THE MACGUFFIN AND THE NET: TAKING INTERNET LISTENERS SERIOUSLY

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To date, listeners and readers play little more than bit parts in First Amendment jurisprudence. The advent of digital networked communication over the Internet supports moving these interests to center stage in free speech doctrine and offers new empirical data to evaluate the regulation of online information. Such a shift will have important and unexpected consequences for other areas, including ones seemingly orthogonal to First Amendment concerns. This Essay explores likely shifts in areas that include intellectual property, tort, and civil procedure, all of which have been able to neglect certain free speech issues because of the lack of listener interests in the canon. For good or ill, these doctrines will be forced to evolve by free speech precedent that prioritizes consumers.

INTRODUCTION

Listeners play a strangely stunted role in First Amendment jurisprudence. They appear to be a sort of free speech MacGuffin—useful as narrative devices, but ultimately inconsequential.[1] Scholars have rightly clamored for the courts to move listeners from offstage to center stage.[2] This Essay

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1. *See MacGuffin*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/MacGuffin [https://perma.cc/HS8T-PBY9]. A MacGuffin, as defined by Alfred Hitchcock, is an attractive but ultimately irrelevant plot device that serves as a foil to generate the rest of the narrative action. *Id.* One well-known example is the Maltese Falcon in the movie of the same name.

2. *See, e.g.*, Enrique Armijo, *Kill Switches, Forum Doctrine, and the First Amendment's Digital Future*, 32 CARDOZO ARTS & ENT. L.J. 411 (2014); Anna Su, *Speech Beyond Borders: Extraterritoriality and the First Amendment*, 67 VAND. L.

advances two arguments. First, the architecture of networked information—colloquially, the Internet—enhances our ability to take readers and listeners seriously. Second, such a shift towards listeners will unsettle a range of doctrines, including seemingly unrelated ones such as tort law and civil procedure, and we should be prepared for those consequences. Put simply, the increased prominence of Internet listeners and readers will force other legal doctrines to deal with First Amendment concerns more openly and rigorously.

First Amendment precedent tends to relegate listeners to the background.[3] The seminal cases concentrate on speakers, focusing on prior restraints, rights of reply, rights of access, modes and mechanisms of communication, and the like. This minimalism suggests that listeners play one of two roles in First Amendment cases. First, they might be unnecessary. The point of free speech doctrine might be to protect one's right to scream into the void, regardless of whether anyone can or cares to hear it. If so, the Internet is an exceptionally promising medium for maximizing speaker autonomy. By greatly reducing the costs of creating and disseminating information, the Internet provides everyone with the prototypical soapbox.[4] As Eugene Volokh noted soon after commercial content debuted on the Internet, cheap speech enables anyone to become a speaker, realizing the free speech potential for self-actualization.[5] This approach, however, ignores the reality that many speakers communicate to produce an effect on others, not merely to declaim for its own sake.[6] Even if listeners are secondary, they

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REV. 1373 (2014); Eugene Volokh, *One-to-One-Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 NW. U.L. REV. 731 (2013); Derek E. Bambauer, *Orwell's Armchair*, 79 U. CHI. L. REV. 863, 917–20 (2012). *See generally* Leslie Kendrick, *Are Speech Rights for Speakers?*, 103 VA. L. REV. 1767 (2017). *But see* Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161, 190.

3. The major exception, oddly, is in the context of commercial speech. *See, e.g.*, Sorrell v. IMS Health, 564 U.S. 552, 578–79 (2011); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566–68 (1980); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 763–65, 770 (1976).

4. *See* Reno v. ACLU, 521 U.S. 844, 870 (1997) (stating "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox").

5. Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).

6. *Cf.* Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CALIF. L. REV. 335, 347 (2017) (noting that people "often produce speech with

are not irrelevant.

Second, perhaps listeners have the true, but hidden, interests that free speech doctrine tries to protect. They might benefit from access to information that lets them grow personally, make better decisions, reject falsehoods, or elect better representatives. Listeners thus possess the paramount claim to protection, but this end is effectuated through the proxy of speaker interests for instrumental reasons. This theory clearly finds support in the vein of First Amendment case law, but it is strange to think that courts would deliberately keep such a critical set of actors sidelined. A weaker version of this claim—and, likely, a more defensible one—is that the confluence of speaker and listener interests is historically contingent. Speakers once served as adequate stand-ins for their audience. However, this conflux has broken down with the advent of broadcast and electronic media, where speakers may be widely separated in time and place from those who would receive their information. As this Essay argues, the relative neglect of listener interests in the First Amendment canon grows less tolerable with time and technological change.

Part I of this Essay describes how the Internet offers new data for evaluating First Amendment issues by dint of its architecture. Part II assesses how listener-centric free speech doctrine will affect other areas of law, using intellectual property (IP), tort, and civil procedure as canonical examples. Part III discusses how the Internet is likely to shape a refocused First Amendment jurisprudence. The last Part concludes.

I. THE INTERNET'S PROMISE AND DEMANDS

The Internet both demands and enables a shift towards a more listener-focused approach to free speech issues, primarily by revealing concrete data about what consumers actually watch, read, share, and download. It is the first widespread medium to make communication by many speakers and many listeners—one-to-one and one-to-many, simultaneous and asynchronous—not only possible but routine.[7] Pre-Internet

but one purpose—to persuade the listener to believe, do, buy, or vote for something").

7. *See* James Grimmelmann, *Listener's Choices*, 90 U. COLO. L. REV. 365 (2019); James Grimmelmann, *The Internet Is a Semicommons*, 78 FORDHAM L. REV. 2799 (2010); Volokh, *supra* note 2.

forms of communication could manage one-to-one information transfer readily—consider, for example, the written letter and the telephone.[8] They also made one-to-many sharing possible, such as through newsprint, radio, and television. Many-to-one communications were possible but cumbersome, as examples such as voting or notice-and-comment rulemaking make plain.[9] However, many-to-many dissemination was impractical at best and impossible at worst.[10] This shortcoming for then-extant technologies was used to justify governmental intervention, such as with the Communications Act of 1934's regulation of the broadcast spectrum.[11] Even early computer networking technologies foundered on many-to-many communication, instead implementing mechanisms that allocated priority to different network nodes in turn to transmit information.[12]

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8. While mechanisms such as the telephone are theoretically capable of many-to-many communication, most readers will appreciate that the conference call exemplifies the shortcomings of this tool. *See* Joshua Keating, *"Like David Lynch Directed a Remake of* Office Space,*"* SLATE (Jan. 24, 2014, 9:09 AM), http://www.slate.com/articles/business/moneybox/2014/01/the_existential_despair_of_the_conference_call_conferencecall_biz_captures.html [https://perma.cc/64S5-C4UP].

9. Consider, for example, the notoriously cumbersome caucuses by which Iowa's two major political parties indicate their preferences for a presidential nominee, or the burden the Federal Communications Commission faced in evaluating public comments on network neutrality rules. *See* Domenico Montanaro, *How Exactly Do the Iowa Caucuses Work?*, NPR (Jan. 30, 2016, 8:08 AM), https://www.npr.org/2016/01/30/464960979/how-do-the-iowa-caucuses-work [https://perma.cc/3AA9-9PZ3]; Melissa Mortazavi, *Rulemaking Ex Machina*, 117 COLUM. L. REV. ONLINE 202 (Sept. 22, 2017), https://columbialawreview.org/wp-content/uploads/2017/09/Mortavazi-v5.0.pdf [https://perma.cc/LFV5-WVVD].

10. Many-to-many communications involve multiple speakers and listeners potentially interacting at the same time. An old-school example would be online chat rooms; a newer one would be technologies like Slack. *See chat room*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/chat%20room? (last visited Nov. 24, 2018) [https://perma.cc/8WMW-AGZP]; *Features*, SLACK, https://slack.com/features (last visited Sept. 8, 2018) [https://perma.cc/T6B6-5Y5G].

11. *See* Charles R. Shipan, *Interest Groups, Judicial Review, and the Origins of Broadcast Regulation*, 49 ADMIN. L. REV. 549, 565–68 (1997); A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 (Max D. Paglin ed., 1989).

12. *See, e.g.*, *Does Anyone Actually Still Use Token Ring?*, TECHREPUBLIC (Apr. 2, 2008, 6:03 AM), https://www.techrepublic.com/blog/classics-rock/does-anyone-actually-still-use-token-ring/ [https://perma.cc/E3AK-RLJ8]; *Token Ring Networks*, PCTECHGUIDE.COM, https://www.pctechguide.com/networking/token-ring-networks (last visited Sept. 8, 2018) [https://perma.cc/3QZA-WMJ7]. For those unfamiliar with networking architectures, Token Ring essentially manages communication among multiple speakers in the same way that the Talking Pillow did for the White family in the AMC television series *Breaking Bad*. *See Gray Matter*, BREAKING BAD WIKI, http://breakingbad.wikia.com/wiki/Gray_Matter (last visited Sept. 14, 2018) [https://perma.cc/9678-EJPD].

By contrast, the Internet, and the applications that it supports, makes many-to-many communication seamless. Facebook posts (and the reactions to them), Reddit threads, and Twitter conversations are all examples of how multiple speakers can interact with multiple listeners, whether simultaneously or asynchronously, co-located or distant from one another. There is no architectural difference between the various nodes on the network—a laptop computer is just as capable of sending and receiving files, Web pages, and e-mail messages as a server. Increasingly, the key constraint on communication is not transmitting power or ownership of a governmental license, but instead it is the cognitive challenge of sorting and managing the deluge of digital data. As limitations on speakers diminish, or vanish altogether, the capacities of readers and listeners rise in priority as both a practical and doctrinal matter.

The Internet also enhances the capacity of courts and policymakers to take account of listeners and readers. Speakers can readily keep track of how many requests a particular piece of content receives, leading to the presence of hit counters on Web sites and blogs. We can draw conclusions quantitatively, at least, about what information people consume. Readers and listeners send clear signals about the content and speakers they find compelling: they click "Like" on Facebook, they retweet, they click on ads, they view YouTube videos, and they accumulate followers across a variety of platforms. HBO can confidently claim that *Game of Thrones* is the world's most popular television series because empirical data shows that it is the one most often downloaded over peer-to-peer networks or streamed online.[13] Music platforms such as Spotify can measure directly what consumers want to listen to, rather than estimating indirectly based on what radio station disc jockeys decide to play.[14] These relatively rich empirical data make it

13. *See* Travis M. Andrews, *'Game of Thrones' Was Pirated More Than a Billion Times—Far More Than It Was Watched Legally*, WASH. POST (Sept. 8, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/09/08/game-of-thrones-was-pirated-more-than-a-billion-times-far-more-than-it-was-watched-legally/ [https://perma.cc/2WJ4-EE39]; Adario Strange, *'Game of Thrones' Is Still the Most Pirated Show, but There's a Twist This Year*, MASHABLE (July 19, 2017), https://mashable.com/2017/07/19/game-of-thrones-piracy/ [https://perma.cc/N4QM-J9SS].

14. *See* Spencer Kornhaber, *Music Sales Are Music PR*, ATLANTIC (Feb. 2, 2016), https://www.theatlantic.com/entertainment/archive/2016/02/music-sales-are-music-pr/459378/ [https://perma.cc/4PPB-Z8J5].

more difficult to ignore or deprecate listener interests; the ever-present numbers are a constant reminder that content consumers are present and active in massive numbers. This capacity to count represents a marked shift from offline media, which must employ rough (and increasingly inaccurate) proxies for audience interest. Newspaper subscriptions do not reveal who reads original reporting and who merely checks out the day's comic strips, jukebox plays tell us little about a song's popularity, and the Nielsen ratings are nothing more than a consensual hallucination about viewership of television programs.[15]

Qualitative analysis remains elusive, even with all the Internet's capabilities: it is difficult to resolve whether audiences consume what they ought to prefer. Readers who would benefit from perusing Thomas Paine may choose Tom Clancy instead. At a minimum, though, the Internet helps us assess whether consumers are living up to a particular philosophical view of what constitutes the "good" of information.[16]

Overall, the Internet's architecture increases the capability to track what information listeners and readers find desirable. This lets us measure the scale of consumer interests for content, and may enable some crude cost-benefit analysis of regulation (such as bans on profanity[17] or temporal limits on programming[18]) when necessary.

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15. *See, e.g.*, Emily Steel, *Nielsen Plays Catch-Up as Streaming Era Wreaks Havoc on TV Raters*, N.Y. TIMES (Feb. 2, 2016), https://www.nytimes.com/2016/02/03/business/media/nielsen-playing-catch-up-as-tv-viewing-habits-change-and-digital-rivals-spring-up.html [https://perma.cc/TD3D-BR9T]; Brian Steinberg, *TV Industry Struggles to Agree on Ratings Innovation*, VARIETY (Apr. 11, 2017, 10:00 AM), https://variety.com/2017/tv/features/nielsen-total-content-ratings-1202027752/ [https://perma.cc/Z56M-7RFS].

16. Offline sources of listening or viewing habits are notoriously inaccurate. Regardless of whether one thinks that viewers should watch CNN over Fox News, or vice versa, it is difficult to tell whether they are actually doing so. *See, e.g.*, Paul Farhi, *Radio Ratings Device Flawed, Stations Say*, WASH. POST (Oct. 11, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/10/10/AR2008101003106.html [https://perma.cc/DVN4-YX7J]; Mark Potts, *Nielsen Ratings May Be Axed by Networks*, WASH. POST (Jan. 18, 1987), https://www.washingtonpost.com/archive/business/1987/01/18/nielsen-ratings-may-be-axed-by-networks/71a038ff-7b35-4023-bb53-ddc8c1b465345 [https://perma.cc/PG88-C5MX].

17. *See* FCC v. Fox Television Stations, 556 U.S. 502 (2009); FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

18. *See, e.g.*, Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727 (1996); Hugh Campbell, Note, *A First Amendment Look at the Statutory Ban on Tobacco Advertisements and the Self-Regulation of Alcohol Advertisements*, 65 FED. COMM. L.J. 99, 110–11 (2013); E.J. Schultz, *Hard Time: Liquor Advertising*

II. DISRUPTIONS TO OTHER DOCTRINES

While an expanded role for listeners in First Amendment analysis will be greeted joyfully by many,[19] nothing gold can stay.[20] The newly prominent listeners will (metaphorically speaking) cross doctrinal boundaries and reshape the landscape in a number of legal disciplines. To date, the speaker-focused approach to free speech questions has let disciplines such as intellectual property, tort, civil procedure, and others off the hook. These areas have been able to elide First Amendment questions that a listener-centered model will pose squarely. This Part provides a few illustrative examples of how—for good and ill—a more listener-centric approach to First Amendment questions will unsettle other doctrines.

A. Intellectual Property

Intellectual property has long had a blithe attitude toward First Amendment concerns. In copyright law, the Supreme Court has explained, the combination of fair use and the idea-expression dichotomy entirely satisfies free speech demands.[21] Trademark law is in shambles from a First Amendment perspective,[22] with a hodgepodge of statutory provisions,[23]

Pours Into TV, AD AGE (May 14, 2012), http://adage.com/article/news/hard-time-liquor-advertising-pours-tv/234733/ [https://perma.cc/GX4S-5R94].

19. Free speech skeptics, however, are increasingly numerous. *See, e.g.*, Bambauer & Bambauer, *supra* note 6, at 337 nn.2–10, 342 n.42, 343 n.55 (listing scholarship); Louis Michael Seidman, *Can Free Speech Be Progressive?*, 119 COLUM. L. REV. (forthcoming 2019); Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html [https://perma.cc/6RLF-25TV].

20. *Cf.* Robert Frost, *Nothing Gold Can Stay*, 13 YALE REV. 1, 30 (1923–24).

21. *See* Golan v. Holder, 565 U.S. 302, 327–30 (2012). The exclusion of facts from copyrightable subject matter is instrumentally helpful in the free speech context, but the Court decided to oust factual material based on the IP Clause, not the First Amendment. *See also* Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 344–51 (1991); Derek E. Bambauer, *Paths or Fences: Patents, Copyrights, and the Constitution*, 104 IOWA L. REV. (forthcoming 2019) (manuscript at 36, 46) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3143772 [https://perma.cc/6QFC-RRMT]).

22. *See generally* William McGeveran, *The Trademark Fair Use Reform Act*, 90 B.U. L. REV. 2267 (2010).

23. *See, e.g.*, 15 U.S.C. §§ 1125(c)(3) (2012) (exceptions to federal dilution liability), 1125(d)(1)(B)(ii) (exception to federal cybersquatting liability), 1115(b)(4) (preserving descriptive use of mark even after incontestable status established),

common law,[24] and conflicting circuit court decisions.[25] The Supreme Court has hesitantly recognized that trademarks are more than mere commercial speech but has yet to elaborate upon the implications of this shift.[26] Both patent law[27] and trade secrets doctrine[28] have almost entirely ignored the issue, although scholars have begun to raise concerns of late.

While both patent and trade secret law will be improved by incorporating any First Amendment analysis in their doctrines, copyright is the discipline most likely to undergo significant shifts when listeners go from MacGuffin to main character. In current copyright law, listeners may not even be as prominent as the thought of a MacGuffin plot device suggests; it is more likely they are just extras on the set. At present, Congress and the courts are free to restrict speech—for example, via prior restraints through injunctions, moving works from the public domain into exclusivity, extending the term of protection, and reinforcing technological protection measures through law even when they bar fair use—so long as they do not transgress the "traditional contours of copyright."[29] As far as free speech is concerned, those contours reduce to fair use[30] and the idea-

1064(3) (allowing cancellation of mark that has become generic term). *See generally* KP Permanent Make-Up Inc. v. Lasting Impression Inc., 543 U.S. 111 (2004); Park 'N Fly, Inc. v. Dollar Park & Fly, 469 U.S. 189 (1985).

24. *See, e.g.*, New Kids on the Block v. News Am. Publ'g, 971 F.2d 302 (9th Cir. 1992). This case unquestionably represents NKOTB's most significant contribution to American culture. *See also* Smith v. Chanel, Inc., 402 F.2d 562 (9th Cir. 1968).

25. *Compare New Kids on the Block*, 971 F.2d 302, *with* PACCAR v. Telescan Techs., 319 F.3d 243 (6th Cir. 2003) (nominative fair use); Anheuser-Busch, Inc. v. Balducci Publ'ns, 28 F.3d 769 (8th Cir. 1994), *and* Mutual of Omaha Ins. Co. v. Novak, 836 F.2d 397 (8th Cir. 1987), *with* L.L. Bean, Inc. v. Drake Publ'rs, 811 F.2d 26 (1st Cir. 1987), *and* Mattel, Inc. v. MCA Records, 296 F.3d 894 (9th Cir. 2002) (parodic use).

26. *See* Matal v. Tam, 137 S. Ct. 1744 (2017); *The Supreme Court, 2016 Term—Leading Cases*, 131 HARV. L. REV. 243 (2017).

27. *See, e.g.*, Dan L. Burk, *Patenting Speech*, 79 TEX. L. REV. 99 (2000); Sapna Kumar, *Life, Liberty, and the Pursuit of Genetic Information*, 65 ALA. L. REV. 625, 634–35 (2014); Kali Murray, *Constitutional Patent Law: Principles and Institutions*, 93 NEB. L. REV. 901, 945–46 (2015); John R. Thomas, *Life and Liberty in the Patent Law*, 39 HOUS. L. REV. 569, 588–92 (2002).

28. *See, e.g.*, Elizabeth A. Rowe, *Trade Secret Litigation and Free Speech: Is It Time to Restrain the Plaintiffs?*, 50 B.C. L. REV. 1425 (2009); Pamela Samuelson, *Principles for Resolving Conflicts Between Trade Secrets and the First Amendment*, 58 HASTINGS L.J. 777 (2007); Deepa Varadarajan, *Trade Secret Fair Use*, 83 FORDHAM L. REV. 1401, 1404–06, 1412 (2014).

29. *See* Golan v. Holder, 565 U.S. 302, 327–30 (2012).

30. 17 U.S.C. § 107 (2012). Title I of the Digital Millennium Copyright Act has

expression dichotomy.[31] From a listener's First Amendment perspective, this presents an impoverished view of copyright. The law imposes an affirmative duty on listeners not to engage in activity, without authorization, that implicates one of the exclusive entitlements of a copyright owner.[32] And direct infringement operates under a scheme of strict liability: it is no defense that the infringer did not know a work was protected by copyright, even if discovering that status was practically impossible.[33]

The digital character of information transmitted over the Internet dramatically worsens the problem for listeners. With analog media, a consumer is free to purchase a copy of a book or DVD regardless of whether that copy is infringing.[34] She can read or listen to its contents, alone or with friends.[35] If the book or DVD is a lawful copy, she can loan it to someone or sell it at a thrift sale.[36] Digital media, though, generally require permission for each of these activities. Downloading a music file, e-book, or movie virtually always makes a new copy of that work, implicating the copyright owner's right of reproduction. Sharing its content with friends over a network likely infringes her reproduction and distribution rights. And sale or lending of digital content similarly requires permission since it too usually involves making a copy on a new device. These technological realities place an increasing strain on the role and scope of fair

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largely been interpreted to evade the traditional contours restriction; Congress cannot abolish fair use but can apparently treat it with a sort of benign neglect. *Compare* MDY Indus. v. Blizzard Entm't, 629 F.3d 928 (9th Cir. 2010), *with* Chamberlain Grp. v. Skylink Techs., 381 F.3d 1178 (Fed. Cir. 2004). The difference between directly altering fair use by changing section 107, and indirectly doing so through section 1201, is of course illusory. *See generally* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913–14).

31. 17 U.S.C. § 102(b) (2012).

32. 17 U.S.C. §§ 106, 106A, 602 (2012).

33. At best, a lack of intent can lead to a reduction in statutory damages and, potentially, weigh in favor of a finding of fair use. *See* 17 U.S.C. § 504(c)(2) (2012) (providing discretion for court to reduce statutory damages to $200 per work if the "infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright"); Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 441 n.5, 474–75 (2009).

34. *See* Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1890, 1908–11 (2007).

35. *See generally* Am. Broad. Co. v. Aereo, 134 S. Ct. 2498 (2014) (discussing meanings of "public" and "perform" under Copyright Act).

36. 17 U.S.C. § 109(a) (2012).

use. Scholars such as Jessica Litman have proposed an expanded "right to read" in order to counteract the effective diminishment of listeners' and readers' capabilities to interact with copyrighted material in digital form.[37] While other scholars have explored thoroughly the implications of the digital transition for users who seek to become creators, this Part concentrates on the implications of users as *consumers*.

At a minimum, a heightened role for listeners on the Internet will require rethinking three features of copyright: the functional character of fair use, its interaction with the prohibitions on bypassing technological protection measures, and the imposition of remedies in successful suits for infringement. First, fair use is generally treated by courts as a defense composed of mixed issues of law and fact.[38] That framing places an enormous burden even on successful claimants. They will rarely be able to prevail at the summary judgment stage since any material disputed issues of fact will overcome such a motion. Fact-intensive issues are expensive—typically requiring discovery—and hard to predict in terms of outcome. At present, then, fair use can be little more than the right to hire a lawyer, as Larry Lessig has written.[39]

Taking audience interests into account will require a careful re-examination of where the fair use burden ought to rest and how much evidentiary work is necessary for a court to make a determination about it. If, as Litman has suggested, fair use operates as an affirmative grant to readers and listeners—a zone of nonliability—then plaintiffs would need to show not only conduct that transgresses one of copyright's entitlements, but also that this conduct does not qualify as fair. For example, at one point, the Ninth Circuit held that plaintiffs must make such a showing as part of their case in chief when the defendant puts forth a nonfrivolous assertion of fair use.[40] It has similarly held that copyright owners, and their agents, must at least consider the possibility of fair use before issuing a

37. Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 40-41 (1994).

38. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985).

39. LAWRENCE LESSIG, FREE CULTURE 187 (2004).

40. The court later reversed itself on this point. *See* Eric Goldman, Perfect 10 v. Amazon *Opinion Amendment—Ninth Circuit Does 180 on Fair Use Burden for Preliminary Injunction*, TECH. & MKTG. L. BLOG (Dec. 4, 2007), https://blog.ericgoldman.org/archives/2007/12/perfect_10_v_am.htm [https://perma.cc/B9AE-ERQW].

notice of claimed infringement under section 512(c)(3)—although this threshold is little more than a formality.[41] Thus, the burden of production might rest initially on the defendant to show that there is a nontrivial possibility of fair use; after such a showing, the burden of persuasion could shift to the plaintiff. Or the burden might rest on the plaintiff for infringements typically associated with consumption—such as infringements of the reproduction, public performance, or public display rights—but not for those generally involved in creation, such as the right to prepare derivative works. A shift in procedural burdens has consequences not only for the costs and substantive outcomes of litigation but also for the rhetoric of copyright debates: defendants could correctly assert that their conduct is protected until shown to be unfair, reversing the current situation.[42]

Second, with digital media protected by a technological protection measure (such as digital rights management schemes), listeners or readers may be liable for infringement even when their consumption of the underlying content is judged to be fair use. Title I of the Digital Millennium Copyright Act (DMCA) prohibits "circumvent[ing] a technological measure that effectively controls access to a [copyrighted] work."[43] Theoretically, this measure does not alter other provisions of the Copyright Act, expressly including fair use.[44] However, the statutory text puts courts in a bind: they must either treat fair use as a defense to circumvention liability or find that the ability to block circumvention is a new copyright entitlement. Both options require contravening part of the statutory text. Most circuit courts of appeal have opted for the latter choice, effectively expanding the copyright owner's scope of rights.[45] Only the Federal Circuit has required that plaintiffs

41. Lenz v. Universal Music Corp., 815 F.3d 1145, 1153–54 (9th Cir. 2016).

42. Copyright operates as a regime of strict liability: there is no scienter requirement for infringement. *See* 17 U.S.C. § 501(a) (2012). Thus, any activity—like listening to a CD in public—that implicates one of the exclusive rights of section 106 constitutes infringement unless a defense applies. If fair use operated as an affirmative grant of non-infringement, plaintiffs would have to show not only that the activity was one of those listed in section 106 but also that it was not fair use.

43. 17 U.S.C. § 1201(a)(1)(A) (2012).

44. 17 U.S.C. § 1201(c)(1) (2012).

45. *See, e.g.*, MDY Indus. v. Blizzard Entm't, 629 F.3d 928 (9th Cir. 2010); Universal City Studios v. Corley, 273 F.3d 429 (2d Cir. 2001). *See generally* Kristian Stout, *Copyrights Without Limits: The Undefeatable Right of Access*

show a nexus between circumvention and copyright infringement to establish liability.[46] Thus, listeners may need authorization from the copyright owner to access the material initially, even if their later, unauthorized activity qualifies as fair use. While the First Amendment does not authorize unlawful acquisition of material, it also does not permit a copyright owner to block publication, distribution, and so forth based on that acquisition.[47] This suggests that section 1201 of the DMCA may run afoul of the First Amendment, at least insofar as it authorizes injunctions against otherwise fair uses—a topic the next Section takes up.

Third, the imposition of a permanent injunction or ruinous damages on a losing defendant may, and should, draw First Amendment scrutiny.[48] Injunctive relief is the norm for victorious plaintiffs in IP cases. Courts are able to sidestep free speech concerns by framing injunctions as having no effect on speech (in patent cases); as barring only false or misleading speech (in trademark cases); or as limiting merely the ability to parrot another's expression rather than rephrasing (in copyright cases).[49] The last of these is the least accurate, and scholars increasingly recognize the First Amendment problems with IP injunctions.[50] At a minimum, courts ought to be reluctant to impose injunctions against defendants in cases where fair use, or a similar exception to liability, is a close but unsuccessful argument. (This would, of course, necessitate developing some sort of free speech defense in patent doctrine.)

Injunctive relief in IP litigation is a classic—if under-

Control Under § 1201(A) of the Digital Millennium Copyright Act, 19 MARQ. INTELL. PROP. L. REV. 181 (2015).

46. *See* Chamberlain Grp. v. Skylink Techs., 381 F.3d 1178, 1202–03 (Fed. Cir. 2004).

47. *See* Bartnicki v. Vopper, 532 U.S. 514, 524–25, 535 (2001); N.Y. Times v. United States, 403 U.S. 713, 718–19 (1971).

48. *See* Samuelson & Wheatland, *supra* note 33.

49. *See, e.g.*, Intellectual Ventures I LLC v. Symantec Corp., 838 F.3d 1307, 1322–29 (Fed. Cir. 2016) (Mayer, J., concurring); Thomas F. Cotter, *A Burkean Perspective on Patent Eligibility*, 22 BERKELEY TECH. L.J. 855, 880–81 (2007).

50. *See* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998). Courts have also begun to apply somewhat greater First Amendment scrutiny to injunctive relief in at least some circumstances. *See, e.g.*, Sindi v. El-Moslimany, 896 F.3d 1 (1st Cir. 2018); Eugene Volokh, *First Circuit Holds Most Anti-Libel Injunctions Are Unconstitutional*, VOLOKH CONSPIRACY (July 11, 2018, 7:17 PM), https://reason.com/volokh/2018/07/11/first-circuit-holds-most-modern-anti-lib [https://perma.cc/LBV8-UUZ9].

recognized—prior restraint on speech, but the threat of exorbitant damages also poses a real risk of chilling expression.[51] This is particularly true for consumers who use multiple copyrighted works, since statutory damages are calculated on a per-work basis and need not bear any relation to any actual damages or harm caused.[52] (Patent damages are theoretically limited either to a reasonable royalty or the plaintiff's lost profits, and trademark damages putatively require misconduct, such as willful infringement on the part of the defendant, to be awarded.) Listening to a record album,[53] watching a season of episodes via the DVD drive on one's laptop computer,[54] or (at one point) viewing the documentary "Eyes on the Prize" in public[55] exposes the viewer or listener to multiple damage awards. The most salient recent examples of the proliferation of statutory damage awards are Joel Tenenbaum[56] and Jammie Thomas-Rasset,[57] both of whom downloaded a large number of songs from peer-to-peer file-sharing networks. But it is not difficult to posit a more sympathetic reader or listener, such as one who downloads scientific articles that they (or their home institution) cannot afford[58] or who copies an overly expensive textbook.[59]

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51. *Cf.* N.Y. Times v. Sullivan, 376 U.S. 254, 277 (1964) (noting "[t]he fear of damage awards under a [civil defamation] rule . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute").

52. *See* 17 U.S.C. § 504(c) (2012); *cf.* Feltner v. Columbia Pictures Television, 523 U.S. 340 (1998).

53. *See* Robert Stigwood Grp. v. O'Reilly, 530 F.2d 1096, 1103–05 (2d Cir. 1976); *cf.* MCA Television Ltd. v. Feltner, 89 F.3d 766, 768–71 (11th Cir. 1996); Gamma Audio & Video, Inc. v. Ean-Chea, 11 F.3d 1106, 1115–18 (1st Cir. 1993).

54. *See, e.g.*, *Feltner*, 89 F.3d at 768–71; *Gamma Audio & Video*, 11 F.3d at 1115–18.

55. *See* DeNeen L. Brown & Hamil R. Harris, *A Struggle for Rights*, WASH. POST (Jan. 17, 2005), http://www.washingtonpost.com/wp-dyn/articles/A14801-2005Jan16.html [https://perma.cc/4FUQ-JDS9].

56. *See* Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487 (1st Cir. 2011).

57. *See* Capitol Records, Inc. v. Thomas-Rasset, 692 F.3d 899 (8th Cir. 2012).

58. *See* John Bohannon, *Who's Downloading Pirated Papers? Everyone*, SCIENCE (Apr. 28, 2016, 2:00 PM), https://www.sciencemag.org/news/2016/04/whos-downloading-pirated-papers-everyone [https://perma.cc/32VM-RCFT]; *cf.* Marcella Bombardieri, *The Inside Story of MIT and Aaron Swartz*, BOS. GLOBE (Mar. 29, 2014), https://www.bostonglobe.com/metro/2014/03/29/the-inside-story-mit-and-aaron-swartz/YvJZ5P6VHaPJusReuaN7SI/story.html [https://perma.cc/WR62-GLLL].

59. *Cf.* Cambridge Univ. Press v. Becker, No. 1:08-CV-1425-ODE, 2016 U.S. Dist. LEXIS 118793 (N.D. Ga. Mar. 31, 2016).

B. Tort

Tort law will have to take greater account of free speech concerns for listeners in the Internet space, particularly since Congress has reduced statutory protections for online users and intermediaries that partially relieved pressure on First Amendment doctrine. Two examples of tort causes of action that will come under strain are the right of publicity and privacy-related claims, such as intrusion upon seclusion or publication of private facts.

The right of publicity is an odd outgrowth of privacy law; it protects an individual's ability to obtain financial compensation from the commercial use of his or her persona.[60] "Borg-like," the right of publicity has assimilated more and more of the subject matter it has come into contact with.[61] The right has mutated from a negative entitlement to prevent unauthorized uses to a positive right that can be licensed and even assigned; the former boxer George Foreman transferred all rights to his persona for a sum of over $100 million dollars.[62] Over time, the right has expanded greatly. At first, it protected only celebrities; now, the right covers anyone whose persona has value (a neatly circular argument). The right has expanded from governing use in commercial contexts to any use that derives value. It has lengthened from existence during one's natural life to postmortem protection. And its coverage has grown from one's name and likeness to encompassing any identifiable characteristic, such as a catch phrase, distinctive gesture, or even a robot version that mildly resembles the plaintiff.[63] The right of publicity is sometimes classified as a tort cause of action, sometimes as a species of intellectual property, and sometimes as both simultaneously. This uncertain or dual existence means that some claims can evade speech-protective regimes, such as section 230 of the Communications Decency Act (CDA),

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60. *See* Michael T. Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 127 (1993).

61. *See Borg*, MEMORY ALPHA, http://memory-alpha.wikia.com/wiki/Borg (last visited Sept. 14, 2018) [https://perma.cc/3QJJ-V857].

62. Sam Walker, *George Foreman Sells His Name and Likeness for $137.5 Million*, WALL ST. J., https://www.wsj.com/articles/SB944787295738101888 (last updated Dec. 10, 1999, 12:01 AM) [https://perma.cc/Z2ZN-LGGQ].

63. *See, e.g.*, Wendt v. Host Int'l Inc., 125 F.3d 806, 809–10 (9th Cir. 1997); White v. Samsung Elecs. Am., 989 F.2d 1512, 1517–19 (9th Cir. 1993) (Kozinski, J., dissenting).

through reclassification as IP related (exempt) rather than as torts (barred).

From a speech perspective, the right of publicity has the worst aspects of both privacy and IP law. Its IP guise makes the right of publicity seem property-like and thus orthogonal to free expression concerns. And, its privacy version makes protection through measures such as injunctions seem less problematic, since it appears to govern privileged or confidential matters rather than commercial exploitation. And while it initially applied only to speech made for commercial or financial gain, the right of publicity now protects against appropriation for any use or benefit.[64]

Moreover, the right of publicity has only slowly and irregularly developed a limited First Amendment defense, framed as protecting newsworthy uses of a subject's persona.[65] The scope of newsworthiness is uncertain, varying from state to state and from statutory to common law protection. Like fair use in copyright, it is generally context sensitive and fact specific, which in practical terms means that the defense is expensive to establish in litigation.

Finally, the right of publicity exists apart from, or parallel to, other IP protections such as copyright. The Supreme Court made plain that the Copyright Act does not preempt the right of publicity even when it covers similar or identical subject matter.[66] Courts—especially the Ninth Circuit—have proceeded to seize this opening, such as by finding that individual actors have cognizable personality rights in distinctive characters that enable claims against defendants otherwise protected by a copyright license.[67] Thus, a defendant immunized from copyright liability by fair use, *de minimis* use, or even authorization can face exposure to plaintiffs who argue exploitation of their likenesses in the material.

Publication of private facts, unlike the right of publicity, is squarely within the tort camp. However, it too raises issues for listeners and speakers alike. Judge Richard Posner has famously characterized privacy as concealment—the ability to

64. *See* RESTATEMENT (SECOND) OF TORTS § 652C cmt. b (AM. LAW INST. 1977).

65. *See, e.g.*, Toffoloni v. LFP Publ'g Grp., 572 F.3d 1201, 1207–12 (11th Cir. 2009).

66. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573–77 (1977).

67. *See, e.g.*, *Wendt*, 125 F.3d at 809–10; *White*, 989 F.2d at 1517–19.

hide unwanted aspects of oneself, even if true, from others so as to push them towards forming a more positive impression than warranted.[68] Like the right of publicity, the private-facts tort includes a partial First Amendment release valve by exempting newsworthy uses from liability.[69] But the contours of the defense are uncertain and contested even by privacy experts. And the newsworthiness defense may fail to account for the value to ordinary listeners and consumers of putatively private information about their neighbors, coworkers, and fellow citizens.[70]

Privacy-related causes of action can expose even media defendants to the risk of ruinous damages if these entities wrongly predict whether information is sufficiently newsworthy. Even if cases with massive damages are rare, or involve questionable judgment on the part of media defendants, their *in terrorem* effect may lead them to have salience far greater than their actual incidence.[71] The most famous recent example is a lawsuit against the Web site/news conglomerate Gawker by the former wrestler and reality television star Hulk Hogan (né Terry Bollea). Gawker decided to publish not only the news that Hogan/Bollea had a sexual relationship with his then-best-friend's wife but also a clandestine videotape that recorded one of their encounters.[72] Bollea had discussed the affair with radio host Howard Stern, and Bollea's friend Todd Clem claimed that Bollea knew contemporaneously of the recording.[73] Nonetheless, Bollea sued Gawker on invasion of privacy theories.[74] In particular, the plaintiffs claimed that while Hulk Hogan was a

68. *See* Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393 (1978).

69. *See, e.g.*, Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).

70. *See* Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 350–62 (1983).

71. Behavioral economics has a flourishing literature on the human mismeasurement of risk. We are famously more afraid of sharks than pigs, even though pigs kill far more people every year. *See Myth 2: Sharks Are the Number One Cause of Animal-Related Deaths!*, AM. MUSEUM OF NATURAL HISTORY, https://www.amnh.org/learn/pd/sharks_rays/rfl_myth/myth_page2.html (last visited Dec. 26, 2018) [https://perma.cc/7QGH-V4VE].

72. Jeffrey Toobin, *Gawker's Demise and the Trump-Era Threat to the First Amendment*, NEW YORKER (Dec. 19 & 26, 2016), https://www.newyorker.com/magazine/2016/12/19/gawkers-demise-and-the-trump-era-threat-to-the-first-amendment [https://perma.cc/LE97-R9PC].

73. *Id.*

74. Sydney Ember, *Gawker and Hulk Hogan Reach $31 Million Settlement*, N.Y. TIMES (Nov. 2, 2016), https://www.nytimes.com/2016/11/03/business/media/gawker-hulk-hogan-settlement.html [https://perma.cc/HW9Y-XMY3].

public figure who had shed most, if not all, of his privacy, Terry Bollea remained someone who could assert privacy rights.[75] This slightly head-spinning duality, and Gawker's unabashed philosophy of publishing any information that caught the public's ear, led a jury to find for the plaintiffs and award damages of over $140 million.[76]

While treating the jury's findings with minimum due regard, it is strange to contemplate that Hogan is worth more alive, with privacy violated, than he would be if Gawker had killed him. (His net worth is reportedly only around $25 million.)[77] By contrast, the verdict caused Gawker to go into bankruptcy protection; it shuttered the eponymous news/gossip site and its remaining assets were sold to the media outlet Univision.[78] Gawker was an unappealing defendant, and the interests of WWE viewers may not initially seem to warrant mounting the free speech barricades. But the lines between entertainment (something of a luxury) and politics (historically considered core First Amendment speech) have long since blurred. Americans have already elected one actor and one reality television star to the presidency.[79] Minnesota sent a stand-up comedian and former "Saturday Night Live" cast member to the Senate as its representative and a former professional wrestler to its governor's residence;[80] California elected an action movie star as governor.[81] And, while these

75. Toobin, *supra* note 72.

76. *Id.*

77. Nat Berman, *How Hulk Hogan Achieved a Net Worth of $25 Million*, MONEY INC., https://moneyinc.com/hulk-hogan-net-worth/ (last visited Nov. 15, 2018) [https://perma.cc/G4G9-2UK5].

78. Toobin, *supra* note 72.

79. Julie Miller, *Is Reality TV Really to Blame for President Donald Trump?*, VANITY FAIR (June 7, 2018, 10:00 AM), https://www.vanityfair.com/hollywood/2018/06/is-reality-tv-really-to-blame-for-president-donald-trump [https://perma.cc/8YMR-L7PE]; *Ronald Reagan*, HISTORY (Nov. 9, 2009), https://www.history.com/topics/us-presidents/ronald-reagan [https://perma.cc/E73H-PN6W].

80. Thanks to Will Soper for this example. Annys Shin, *When Former Professional Wrestler Jesse Ventura Became Minnesota Governor*, WASH. POST (Dec. 28, 2017) https://www.washingtonpost.com/lifestyle/magazine/former-professional-wrestler-jesse-ventura-sworn-in-as-minn-governor/2017/12/20/ [https://perma.cc/K6AR-NNGF]; David Smith, *The Rise and Fall of Al Franken: From Comedy to Politics to Disgrace*, GUARDIAN (Dec. 7, 2017, 1:06 PM), https://www.theguardian.com/us-news/2017/dec/07/al-franken-politics-minnesota-senator [https://perma.cc/9J3V-Z2BE].

81. *Arnold Schwarzenegger Biography*, BIOGRAPHY (Apr. 2, 2014), https://www.biography.com/people/arnold-schwarzenegger-9476355 [https://perma.cc/5S5Q-9LYC].

examples show that today's Broadway or Hollywood gossip may be tomorrow's issue in Washington, D.C., they also fail to capture the ordinary value that listeners, readers, and viewers place on information about the powerful figures at the center of modern American culture.

Moreover, as the right of publicity discussion shows, statutory protection for speech online is an imperfect shield.[82] Congress recently enacted legislation, purportedly to reduce sex trafficking online, that further weakens that shield.[83] While the law may affect only a relatively narrow set of Web sites—it was aimed principally at Backpage.com—it risks having two negative effects for listeners and readers.[84] First, other advocacy groups can, and likely will, pursue reductions in section 230 for their own causes, such as revenge porn. Even if those causes are worthy, online intermediaries—the gateways to most Internet information—are unlikely to be able to target information with perfect accuracy, avoiding both false positive and false negative results. They are thus likely either to over-block or under-block information, harming readers and listeners in both cases.[85] Second, if Internet intermediaries face liability, they will have to mount a defense based on constitutional law (the First Amendment) rather than relying on the statute. While courts seem more receptive to intermediary free speech claims of late,[86] First Amendment litigation is more expensive and uncertain than CDA 230's relatively straightforward exemption from liability.

C. Civil Procedure

Civil procedure seems an odd place to locate the effects of a listener-focused First Amendment, but some of its tenets—

82. 47 U.S.C. § 230 (2012). *See generally* David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373 (2010).

83. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253; *see* Mike Godwin, *Why Internet Advocates Are Against the Anti–Sex Trafficking Bill*, SLATE (Mar. 14, 2018, 6:31 AM), https://slate.com/technology/2018/03/the-antisex-trafficking-bill-sesta-fosta-will-hurt-the-internet.html [https://perma.cc/UK72-APLM].

84. *See* Godwin, *supra* note 83.

85. *See generally* Derek E. Bambauer, *Cybersieves*, 59 DUKE L.J. 377, 399–400 (2009) (discussing over- and under-blocking).

86. *See, e.g.*, Hassell v. Bird, 420 P.3d 776 (Cal. 2018) (disclosure: I signed a scholars' brief on behalf of Bird and Yelp).

particularly regarding personal jurisdiction—will be placed under tension by this shift. Personal jurisdiction is not simply a question of strategic advantage or judicial convenience. Rather, the Supreme Court has long held that jurisdiction is rooted in the protections offered by the Due Process Clause.[87] A defendant must have a constitutionally sufficient linkage to a forum state for that state to force him to litigate a suit there.[88] The Internet seemed to offer courts and judges license to expand jurisdiction almost without limit—after all, the online world appeared to be everywhere and nowhere at the same time.[89] Placing information on the Internet theoretically makes it available to any citizen in any jurisdiction; harm from that information could thus in theory occur anywhere as well.[90]

The problem redoubles when combined with certain types of inchoate injuries. If an online merchant sells a defective item to a customer in a particular state, and the item harms that person, then the contacts are tangible and clear.[91] However, certain harms are less cleanly rooted in physical territory, such as defamation (where harm depends upon where an individual has earned a reputation that can be damaged)[92] or trademark infringement (where harm depends upon the presence of a brand's reputation and consumers who can be confused).[93] Thus, not only is the medium ubiquitous, but the harm can be as well. Geography does not necessarily constrain jurisdiction.

In addition, some courts have created Internet-specific (or, perhaps, Internet-peculiar) personal jurisdiction doctrine that is at best benighted and at worst unconstitutional.[94] When confronted with the puzzles posed by the network's series of tubes, a number of courts followed the model of a single federal district court in Pennsylvania by adopting a test that measured amenability to jurisdiction based on an entity's Web presence.[95]

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87. *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1878). *See generally* Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the "Interwebs,"* 100 CORNELL L. REV. 1129, 1134, 1153 (2015).

88. *Pennoyer*, 95 U.S. at 722; *see also* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

89. *Cf.* Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CALIF. L. REV. 439 (2003).

90. Trammell & Bambauer, *supra* note 87, at 1157–60.

91. *Cf.* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 881–82 (2011).

92. *See* Calder v. Jones, 465 U.S. 783, 788–89 (1984).

93. *See* Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 412–16 (1916).

94. *See* Trammell & Bambauer, *supra* note 87, at 1145–52.

95. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124–25

If, for example, a firm offered a purely static site, Internet contacts alone would not suffice for jurisdiction.[96] An e-commerce site, by contrast, would almost surely result in jurisdiction.[97] Sites that were moderately interactive could tip towards finding jurisdiction, but not in a predictable fashion.[98] Interactivity is a crude proxy at most for whether there are contacts between a defendant that uses the Internet to share information and a forum state whose citizens might receive it.[99] This metric—known as the *Zippo* test after the case that first employed it—is either redundant (the instances where it is predictive are usually clear-cut in terms of jurisdiction) or unhelpful (its indeterminate middle range compromises the majority of cases).[100]

The muddied jurisprudence of Internet-based personal jurisdiction poses twin risks for listeners and readers. The first is that speakers and intermediaries may react to the claims of many sovereigns to regulate conduct by engaging in a sort of race to the bottom: following the rules of the most restrictive, least speech-friendly regime. This lowest common denominator approach is a familiar one in censorship debates. The second is that the costs of compliance, and the risks of liability, may drive information providers to affirmatively filter based upon geography, resulting in an inequitable distribution of information that is only indirectly driven by state action and thus less amenable to redress through First Amendment challenge.

The Supreme Court has begun to gradually rein in personal jurisdiction[101] by cabining the purely effects-based approach expressed in cases such as *Calder v. Jones*.[102] Thus far, though, the Court has avoided evaluating Internet-specific contexts.[103] Personal jurisdiction precedent has not squarely confronted the risk that the distribution of information will be chilled by the most litigious or least friendly forum, regardless

(W.D. Pa. 1997).

96. *See id.*; Trammell & Bambauer, *supra* note 87, at 1145–52.

97. *Zippo Mfg. Co.*, 952 F. Supp at 1124; Trammell & Bambauer, *supra* note 87, at 1145–52.

98. Trammell & Bambauer, *supra* note 87, at 1145–52.

99. *Id.*

100. *Id.*

101. *E.g.*, Walden v. Fiore, 571 U.S. 277 (2014).

102. 465 U.S. 783, 788–89 (1984).

103. *See* J. McIntyre Mach. v. Nicastro, 564 U.S. 873, 890 (2011) (Breyer, J., concurring).

of that jurisdiction's connection to the speaker or listener.[104] An emphasis on actual harms to actual listeners can help future courts refine Internet-specific case law on jurisdiction in a way that complements First Amendment concerns.

III. SHIFTS WITHIN FIRST AMENDMENT DOCTRINE

The confluence of the networked digital information ecosystem and a listener-centric view of the First Amendment will necessarily provoke shifts within the free speech doctrine itself. The most important change relates to how purported governmental interests are analyzed within the tiers of First Amendment scrutiny.[105] The advent of Internet communication means that litigants, and adjudicating courts, have much better data at their command when evaluating how the state's interest interacts with the burden a given regulation places upon free expression. This new empirical wealth could land on either side of the ledger. For example, studies have shown that Utah is the U.S. state with the highest per-capita consumption of Internet pornography, possibly because offline adult content is relatively difficult to access there.[106] This datum could be used either to support or oppose the regulation of adult material online: one could frame the problem as about the inescapability of pornography or about the Internet as a medium of last resort. Hopefully, the new availability of empirical evidence will increase the rigor with which courts and policymakers assess the tradeoffs inherent in deciding whether to regulate expression. The Internet's architecture can help reveal the actual extent of a purported information problem and perhaps also the degree to which a given regulatory regime is effective in addressing that issue.

However, richer data will also highlight choices that cannot be made on a consequentialist basis. It may be possible to determine the marginal effects that a particular regulatory regime has on chilling speech. But it is impossible to capture with any numerical precision what impact speech rules have on

104. *See, e.g.*, *Calder*, 465 U.S. at 790–91; Cassandra Burke Robertson, *The Inextricable Merits Problem in Personal Jurisdiction*, 45 U.C. DAVIS L. REV. 1301 (2012).

105. *See generally* McCullen v. Coakley, 134 S. Ct. 2518 (2014).

106. Benjamin Edelman, *Red Light States: Who Buys Online Adult Entertainment?*, 23 J. ECON. PERSP. 209 (2009).

autonomy, self-governance, or human flourishing. First Amendment theory and precedent are replete with deontological values and questions.[107] The Internet's wealth of data about information is simply irrelevant to these approaches. In fairness, First Amendment doctrine is already somewhat imprecise when it comes to weighing competing non-utilitarian values.[108] But the case law is likely to become even more imprecise as courts consider, for example, how to measure empirical data about the prevalence and effects of fake news versus the competing claims about the virtues of uninhibited political dialogue.[109] In areas such as the regulation of pornography, free speech doctrine is already beginning to shift towards consequentialist arguments (for example, about the effects of porn on divorce rates[110] and domestic violence[111]) and away from deontological claims (such as decreased autonomy and harm to community mores).[112] The Internet lets us measure more things, but it also requires that we decide which metrics should count.

CONCLUSION

Listeners and readers should, and probably will, move from MacGuffin to main player in First Amendment narratives. This shift in focus complements the rise of the Internet as a medium of communications: we know far more about what people view, like, ignore, and condemn online than we do in the

107. *See* David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 89–93 (2012).

108. *See, e.g.*, Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365 (2014); Rodney A. Smolla, *Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique of* United States v. Alvarez, 76 ALB. L. REV. 499 (2012).

109. *See, e.g.*, Michael Chertoff, *Fake News and the First Amendment*, HARV. L. REV. BLOG (Nov. 10, 2017), https://blog.harvardlawreview.org/156-2/ [https://perma.cc/Y9BK-ZPK5]; Mark Verstraete & Derek E. Bambauer, *Ecosystem of Distrust*, 16 FIRST AMEND. L. REV. 129, 149–52 (2017).

110. *See, e.g.*, David Shultz, *Divorce Rates Double When People Start Watching Porn*, SCIENCE (Aug. 26, 2016), https://www.sciencemag.org/news/2016/08/divorce-rates-double-when-people-start-watching-porn [https://perma.cc/GQ5E-9MTV].

111. *See, e.g.*, Gail Dines, *Is Porn Immoral? That Doesn't Matter: It's a Public Health Crisis*, WASH. POST (Apr. 8, 2016), https://www.washingtonpost.com/posteverything/wp/2016/04/08/is-porn-immoral-that-doesnt-matter-its-a-public-health-crisis/ [https://perma.cc/4DZQ-3LGS].

112. *See, e.g.*, Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324 (7th Cir. 1985).

offline world. Some of the second-order effects of a listener-focused First Amendment are predictable, and some will be surprises, but all deserve attention as the transition begins.