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To Speak, Perchance to Have a Dream: The Malicious Author and Orator Estate as a Critique of the Digital Millennium Copyright Act's Subversion of the First Amendment in the Era of Notice and Takedown

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**TO SPEAK, PERCHANCE TO HAVE A DREAM:
THE MALICIOUS AUTHOR AND ORATOR ESTATE
AS A CRITIQUE OF THE DIGITAL MILLENNIUM
COPYRIGHT ACT'S SUBVERSION OF THE FIRST
AMENDMENT IN THE ERA OF NOTICE AND
TAKEDOWN**

*Michael Bradford Patterson**

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I. INTRODUCTION

The “I Have a Dream” speech¹—one of the most influential and immediately recognizable speeches of the twentieth century—is a profoundly moving oration that galvanized a nation. However, if a video of the speech was posted online without permission of the copyright owner, it would be removed—likely by using a takedown notice.² The power that a deceased author’s estate has over the author’s copyrighted works long after death can have severe consequences on anyone who posts them online, and can have a chilling effect on free speech.³ As Bill Rutherford, the executive director of the Christian Leadership Conference, said, “I think Martin Luther King must be spinning in his grave . . . he gave his life for his ideas of justice, peace and love. He attempted his entire life to communicate ideas for free. To communicate, not to sell.”⁴ Though this assertion is undercut by the fact that King himself established a copyright over “I Have a Dream” shortly after his speech, the fact remains that someone would likely have to pay twenty dollars to view the speech legally in its entirety, by purchasing the DVD.⁵ Today, the rights to the video of the speech are held by EMI Music Publishing, a music publishing company, which means that video footage of the speech cannot be uploaded without EMI’s permission.⁶ The King Estate is not alone; throughout the past 100 years, many other estates, such as the James Joyce and J.D. Salinger estates,⁷ have leveraged copyright to sell rather than disseminate the famous words of their forebears. With the onset of takedown notices, the power that estates hold over public discourse is greater than ever. The ability of the estates of

¹ Martin Luther King, Jr., *I Have a Dream*, delivered at the Lincoln Memorial, Washington, D.C. (Aug. 28, 1963), available at <http://www.americanrhetoric.com/speeches/mlkhaveadream.htm>.

² Alex Pasternack, *Copyright King: Why the “I Have a Dream” Speech Still Isn’t Free*, MOTHERBOARD, Aug. 28, 2013, <http://motherboard.vice.com/blog/copyright-king-why-the-i-have-a-dream-speech-still-isn-t-free> (where a content owner requests that allegedly infringing material be removed from the web pursuant to the Digital Millennium Copyright Act, 17 U.S.C. § 512).

³ See, e.g., Timothy Egan, *Estate Loses Suit to Control Plays on Janis Joplin*, N.Y. TIMES, Dec. 18, 1991, <http://www.nytimes.com/1991/12/18/theater/estate-loses-suit-to-control-plays-on-janis-joplin.html>.

⁴ Pasternack, *supra* note 2.

⁵ Alex Pasternack, *Web Activists are Waging a Guerilla War to Free Martin Luther King from Copyright*, MOTHERBOARD (Jan. 22, 2013, 5:40 PM), <http://motherboard.vice.com/blog/internet-activists-are-waging-a-guerrilla-war-to-free-martin-luther-king-from-copyright>.

⁶ *Id.*

⁷ See, e.g., D.T. Max, *The Injustice Collector: Is James Joyce’s Grandson Suppressing Scholarship?*, NEW YORKER, June 19, 2006, available at <http://www.newyorker.com/magazine/2006/06/19/the-injustice-collector>; Gordon Bowker, *James Joyce’s Grandson Stephen and Literature’s Most Tyrannical Estate*, DAILY BEAST (June 14, 2012), <http://www.thedailybeast.com/articles/2012/06/14/james-joyce-s-grandson-stephen-and-literature-s-most-tyrannical-estate.html> (discussing both Joyce and Salinger estates).

authors and orators to pull speeches, letters, and biographies down from the public sphere has grown past the level considered by the Supreme Court only eleven years ago when they held that the Copyright Term Extension Act comported with the First Amendment.⁸

I limit this inquiry to author and orator estates because inherent in this discussion is the idea that works created by authors and orators have distinct educational value. Though as a society we generally shy away from valuing different forms of speech, when copyright is abused online the effect may be felt disparately by those seeking to educate or create derivative works that may shine light on the original. For example, it is not beyond the realm of possibility that high schoolers would be better educated by viewing the video of the “I Have a Dream” speech rather than reading it in their textbook. Dissemination through video is a powerful medium that is threatened by our current Digital Millennium Copyright Act (DMCA) system.⁹

It’s unsurprising that estates zealously attempt to protect the copyrights they hold: The estate of a dead celebrity can be extremely lucrative.¹⁰ For instance, in 2012, Michael Jackson’s estate raked in \$145 million, while Elizabeth Taylor’s estate was able to make \$210 million.¹¹ Entertainers are not the only people who make money long after they are dead—Charles Schultz, the creator of the Peanuts comic strip characters, made \$37 million in 2012.¹²

Because estates have the potential to make great sums of money after the creator of the work is dead, they have a vested interest in keeping that work secure and profitable. The internet is still relatively young and has transformed the way that we transmit information and display our created works. It only makes sense, therefore, that there is a legal mechanism in place allowing rights holders to assert copyright claims over material posted online. However, the current system is one that encourages bad copyright claims by “malicious” estates, and chills free expression on the Web.¹³ Moreover, the DMCA’s notice and takedown system inherently fails to record how often these negative effects

⁸ *Eldred v. Ashcroft*, 537 U.S. 168 (2003) (petitioners made a First Amendment free speech challenge to the extension of copyright protection to life of the creator plus seventy years. The Court found that the CTEA comported with the First Amendment and contained adequate safeguards of free expression.).

⁹ See Digital Millennium Copyright Act, Pub. L. No. 105-340, § 512, 112 Stat. 2860, 2877–86 (1998).

¹⁰ Rebecca F. Ganz, Note and Commentary, *A Portrait of the Artist’s Estate as a Copyright Problem*, 41 LOY. L.A. REV. 739, 740 (2008).

¹¹ Dorothy Pomerantz & Zach O’Malley Greenburg, *The Top Earning Dead Celebrities 2012*, FORBES, Oct. 24, 2012, http://www.forbes.com/special-report/2012/1024_dead-celebrities.html.

¹² *Id.*

¹³ Emily Meyers, Note, *Art on Ice: The Chilling Effect of Copyright on Artistic Expression*, 30 COLUM. J.L. & ARTS 219, 233–34 (2007).

occur. The system, which pulls material off the Web, also disincentivizes content uploaders from fighting back or litigating a fair use defense against a copyright holder.¹⁴ Thus, many of the “chilling effects” are felt, even if not seen directly. However, the estate cases highlighted above are indicative of the underlying problem online as this Note will further discuss.

Part II of this Note will discuss the United States copyright law landscape, from its origins in the Constitution to its current state on the internet, including a discussion of two Supreme Court challenges (*Eldred v. Ashcroft* and *Golan v. Holder*) to modern copyright laws. Part III will analyze how the considerations the Supreme Court took into account in those cases have been warped by our current DMCA system. In order to protect these First Amendment considerations, several solutions will be discussed, including a modified licensing system, an automation of the DMCA system, and several proposals from legal commentators.

II. BACKGROUND

This section will discuss the current copyright landscape, beginning with basic rights of copyright holders. The discussion will then turn to defenses to copyright claims under section 106 of the Copyright Act. Next, three estates will be presented as examples of how estates wield great power in our current copyright system. Two challenges to our current copyright system, *Eldred v. Ashcroft* and *Golan v. Holder* will be used to illuminate the First Amendment considerations of copyright law. Next, a discussion of the DMCA will show how our copyright protections often operate on the internet.

A. BASIC RIGHTS OF COPYRIGHT HOLDERS

The United States Constitution itself provides the origins of copyright law by granting Congress the power to “[P]romote 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.”¹⁵ The rights of copyright holders are codified in section 106 of the Copyright Act.¹⁶ These protections begin from the instant an author fixes a work in a tangible medium of expression (such as a writing, drawing, sculpture, etc.) so long as the work is

¹⁴ See, e.g., David S. Olson, *First Amendment Based Copyright Misuse*, 52 WM. & MARY L. REV. 537, 554–55 (2010) (noting that a Stanford professor’s fair use claim against the Joyce estate was made possible through access to pro bono counsel, not available to most ordinary parties).

¹⁵ U.S. CONST. art. I, § 8, cl. 8.

¹⁶ Copyright Act of 1976, 17 U.S.C. §§ 101–810 (2012).

sufficiently original.¹⁷ Copyright protection for a work lasts for the life of the author, plus seventy years after the death of the author.¹⁸

The Copyright Act grants several exclusive rights to authors.¹⁹ First, the right of reproduction is arguably the most important protection afforded author and orator estates, and violations of this section lead to many lawsuits. Copyright holders also possess the right of adaptation—or “derivative works.”²⁰ This right requires those who write something based on a novel or play to get the creator’s permission to avoid infringing the underlying work.²¹ It is this derivative right which led the J.D. Salinger estate to file a successful suit to prohibit publication in the United States of Frederick Colting’s *60 Years Later: Coming Through The Rye*.²² Another right belonging to authors or their estates is the right to control the first distribution of each copy of a work to the public.²³ Estates invoke this right when they want to prohibit letters and other works of the author from becoming known. In addition, estates possess the power to prevent the public performance²⁴ or display of a work,²⁵ and the ability to control a digital audio transmission²⁶ (such as the “I Have a Dream” speech). Lastly, creators enjoy some moral rights to prevent their names from appearing on material falsely attributed to them, and stop others from claiming creation of their own works; however, these moral rights only apply to works of visual art in limited runs.²⁷

B. DEFENSES TO COPYRIGHT CLAIMS UNDER § 106

The Copyright Act additionally codifies several affirmative defenses available to alleged infringers in sections 107–122.²⁸ Perhaps the most important defense in the context of derivative works is “fair use.”²⁹ Courts analyze the frequently

¹⁷ *Id.* § 106(1)–(5). See *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 347 (1991); see also 17 U.S.C. § 102(b).

¹⁸ See 17 U.S.C. § 302(a); see also Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (retroactively extending copyright protection an additional twenty years beyond the 1976 Copyright Act’s term for works created on or after January 1, 1978).

¹⁹ 17 U.S.C. § 106(1). See also David Shipley, *An Overview of Intellectual Property Law* (on file with the *Journal*).

²⁰ 17 U.S.C. § 106(2).

²¹ *Id.*

²² *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010).

²³ See 17 U.S.C. § 106(3).

²⁴ *Id.* § 106(4).

²⁵ *Id.* § 106(5).

²⁶ *Id.* § 106(6).

²⁷ *Id.* § 106A.

²⁸ *Id.* §§ 107–122.

²⁹ *Id.* § 107; see also H.R. REP. NO. 94-1476, at 65 (1979).

litigated fair use defense using a balancing test.³⁰ First, a court considers “the purpose and character of the use, including whether such use is of commercial nature or is of nonprofit educational purposes.”³¹ Second, a judge will consider “the nature of the copyrighted work.”³² A work that is more scientific, technical, or less artistic weighs in favor of finding fair use.³³ This second factor embodies the fact-expression dichotomy, which draws a line between unprotected facts or ideas and an author’s protected expression of that idea.³⁴ Third, a court evaluates the “amount and substantiality of the portion used in relation to the copyrighted work as a whole.”³⁵ The court is more likely to find a fair use defense when smaller portions of the work are used.³⁶ The final factor is “the effect of the use upon the potential market for or value of the copyrighted work.”³⁷

C. PROTECTION OF AUTHOR AND ORATOR ESTATES

Suits asserted to invoke the protection of one of the exclusive rights are often invoked by estates seeking to limit the dissemination of a work. Recently, the Martin Luther King estate, the J.D. Salinger estate, and the James Joyce estate have exemplified the great power estates can wield.

1. *Martin Luther King Estate*. In the mid-1990s, CBS sought to create a segment of *The 20th Century with Mike Wallace* called “Martin Luther King, Jr. and the March on Washington.”³⁸ In creating the segment, CBS used about sixty percent of Martin Luther King’s famous “I Have a Dream” speech delivered on August 28, 1963 to a crowd of about 200,000, and broadcast to a nationwide audience.³⁹ About a month after delivering the speech, King had taken the necessary steps to seek copyright protection under the Copyright Act of 1909 by registering his copyright before publishing the speech.⁴⁰ When CBS

³⁰ See 17 U.S.C. § 107 (providing four factors to consider).

³¹ *Id.*

³² *Id.*

³³ *What is Fair Use?*, <http://www.youtube.com/yt/copyright/fair-use.html> (last visited Sept. 6, 2014).

³⁴ See *Feist Publications, Inc.*, 490 U.S. 340, 348 (“The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the *sine qua non* of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author. . . . Others may copy the underlying facts from the publication, but not the precise words used to present them.”); see also 17 U.S.C. 102(b).

³⁵ 17 U.S.C. § 107(3).

³⁶ *What is Fair Use?*, *supra* note 33.

³⁷ 17 U.S.C. § 107(4).

³⁸ *Estate of Martin Luther King, Jr. v. CBS, Inc.*, 194 F.3d 1211, 1213 (11th Cir. 1999).

³⁹ *Id.*

⁴⁰ *Id.*

created the segment, however, it failed to negotiate a license with his estate, and his estate sued for copyright infringement.⁴¹ There was some question in the lower courts as to the facts, but there was evidence that an advance text of the speech was available in a press tent that day.⁴² In addition, the Southern Christian Leadership Conference sent out a newsletter with the exact words of the speech.⁴³ On appeal by the state, the Eleventh Circuit Court of Appeals held that the estate did have the authority to prohibit the speech from being broadcast.⁴⁴ Since the authority to broadcast the speech was granted to a limited group for a limited purpose, the restrictions on copying and reproducing were implied.⁴⁵ In overturning summary judgment for CBS, the Eleventh Circuit relied on precedent indicating that distribution to the new media for the purpose of news coverage is only a limited publication⁴⁶ and that, here there was a genuine issue of material fact as to whether a publication had occurred.⁴⁷

2. *J.D. Salinger Estate*. Another estate is notorious for its vigorous use of copyright, originating with the author himself: the estate of J.D. Salinger. J.D. Salinger is best known for the book *The Catcher in the Rye*, published in 1951.⁴⁸ After he stopped publishing books in 1965, he shunned his acquired fame, attempting to avoid journalists and fans alike—essentially becoming what Holden Caulfield had attempted to become in *The Catcher in the Rye*.⁴⁹ He tried to keep his unpublished works secret (there is evidence he continued to write regularly and kept his writings in a fireproof safe in his home),⁵⁰ and would not allow alteration of his published works even though by doing so he was forgoing any possible royalties.⁵¹ Despite his attempt to fade back into obscurity, his ability to do so was severely diminished as his notoriety for closely guarding his personal life and works reached almost the same heights as his

⁴¹ *Id.*

⁴² *Id.*

⁴³ Since there was a legal question as to whether King's permission had been given for the distribution at the tent or through the newsletter, the court disregarded this evidence at the summary judgment stage. See *Estate of Martin Luther King, Jr. v. CBS Inc.*, 13 F. Supp. 2d 1347, 1348 (N.D. Ga. 1993).

⁴⁴ *Estate of Martin Luther King, Jr.*, 194 F.3d at 1218.

⁴⁵ *Id.* See also *Burke v. Nat'l Broad. Co.*, 598 F.2d 688 (1st Cir. 1979) (superseded by statute) (allowing a man who filmed animal behavior and gave the film to a professor for use in lectures to recover when the professor released the film to a British company).

⁴⁶ *Estate of Martin Luther King*, 13 F. Supp. 2d at 1216.

⁴⁷ *Id.* at 1220.

⁴⁸ J.D. SALINGER, *THE CATCHER IN THE RYE* (1951).

⁴⁹ *Id.* at 26.

⁵⁰ Kate O'Neill, *Copyright Law and the Management of J.D. Salinger's Literary Estate*, 31 CARDOZO ARTS & ENT. L.J. 19, 29 (2012).

⁵¹ *Id.*

fame for literature in his final years.⁵² In a rare interview from 1976, speaking about an unpublished set of short stories that were going to be released to the public, Salinger said, “Someone’s appropriated [the stories]. It’s an illicit act. It’s unfair. Suppose you had a coat you liked and somebody went into your closet and stole it. That’s how I feel.”⁵³ He sued for copyright infringement with some regularity, but two cases from the Second Circuit are particularly pertinent—*Salinger v. Colting*⁵⁴ and *Salinger v. Random House*.⁵⁵

In *Random House*, Salinger appealed to the Second Circuit an order denying his motion for a preliminary injunction against the defendants Ian Hamilton and Random House, who were seeking to publish a biography of Salinger called *J.D. Salinger: A Writing Life*.⁵⁶ This biography would have included unpublished letters Salinger wrote to his friends and colleagues between 1939 and 1961, including letters to Judge Learned Hand and Ernest Hemingway.⁵⁷ In May of 1986, Salinger received a draft version of this biography and discovered that these letters had been donated to various university libraries.⁵⁸ He immediately registered seventy-nine of his unpublished letters for copyright protection and directed his lawyers to object to any publication of the biography until the defendants removed all material from his unpublished letters.⁵⁹ The defendants failed to comply and asserted a fair use defense when Salinger subsequently sued for infringement.⁶⁰ The District Court judge found fair use, explaining that “Hamilton’s appropriation of copyrighted expressions are too minimal to subject Salinger to any serious harm.”⁶¹ On appeal to the Federal Circuit Judge Newman granted a preliminary injunction, stating that even though the use of the letters for a biography leans in favor of finding fair use, biographers do not face a dilemma of infringing on copyright when they take only factual information from the letters.⁶² However, Hamilton had used sentences in a way that “exceed[ed] that necessary to disseminate the facts,” thereby also capturing Salinger’s expression.⁶³ Moreover, the copied words were a very important part of the biography, which weighed against the defendants on the third factor of

⁵² *Id.*

⁵³ Lacey Fosburgh, *J.D. Salinger Speaks About His Silence*, N.Y. TIMES, Nov. 3, 1974, at 1, available at <http://www.nytimes.com/books/98/09/13/specials/salinger-speaks.html>.

⁵⁴ *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010).

⁵⁵ *Salinger v. Random House*, 811 F.2d 90 (2d Cir. 1987).

⁵⁶ *Id.* at 92.

⁵⁷ *Id.* at 92–93.

⁵⁸ *Id.* at 93.

⁵⁹ *Id.*

⁶⁰ *Id.* at 94.

⁶¹ *Id.* (quoting *Salinger v. Random House*, 650 F. Supp. 413, 428 (S.D.N.Y. 1986)).

⁶² *Id.* at 96.

⁶³ *Id.* at 98.

the fair use test.⁶⁴ The court denied Hamilton's fair use defense because the ability to copy expressive content of unpublished letters did not interfere with "the process of enhancing public knowledge of history or contemporary events."⁶⁵

Twenty years later, shortly before his death, Salinger filed another infringement claim against Frederick Colting, author of *60 Years Later: Coming Through the Rye*.⁶⁶ In *Colting*, Salinger alleged that Colting's main character of the novel Mr. C was obviously intended to be Holden Caulfield, the protagonist from Salinger's *Catcher in the Rye*, as an old man.⁶⁷ In addition, the novel included Salinger himself as a character.⁶⁸ The trial court granted Salinger a preliminary injunction, and held that the defendants were unlikely to be able to mount a fair use defense—because, among other things, the defendant was at that point calling the book a literary critique, but had previously called it a sequel.⁶⁹ The court also emphasized "some uses . . . so patently infringe another's copyright, without giving rise to an even colorable fair use defense, that the likely First Amendment value in the use is virtually nonexistent."⁷⁰ After his death, Salinger's family reached a settlement with Mr. Colting, denying him the rights to publish *60 Years Later* in the United States.⁷¹ As one commentator reflected, "[I]n the end, Salinger could not put the genie back in the bottle, though his faithful estate did manage to deny the genie an American visa, for what that's worth."⁷²

3. *James Joyce Estate*. The James Joyce estate has also prolifically sought to invoke the protections of copyright law. Currently, the James Joyce estate is managed by Joyce's grandson, a man who insists on being referred to by his full name—Stephen James Joyce.⁷³ Since obtaining control of the estate, Joyce crusaded to prohibit use of his grandfather's works.⁷⁴ Though there were around 1,500 of Joyce's letters in libraries and archives throughout the world, should anyone attempt to publish those letters, they would be met with a copyright claim from Stephen Joyce.⁷⁵ The Joyce estate forbade the publishing

⁶⁴ *Id.* at 98–99; *see also* 17 U.S.C. § 107(3).

⁶⁵ *Salinger v. Colting*, 607 F.3d 68, 100 (2d Cir. 2010).

⁶⁶ *Id.* at 71.

⁶⁷ *Id.* at 71–72.

⁶⁸ *Id.* at 72.

⁶⁹ *Id.* at 82.

⁷⁰ *Id.* at 82–83.

⁷¹ Will Wilkinson, J.D. *Salinger's Miserly Legal Legacy*, COPYWRONGS BLOG (Jan. 17, 2011, 11:57 PM), <http://www.economist.com/blogs/prospero/2011/01/copywrongs>.

⁷² *Id.*

⁷³ Max, *supra* note 7.

⁷⁴ *Id.*

⁷⁵ *Id.*

of an epilogue to a biography of Joyce's wife, which noted the years that Joyce's daughter Lucia spent in a mental hospital battling schizophrenia.⁷⁶ Stephen Joyce then announced that he had destroyed all letters from Lucia and correspondence between Lucia and a former romantic partner.⁷⁷ However, he remarked that he had "not destroyed any papers or letters in my grandfather's hand, yet."⁷⁸

Through the years, the Joyce Estate has also litigated to try to halt public readings of Joyce's works. The estate even told a performance artist planning to recite a portion of *Finnegans Wake* onstage that he had "already infringed" the estate's copyright.⁷⁹ The performer, Adam Harvey, later learned that there was no real legal way for Stephen Joyce to stop his performance within the British legal system.⁸⁰ In addition, the Joyce estate spent twenty years denying the request by singer Kate Bush to use part of *Ulysses*.⁸¹ Bush first asked for permission to use Molly Bloom's (an important character in *Ulysses*) soliloquy as part of her song "The Sensual World."⁸² Finally, in 2011 Stephen Joyce allowed Bush to use the lyrics, at which point she re-released the song under the title "Flower of the Mountain."⁸³ In a display of the arbitrariness with which estates may wield copyright power, Stephen Joyce had previously permitted the same lyrics to be used in the Euro-pop dance hit "Yes" by Dutch pop singer Amber.⁸⁴ Though the EU considers Joyce's works to be in the public domain, many of his works retain their copyright protections in the U.S.⁸⁵

The Joyce estate's most famous copyright battle came in 2006 with professor Carol Schloss.⁸⁶ Schloss wrote a book about Joyce's daughter entitled *Lucia Joyce: To Dance in the Wake*, and the estate forced her to remove much of the book's content.⁸⁷ *Lucia* was met with mixed reviews, not in small part because Schloss was unable to back up her contentions with sufficient

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ D.T. Max, *Kate Bush's Rewrite, Reasons to ReJoyce?*, NEW YORKER, Apr. 11, 2011, <http://www.newyorker.com/books/page-turner/kate-bushs-rewrite-reason-to-rejoyce>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Joyce Works in Copyright and in the Public Domain*, INT'L JAMES JOYCE FOUND., <http://joycefoundation.osu.edu/joyce-copyright/fair-use-and-permissions/about-law/public-domain> (last updated Apr. 2012).

⁸⁶ Max, *supra* note 7; *see also* Ganz, *supra* note 10.

⁸⁷ *Id.*

evidence.⁸⁸ She later uploaded a supplement to the book designed to comport with U.S. fair use doctrine.⁸⁹ Shloss then sued the estate to gain rights to the published works and family letters. When the parties eventually reached a settlement, the court awarded Shloss \$240,000 in legal fees.⁹⁰

D. MODERN COPYRIGHT AND FIRST AMENDMENT CONCERNS

1. *Sonny Bono Copyright Term Extension Act.* As shown by these estates, there are major First Amendment concerns implicated when estates assert power over their copyright works. In 1998, Congressman and singer Sonny Bono sponsored the Copyright Term Extension Act (CTEA), which defines our modern copyright landscape.⁹¹ Critics often derisively call this act “The Mickey Mouse Protection Act,” because it passed right before Mickey Mouse would have entered the public domain.⁹² The CTEA protected other lucrative copyrighted works as well, including the song “Yes! We have No Bananas” and Winnie the Pooh.⁹³

The CTEA made several important changes to copyright law. Most importantly, the Act increased the duration of copyright for both current and future copyrighted works.⁹⁴ Before the CTEA, copyrights lasted from the time of the work’s creation until fifty years after the creator died, whereas now they last from time of creation until seventy years after the death of the author.⁹⁵ Though the Act did not restore copyright protections to anything then already in the public domain, it did extend protection to many works that were about to enter the public domain until the year 2018.⁹⁶ There is an exception in the law that allows libraries, archives, and nonprofit educational institutions to essentially treat works as they would have been treated before the law was

⁸⁸ Cynthia Haven, *Stanford Researcher Gets Six-Figure Settlement from James Joyce Estate*, STAN. REP. (Sept. 28, 2009), <http://news.stanford.edu/news/2009/september28/shloss-joyce-settlement-092809.html>.

⁸⁹ Sam Whiting, *Biographer Took on Joyce’s Heirs to Quote Him*, SFGATE (Mar. 18, 2010), <http://www.sfgate.com/entertainment/article/Biographer-took-on-Joyce-s-heirs-to-quote-him-3269891.php>.

⁹⁰ Haven, *supra* note 88.

⁹¹ Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

⁹² Jeff John Roberts, *Will Copyright be Extended 20 More Years? An Old Debate Returns*, GIGAOM, Aug. 20, 2013, <http://gigaom.com/2013/08/20/will-copyright-be-extended-20-more-years-an-old-debate-returns/>.

⁹³ Eldred v. Ashcroft: *A Primer*, WASH. POST, Jan. 15, 2003, http://www.washingtonpost.com/wp-srv/technology/articles/eldredprimer_100902.htm.

⁹⁴ See 17 U.S.C. §§ 108, 303 (2012).

⁹⁵ Office of the Gen. Counsel, *Summary of Federal Laws*, CATH. U. AM., <http://counsel.cua.edu/fedlaw/ctea.cfm> (last updated May 2, 2013).

⁹⁶ See Roberts, *supra* note 92.

passed if they are being used for preservation, scholarship, or research.⁹⁷ However, this exception only applies if the work is not subject to normal commercial exploitation, cannot be obtained at a fair price, and the copyright owner can stop use of the work if they provide notice.⁹⁸

Miriam Nisbet, legislative counsel to the American Library Association, argued that the CTEA would hurt the flow of information on the internet by limiting the accessibility of information. Nisbet saw this as the main purpose of the internet.⁹⁹ In addition, she argued that the extension of copyright that far into the future shifts the balance between creators and the public overly towards the creators' favor.¹⁰⁰

2. *Eldred v. Ashcroft*. Others criticized the CTEA's term extension as well. Eric Eldred, who ran the Eldritch Press (an online publisher of public domain works), challenged the CTEA shortly after its passage.¹⁰¹ Other publishers of literature, sheet music, film and the American Library Association joined Eldred's challenge.¹⁰² Harvard Law professor Lawrence Lessig argued the case.¹⁰³ The Walt Disney Company, the Motion Picture Association of America, the Recording Industry Association of America, and the American Society of Composers, Authors, and Publishers supported the government.¹⁰⁴ Eldred challenged the law based on two grounds: first, that the Constitution's Copyright Clause was violated and, second, that the law violated the First Amendment protection of free speech.¹⁰⁵ The Supreme Court ultimately upheld the CTEA as valid both under the Copyright Clause and the First Amendment.¹⁰⁶

Writing for the majority, Justice Ginsburg offered several reasons why the CTEA did not violate the First Amendment. First, the temporal relation between the passage of the Copyright Clause and the First Amendment

⁹⁷ See Office of the Gen. Counsel, *supra* note 95; see also 17 U.S.C. § 108.

⁹⁸ 17 U.S.C. § 108(h)(2)(A)–(C).

⁹⁹ See *Eldred v. Ashcroft: A Primer*, *supra* note 93 (“We see the Internet as a way of expanding the accessibility of information for people, [and] information that may have been only available to a few people. We hate to see that potential limited in such a way.”).

¹⁰⁰ See *id.* (“It just takes [copyrights] so far into the future that the balance that you’re talking about seems to be entirely in favor of the creators and leaving out any benefit to the public.”).

¹⁰¹ *Id.*

¹⁰² *Id.* (plaintiffs included a publisher of genealogies, sheet music publishers, and dealers of rare books).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Eldred v. Ashcroft*, 537 U.S. 186, 198 (2003).

¹⁰⁶ *Id.*

reasoning indicated that they are compatible with each other.¹⁰⁷ In addition, Justice Ginsburg emphasized that current copyright laws contained First Amendment protections by only protecting an author's individual expression, rather than the underlying facts.¹⁰⁸ Justice Ginsburg also relied on the protections of the fair use defense as another bulwark against First Amendment encroachment.¹⁰⁹ Finally, Justice Ginsburg noted that the CTEA provides additional First Amendment safeguards, such as allowing libraries to reproduce and distribute copies of certain published works for scholarly purposes during the twenty years added by the Act, and an exemption for small businesses from paying performance royalties on music played from licensed electronic mediums.¹¹⁰

Justice Ginsburg also found the third argument that the respondents brought lacked merit. Eldridge argued that under *Turner Broadcasting System, Inc. v. FCC* this was an undue burden of the First Amendment like the statute at issue in *Turner*.¹¹¹ Ginsburg distinguished this case because the CTEA is not a "must carry" provision; it is essentially the opposite and, therefore, does not likewise implicate "the heart of the First Amendment."¹¹² Concluding, she simply reiterated that existing First Amendment safeguards were "generally adequate" and confirmed the constitutionality of the CTEA.¹¹³

Justice Breyer dissented, arguing that this extension essentially makes the copyright term "virtually perpetual."¹¹⁴ The grant benefits not creators themselves, but their "heirs, estates, or corporate successors. Most importantly, its practical effect is not to promote, but to inhibit the progress of 'Science'—by which word the Framers meant learning or knowledge."¹¹⁵ Justice Breyer also argued that under the First Amendment Congress lacked authority to pass the CTEA, as it risked serious "expression-related harm"—by restricting the propagation of copyrighted works, by interfering with efforts to educate, and by

¹⁰⁷ *Id.* at 219 ("This proximity [in time] indicates that, in the Framers' view, copyright's limited monopolies are compatible with the speech principles. Indeed, copyright's purpose is to *promote* the creation and publication of free expression.").

¹⁰⁸ *Id.* ("[T]his idea/expression dichotomy strikes a balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." (quoting *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 105 S. Ct. 2218)).

¹⁰⁹ *Id.* at 220 (referring to 17 U.S.C. § 107).

¹¹⁰ *Id.*

¹¹¹ *Id.*; see also *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (a statute required cable operators to hold some stations open through their cable systems to promote local networks met intermediate scrutiny because it was content neutral).

¹¹² *Eldred*, 537 U.S. at 220 (quoting *Turner*, 512 U.S. at 641). A "must carry" provision compels, rather than prohibits, a carrier broadcasting of a certain kind of speech by carriers. *Id.* at 220–21.

¹¹³ *Id.*

¹¹⁴ *Id.* at 243 (Breyer, J., dissenting).

¹¹⁵ *Id.*

benefiting private financial institutions of corporations and heirs at the expense of the public.¹¹⁶ For these reasons, Justice Breyer felt that the statute was untenable under the Copyright Clause, read in the light of its First Amendment restrictions.¹¹⁷

In 2007, the Ninth Circuit reevaluated the holding of *Eldridge* in light of a First Amendment challenge to the Copyright Renewal Act of 1992, which “eliminated the renewal requirements for works created between 1964 and 1977 and thus extended their term,” and the CTEA, which “effected a further extension.”¹¹⁸ The court in *Kable* ultimately decided that the discussions in *Eldred* were not dicta, and reaffirmed that retroactively extending the term of existing copyrights does not violate the First Amendment.¹¹⁹ Furthermore, the court agreed that “safeguards such as fair use and the idea/expression dichotomy [sufficiently] vindicate the speech interests affected by the CRA and the CTEA.”¹²⁰ In all, the court essentially repeated the majority’s arguments in *Eldridge*, putting to rest any lingering First Amendment judicial challenges to the recent extensions in copyright protection.

3. *Golan v. Holder*. In addition to *Eldred*, the Supreme Court also discussed copyright concerns intersecting with the First Amendment in *Golan v. Holder*.¹²¹ This suit challenged the Uruguay Rounds Agreements Act, which applied copyright protections to foreign works between the years 1923–1989 (before the United States joined the Berne Union).¹²² In effect, it took many works out of the public domain, including works created in countries that had a copyright relationship with the U.S. but did not have a valid U.S. copyright, works created in countries with which the United States lacked a copyright relationship (such as Russia and China), and all sound recordings from eligible foreign countries published after February 15, 1972.¹²³ According to Marybeth Peters, head of the U.S. Copyright Office, the number of works affected by the Act would “probably number in the millions.”¹²⁴ The Act’s passage meant that those who had their copyrights “restored” would now charge fees for works that the challengers previously used for free.¹²⁵

¹¹⁶ *Id.* at 266.

¹¹⁷ *Id.* at 266–67.

¹¹⁸ *Kahle v. Gonzales*, 487 F.3d 697, 699 (2007).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 700 (citing *Eldred*, 537 U.S. at 219–20).

¹²¹ 132 S. Ct. 873 (2012).

¹²² *Id.* at 903 (Breyer, J., dissenting).

¹²³ *Id.* at 904 (copyright relationships entail some form of reciprocal international copyright protections).

¹²⁴ *Id.*

¹²⁵ *Id.* (noting, as an example the score of Shostakovich’s Preludes and Fugues Op. 87, the price of which has risen sevenfold).

In *Golan v. Holder*, Justice Ginsburg, again writing for the majority, analyzed the URAA under the First Amendment.¹²⁶ She noted that a restriction of the freedom of expression guaranteed by the First Amendment is the “inherent and intended effect of every grant of copyright.”¹²⁷ However, unlike in *Eldred*, the petitioners had access to the materials before they were pulled from the public domain.¹²⁸ Nevertheless, Justice Ginsburg argued that the text of the Copyright Clause and the historical record did not prevent Congress from restoring copyrights.¹²⁹ She also held that nothing warranted “exceptional First Amendment solicitude for copyrighted works that were once in the public domain.”¹³⁰ In reaching this conclusion, Justice Ginsburg rejected the argument that there were any public “vested-rights,” noting that no one in the public gains ownership rights as to formerly protected material once that material passes into the public domain.¹³¹ In addition, Justice Ginsburg supported the majority’s conclusion by noting that section 514 of the Act did not entirely prohibit public access—it merely required licensing. As an example, Ginsburg offered that “Peter and the Wolf could once be performed free of charge; after § 514 the right to perform it must be obtained in the marketplace.”¹³² Without this practice, orchestral concerts with copyrighted music would not exist unless the original composer performed them, indicating that Congress had included necessary public access protection.¹³³

Furthermore, Justice Ginsburg also observed that implementing the Berne Agreement standardized a copyright regime across countries, and put foreign works in the position they would be in if the URAA had been in effect at the time they were published.¹³⁴ In her view, this spared creators the continued effects of deprivation of royalties for their works until their copyright terms expire, rather than taking away works from users.¹³⁵

Justices Breyer and Alito took a different view from the rest of the Court.¹³⁶ In Justice Breyer’s dissent, he argued that the URAA did not promote the production of new material and imposed high costs that would severely restrict dissemination of works that could otherwise serve educational or cultural

¹²⁶ *Id.* at 889 (majority opinion).

¹²⁷ *Id.*

¹²⁸ *Id.* at 875, 891.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 892.

¹³² *Id.* at 893.

¹³³ *Id.* at 892–93.

¹³⁴ *Id.* at 889–91.

¹³⁵ *Id.*

¹³⁶ *Id.* at 899 (Breyer, J., dissenting).

purposes.¹³⁷ Justice Breyer then analyzed the poor outcomes and restrictions on dissemination springing from the Act's practical effects.¹³⁸ First, by affording new protections to works previously in the public domain, those who could once use works freely would often have to pay a high price.¹³⁹ For example, Justice Breyer noted how many orchestras and school music programs would be unable to afford the new prices, and therefore would have to go without the music they were once able to use for free.¹⁴⁰

Next, Justice Breyer criticized the Act's large administrative costs.¹⁴¹ Those wishing to use pre-existing works must first determine whether it is a work with restored copyright, find the copyright holder, and then negotiate a fee.¹⁴² This is particularly problematic for "orphan works"—those works that were old and obscure, or otherwise assigned to a copyright owner who proves difficult to track down.¹⁴³ There are millions of "orphan works," and the cost of finding the authors could be prohibitively high.¹⁴⁴ Justice Breyer also argued that administrative costs were counterproductive because they will tempt users to pirate works rather than do without them.¹⁴⁵ Though he did not find this to be a content-based restriction, in concluding his dissent Justice Breyer argued that the speech related harms in the case raised a First Amendment question as to whether there were reasonable justifications for the harms that the Act would impose.¹⁴⁶

E. NOTICE AND TAKEDOWN—DIGITAL MILLENNIUM COPYRIGHT ACT

1. The Basics of Notice and Takedown. The DMCA also shapes our modern copyright law landscape and was created to try to strike a balance between internet service providers (ISPs), internet hosts, and users.¹⁴⁷ The DMCA includes a "safe harbor provision" in the Online Copyright Infringement Liability Limitation Act.¹⁴⁸ The purpose of the provision is essentially to protect from infringement liability the service providers who cannot keep track

¹³⁷ *Id.* at 899–912.

¹³⁸ *Id.* at 900.

¹³⁹ *Id.* at 904–05.

¹⁴⁰ *Id.* at 905.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 906.

¹⁴⁶ *Id.* at 907–08.

¹⁴⁷ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2873–74 (Oct. 28, 1998).

¹⁴⁸ 17 U.S.C. § 512(b) (2012).

of posts they facilitate on their site.¹⁴⁹ In order to fall within the safe harbor, an ISP must not have knowledge of or financial benefit that can be directly traced from the infringing content present on the network, must have a copyright policy and inform its subscribers of that policy, and must list an agent to deal with copyright complaints.¹⁵⁰ Once providers find out from the copyright owner that they are hosting potentially copyright infringing material, the provider has a duty to take it down and a duty to inform the person who uploaded the content; however, the provider has no duty to investigate whether the material actually infringes on copyright.¹⁵¹

2. *Notice and Takedown in Practice.* The system of “notice and takedown” starts when a service provider receives notice of an alleged infraction from a copyright owner.¹⁵² Next, the ISP will remove the material from the internet or block access to it, as is required under the safe harbor provision.¹⁵³ The ISPs must take “reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material.”¹⁵⁴ To have the material replaced, the person who uploaded it must file a counter-notice.¹⁵⁵ After the counter-notice has been sent, the ISPs must re-enable the content between ten and fourteen business days later, unless the copyright holder has by that point filed a lawsuit.¹⁵⁶

Under 17 U.S.C. § 512, when a service provider receives a notice of possible infringement, that provider must take the material down quickly.¹⁵⁷ The material will remain offline unless the uploader provides a counter-notice.¹⁵⁸ In the counter-notification, the uploader/writer must include a signature, identification of the material, their name, address, telephone number, and consent to jurisdiction in Federal District Court in the judicial district in the address where they are located.¹⁵⁹ The counter-notice must also state under

¹⁴⁹ *Digital Millennium Copyright Act of 1998 U.S. Copyright Office Summary*, 1, Dec. 1, 1998, <http://www.copyright.gov/legislation/dmca.pdf>.

¹⁵⁰ *DMCA Safe Harbor*, CHILLING EFFECTS CLEARINGHOUSE, <http://www.chillingeffects.org/to pics/14> (last visited Oct. 14, 2014).

¹⁵¹ *Id.*

¹⁵² 17 U.S.C. § 512(c)(3)(A).

¹⁵³ *Id.* § 512(g).

¹⁵⁴ *Id.* § 512(g)(2)(A).

¹⁵⁵ *Id.* § 512(g)(3).

¹⁵⁶ *Id.*

¹⁵⁷ *See id.* § 512(c)(1)(C) (“[U]pon notification of claimed infringement . . . responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or the subject of infringing activity.”).

¹⁵⁸ *See id.* § 512(g)(2)(b).

¹⁵⁹ *Id.* § 512(g)(3).

penalty of perjury that the counter-notice provider has a good faith belief that the material does not infringe on copyright.¹⁶⁰

III. ANALYSIS

A. THE SAFE HARBOR PROVISION CREATES INCENTIVES FOR COPYRIGHT HOLDERS TO SUPPRESS MATERIAL THAT MAY NOT INFRINGE ON COPYRIGHT

These elements working together create the type of environment where someone like James Joyce's grandson can control dissemination of derivative works long after the protected material was originally published. As material proliferates online, an estate can work within the system to pull material off of the Web, whether that material validly infringes on copyright or not. The DMCA system puts the burden on the uploader to file a counter-notice, or see their allegedly infringing material stay offline.

In practice, the Safe Harbor provisions of the DMCA work to silence otherwise permissible freedom of expression. Such notices create incentives for the service provider to pull every possibly infringing item off of their site, often to the detriment of the uploader and possibly the public as a whole. In *ALS Scan, Inc. v. RemarQ*, for example, the court refused to grant a service provider immunity from infringement liability when a takedown notice was not even entirely correct.¹⁶¹ Though takedown notices are required to be specific, the Court of Appeals for the Fourth Circuit held that since the notice substantially complied with the DMCA's requirements, the ISPs must abide by it.¹⁶² For sites such as YouTube that host high amounts of material and receive many of these notices, pursuing an independent investigation of whether the material actually infringes on copyright is not feasible or rational. Instead, these service providers will just pull the material down in order to maintain coverage under the safe harbor provision. Thus, service providers often take such "takedown notices" at face value without doing any further examination. Why would they? It's the safest course of action for them to remove the content and then shift the burden back to the uploader to claim that it does not infringe upon copyright. In doing so, ISPs remove themselves from the dispute between the uploader and content owner.

¹⁶⁰ *Id.* § 512(g)(3)(C).

¹⁶¹ 239 F.3d 619 (4th Cir. 2001).

¹⁶² *Id.*

B. THE MECHANISMS ALLOWING UPLOADERS TO PROTECT THEIR CONTENT ARE INADEQUATE

1. *The Fair Use Defense Online.* The fair use defense is an obvious way for an uploader to protect their content online.¹⁶³ There is still some speculation regarding the intersection of fair use and the First Amendment, but while “the Supreme Court has never held that fair use is constitutionally required,” the Second Circuit noted that “some isolated statements in its opinions might arguably be enlisted for such a requirement.”¹⁶⁴ Nonetheless, the fair use defense is granted by the Copyright Act and the DMCA, so arguments about the rights of uploaders who claim fair use under these statutes parallel arguments for constitutional protection in light of *Eldred’s* and *Golan’s* holding that these statutes withstand a First Amendment challenge. Unfortunately for uploaders, however, though the fair use defense would often lead to better outcomes if they were actually sued, the fact that the DMCA’s notice system leads to little actual litigation means that their interests in fair use are not often vindicated.

Under *Golan v. Holder*, a significant part of the majority’s opinion argued First Amendment concerns could still be vindicated because uploaders of derivative content can rely on a fair use defense.¹⁶⁵ Inherent in Justice Ginsburg’s argument that the First Amendment protections of the CTEA vindicated those who wished to perform or publish copyrighted works was the idea that, when challenged, these alleged infringers would be able to bring the fair use defense. However, increasing evidence demonstrates that under the current DMCA system, uploaders who see their material pulled down are better off just letting it happen, and uploading elsewhere, if at all. For a prime example, one only needs to look at the Counter-Notification page online at the University of Virginia.¹⁶⁶ It contains such language as “[t]o be frank, it is rare that the copyright infringement notices we forward to you are in error.”¹⁶⁷ It also notes that you should only file a counter-notice if “[Y]ou are *certain* you are using the material legally.”¹⁶⁸ As courts apply a balancing test for fair use defense, it is difficult for someone who lacks a legal education (or even those that have one) to be sure that they are using that material legally.

¹⁶³ 17 U.S.C. § 107.

¹⁶⁴ *Universal City Studios v. Corley*, 273 F.3d 429, 458 (2001).

¹⁶⁵ *See Golan v. Holder*, 132 S. Ct. 873 (2012).

¹⁶⁶ Information Policy, *Copyright at UVa: Counter-Notification*, U. VA., <http://www.virginia.edu/informationpolicy/copyright/counternotice.html> (last modified Oct. 14, 2014).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (emphasis added).

The DMCA notice system is not only in place to protect rights-holders and internet service providers; it is in place to notify uploaders as well of the infringement alleged against them. Copyright holders could file suit against those who have uploaded the material without filing a DMCA notice, and just move straight to an injunction or litigation. The DMCA system provides uploaders an opportunity to see that they could be sued before a copyright holder actually sues. In theory, this sounds like a system where everyone benefits. However, in practice it has become a system where copyright holders can file false claims, leaving uploaders without a way to call them on their bluff. Although uploaders could send a counter-notice, evidence shows these are under-utilized. One reason for this may be the notice appears to indicate that the uploader will be willing to defend the copyright in court, when an uploader would really rather avoid litigation. Moreover, sending a counter-notice can also be costly. Those that wish to file a counter-notice often need to consult a lawyer to be able to do so correctly. There are also personal costs to the time taken to create the counter-notice. In addition, DMCA takedown notices often have intimidating language, which deters uploaders from uploading other material, even if they do have a fair use defense.¹⁶⁹

In *Lenz v. Universal Music Corp.*, Stephanie Lenz survived a motion to dismiss when Universal had sent her a fraudulent copyright notice over its rights to the Prince song “Let’s Go Crazy,” which she used in a twenty-nine-second low-quality video of her son dancing.¹⁷⁰ In a striking parallel to cases of “malicious” literary and orator estates, Prince stated that, on principal, no one should use his music on the internet without permission, and Universal had done its best to completely remove any non-sanctioned Prince music.¹⁷¹ The district court held that individuals sending copyright notices must at least consider the fair use defense before sending the notice, and that fair use is a lawful use of a copyright, rather than an excuse after the fact.¹⁷² Additionally, the court made an exceptional allowance due to Universal’s knowing misrepresentation and awarded her the recovered costs of her actual damages stemming from the fraudulent DMCA notice.¹⁷³ Although this extraordinary outcome granted a

¹⁶⁹ See *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1156 (N.D. Cal. 2008) (where Universal’s bad faith takedown notice caused Lenz to be fearful enough to refrain from uploading any other videos after the original takedown notice).

¹⁷⁰ *Id.* at 1152.

¹⁷¹ Universal’s statement on the matter was “It’s simply a matter of principle. . . . [T]hat’s why, over the last few months, we have asked YouTube to remove thousands of different videos that use Prince music without his permission.” *Id.*

¹⁷² *Id.* at 1154–55 (“[I]n the majority of cases, a consideration of fair use prior to issuing a takedown notice will not be so complicated as to jeopardize a copyright owner’s ability to respond rapidly to potential infringements.”).

¹⁷³ *Id.* at 1156.

success to Ms. Lenz, the uploader who actually fights for his or her rights is an exception to the rule.¹⁷⁴

Another instance where uploaders successfully invoked the fair use defense was illustrated in *Online Policy Group v. Diebold*, where a group of individuals published e-mails about possible problems with Diebold voting machines.¹⁷⁵ The court held that Diebold would be liable if they knowingly misrepresented the fact that copyright infringement had occurred.¹⁷⁶ However, like *Lenz*, this case also features an exceptional plaintiff, as the takedown notices were sent to a group that dealt with online policy—it is tough to believe that the other plaintiffs would have brought the case on their own.¹⁷⁷

2. *Burden-Shifting*. Even if the fair use defense adequately protects the interests of uploaders, in some circumstances the DMCA contains a provision that ultimately unfairly turns the tables against those who upload content. This can be problematic for uploaders from out of the country (who now must consent to jurisdiction inside the United States).¹⁷⁸ Section 12 raises another problem for uploaders. When their media content is removed from the internet, they have one option to return it online: consent to possibly go to court against the estate.¹⁷⁹ The term “safe harbor provision” means that section 512 protects the service provider.¹⁸⁰ Therefore, if the uploader does want to sue, they cannot sue the party who actually removed the content. Instead, they must consent to suit by an estate, often a group of heirs that have a considerable amount of money at their disposal.

C. ESTATES ARE SPECIAL CASES

Estates, especially those that own rights of famous authors and creators, and want to use their power to pull information out of the public sphere, often have a great deal of money at their disposal, which gives them a unique ability to utilize the imbalances of the DMCA.¹⁸¹ This creates a disincentive for individual uploaders with credible copyright defenses to litigate them. For a clear example of the costs of litigation, one need look no further than Carol

¹⁷⁴ Ganz, *supra* note 10, at 758.

¹⁷⁵ *Online Policy Grp. v. Diebold*, 337 F. Supp. 2d 1195, 1197 (N.D. Cal. 2004).

¹⁷⁶ *Id.* at 1202.

¹⁷⁷ *Id.* at 1197. The co-plaintiffs, Nelson Pavlosky and Luke Smith were college students who posted the e-mail archive on other websites.

¹⁷⁸ *Id.*; see also 17 U.S.C. § 512(g)(3)(D).

¹⁷⁹ § 512(g)(3)(D).

¹⁸⁰ *Id.* § 512(b)(1).

¹⁸¹ See Pomerantz & Greenburg, *supra* note 11 (citing celebrities' estates as profitable, particularly due to royalties).

Schloss's legal battle with the James Joyce estate.¹⁸² To avoid a lawsuit with the Joyce estate, Carol Schloss, an academic, edited over thirty pages out of a four hundred page manuscript after the executor of the estate wrote to her, threatening her if she were to use material about Lucia Joyce.¹⁸³ She was able to recover \$240,000 in legal fees from the estate, but only after considerable amounts of litigation and uncertainty.¹⁸⁴

Another reason why estates somewhat differ from individual copyright holders is because they are not the creator of the work. The estate is the work's protector, the creator's protector, and most importantly, the estate is often the work's beneficiary. Our society values the idea that heirs are simply the people who the author was trying to provide for with his or her work. Yet the possibility of an estate that not only benefits from the works of its forebear, but attempts to exclude the author's work from society as a whole has not seemed to concern many courts or legislatures. For example, in drafting the Copyright Term Extension Act Congress considered what the views of authors and their heirs would be, but did not consider the impact on society as a whole.¹⁸⁵

Our copyright law also establishes that copyright protection does not die with the author.¹⁸⁶ However, the assumption grounding this policy—that heirs will be good custodians of the author's property—may not be based in facts.¹⁸⁷ Estates do not always act rationally. The Joyce estate, for example has even attempted to prevent academic discussion of the work.¹⁸⁸ Likewise, the Salinger estate (and Salinger himself) worked to prohibit an arguably derivative work and a collection of letters from Salinger from going to the public.¹⁸⁹ Finally, the Martin Luther King Estate has prohibited showing of the "I Have a Dream" speech, one of the greatest speeches of the twentieth century.¹⁹⁰

Another relevant question pertains to the identification of those heirs that an author would generally intend to benefit. Though, as noted by the Berne Convention and offered as evidence of the need for the CTEA, the average lifespan of most industrialized nations are increasing, this cannot really provide support for leaving copyright protections at life of the author plus seventy

¹⁸² See Haven, *supra* note 88.

¹⁸³ 515 F. Supp. 2d 1068, 1073 (2007).

¹⁸⁴ *Id.* at 1083; see also Haven, *supra* note 88.

¹⁸⁵ Symposium, *Intergenerational Equity and Intellectual Property: The Life and Death of Copyright*, 2011 WIS. L. REV. 219, 225.

¹⁸⁶ See Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (extending copyright protections to life of the author plus seventy years).

¹⁸⁷ See Symposium, *supra* note 185, at 222.

¹⁸⁸ See *id.* at 258.

¹⁸⁹ See *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010).

¹⁹⁰ "I Have a Dream" Leads Top 100 Speeches of the Century, U. WIS.-MADISON NEWS (Dec. 15, 1999), <http://www.news.wisc.edu/releases/3504.html>.

years.¹⁹¹ One commentator illustrated this through a thought experiment: if one assumes that every generation is about twenty-five years, protections for an author born in 1971 who dies in 2046 will extend until 2116.¹⁹² At that point, the author's great-grandchildren will be sixty years old.¹⁹³ Thus, the current copyright system protects heirs who are extremely far removed from the authors themselves.¹⁹⁴ It is difficult to draw specific lines in policy discussions but it is hard to believe that the creativity associated with a work will receive greater honor after seventy years than it would after thirty or fifty years, especially as the beneficiaries of the copyright become further and further removed from the creator.

The amount of control estates seek to assert over written works could be equated with a kind of fetish¹⁹⁵: an irrational attachment to the work to the detriment of society.¹⁹⁶ Considered in conjunction with the fact that copyrighted works are nonrivalrous,¹⁹⁷ the personal interests of descendants are not interests to which copyright law and policy should elevate.¹⁹⁸

D. FIRST AMENDMENT CONSIDERATIONS OF COPYRIGHT

One of the relevant First Amendment considerations noted by the dissent in *Golan* was the impact of dissemination of information.¹⁹⁹ The actions of controlling estates such as the Joyce, Martin Luther King, and J.D. Salinger estates undeniably worked against information dissemination. In addition, the features of the DMCA have given estates another tool with which to control information dissemination.

Some works of authorship retain value very well over the course of a long life.²⁰⁰ However, the Constitution states that copyright must be for a limited

¹⁹¹ William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 931–32 (1997).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See Symposium, *supra* note 185, at 266; see also *Schloss v. Sweeney*, 515 F. Supp. 2d 1068, 1073 (2007) (Joyce told Schloss's publisher that her fair use claim "sounds like a bad joke or wishful thinking" and furthermore asked the publisher to "kindly bear in mind that there are more than one way [sic] to skin a cat").

¹⁹⁶ Symposium, *supra* note 185, at 266.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Golan v. Holder*, 132 S. Ct. 873, 900 (2012) (Breyer, J., dissenting).

²⁰⁰ See, for example, CATCHER IN THE RYE, which is still often assigned for classes or summer reading to this day, or a copy of the first edition of ULYSSES that sold for £275,000 in 2009. Mark Brown, *First Edition of Ulysses Sells for Record £275,000*, THE GUARDIAN (June 4, 2009), <http://www.theguardian.com/books/2009/jun/04/ulysses-sells-record-price>.

time.²⁰¹ The fact that the Constitution calls for a limited time would seem to imply that such a time should be reasonable. But it seems unreasonable that the great-grandchildren of authors or orators can benefit from their great-grandfather's copyrighted work.

In *Golan*, Justice Ginsburg also based her decision on the rationale that taking a work simply be licensed.²⁰² This rationale, however, does not apply to many of the situations discussed above, especially where an author or orator estate attempts to prevent a work from entering the public sphere at all.

In addition, Justice Ginsburg read the statute in *Golan* as requiring users to pay for copyrighted works.²⁰³ Again, when it comes to biographers, letters, and speeches especially, there may not be much value in licensing. Ginsburg's argument also hinges on the idea that the copyright holder would be willing to license the material out, whether for personal gain or for the betterment of society. In fact, copyright holders may instead attempt to control the dissemination of information, to prohibit something from coming to light that they do not agree with, or attempt to protect the creator's image or integrity of the work.²⁰⁴

In *Golan*, Justice Breyer highlighted the problem this poses for those who want to use the work.²⁰⁵ His concerns are exacerbated for those who want to post material online. To maintain compliance with the law, someone wishing to use the material must track down the copyright owner.²⁰⁶ If they do not, or the copyright owner refuses to comply, the copyright owner can send a takedown notice under the DMCA, which will allow the host site to remove the supposedly offending material. However, much of this goes unnoticed by courts because the system inherently works to keep these issues out of court. A common course of action when one receives a counter notice is to simply do nothing, and allow the material to be pulled off the Web. It is easy to see how an uploader would choose this, if they appeared to be facing off against an estate or a corporation that had considerable amounts of money at its disposal. They also may simply not have a particularly vested interest in maintaining the content online. While pulling their material off the Web may damage uploaders' interests, it could be more difficult for uploaders to subject themselves to litigation, especially if they are not very well funded. In addition, the notice and takedown system fails to consider the public interest in making the work available to a broader audience.

²⁰¹ See U.S. CONST. art. I, § 8 cl. 8 ("by securing for limited times").

²⁰² *Golan*, 132 S. Ct. at 903 (Breyer, J., dissenting).

²⁰³ *Id.* at 893 (majority opinion).

²⁰⁴ See *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010).

²⁰⁵ *Golan*, 132 S. Ct. at 903 (Breyer, J., dissenting).

²⁰⁶ See *id.* at 905.

Many DMCA claims also are without merit.²⁰⁷ In 2009, Google estimated that more than half of the DMCA takedown notices it received were sent by businesses targeting competitors and 37% of notices were not valid copyright claims.²⁰⁸ The Chilling Effects Clearinghouse maintains a database of cease-and-desist and takedown letters online.²⁰⁹ In a study by the Brennan Center for Justice and New York University School of Law, researchers examined many of these takedown notices, and found that almost half of them sought to remove material with what appear to be solid fair use or First Amendment defenses.²¹⁰ Even with these high numbers of invalid claims, there is still not impetus for an alleged infringer to fight a DMCA notice.

While we have discussed burdens placed on uploaders of content, there are also valid considerations as to estates themselves and children of authors. One rationale behind copyright protection for written works is that it is often claimed that a motivation for writing is the need to provide for children.²¹¹ This claim may or may not hold water. For example, it is unlikely that Martin Luther King copyrighted the “I Have a Dream” speech in order to provide for his children, at least in monetary terms. In addition, the literary market is extremely difficult to break into—the vast majority of books are doomed to obscurity and make very little money.²¹² In addition, this assertion does not take into account other forms of writing—letters that have been given to museums, recordings of speeches, and other works that may have literary value but in general are not monetized. Any author who has achieved fame within his or her lifetime can expect that one of his or her letters may someday find its way into a museum, just as a famous orator would expect a speech to be transcribed.

Since author estates owned by creators’ children are not actually the speakers, just the “enablers” of a copyrighted speech, their only interests that appear to relate to the First Amendment involve the *suppression*, rather than expression of speech.²¹³ As mentioned, they may keep media and works out of the public sphere to prohibit certain kinds of discussion about the work. It is strange that the First Amendment would reach out to protect suppression of speech by the heirs of the original speakers more than expression by others.

²⁰⁷ *Google Provides Numbers on Just how Often DMCA Takedown Process is Abused*, TECHDIRT, <https://www.techdirt.com/articles/20090315/2033134126.shtml> (last visited Sept. 2, 2014).

²⁰⁸ *Id.*

²⁰⁹ CHILLING EFFECTS CLEARINGHOUSE, <http://www.chillingeffects.org> (last visited Oct. 27, 2014).

²¹⁰ *See* Meyers, *supra* note 13, at 233–34.

²¹¹ *See* Symposium, *supra* note 185, at 256.

²¹² *Id.*

²¹³ *Id.* at 258–60.

Furthermore, once the original creator has passed away, it is extremely difficult to determine what their interests actually were when creating the work.

One area where estates may have a legitimate First Amendment interest is freedom of association. It seems obvious that the law should prohibit someone from impersonating the author or estate, and that the estate has a valid First Amendment interest in not wanting to appear to endorse speech that they do not agree with (or just do not want to exist).²¹⁴ However, there are sufficient safeguards in place to deal with impersonation of an author, but copyright owners are protected by the Copyright Act's requirements for derivative works.²¹⁵

E. SOLUTIONS

The problem of the “malicious estate” highlighted the need for new solutions to copyright problems online in the digital age. Though a complete overhaul of our current system seems unlikely, three proposals could help to fix the problems. Many of Justice Ginsburg's considerations as to the constitutionality of the statutes in *Golan* and *Eldred* have been warped in the years since those decisions. Most importantly, the fair use defense has not been the bulwark against expression-related harms that the majority felt it would be. The problem of the “malicious” estate, and the ease with which that estate can exercise its power has highlighted the need for new copyright protection schemes. One possibility is a limited licensing scheme that would still respect the rights of authors and their heirs while making it easier for those who wish to use materials do so at a reasonable price. In addition, recent developments in copyright protection have made it easier for internet providers to monitor their own networks. Legal scholars have also proposed other copyright frameworks that would increase the ability for uploaders of content to vindicate their First Amendment rights.

1. *Modified Licensing System.* When attempting to craft policy solutions to the issues arising from the intersection of the DMCA, malicious estates, especially the problems created by imposing these costs on educators and those seeking to publish works or incorporate works of authors and orators into their writings, it is helpful to look to Justice Breyer's concerns in *Golan*. Justice Breyer mostly focused on concerns about spurring the creation of new works, and the issue of orphan works (those works that would be impossible to locate and correctly use). In addition, in *Eldred*, Justice Breyer confronted the idea of “expression

²¹⁴ See *Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp. of Bos.*, 515 U.S. 557 (1995) (holding that speakers have a right to determine their message and not convey that of other groups).

²¹⁵ 17 U.S.C. § 106(2).

related harm”—a strong First Amendment concern that the CTE would interfere with efforts to educate, and restrict propagation of copyright works, in part, because the term extension made copyright “virtually perpetual,” benefitting not those who created works, but rather those estates that still held the rights to them.

Licensing fees could work to curb the heavy burden on content uploaders under the DMCA.²¹⁶ The government could set the fees, or they could be regulated by the industries themselves. Another solution often proposed is the one espoused by the litigants in *Eldred*—to pull back the copyright period after an author’s death. In short, they would call on Congress to restrict the copyright period to some length of time substantially shorter than seventy years, replacing the CTEA.

If we look to the concerns of Justice Breyer, however, it appears that we should take a more limited view than just applying licensing fees across the board to all material on the internet. This would also be overbroad, would have the end result of chilling speech, and would not take into consideration the built-in defenses to copyright claims. Furthermore, there may be less disruptive means of changing our current copyright landscape.

I would propose a solution that merges both ideas, at least in terms of online material. After some shorter period than seventy years, such as twenty, copyrights would not lose protection, but would rather lapse into a licensing scheme. This would completely preserve the author’s rights during life, and keep them operating functionally the same way from much of their heirs’ life. Licensing fees would need to be regulated to deal with the “malicious estate” problem, but would allow more materials to be posted online. In addition, for those whose works have a high level of cultural value, a system where people can pay a reasonable fee to use the material could lead to higher profits. Since the U.S. government already issues copyright protections, it could also help with the orphan works issue to have an automatic licensing system. In short, if one only needed to look up in a database where to send the licensing fee to, it would eliminate the problem of tracking that creator down.

A unique function of the DMCA is of course the notice and takedown system. Under a post-death online copyright licensing scheme the notices themselves could be harnessed to provide more avenues for those who want to use material to be able to do so without risking a visit to court to vindicate their fair use rights.

²¹⁶ Congress already requires mandatory licensing in some areas. See *id.* § 115. In addition, licensing schemes have been proposed as early as 1878. See also Symposium, *supra* note 185, at 241–42.

2. *Remove Safe Harbor/Increase the Requirements of the Provision for Internet Service Providers.* Another possible solution to mitigate the abuse of DMCA takedown notices by uncompromising estates or other copyright holders in general would be to alter the safe harbor provision to incentivize service providers to investigate the allegedly infringing material before pulling it off the internet. The obvious problem with this solution is implementation. Service providers do not have time to look at every single notice that they receive because they receive such a high volume. Therefore, the idea of compelling each ISP to review each allegedly infringing material before pulling it seems far-fetched. However, with increases in the power of technology, signs point towards a time when such a requirement would be feasible with automation. As an example, Google processed around eight URL takedowns per second during the last week of September 2013.²¹⁷ Though Google is certainly an outlier on the high end of DMCA notice recipients, they have implemented some safeguards to prevent erroneous URLs from being taken down from their search service, perhaps because they have even received allegedly infringing URLs that lead to their own “Gmail” service.²¹⁸ The fact that Google can implement some basic safeguards demonstrates that this is something that could be done by normal ISPs in the future, even if not at the moment.

In all, the incentivization for service providers to better investigate allegedly infringing material would not be complete until the safe harbor provision is altered. The safe harbor provision should not be removed, however. It should just be modified by language requiring a good faith effort to determine whether the allegedly infringing copyright material actually infringes upon copyright. Furthermore, with such a system there is another problem of implementation: that a service provider may, in an effort to protect itself, pull much more material than is necessary off the Web by using automated services. For a prime example of this problem, one needs only look to YouTube copyright “crackdown” that happened in late 2013.²¹⁹ Such automated systems can be overbroad, and open up service providers to liability for a lax effort to determine what content is permissible incentivizes those service providers to aggressively remove materials.

²¹⁷ *Gmail Stays Up as Google Rejects Microsoft DMCA Takedown Notice*, TORRENTFREAK (Nov. 2, 2013), <http://torrentfreak.com/gmail-stays-up-as-google-rejects-microsoft-dmca-takedown-notice-131102/>.

²¹⁸ *Id.*

²¹⁹ See Owen Good, *YouTube’s Copyright Crackdown: Everything You Need To Know*, KOTAKU, Dec. 18, 2013, available at <http://kotaku.com/youtube-copyright-crackdown-simple-answers-to-compli-148599937>; see also Paul Tassi, *YouTube Unleashes Strange Storm of Copyright Claims on Video Game Content Producers*, FORBES, Dec. 11, 2013, available at <http://www.forbes.com/sites/insertcoin/2013/12/11/youtube-unleashes-strange-storm-of-copyright-claims-on-video-game-content-producers/>.

3. *Alternative Proposals.* Some legal scholars have endorsed a copyright system that turns on a fixed number of years without renewals. Such a system would have a long period (one proposal lists it at ninety-five years).²²⁰ This would create some sense of certainty in terms of copyright period, but would do little to help those who wished to assert a defense under the Copyright Act online. Another possibility offered by legal scholars is to create a copyright that would exist perpetually, but would require frequent renewals. This solution would generally only be economically feasible for the copyright holder to maintain for around fifteen years.²²¹ Therefore, it would lead to more works entering the public domain as rights holders let copyrights lapse rather than spend the money to renew them. It would also allow works that are actually valuable to stay protected by copyright as long as they remained valuable.²²² Since more total works would be in the public domain, the amount of DMCA notices would decrease, and in all more First Amendment protections would be vindicated. However, this perpetual copyright solution demanding renewal would do nothing to protect against estates that have a great deal of money and are willing to expend the effort to keep works from entering the public domain.

To be sure, none of these policy proposals would completely eliminate the problems springing from the DMCA. By their nature, any of these proposals strikes some sort of balance between rights-holders and content upholders. However, a modified licensing system would likely go the farthest in protecting expression, provided licensing fees could actually be kept reasonable. Those worried about vindicating their expression rights under the first amendment, however, may not need to worry for very long, as technology may soon come to the point where it can identify those items with fair use defenses online.

IV. CONCLUSION

If all else fails, much of the root of the problems under the DMCA can be traced back to the fact that people cannot adequately vindicate their rights when they receive a DMCA notice.²²³ With an estate protecting a lucrative copyright, there is a decided power imbalance that leads to an inordinate amount of material pulled from the Web.²²⁴ As exemplified by these powerful estates, copyright power can be abused. When it comes to the work of authors and orators, there is a definite educational value to be gained in publication of their works, and a dedicated fair use protection for these educational purposes.

²²⁰ See Symposium, *supra* note 185, at 269.

²²¹ *Id.* at 270.

²²² *Id.*

²²³ Ganz, *supra* note 10, at 758.

²²⁴ *Id.*

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The DMCA's shift of power from uploaders to copyright holders is felt particularly strongly in the context of a malicious author or orator estate. Here, there are often materials that should be allowed by fair use (such as those used for educational purposes). However, a powerful estate, rather than the original creator of the content, can wield great power over the materials online. As DMCA takedown notices render fair use, they are inadequate to vindicate uploaders' First Amendment rights. Under the CTEA's life plus seventy years provision, this problem will not go away any time soon. In addition to their failure to vindicate fair use defenses, the incentives created by the current DMCA system leads uploaders to let their material be pulled off the Web, if they even find out that it has been removed in the first place. Though much of the DMCA system goes on behind the scenes, rather than in courtrooms, as we enter a more digitally oriented society these problems are only going to become more and more visible. Currently what we see litigated is just the tip of the iceberg—lurking beneath the surface is a greater danger to our freedom of expression online.

