).
61. *Id.* at 212 (quoting Feist Publ'ns Pubs. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991).
62. *Id.* (quoting Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 6 (1966)).
63. *Id.* at 212–13.
64. *Id.* at 212 n.18.
65. *Id.* at 217.
66. *Id.* at 219.
67. *Id.*

doctrine allows the free exploitation of ideas in works,[68] and the fair use doctrine allows the free exploitation of the expression of the works itself for certain public policy-driven and First Amendment purposes, such as education, research, teaching, scholarship, news reporting, commentary, and criticism.[69] The Court again reiterated an important distinction for the discussion here: that the First Amendment is most concerned with allowing unfettered ability to make one's own speech, not to make (or remake) the speeches of others.[70] Access to information and to artistic expression is the first principles issue here, not the right to copy, use, manipulate, and exploit that expression.

### C. *Golan*

*Golan v. Holder*[71] directly follows *Eldred*. The *Golan* case upheld the United States' passage and adherence to section 514 of the Uruguay Round Agreements Act ("URAA") that restored certain foreign works to copyright protection under United States law in conformity with WTO and TRIPS obligations.[72] The TRIPS obligations were to conform to all of the first twenty-one articles of the Berne Convention (on Copyright law), including Article 18, which called for recognition (or, in the case of the United States, restored recognition) of the copyrights of certain foreign works that had previously fallen into the public domain in the United States.[73] Several challenges were raised by educators, musicians, and others involved in the arts and entertainment field who craved the unrestricted right to perform, copy, teach, and distribute the entire works that previously resided in the public domain.[74] In the main, the claimants raised constitutional First Amendment challenges to the URAA because it removed works from the public domain in the United States, and the claimants argued that this was an impermissible restriction on their rights of speech and expression as well as a violation of the constitutional Copyright Clause requirement to give limited terms of copyright protection over works but then, they asserted, to place the works into the public domain and leave them there.[75] The Court rejected all challenges to the URAA.[76]

Although the URAA ended the free and unrestricted use of certain works previously in the public domain, the Court explained its rationale making two points very relevant to this Article. First, that the Copyright Clause's scheme encourages not only the creation of new

68. *Id.*
69. *See id.* at 219–20.
70. *Id.* at 221.
71. Golan v. Holder, 132 S. Ct. 873 (2012).
72. *See id.* at 875–78.
73. *Id.* at 880–83.
74. *Id.* at 883–84.
75. *Id.* at 884–94.
76. *Id.*

works but also the publication and dissemination of existing works.[77] The terms of the Copyright Clause, to "promote the Progress of Science and useful Arts" are meant to further the creation and spread of knowledge and learning.[78] Publication and dissemination are important steps—essential steps, in fact—toward granting access to published works.[79]

Second, the reason for the rejection of the First Amendment challenges is the same reason offered in *Eldred* and *Harper & Row*: the copyright scheme accommodates the First Amendment through the originality, idea expression, and fair use, not by defining terms of copyright protection.[80]

Under *Eldred* and *Harper & Row*, copyright is not just an acceptable limitation on speech, it is an "engine of free expression."[81] "[C]opyright supplies the economic incentive to create and disseminate ideas."[82] The contours of copyright (defined in *Golan* and *Eldred* as the idea-expression distinction and the fair use doctrine) are to carry out the "speech-protective purposes and safeguards" required by copyright law if it is to be properly balanced against the First Amendment.[83]

The proper construction of the contours of copyright in *Golan* does not mean that the public domain concept supersedes the right to design a scheme that both encourages creation, publication, and dissemination of domestic and foreign access to works of United States and foreign creators, but also accommodates the requirements of the copyright system and the First Amendment that requires the ideas of works maintained or restored to copyright protection to be freely used and exploited. This is possible only if these ideas are freely accessible.

### D. *Kirtsaeng*

*Kirtsaeng v. John Wiley & Sons, Inc.*,[84] asked whether the "First Sale" doctrine applies to protect a buyer or other lawful owner of a copy (of a copyrighted work) lawfully manufactured abroad such that the buyer or owner can bring that copy into the United States and sell it or give it away without obtaining permission to do so from the copyright owner. Under the facts of the case, the Court asked, Can someone who purchases, say at a used bookstore, a book printed abroad subsequently resell the book without the copyright owner's permis-

77. *Id.* at 887–89.
78. *Id.* at 887–88.
79. *See id.* at 888.
80. *Id.* at 889–92; Eldred v.Ashcroft, 537 U.S. 186, 219 (2003); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985).
81. *Golan*, 132 S. Ct. at 890 (quoting *Eldred*, 537 U.S. at 219; *Harper & Row*, 471 U.S. at 558).
82. *Id.* (quoting *Eldred*, 537 U.S. at 219; *Harper & Row*, 471 U.S. at 558).
83. *Id.*
84. Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351 (2013).

sion?[85] The Court answered both questions, "yes": the first sale doctrine does cover works created abroad and does allow persons who purchase or own works abroad to bring them into the United States for subsequent resale or distribution.[86] The specific issue and specific facts of the case are important in and of themselves, but, as would be expected with a Supreme Court case, the implications of the ruling are larger still and very important. Many parties in the education, library administration, museum, fine arts, and books selling and reselling fields, some of whom were motivated enough to file amicus briefs, were extremely troubled by the possibility (that did not come to pass) that they would not be able to enjoy unfettered rights under the First Sale Doctrine to display, trade, loan, resell, or distribute works (the actual objects) obtained abroad and brought in the United States.[87]

For purposes of this Article, the Court's answer, reaffirming a strong and robust role for the First Sale doctrine, indicates two things. First, copyright is meant to benefit the general public first and foremost and assist the information, education, enrichment, and edification of the public.[88] The ruling, along with the First Sale doctrine itself, significantly enhances these goals by allowing the display, borrowing, study, transfer, and distribution of copyrighted works without further involvement or approval of the original rights-holder.[89] Second, the Court affirms that the goal of copyright is not to enrich and advantage the rights-holder in its effort to maximize the profits and profit-potential of their works.[90] International and transnational creators and rights-holders, such as publishers, wanted to do just that—to carve up the world into separate markets that could be controlled by the creators and rights-holders so as to squeeze the most profits possible out of their works.[91] Profits are maximized by getting the most sales and the most profit for those sales from the greatest number of potential buyers of the work. To accomplish this, the rights-holder must charge the most for the works in the most developed and wealthiest markets and charge much less for the same works (with the same content) in less developed and less wealthy markets. This effort works only if entrepreneurial arbitrage agents, such as Mr. Kirtsaeng, are stopped from buying in the lower-price markets and reselling in the higher-price markets at a discount price for the higher-price market, but still at a price that is higher than the prevailing market price charged by the rights-holder for first sales in the lower-price market. In rejecting the profit-maximization position, the Court said, "[W]e can find no basic principle of copyright law that suggests that publish-

85. *Id.* at 1356–57.
86. *Id.* at 1358–71.
87. *Id.* at 1366.
88. *E.g.*, *id.* at 1363–64, 1366–67 (discussing public benefit of first sale doctrine).
89. *Id.*
90. *Id.* at 1370–71.
91. *See id.* at 1370.

ers are especially entitled to such rights."[92] More specifically, the Court said:

> [T]he Constitution's language nowhere suggests that its limited exclusive right should include a right to divide markets or a concomitant right to charge different purchasers different prices for the same book, say to increase or to maximize gain. Neither, to our knowledge, did any Founder make any such suggestion. We have found no precedent suggesting a legal preference for interpretations of copyright statutes that would provide for market divisions.[93]

### E. Grokster *and* Harper & Row *Do Not Undercut the Right of Access to Published Works*

While *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*[94] is not a copyright-contours case, it speaks to one aspect of the copyright scheme that is often associated with the contours cases, namely the balancing of creators' and right-holders' rights against the desire to spur technological innovation in methods of communication and dissemination. This case does not undermine my thesis. *Grokster* is a use case, not an access case. The focus on potential uses versus misuses is not removed from all consideration in copyright law; it is simply removed from my discussion because the contours issue and the question of access come first.

*Grokster*'s analysis, which follows a line of cases from *Sony*[95] through *Napster*,[96] evaluates not tools of access but tools and technologies that facilitate misuse and infringement. The works that were being copied and redistributed in *Sony*, *Napster*, and *Grokster* were all published, publically available works. No one was denied access to the works. The issue in these cases was whether you can make a tool that allows persons to retain and duplicate, and redistribute copies in an unregulated, unauthorized, and uncompensated manner, and then distribute the tool in a manner that communicates a motive and intention of inducement.[97] Inducement premises liability on purposeful, culpable expression and conduct to encourage and facilitate infringing activities, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.[98]

*Harper & Row* likewise does not undercut my thesis. The case states that copyright is intended to increase and not to impede the harvest of knowledge.[99] It attempts to preserve a careful balance between

92. *Id.*
93. *Id.* at 1371.
94. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).
95. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).
96. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).
97. *E.g.*, *Grokster*, 545 U.S. at 937.
98. *Id.*
99. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 545 (1985).

rights—the holders' ability to reap benefits from creations and the general public's ability to receive knowledge and information. Once again, the Supreme Court looks at misuse of copyrighted material—particularly unpublished copyrighted material. I am informed by *Harper & Row*, and express my thesis carefully that the limits on the right to preclude access to works I am discussing do not apply to unpublished works. A right to control the first publication of a work is described by the Supreme Court as essential to the copyright scheme.[100] To the extent that an argument in favor of access asserts that this right of access supersedes an author's right to control the first publication of a work, I do not support any such interpretation of the right. Aside from the defense of the right of first publication stated in *Harper & Row* against arguments of a right of access and of fair use obtained through purloining and preempting the first publication of a work, there are both moral and utilitarian justifications for the first publication right. Under moral rights theory, the author should receive the respect to determine the completeness and fitness of her work for publication. And in practical, utilitarian concerns, the author should be the one to determine the veracity, completeness, and ripeness of a work for publication so as to contribute the more true and most beneficial contribution of the work for the benefit of society. These goals are directly counteracted by an argument that the right of access supersedes the right to determine first publication.

## V. The First Amendment Doctrine of the Right of Access to Expression

Parallel to and directly supportive of the assertions of this Article is the First Amendment doctrine on the right of access to expression. Following the rebirth (or reinvigoration) of the First Amendment in the post-World War I-era cases,[101] the courts have written the law of expression to strive for public access to expression first, second, and foremost in First Amendment jurisprudence.[102]

Access is engrained in the policy behind the First Amendment.[103] Many of the best metaphors supporting free, unrestricted expression

100. *See id.* at 545–49.

101. *See generally* Schenck v. United States, 249 U.S. 47 (1919); Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919); Gitlow v. New York, 268 U.S. 652 (1925); Whitney v. California, 274 U.S. 357 (1927).

102. *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978); *see also* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 77 (1976); Va. St Bd. of Pharmacy v. Va. Citizens Cons. Coun., Inc., 425 U.S. 748 (1976); Martin v. City of Struthers, 319 U.S. 141, 143 (1943); Jerome A. Barron, Public Rights and the Private Press 21 (1981).

103. *See* Bd. of Ed., Island Trees Union Free Sc. Dist. No. 26. v. Pico, 457 U.S. 853, 866–67 (1982).

and communication of information depend on access.[104] As one prime example, a free and uninhibited "marketplace of ideas" means nothing if the doors to the marketplace are bolted.[105] "The 'marketplace of ideas' view has rested on the assumption that protecting the right of expression is equivalent to providing for it."[106] "A realistic view of the first amendment requires recognition that a right of expression is somewhat thin if it can be exercised only at the sufferance of the managers of [rights to the] communications."[107] "It would be a barren marketplace of ideas that had only sellers and no buyers."[108]

The prior restraint doctrine means that speech must be heard[109]—listeners must have access to the speech in all but the most outrageously dangerous circumstances of wartime information on troop movements or information that could lead to nuclear annihilation[110]—even if the speaker is to be liable for some effects of the speech after it is heard.[111] Eliminating for nearly all intents and purposes the prior restraint on speech separates access to the speech from the possible effects of the speech. Access is ensured even if the effects of the speech might produce other consequences for the speaker or those who hear and act further on the speech.[112]

Censorship law is all about access to information. Content-based restrictions require strict scrutiny because they deny the listeners' access to ideas and expression. They must be narrowly tailored and use

104. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (no "shedding" of constitutional rights at the "schoolhouse gate"); Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) (no right to "drown out" other speakers); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (marketplace metaphor). The famous "wall of separation" between church and state metaphor is less about public access to information and more about government neutrality. *See* Goodson v. Northside Bible Church, 261 F. Supp. 99, 103 (S.D. Ala. 1966); Letter from Thomas Jefferson, to Nehemiah Dodge et al., Danbury Baptist Ass'n (Jan. 1, 1802), *in* DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 148 (2002); *see also* HAIG BOSMAJIAN, METAPHOR AND REASON IN JUDICIAL OPINIONS 37 (1992); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 23–28 (1993).

105. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980); Griswold v. Connecticut, 381 U.S. 479, 482 (1965); *see also* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 7 (1989); Clay Calvert, *Where The Right Went Wrong in* Southworth*: Underestimating the Power of the Marketplace*, 53 ME. L. REV. 53, 66–68 (2001); *see also* Karl S. Coplan, *Ideological Plaintiffs, Administrative Lawmaking, Standing, and the Petition Clause*, 61 ME. L. REV. 377, 446 (2009).

106. Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1647–48 (1967).

107. *See id.* at 1648.

108. Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J. concurring).

109. Near v. Minnesota, 283 U.S. 697, 715 (1931).

110. *See* United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979).

111. Stephen R. Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 543–44 (1977); Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 4, 10–12, 30–31 (1989).

112. This happens to parallel the separation of access and use (appropriation, adaptation, and exploitation) of the content of works.

the least restrictive means to achieve their compelling government purpose—and what they must least restrict is *access* to the speech. Content-neutral regulations of speech using the intermediate scrutiny standard must allow "ample alternative channels for the communication."[113] Channels for what? For the public's or an audience's *access* to the communication. Not just one form of access, but *ample* alternative channels. The speaker already has the ideas and expression; nothing about censorship stops the speaker from possessing and using her own thoughts and ideas. Thus, the whole law regulating the censorship of free expression is built for the goal of allowing access to ideas, information, and expression.

In between the extremes of prior bans on speech and complete censorship of ideas and expression, case law further confirms the importance of access to First Amendment rights and freedoms. *Red Lion Broadcasting Co. v. FCC* upheld the "equal time" requirements of the Fairness Doctrine mandating that both sides (or all sides) of a public issue in debate must be permitted by broadcasters.[114] The rationale was completely driven by the need of the benefits to the public from receiving both sides of the debate. The Court stated, "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."[115]

*Martin v. City of Struthers*[116] held that the right to distribute speech necessarily protects the right to receive it.[117] *Stanley v. Georgia*[118] held that the Constitution protects the right to receive information and ideas, which extends as far as the right to receive the information and ideas in a work of pornography.[119] *Time, Inc. v. Hill*[120] protected the right to read and receive information on any matter of public interest.[121] *Griswold v. Connecticut*[122] held that "[t]he right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, [and] the right to read."[123]

113. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

114. Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

115. *Id.* at 390; *but see* CBS v. Democratic Nat'l Conv., 412 U.S. 94 (1973) (holding the Fairness Doctrine does not apply to paid advertisements on broadcast media).

116. Martin v. City of Struthers, 319 U.S. 141 (1943) (upholding a right to distribute leaflets).

117. *Id.* at 143.

118. Stanley v. Georgia, 394 U.S. 557 (1969) (holding mere possession of pornography may not be proscribed by state law).

119. *See id.* at 564.

120. Time, Inc. v. Hill, 385 U.S. 374, 388 (1967).

121. *See id.* at 388.

122. Griswold v. Connecticut, 381 U.S. 479 (1965).

123. *Id.* at 482.

*Lamont v. Postmaster General*[124] upheld the right to unimpeded access to mail.[125] And *New York Times Co. v. Sullivan*[126] promoted an "uninhibited, robust, and wide-open" debate and discussion for the purpose of access to ideas and information.[127]

## VI. Conclusion: Bars to Access Serve Authors' and Creators' Interests over the Public in an Unconstitutional Manner

The recent trends to support and strengthen bars to access are purely functional in nature, driven only by convenience to rights-holders.[128] The United States and other countries seek protections for authors, creators, and rights-holders seemingly without regard or acknowledgment of the right of the public to access works.[129] Such ill-considered limitations and bars to access are unconstitutional under both the Copyright Clause and the First Amendment. What is likely to be justified is a limit on manipulation, exploitation, and misuse of content—but not a complete limit on access.

The concept of access not only precedes the question of use but it is the primary constitutional question that must be answered in the contours debate. Use is secondary, just as exploitation and profit-making is a secondary consideration both with regard to authors, creators, and right-holders and with regard to the general public. My concern is not with controls on exploitation; copying itself is a potential exploitation when the "copying" itself is not simply a technological necessity required to achieve access to the work.[130]

I acknowledge that if we do not allow limits or bars to access to published works, it will be harder for rights-holders to protect and fully exploit their authors' rights. This concern would be stronger *if* we had a reward, quid pro quo system directly tied to benefit authors, artists, and inventors—but we don't. The American copyright system is rife with limitations on exploitation and profit-making. The first sale doctrine is a limit on profit-making and maximizing the exploitation of works. The originality requirement is a limit. All the exclusions of un-

124. Lamont v. Postmaster General, 381 U.S. 301(1965).

125. *Id.* at 306–07.

126. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

127. *Id.* at 270.

128. *See* Timothy K. Armstrong, *Digital Rights Management and the Process of Fair Use*, 20 Harv. J.L. & Tech. 49, 56–58 (2006); Maria Lillà Montagnani, *A New Interface Between Copyright Law and Technology: How User-Generated Content Will Shape the Future of Online Distribution*, 26 Cardozo Arts & Ent. L.J. 719, 741–47 (2009); Yu, s*upra* note 7, at 61–64.

129. *See generally* sources cited *supra* note 130.

130. As in the case where a work exists only in a computer-readable, computer-accessible format, so that in order to access the work, a "copy" must be downloaded or "created" on the viewing device. What is done further with the "copy" required for access is a question of use—manipulation, exploitation, or adaptation—that is not encompassed in my discussion of the requirement of access.

copyrightable subject matter in section 17 U.S.C. § 102 are limits. The idea-expression doctrine is a limit, and all of the other originality doctrines—merger, scènes à faire, and utilitarian works—are limits on the breadth of copyrights that limit profit-making and maximizing the exploitation of works. The fair use right allows for *someone else's* complete appropriation, exploitation, and profit-making use of your own works (under the appropriately defined circumstances of the right, each of which has strong publicly beneficial aspects).

Originality and idea-expression design is to allow complete exploitation of any idea—defined specifically as "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[131] Complete limits on access deny the operation of the idea-expression doctrine and the fair use doctrine. The Supreme Court has repeatedly held that both doctrines are necessary for the coexistence of the copyright system and First Amendment system.[132] Access to content is the defining characteristic and requirement of both the idea-expression doctrine and the fair use doctrine.

Therefore, because the meta-theory of the Copyright Clause carried out through the originality and idea-expression doctrines is to promote and protect dissemination of and access to works, and not directly to promote and protect rights maximization, monopoly power, and merchandizing of owners and creators of works, and if this meta-theory is required for copyright to coexist with the First Amendment of the United States Constitution, then the supposed right to deny access to published works is not within the contours of copyright.

131. 17 U.S.C. § 102(b) (2012).

132. Golan v. Holder, 132 S. Ct. 873, 889–92 (2012); Eldred v. Ashcroft, 537 U.S. 186, 219 (2003); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349–50 (1991); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558, 560 (1985).