# LIBRARY DEPOSITS AND THE COPYRIGHT ACT, POST-*VALANCOURT BOOKS*

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*"I have an unshaken conviction that democracy can never be undermined if we maintain our library resources and a national intelligence capable of utilizing them."*[1]

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1. Letter from Franklin D. Roosevelt, U.S. President, to Herbert Putnam, Libr. of Cong. (Mar. 28, 1939), *in* Edward N. Waters, *Herbert Putnam: The Tallest Little Man in the World*, 33 Q.J. LIBR. CONG. 77, 171 (1976).

## INTRODUCTION

Libraries play an integral role in the American identity.[2] They also ensure that learning is accessible,[3] advancing the Copyright Clause's purpose—"to promote the progress of science and useful arts."[4] Since "creativity is almost always derivative," access is crucial to progress.[5] Libraries invaluably correct "access" market failures by preserving works in the public domain and loaning works to those who cannot or will not buy them.[6] Without libraries, commercial publishers could wield oligarchic control over the public's access to knowledge.[7]

Most countries use library deposit systems to enrich their national libraries.[8] These systems generally require commercial publishers to deposit copies of each work with their respective national libraries.[9] But America's library deposit system uniquely requires library deposit from copyright owners—not just publishers—under § 407 of the Copyright Act.[10] The works deposited under § 407

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2. Historian Arthur M. Schlesinger notes, "The public library has been historically a vital instrument of democracy and opportunity in the United States . . . . Our history has been greatly shaped by people who read their way to opportunity and achievements in public libraries." MARY RASENBERG & CHRIS WESTON, THE SECTION 108 STUDY GROUP REPORT 14 (2008); *see also* BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 73 (Houghton Mifflin & Co. 1906) (1791) ("[L]ibraries have improved the general conversation of the Americans, made the common tradesmen and farmers as intelligent as most gentlemen from other countries, and perhaps have contributed in some degree to the stand so generally made throughout the colonies in defence of their privileges.").

3. RASENBERG & WESTON, *supra* note 2, at 14.

4. U.S. CONST. art. I, § 8, cl. 8.

5. Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1578 (2009).

6. *Id.* (describing the "static and dynamic inefficiency" that copyrights create in "enabling creators to price their works at a monopoly level"—limiting access for users who are "willing to pay a price lower than that charged by the creator, but above the marginal cost of producing it"); Ariel Katz, *Copyright, Exhaustion, and the Role of Libraries in the Ecosystem of Knowledge*, 13 I/S: J.L. & POL'Y FOR INFO. SOC'Y 81, 104, 108 (2016).

7. *See* Balganesh, *supra* note 5; RASENBERG & WESTON, *supra* note 2, at 14 ("Libraries and archives collect and bring together in single repositories books, journals, music, and a wealth of other materials from a variety of sources in a way that no single individual could, thereby streamlining and facilitating the process by which authors and creators learn from and build upon the work of others. Libraries and archives open to the general public provide an opportunity for learning for all, including those who cannot afford to purchase books and other materials.").

8. *See* STAFF OF THE GLOB. RSCH. DIRECTORATE, MANDATORY DEPOSIT LAWS IN SELECTED JURISDICTIONS (2017).

9. *Id.*

10. 17 U.S.C. § 407(a).

bolster the Library of Congress: America's "de facto national library."[11] The Library of Congress's purpose is to "sustain and preserve a universal collection of knowledge and creativity for Congress and future generations."[12]

In *Valancourt Books, LLC v. Garland*,[13] the D.C. Circuit held that § 407 violates the Takings Clause when applied to physical deposits.[14] While correctly decided, *Valancourt Books* puts the United States at odds with the international status quo.[15] This Note seeks to reconcile these points by analyzing various means for enriching the Library of Congress without offending the Constitution. It considers whether the Copyright Clause can support a library deposit mandate and, if so, how the Constitution's affirmative limitations affect the mandate's constitutionality.

Part I describes *Valancourt Books*. Part II chronicles library deposit laws throughout history. Part III considers whether the Copyright Clause can support a library deposit mandate. Part IV addresses how the First Amendment and the Takings Clause impact the constitutionality of a library deposit mandate. Finally, Part V examines alternative library deposit systems to § 407. This Note implores Congress to revise the federal copyright system to account for legal and technological changes. It also suggests basing the federal library deposit system on § 408 during the interim.

## I. *VALANCOURT BOOKS, LLC V. GARLAND*

In *Valancourt Books, LLC v. Garland*, the court struck down § 407's library deposit mandate under the Fifth Amendment's Takings Clause.[16] Section 407 requires copyright owners to deposit two copies of their work with the Library of Congress.[17] To enforce this requirement, the Copyright Office sends demand letters that threaten to fine those who do not comply.[18] For most works, physical deposit is required by default.[19] While a copyright owner may request

11. David S. Clark, *Nation Building and Law Collections: The Remarkable Development of Comparative Law Libraries in the United States*, 109 LAW LIBR. J. 499, 523 (2017).

12. *Collections Policy Statements: Literature and Language*, LIBR. CONG. 2 (Mar. 2022), https://perma.cc/9VAB-5ZFE.

13. 82 F.4th 1222 (D.C. Cir. 2023).

14. *Id.* at 1238–39.

15. *See* STAFF OF THE GLOB. RSCH. DIRECTORATE, *supra* note 8.

16. *Valancourt Books*, 82 F.4th at 1238.

17. 17 U.S.C. § 407(a) (explaining that those subject to § 407's mandate include "the owner of copyright or of the exclusive right of publication in a work published in the United States"). This Note collectively refers to those subject to § 407's deposit mandate as "copyright owners" or "authors."

18. *Valancourt Books*, 82 F.4th at 1226; *see also* 17 U.S.C. § 407(d).

19. 37 C.F.R. § 202.19 (2024). Digital deposit is only the default deposit option for *exclusively* electronic works. *Id.*

special relief from § 407's mandate, such relief is granted solely at the Copyright Office's discretion.[20]

Valancourt Books, LLC (Valancourt) is a small publisher that prints rare books on-demand through order requests.[21] Although Valancourt affixes copyright notice on the books, it does not register such copyrights under § 408 or deposit copies under § 407.[22] The Copyright Office sent Valancourt a demand letter threatening to fine the small publisher if it did not deposit the requested copies.[23] Still, Valancourt refused.[24] In response, the Copyright Office gave Valancourt the option to deposit the copies digitally.[25] But Valancourt refused again for two reasons.[26] First, it opposed the idea of receiving baseless, preferential treatment over other small publishers from the mandate's burdens.[27] Second, to find and format the books for digital deposit would require countless hours of labor.[28]

Valancourt challenged the Copyright Office's demand as unconstitutional under the Fifth Amendment's Takings Clause and the First Amendment's right to free speech.[29] On appeal, the court held that the Copyright Office's demand for physical copies under § 407 was a per se taking.[30] It explained that the Copyright Office sought to physically appropriate Valancourt's private property (the printed books) for public use (the Library of Congress) without just compensation—a categorical Takings Clause violation.[31] And the "voluntary exchange" exception did not apply since the deposit, if made, would be neither reasonably voluntary nor done in exchange for a special governmental benefit.[32] Thus, the court ruled that demands for physical books under § 407 violated the Takings Clause.[33] With no need to reach the other issues, the court did not opine on Valancourt's First Amendment challenge or the constitutionality of demands for digital deposit.[34]

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20. *Id.* § 202.19(e).
21. *Valancourt Books*, 82 F.4th at 1228.
22. *Id.*
23. *Id.*
24. *Id.*
25. Valancourt Books, LLC v. Perlmutter, 554 F. Supp. 3d 26, 32 (D.D.C. 2021).
26. *Id.*
27. *Id.*
28. *Id.*
29. *Valancourt Books*, 82 F.4th at 1228.
30. *Id.* at 1231.
31. *Id.*
32. *Id.* at 1233.
33. *Id.* at 1238.
34. *Id.* at 1239.

## II. A CHRONICLE OF LIBRARY DEPOSIT MANDATES

Library deposit mandates date back to 1537, when King Francis required publishers to deposit copies of their works to build up his library—*Bibliothèque du Roi*.[35] England later enacted the Licensing Act of 1662, which similarly used a library deposit mandate to build up the Royal Library, Oxford, and Cambridge.[36] The Licensing Act gave commercial publishers perpetual copyrights on certain conditions, serving as an effective means of press control.[37]

> The confluence of political and religious unrest in a despotic society with a new means of mass communication by dissidents meant that censorship and press control were inevitable. The new means of communication—the printing press—resulted in the rise of a new industry—the book trade—that provided the economic impetus for monopoly, and monopoly became the handmaiden of press control by the Crown.[38]

But after the Glorious Revolution, England passed the Statute of Anne—a landmark law that veered publishers' copyright monopoly into authors' hands and cinched each monopoly's lifespan to fourteen years.[39] Despite its unprecedented changes, the Statute of Anne kept some remnants of the Licensing Act: Authors had to deposit nine copies of their works with the Royal Library and other institutions.[40]

In 1789, Congress received federal copyright powers through the Copyright Clause of the newly ratified Constitution.[41] Congress quickly used its copyright powers to pass the Copyright Act of 1790, which centralized the copyright system federally amidst fragmented state copyright laws.[42] Modeled after the Statute of Anne,[43] the 1790 Act required authors to deposit one copy of each work with the Secretary of State within six months of publication to complete copyright registration.[44] The deposited copies served as a record in the event of copyright infringement litigation.[45]

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35. Clark, *supra* note 11, at 510.

36. R.C. BARRINGTON PARTRIDGE, THE HISTORY OF THE LEGAL DEPOSIT OF BOOKS 23–24 (2006); L. RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 138 (1968).

37. L. RAY PATTERSON & STANLEY F. BIRCH, JR., A UNIFIED THEORY OF COPYRIGHT (Craig Joyce ed., 2009), *reprinted in* 46 HOUS. L. REV. 215, 249 (2009).

38. *Id.* at 244–45.

39. *Id.* at 250; PATTERSON, *supra* note 36, at 148.

40. PARTRIDGE, *supra* note 36, at 34.

41. U.S. CONST. art. I, § 8, cl. 8.

42. Craig W. Dallon, *Original Intent and the Copyright Clause:* Eldred v. Ashcroft *Gets It Right*, 50 ST. LOUIS U. L.J. 307, 314 (2006).

43. PATTERSON & BIRCH, *supra* note 37, at 242.

44. Copyright Act of 1790, Pub. L. No. 1-15, §§ 3–4, 1 Stat. 124, 125; *see also* PATTERSON, *supra* note 36, at 194.

45. Wheaton v. Peters, 33 U.S. 591, 665 (1834).

The Smithsonian Institution's enactment in 1846 connected copyright deposits to libraries in the United States for the first time.[46] Congress statutorily required authors to deposit a copy of their work with the Smithsonian Institution and the Library of Congress.[47] But with no incentive to comply, the requirement was largely ignored and ultimately repealed.[48] Ainsworth Spofford, the Librarian of Congress appointed by President Lincoln, reinstated the deposit requirement and introduced new statutory tools to enforce it.[49] As a result, the Library of Congress flourished.[50]

In 1886, the Berne Convention—the first international copyright treaty—was signed.[51] A 1908 revision to the Convention barred member states from conditioning copyright ownership on formalities such as library deposit.[52] While not yet a party to the Berne Convention, the United States still followed suit with the Copyright Act of 1909, eliminating many conditions to copyright ownership.[53] But the 1909 Act retained a copyright deposit requirement that served a dual purpose: fortifying the national library and maintaining

46. An Act to Establish the "Smithsonian Institution," for the Increase and Diffusion of Knowledge Among Men, ch. 178, § 10, 9 Stat. 102, 106 (1846), *repealed by* Act of Feb. 5, 1859, ch. 22, § 6, 11 Stat. 379, 380.

47. *Id.*

48. *See id.*; Clark, *supra* note 11, at 521; Jollie v. Jaques, 13 F. Cas. 910, 912 (C.C.S.D.N.Y. 1850) (holding that library deposit with the Smithsonian Institution was not required to avoid a statutory penalty or hold a copyright).

49. *See* Act of Mar. 3, 1865, ch. 126, 13 Stat. 540 (authorizing the Librarian of Congress to make a demand for works not deposited within twelve months of publication); DAVID C. MEARNS, THE STORY UP TO NOW: THE LIBRARY OF CONGRESS, 1800–1946, at 76 (1947).

50. MEARNS, *supra* note 49, at 90 ("The revolutionary element in the act of 1865, so far as the Library of Congress was concerned, was the one involving a penalty for non-compliance with the obligation to deposit."). Under Spofford's leadership, the Library of Congress underwent "extraordinary expansion, consolidation and reconstitution." *Id.* at 87. From 1865 to 1870, the Library's collections sharply increased. *Id.* ("[A]t the beginning, 82,000 volumes; at their end, 237,000—if the space had tripled, so had the collections.").

51. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 (revised at Berlin, Nov. 13, 1908).

52. *Id.*

53. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (repealed 1976) (conferring copyrights to authors upon publication of the work with copyright notice affixed, rather than requiring formal registration); *see also* Daniel Gervais, *The 1909 Copyright Act in International Context*, 26 SANTA CLARA COMPUT. & HIGH TECH. L.J. 185, 192 (2010).

a record of existing copyrights.[54] Copyright owners who failed to deposit their works forfeited their copyrights and incurred fines.[55]

The Copyright Act of 1976 removed all preliminary formalities to copyright ownership, granting copyrights in "original works of authorship" instantly upon their fixed, tangible creation.[56] Still, copyright owners had to include copyright notice on "all publicly distributed copies" to *maintain* that ownership.[57] The 1976 Act also bifurcated copyright deposits from library deposits.[58] Section 407 applied to all works published with copyright notice affixed, while § 408 only applied to copyrights seeking federal registration.[59]

In 1989, the United States became a party to the Berne Convention and enacted the Berne Convention Implementation Act of 1988 (Berne Act).[60] The Berne Act made two key changes to the 1976 Act. First, it rid all conditions to copyright ownership, including affixed notice on published copies.[61] Second, it removed the notice requirement from § 407's deposit mandate.[62] Thus, the Berne Act broadened § 407's reach to all copyrighted works published in the United States—with or without copyright notice affixed.[63]

The amended version of § 407 is what Valancourt challenged.[64] And its demise puts the United States in the minority: At least 118 countries use library deposit mandates unconnected to copyright ownership to build up their national libraries.[65] Even so, *Valancourt Books* was correctly decided. Without providing a special benefit or just compensation in exchange for physical library deposit, § 407 violates the Takings Clause.[66] The mandate may also be unconstitutional on other grounds. The D.C. Circuit did not address § 407's First Amendment concerns or the constitutionality of a digital deposit mandate.[67]

*Valancourt Books* exposed a hole in Congress's federal copyright law vessel—the 1976 Act. Given the rise of the digital age, the hole

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54. Copyright Act of 1909, Pub. L. No. 60-349, § 13, 35 Stat. 1075, 1078 (repealed 1976); ELIZABETH K. DUNNE, 86TH CONG., STUDY NO. 20: DEPOSIT OF COPYRIGHTED WORKS 1–2 (Comm. Print 1960).

55. Copyright Act of 1909, Pub. L. No. 60-349, § 13, 35 Stat. 1075, 1078 (repealed 1976).

56. Copyright Act of 1976, Pub. L. No. 94-553, § 102, 90 Stat. 2541, 2544–45.

57. *Id.* §§ 401, 405.

58. *Compare id.* § 407 (library deposit), *with id.* § 408 (copyright deposit).

59. *Id.*

60. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

61. *Id.* § 7.

62. *Id.* § 8.

63. *Id.*

64. Valancourt Books, LLC v. Garland, 82 F.4th 1222, 1226 (D.C. Cir. 2023).

65. STAFF OF THE GLOB. RSCH. DIRECTORATE, *supra* note 8.

66. *See Valancourt Books*, 82 F.4th at 1233.

67. *See id.* at 1230.

punctured by § 407 is not alone. Modern developments such as artificial intelligence, digital media, and electronic distribution have perforated the 1976 Act.[68] Congress habitually plugs these holes with amendments to prevent the 1976 Act from sinking.[69] But this jury-rigged approach is unsustainable. *Valancourt Books* loudened the call for Congress to scrap and rebuild its federal copyright vessel. While the 1976 Act is precarious on several counts, this Note considers whether Congress can include a library deposit system in future iterations of the Act without violating the Constitution. Such a feat hinges on two constitutional requirements. First, the system must fall within congressional authority. Second, the system cannot violate the Constitution's affirmative limitations.[70]

## III. DRAWING THE COPYRIGHT CLAUSE'S BOUNDARIES

The Copyright Clause allows Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"—that is, to enact copyright and patent laws.[71] Various interpretations of the Copyright Clause have circulated among courts and scholars throughout history.[72] But its syntax and barren history have impeded any consensus.[73]

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68. *See* RASENBERG & WESTON, *supra* note 2, at i.

69. *See, e.g.*, Copyright Remedy Clarification Act, Pub. L. No. 101-553, 104 Stat. 2749 (1990); Computer Software Rental Amendments Act, Pub. L. No. 101-650, 104 Stat. 5089 (1990); Audio Home Recording Act, Pub. L. No. 102-563, 106 Stat. 4237 (1992); Satellite Home Viewer Act, Pub. L. No. 103-369, 108 Stat. 3477 (1994); No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998); Digital Theft Deterrence and Copyright Damages Improvement Act, Pub. L. No. 106-160, 113 Stat 1774 (1999); Fraudulent Online Identity Sanctions Act, Pub. L. No. 108-482, 118 Stat. 3912 (2004); Copyright Cleanup, Clarification, and Corrections Act, Pub. L. No. 111-295, 124 Stat. 3180 (2010); Satellite Television Community Protection and Promotion Act, Pub. L. No. 116-94, 133 Stat. 2534 (2019).

70. *See* MICHAEL KENT CURTIS, J. WILSON PARKER, WILLIAM G. ROSS, DAVISON M. DOUGLAS & PAUL FINKELMAN, CONSTITUTIONAL LAW IN CONTEXT 68 (4th ed. 2018).

71. U.S. CONST. art. I, § 8, cl. 8.

72. Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. 1771, 1781 (2006).

73. *Id.* at 1785; *see also* United States v. Martignon, 492 F.3d 140, 145–46 (2d Cir. 2007) ("It is not clear from the wording of the Copyright Clause where the grant of power ends and where the limitation(s) begin(s). This clause allows Congress '[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.' One could draw the line between grant and limitation(s) almost anywhere in this sentence.").

A library deposit system based on the Copyright Clause must fall within the Clause's boundaries to qualify as constitutional.[74] Deciding where to draw those boundaries hinges on the Copyright Clause's twin objectives: (1) promoting the progress of science and (2) securing authors with the exclusive right to their writings for a limited time.[75] The first objective comes from the Progress Clause (the Copyright Clause's "end"), while the second objective comes from the Exclusive Rights Clause (the Copyright Clause's "means").[76]

TABLE 1: THE COPYRIGHT CLAUSE'S ENDS AND MEANS

| PROGRESS CLAUSE ("ENDS") | EXCLUSIVE RIGHTS CLAUSE ("MEANS") |
|---|---|
| To promote the progress of science and useful arts, | by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. |

Courts and scholars disagree on how to interpret these provisions.[77] Most courts view the Exclusive Rights Clause as the source of Congress's copyright powers and the Progress Clause as a nonoperative preamble.[78] Some courts view the Progress Clause as a limit to Congress's copyright powers, which the Exclusive Rights Clause confers.[79] Others correctly contend that the reverse is true: Congressional copyright powers come from the Progress Clause and are limited by the Exclusive Rights Clause.[80] Yet courts and scholars agree that the Necessary and Proper Clause expands congressional copyright powers,[81] and the Copyright Clause's "limited times" language reins these powers by forbidding perpetual copyrights.[82]

74. *See* Ladd v. Law & Tech. Press, 762 F.2d 809, 812 (9th Cir. 1985).
75. *See* U.S. CONST. art. I, § 8, cl. 8; *see also* Oliar, *supra* note 72, at 1780–84.
76. *See* Oliar, *supra* note 72, at 1773 n.1.
77. *See id.* at 1780.
78. *Id.* at 1781.
79. *Id.* at 1782.
80. *Id.*
81. *See, e.g.*, Ladd v. Law & Tech. Press, 762 F.2d 809, 812 (9th Cir. 1985) (holding that the Necessary and Proper Clause expands Congress's copyright powers); Mitchell Bros. Film Grp. v. Cinema Adult Theater, 604 F.2d 852, 860 (5th Cir. 1979) ("Congress has authority to make any law that is 'necessary and proper' for the execution of its enumerated Article I powers, including its copyright power, and the courts role in judging whether Congress has exceeded its Article I powers is limited. The courts will not find that Congress has exceeded its power so long as the means adopted by Congress for achieving a constitutional end are 'appropriate' and 'plainly adapted' to achieving that end." (citations omitted)).
82. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 208–10 (2003); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 648 (1999)

Rather than evaluating each interpretation, this Part uses an ends-means analysis to determine whether the Copyright Clause can support a library deposit system. It employs rational basis review and intermediate scrutiny while also addressing the Necessary and Proper Clause's effect on the calculus.

Efforts to fortify the Library of Congress align with the Progress Clause without controversy.[83] But whether § 407's mandate aligns with the Exclusive Rights Clause's prescribed means—securing exclusive rights to authors—is less clear. This is because complying with § 407's mandate is not a condition to copyright ownership.[84] Thus, this Part focuses on whether § 407's mandate is a constitutional means under the Exclusive Rights Clause. It ultimately concludes that such a mandate is constitutional only when the Necessary and Proper Clause and rational basis review are employed in tandem.

### *A. Rational Basis Review*

Under rational basis review, Congress may use its enumerated powers to pass laws rationally related to a legitimate governmental purpose.[85] Virtually all laws survive this highly deferential standard.[86] When applied to the Copyright Clause, rational basis review sustains federal laws that are rationally related to promoting progress by securing copyrights to authors. And when the Necessary and Proper Clause supplements, the law's ends-means "fit" is judged in the context of the whole federal copyright system: Each law need not promote progress individually, so long as it belongs to a system of laws rationally designed to promote progress in their aggregate.[87]

For example, in *Ladd v. Law & Technology Press*,[88] the court found § 407's mandate constitutional even though library deposit was

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(Stevens, J., dissenting); Mills Music, Inc. v. Arizona, 591 F.2d 1278, 1285 (9th Cir. 1979).

83. *See supra* note 7.

84. 17 U.S.C. § 407(a)(2).

85. *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 309, 314 n.6 (1993); Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 38 LOY. L.A. L. REV. 123, 129 (2002).

86. Epstein, *supra* note 85, at 129. Under rational basis review, "so long as we can identify a political winner, then we can identify one (lone) social benefit that enables the statute to [pass] muster." *Id.* at 130.

87. *See* Mitchell Bros. Film Grp. v. Cinema Adult Theater, 604 F.2d 852, 860 (5th Cir. 1979) ("[A]lthough Congress could require that each copyrighted work be shown to promote the useful arts (as it has with patents), it need not do so. . . . Congress could reasonably conclude that the best way to promote creativity is not to impose any governmental restrictions on the subject matter of copyrightable works. By making this choice Congress removes the chilling effect of governmental judgments on potential authors and avoids the strong possibility that governmental officials (including judges) will err in separating the useful from the non-useful." (citations omitted)).

88. 762 F.2d 809 (9th Cir. 1985).

not a condition to copyright ownership.[89] There, the court demurred the argument that the Copyright Clause only allowed Congress to grant copyrights that promote progress.[90] It added that while the Copyright Clause did not expressly authorize § 407, it was still constitutional since the mandate fortified a national public library to "promote the arts and sciences for the public good."[91] The court explained that the Necessary and Proper Clause "expands rather than limits" Congress's copyright powers.[92] Deeming it "necessary and proper" in the federal copyright system, the court upheld § 407.[93]

*Ladd* was decided before Congress removed the notice requirement from § 407.[94] Yet the outcome is the same: A library deposit mandate imposed on published, copyrighted works is "necessary and proper" to promoting progress because it increases public access to works.[95] The mandate also only applies to copyright owners, which makes it at least incidental to copyright ownership.[96] Many federal copyright laws do not share a strong nexus with securing exclusive rights to authors or promoting progress. For example, the Copyright Act offers standing in federal court for copyright infringement proceedings[97] and allows parties to recoup costs related to such proceedings.[98] While these provisions are not strongly tied to the Copyright Clause's ends or means, the Necessary and Proper Clause's expansive power likely spares their constitutional status.

An argument can be made that, unlike § 407's mandate, those laws are "necessary and proper" to securing copyrights to authors since they help authors enforce their exclusive rights. And if there is no way or reason for authors to enforce their exclusive rights, copyrights lose their value and purpose.[99] For example, § 411 allows copyright owners to enforce their copyrights in federal courts.[100] To

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89. *Id.* at 814–15.
90. *Id.* at 812.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Compare id.* at 810 (decided in 1985), *with* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 8, 102 Stat. 2853, 2859.
95. *See* RASENBERG & WESTON, *supra* note 2, at 27.
96. *See* 17 U.S.C. § 407.
97. *Id.* § 408.
98. *Id.* § 505.
99. In the famous words of Chief Justice Marshall, "every right . . . must have a remedy, and every injury its proper redress." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803); *see also* PATTERSON, *supra* note 36, at 194 (noting that the right to "print, publish, and sell" has to be exclusive because copyrights are designed to "prevent the piracy of published works").
100. 17 U.S.C. § 411 (conditioning federal copyright infringement claims on federal copyright registration); *see also id.* § 408 (federal copyright registration requirements).

encourage this enforcement, § 505 allows copyright owners to recoup their infringement-related losses.[101] Thus, these statutes are perhaps necessary and proper in a federal copyright system because they help maintain copyrights' exclusivity.

Unlike these statutes, § 407's mandate may not be a necessary or proper use of congressional copyright powers because the mandate plays no role in securing, enforcing, or preserving copyrights. In fact, the mandate might deter authors from publishing their works since it automatically applies upon publication, and compliance can prove costly.[102] But as shown in *Ladd*, § 407 likely still survives rational basis review, particularly when the Necessary and Proper Clause supplements. This is because the mandate fortifies the Library of Congress and thus is rationally related to promoting progress.[103]

### *B. Intermediate Scrutiny*

Intermediate scrutiny requires that laws be substantially related to an important governmental interest.[104] While rational basis review only considers the statute's benefits, intermediate scrutiny weighs those benefits against the statute's losses.[105] Here, intermediate scrutiny requires that § 407 substantially relate to the important governmental interest of promoting progress. Section 407 fails to meet this threshold for two reasons. First, its burden to copyright owners outweighs its intended benefits. Second, § 408 is a more effective alternative to § 407.

Section 407 is more burdensome than beneficial.[106] While its deposit mandate bolsters the Library of Congress, it does so on the owner's dime—without conferring any benefits to the owner in exchange.[107] Forcing copyright owners to shoulder deposit-related costs without returning any benefit causes the mandate to collapse under the weight of intermediate scrutiny. This is because the inequitable burden imposed on copyright owners could discourage them from creating or publishing their creations, thereby hindering progress.[108]

Also, there are less imperious ways to build up the Library of Congress. For example, § 408 allows copyright owners to federally register their copyrights.[109] Federal registration requires the

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101. *Id.* § 505.

102. *See, e.g.*, Valancourt Books, LLC v. Garland, 82 F.4th 1222, 1227–28 (D.C. Cir. 2023).

103. *See* Epstein, *supra* note 85, at 130–31.

104. *Id.*

105. *Id.* at 131–32.

106. *See* Clark, *supra* note 11, at 517, 521–23; *infra* note 156 and accompanying text.

107. *See Valancourt Books*, 82 F.4th at 1232–33.

108. *See id.*

109. *See* 17 U.S.C. § 408.

registrant to deposit two copies of the work with the Copyright Office for recordation purposes.[110] The Copyright Office may then donate the copies to the Library of Congress.[111] Federal registration gives copyright owners the benefit of accessing federal infringement claims.[112] And unlike § 407's mandate, registration under § 408 is completely voluntary: Copyright owners are not hit with demand letters or fines for not registering their works.[113] Thus, § 408 is more narrowly tailored to bolstering the Library of Congress.[114]

Section 407 does not survive intermediate scrutiny because it might deter creation, and § 408 promotes progress more effectively. As such, a library deposit mandate based on the Copyright Clause is only constitutional when the Necessary and Proper Clause supplements. Even so, such a system likely only survives rational basis review. But as explored in Part V, other Article I powers may provide stabler grounds for a library deposit system. Yet, no matter which enumerated power is used, the resulting library deposit system cannot violate the Constitution's affirmative limitations.[115]

## IV. AFFIRMATIVE LIMITATIONS

The Constitution's affirmative limitations, such as those nestled in the Bill of Rights, limit Congress's copyright powers.[116] Of these limitations, the First and Fifth Amendments pose the greatest threats to a library deposit system. *Valancourt Books* found § 407's physical library deposit mandate unconstitutional under the Takings Clause.[117] But the D.C. Circuit did not address the (un)constitutionality of § 407 with respect to the First Amendment or digital deposits.[118] This Part picks up where the court left off, considering each of these unaddressed issues in turn.

### *A. First Amendment*

Some argue that § 407's library deposit mandate violates the First Amendment—namely, its bar against compelled speech, viewpoint discrimination, and overburdensome regulations.[119] While

110. *Id.*
111. *Id.* § 704.
112. *Id.* §§ 408, 411.
113. *Compare* 17 U.S.C. § 407(d), *with id.* § 408.
114. H.R. REP. NO. 94-1476, at 150, 152 (1976).
115. *See* CURTIS ET AL., *supra* note 70, at 68.
116. *See id.*; Kenneth J. Burchfiel, *The Constitutional Intellectual Property Power: Progress of Useful Arts and the Legal Protection of Semiconductor Technology*, 28 SANTA CLARA L. REV. 473, 506–07 (1988).
117. Valancourt Books, LLC v. Garland, 82 F.4th 1222, 1231, 1239 (D.C. Cir. 2023).
118. *Id.* at 1230–31.
119. Drew Thornley, *The Copyright Act's Mandatory-Deposit Requirement: Unnecessary and Unconstitutional*, 53 LOY. L.A. L. REV. 645, 667 (2020).

§ 407's mandate likely does not amount to compelled speech, it still violates the First Amendment by exercising content-based discrimination and overburdening free speech.

As for compelled speech, the First Amendment protects "the right to speak freely and the right to refrain from speaking at all."[120] For example, in *Miami Herald Publishing Co. v. Tornillo*,[121] the Supreme Court struck down Florida's "right of reply" statute.[122] The statute imposed criminal liability on newspapers that published criticisms of a political candidate without also publishing the candidate's response to such criticisms.[123] Worried about its potential chilling effects on political coverage, the Court ruled that the statute violated the First Amendment because it compelled newspapers to publish content they otherwise would not.[124]

Here, some argue that § 407 compels speech by forcing copyright owners to "publish" their works in the Library of Congress when they otherwise would not.[125] But contrary to the right of reply statute in *Tornillo*, § 407's mandate only applies to speech already published in the United States.[126] Section 407 is also facially content-neutral; its mandate does not exclusively apply to political speech, unlike *Tornillo*'s right of reply statute.[127] While both statutes may burden publishers (that is, those subject to the law's requirements) with the costs of compliance, the Copyright Office can grant exemptions from § 407's mandate upon request.[128] And unlike the right of reply statute, § 407's penalty for noncompliance is only a monetary fine—not a criminal charge.[129] Thus, a library deposit mandate likely does not amount to compelled speech.

Even so, § 407's selective enforcement is unconstitutional content-based discrimination. The Supreme Court applies strict scrutiny to laws that exercise content-based discrimination—even when the law is facially neutral.[130] And laws that impose "content-

120. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2463 (2018).

121. 418 U.S. 241 (1974).

122. *Id.* at 256, 258.

123. *Id.* at 244.

124. *Id.* at 256, 258.

125. Thornley, *supra* note 119, at 667.

126. 17 U.S.C. § 407(a) ("[T]he owner of copyright or of the exclusive right of publication in a work published in the United States shall deposit, within three months after the date of such publication . . . .").

127. *See id.* (applying the mandate to all works published in the United States).

128. *See* 37 C.F.R. § 202.19(e) (2024).

129. *See* 17 U.S.C. § 407(d).

130. Reed v. Town of Gilbert, 576 U.S. 155, 164 (2015) (emphasis added). Laws that exercise content-based discrimination receive strict scrutiny, the highest standard of judicial review. *Id.* at 163. Under strict scrutiny, the law must be "narrowly tailored" to furthering a "compelling governmental interest." *Id.*

based *burdens* must satisfy the same rigorous scrutiny" as laws that impose "content-based *bans*."[131] Impermissible burdens on speech can come in the form of financial costs selectively imposed on "certain speakers based on the content of their expression."[132]

With respect to content-based discrimination, some argue that § 407 is unconstitutional because the Copyright Office only enforces the mandate on works it considers desirable.[133] The Copyright Office and the Library of Congress develop rubrics to help evaluate a work's desirability at the time.[134] This practice qualifies as content-based discrimination because the Copyright Office "decides whether to threaten a publisher with fines based *solely* on the content of that publisher's speech."[135]

Still, § 407's facially neutral language and the practical problems of enforcing the mandate against every work published in the United States might spare the mandate's constitutionality. For example, in *National Endowment for the Arts v. Finley*,[136] the Supreme Court considered whether the criteria used by the National Endowment for the Arts (NEA) to award art grants violated the First Amendment.[137] Congress directed the NEA to award grants that fund artistry of "cultural significance" in order to encourage public appreciation for the arts.[138] To select grant recipients, the NEA evaluated applicants' works according to criteria derived from federal law.[139] Several rejected applicants challenged the NEA's criteria under the First Amendment, arguing that it was impermissibly vague and viewpoint-based.[140] But the Supreme Court disagreed.[141] It reasoned that any "content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts

131. United States v. Playboy Ent. Grp., 529 U.S. 803, 812 (2000).

132. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995).

133. Brief of Appellant at 43, Valancourt Books, LLC v. Garland, 82 F.4th 1222 (D.C. Cir. 2023) (No. 21-5203).

134. *See, e.g.*, *Collection Development, Policies*, LIBR. CONG. (2024), https://perma.cc/W8WX-6KT9; *Collecting Levels*, LIBR. CONG. (2024), https://perma.cc/LJP9-8ATY (describing the five different "collection levels"); *Collections Policy Statements: Literature and Language*, *supra* note 12 (ranking the acquisition desirability of different genres and types of literature).

135. Brief of Appellant, *supra* note 133, at 47.

136. 524 U.S. 569 (1998).

137. *Id.* at 572–73.

138. *Id.* at 573 (citing 20 U.S.C. § 954(c)(1)–(10)).

139. *Id.* at 572; *see also* 20 U.S.C. § 945(d)(1) (requiring the NEA's Chairperson to establish procedures ensuring that "artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public").

140. *Finley*, 524 U.S. at 577.

141. *Id.* at 585.

funding."[142] Since grant funds are finite, the NEA had to reject most grant applications, "including many that propose 'artistically excellent' projects."[143] Absent specific examples of discriminatory funding decisions, the applicants' First Amendment claim failed.[144]

Like the selective nature of awarding art grants described in *Finley*, § 407's mandate is selectively enforced depending on whether the government deems the work desirable.[145] Similar to the criteria challenged in *Finley*, the Library of Congress uses an acquisition rubric to rank works' desirability.[146] But unlike the NEA's statutory-based requirements, the Library of Congress's rubric is transient and statutorily unfounded. It changes according to shifts in "the publishing landscape, sources of expression, current events, and socio-cultural trends."[147]

The NEA, Copyright Office, and Library of Congress share one feature—finite resources. Their facilities, employees, and funds are all limited.[148] Just as *Finley* pinned the constitutionality of content-based art grants on limited funds, the selective enforcement of § 407 is perhaps a product of limited resources, not content-based discrimination. Any content-based evaluations or decisions related to § 407's enforcement may be a natural consequence of limited staff and funds, just like the NEA's process for awarding art grants. If so, neither the NEA's criteria nor § 407's selective enforcement violates the First Amendment, absent evidence of specific discriminatory decisions.

Yet the competitive process used to allocate art grants is perhaps distinct from § 407's procedure, as awarding art grants requires aesthetic judgments that are inherently content-based.[149] Conversely, a library deposit mandate that feeds America's de facto library—selectively enforced according to a small group's labile standards for preservation-worthy content—may violate the First Amendment by driving "certain ideas or viewpoints from the marketplace."[150] Charles Jewett, the first Smithsonian Librarian, warned of such:

> To the public, the importance, immediate and prospective, of having a central depot, where all the products of the American

142. *Id.*
143. *Id.*
144. *Id.* at 586–87.
145. *See supra* note 134.
146. *See, e.g.*, *Collections Policy Statements: General Works*, LIBR. CONG. (Apr. 2022), https://perma.cc/93JZ-AATW (describing works that are considered "Class A" for acquisition).
147. *Id.*
148. *See General Information*, LIBR. CONG. (2024), https://perma.cc/2JJ9-M92E.
149. *Finley*, 524 U.S. at 586.
150. *Id.* at 587 (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)).

> press may be gathered, year by year, and preserved for reference, is very great. . . . [T]he collection should be complete, *without a single omission*. We wish for every book, every pamphlet, every printed or engraved production, however apparently insignificant. *Who can tell what may not be important in future centuries?*[151]

Basing the decision to burden some content over others according to the standards *du jour* flouts the Jeffersonian ideals that undergird the Library of Congress.[152] It degrades America's de facto library from a "universal repository of knowledge" to a coterie of hubris; it conflates the transient views of a few as emblematic of the many; and it uses content-based discrimination to do so.

Even if § 407's mandate qualifies as content-neutral, it still violates the First Amendment by overburdening free speech.[153] The First Amendment requires that content-neutral laws be "narrowly tailored" to advance a "significant governmental interest."[154] In furthering such an interest, the law must not burden "substantially more speech than necessary."[155] Here, § 407 fortifies the Library of Congress, advancing the important governmental interest of promoting progress. But the mandate overburdens speech in the process: The Library of Congress only uses 45–50 percent of deposited works, which means that the mandate burdens 50–55 percent of depositors for no benefit.[156] In contrast, § 408 also fortifies the Library of Congress—but it does so in less onerous, *voluntary* ways.[157] With over half of deposited works going unused and § 408 serving as a reasonable alternative, § 407 violates the First Amendment by overburdening free speech.

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151. SMITHSONIAN INST., ANNUAL REPORT OF THE BOARD OF REGENTS OF THE SMITHSONIAN INSTITUTION 35 (1846) (emphasis added).

152. *See* LIBR. OF CONG., LIBRARY OF CONGRESS FINANCIAL STATEMENTS FOR THE FISCAL YEAR 2022, at 9 (2022), https://perma.cc/HCV8-3PMN. Thomas Jefferson stressed the importance of a *universal* collection to a democratic society. *See, e.g.*, Letter from Thomas Jefferson to Samuel H. Smith (Sept. 21, 1814).

153. Brief of Appellant, *supra* note 133, at 51.

154. McCullen v. Coakley, 573 U.S. 464, 486 (2014).

155. *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997); *McCullen*, 573 U.S. at 496 ("To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier."); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 456–58, 510–12 (1996).

156. *Frequently Asked Questions: Rare Books and Special Collections*, LIBR. CONG. (July 25, 2024), https://perma.cc/GTY8-KZJ6.

157. *See supra* Section III.B.

### *B. Fifth Amendment*

Physically appropriating property for public use is a per se taking.[158] But an exception is made when (1) the property owner voluntarily exchanged the property in exchange for a special governmental benefit, (2) the property owner knew of the exchange's conditions, and (3) the conditions "rationally relate" to a legitimate governmental interest.[159]

The Fifth Amendment's Takings Clause limits the Copyright Clause's scope. Congress may bestow copyrights, but the Takings Clause demands "just compensation" when private property is taken for public use in the process.[160] While § 407's mandate amounts to a per se taking when applied to physical deposits, its takings status is less clear when applied to digital deposits.[161]

The Supreme Court has yet to address whether copyrights or digital files qualify as "property" under the Takings Clause.[162] As for digital files, a court could rule either way. On one hand, digital copies arguably do not create a "tragedy of the commons."[163] This is because countless replicas of the work can be copied digitally, unlike tangible property such as land or chattels. On the other hand, takings status is not limited to tangible property. For example, in *Ruckelshaus v. Monsanto Co.*,[164] the Supreme Court found that the Takings Clause protected trade secrets since state law recognized them as private property.[165] Yet, like tangible property, a trade secret is finite—once the secret information is publicized, the trade secret is irreparably destroyed.[166] But if a digital copy is destroyed, another copy may take its place.

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158. *See* Horne v. Dep't of Agric., 576 U.S. 350, 360 (2015).

159. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 987 (1984).

160. *See* U.S. CONST. amend V. As penned by Chief Justice Roberts, "The Court assesses such physical takings using a *per se* rule: The government must pay for what it takes." Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021).

161. *See* Valancourt Books, LLC v. Garland, 82 F.4th 1222, 1229 (D.C. Cir. 2023).

162. Paul M. Shwartz & William Michael Treanor, Eldred *and* Lochner*: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2334–35 (2003).

163. Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1166 (1999).

164. 467 U.S. 986 (1984).

165. *Id.* at 987.

166. *See* CAE Integrated, LLC v. Moov Techs., Inc., 44 F.4th 257, 262 (5th Cir. 2022) ("A trade secret is information which derives independent economic value from being not generally known or readily ascertainable through proper means."); BondPro Corp. v. Siemens Power Generation, Inc., 463 F.3d 702, 706 (7th Cir. 2006) ("A trade secret that becomes public knowledge is no longer a trade secret.").

Also, the first sale doctrine may not protect digital deposits. Since libraries generally do not own copyrights or licenses to the works they loan, the first sale doctrine is essential to their free-to-loan system.[167] The first sale doctrine protects the right to control the disposition of lawfully-obtained copies of copyrighted works.[168] In turn, the doctrine allows libraries to loan copies of physical books collected through purchase or donation. But in *Hachette Book Group, Inc. v. Internet Archive*,[169] the court held that the first sale doctrine does not protect digital library loans.[170] It reasoned that the process of loaning a digital book requires lenders to make copies of the work—directly violating the right to reproduction protected under § 106 of the Copyright Act.[171] Thus, the court ruled that libraries must pay for digital lending licenses from publishers to loan books digitally.[172]

In 2022, the Library of Congress launched a "digital collections strategy" that aims to shift deposits to an "electronic-preferred model."[173] While the shift is appropriate in the digital age, its constitutional and copyright implications remain uncertain. Like the digital library at issue in *Hachette*, the Library of Congress makes works available to the public without charge. But unlike *Hachette*'s digital library, the Library of Congress is a governmental entity—a distinction that improves § 407's likelihood of skirting takings status. Even so, digital takings jurisprudence is too primitive to evaluate this likelihood confidently.

## V. REMEDYING § 407'S WEAKNESSES

Congress may respond to *Valancourt Books* and preserve the library deposit mandate in various ways. For one, Congress could re-condition copyright ownership on formalities. But this approach requires the United States to leave the Berne Convention, since conditional copyrights go against the Convention's requirements.[174] Should Congress wish to stay in the Berne Convention, it could instead base a library deposit mandate on other Article I powers—

167. Matthew Chiarizio, *An American Tragedy: E-Books, Licenses, and the End of Public Lending Libraries?*, 66 VAND. L. REV. 615, 620 (2013) ("One benefit of the first sale doctrine is that it allows libraries to obtain a physical copy of a book and to lend that copy out to patrons on the library's own terms and without requiring the authorization of the copyright holder.").

168. 17 U.S.C. § 109. The right to loan or sell copies of a copyrighted work is only available to those who received the copy lawfully, such as through purchase or gift. This right does not include the right to create copies of the work. *See id.*

169. 664 F. Supp. 3d 370 (S.D.N.Y. 2023), *aff'd*, 115 F.4th 163 (2d Cir. 2024).

170. *Id.* at 384.

171. *Id.* at 375.

172. *Id.* at 378.

173. LIBR. OF CONG., *supra* note 152, at 22.

174. Chris Dombkowski, *Simultaneous Internet Publication and the Berne Convention*, 29 SANTA CLARA COMPUT. & HIGH TECH. L.J. 643, 647–48 (2013).

such as the Commerce Clause or the Taxing and Spending Clause. This Part finds, however, that the most feasible immediate response to *Valancourt Books* is to repeal § 407 and instead use § 408 to enrich the Library of Congress.

### *A. Bring Back Formalities*

Because copyrights hail from positive law, Congress may condition their ownership upon formalities.[175] This was the status quo in U.S. copyright law until the late twentieth century.[176] Since conditioning copyrights on library deposit substantially relates to the Copyright Clause's objective, this method survives both rational basis review and intermediate scrutiny.[177] Such conditional copyrights share a strong nexus with copyright ownership, satisfying the Exclusive Rights Clause. And the deposited works promote progress by fortifying the Library of Congress, satisfying the Progress Clause.[178]

Also, conditioning copyrights on library deposits does not offend the First or Fifth Amendments. It avoids "takings" status under the Fifth Amendment because the deposit is voluntarily done in exchange for the special governmental benefit of copyright ownership.[179] It also does not violate the First Amendment for three reasons. First, the "speech"—that is, the published works available in the Library of Congress—is volunteered, not compelled. Second, it does not overburden speech because it only applies to authors affirmatively seeking out copyright ownership. Third, it skirts content-based discrimination concerns because the Copyright Office is not tasked with selectively enforcing it according to each work's desirability.[180] Thus, conditioning copyrights on library deposits is constitutional.

But returning to a conditional copyright system could be considered a radical course of action, as it requires the United States to leave the Berne Convention and rewrite the Copyright Act.[181] The current Copyright Act does not condition copyright ownership on any formalities, per the Berne Convention's requirements.[182] Thus, to reintroduce conditional copyrights, the Copyright Act would need to be repealed or amended—particularly § 102, which automatically grants copyrights in works upon their fixed, tangible creation. While

175. *See* Wheaton v. Peters, 33 U.S. 591, 592 (1834).

176. *See supra* Part II.

177. *See supra* Section III.A.

178. *See supra* Part III.

179. Copyrights are uniquely governmental benefits because they are a product of positive law. *See Wheaton*, 33 U.S. at 592. *But see* PATTERSON, *supra* note 36, at 194 (suggesting that the term "secure" in the Copyright Clause indicates that a statutory copyright protects an existing right).

180. *See supra* Part IV.

181. *See supra* Part II.

182. *See supra* Part II; 17 U.S.C. § 102(a).

amending the Copyright Act to condition copyright ownership on formalities makes a deposit requirement constitutional, it does so at the expense of the United States' membership in the Berne Convention.

### *B.* Dépôt Légal

To preserve a library deposit requirement while also adhering to the Berne Convention, Congress may adopt the *dépôt legal* system that most countries use.[183] A *dépôt legal* system is independent of copyright ownership and only involves publishers.[184] For example, the United Kingdom requires all publishers to deposit one copy of each published work with a deposit library, like the National Library of Wales.[185] However, the U.S. Constitution's Copyright Clause could not provide the authority for a *dépôt legal* system since only publishers participate in it—not copyright owners.[186] A 1960 congressional report contemplates this dilemma:

> If a "legal deposit" system covering all domestic publications without regard to copyright were desired, the [constitutional] basis for requiring the deposit of works not under copyright would need to be considered, and since the deposit requirement for such works would not be based on the copyright clause of the Constitution, such a "legal deposit" system for works not under copyright would properly be the subject of legislation other than the copyright law.[187]

Thus, the system would have to rest on an alternative source of power, such as the Commerce Clause or the Taxing and Spending Clause.

#### *1. Commerce Clause*

The Commerce Clause gives Congress the power to regulate the interstate channels of interstate commerce, the instrumentalities of interstate commerce, and economic activities that substantially affect interstate commerce.[188] The last category requires a "rational basis" for determining that the regulated activity substantially impacts interstate commerce.[189] Courts also look for a jurisdictional element when reviewing laws passed under the Commerce Clause.[190]

The Commerce Clause may fill gaps in Congress's copyright powers. For example, in *United States v. Martignon*,[191] the court held

183. *See* STAFF OF THE GLOB. RSCH. DIRECTORATE, *supra* note 8.
184. DUNNE, *supra* note 54, at 2–3.
185. *See* Legal Deposit Libraries Act 2003, ch. 28 (Eng.).
186. *See* DUNNE, *supra* note 54, at 3.
187. *Id.* at 33.
188. *See* United States v. Lopez, 514 U.S. 549, 558–59 (1995).
189. *Id.* at 557.
190. *See id.* at 561–62.
191. 492 F.3d 140 (2d Cir. 2007).

that 18 U.S.C. § 2319A (the criminal corollary to the Copyright Act's civil bootlegging ban[192]) fell outside the Copyright Clause's scope.[193] It opined that § 2319A effectively granted perpetual copyrights, violating the Exclusive Rights Clause's "limited times" language.[194] Yet the court upheld § 2319A under the Commerce Clause.[195] It reasoned that Congress could rationally find that criminalizing bootlegging federally was "necessary" due to bootlegging's substantial impacts on interstate commerce.[196]

Similar to how the Copyright Clause failed to support the bootlegging statute in *Martignon*, it also fails to support a *dépôt legal* system. But just as the *Martignon* court upheld the bootlegging statute under the Commerce Clause, Congress may hitch a *dépôt legal* system to the Commerce Clause instead. This alternative is constitutional so long as a rational basis exists for determining that the publishing industry substantially impacts interstate commerce.[197] When basing the system on the Commerce Clause, Congress should also include a jurisdictional element, perhaps stating: "All commercial publishers must deposit two copies of each work published and distributed in interstate commerce."

But even the Commerce Clause's broad authority is not exempt from the Constitution's affirmative limitations. For example, in *Horne v. Department of Agriculture*,[198] the Court struck down a regulation requiring raisin farmers to donate a portion of their raisins to the government.[199] It held that the regulation amounted to a per se taking because it physically appropriated private property for public use.[200] The Court also ruled that the "voluntary exchange" exception did not apply, as permission to sell raisins without being fined is not a "special governmental benefit" but a natural exercise of ownership.[201] Thus, the government had to pay just compensation for the raisins.[202]

Like the confiscated raisins in *Horne*, a *dépôt legal* system that requires publishers to donate copies of published works to the Library of Congress is a per se taking because it physically appropriates private property for public use. And like the illusory benefit of selling raisins without being fined, the benefit of publishing works and distributing copies without being fined is not sufficient to relieve

192. *See* 17 U.S.C. § 1101.
193. *Martignon*, 492 F.3d at 152.
194. *Id.* at 150–51.
195. *Id.* at 152.
196. *Id.*
197. *See* United States v. Lopez, 514 U.S. 549, 558–59 (1995).
198. 576 U.S. 350 (2015).
199. *Id.* at 367.
200. *Id.*
201. *Id.* at 361–62.
202. *See id*. at 362.

takings status. While defaulting to digital deposits might curb such an outcome, this solution is vulnerable to the inchoate state of digital takings jurisprudence.[203] Thus, a *dépôt legal* system that rests on the Commerce Clause is precarious.

### *2. Taxing and Spending Clause*

The Taxing and Spending Clause provides stabler grounds for a *dépôt legal* system.[204] Congress may use its taxing and spending powers—fiscal "carrots and sticks"—to advance public purposes, even when the public purpose is not set forth in the Constitution.[205] The Taxing and Spending Clause thus expands Congress's legislative reach outside of Article I's text.[206] Importantly, the Supreme Court is not eager to trim this expansive congressional power: When determining whether the tax or expenditure aligns with a public purpose, the Court gives substantial deference to Congress's judgment.[207]

For example, in *National Federation of Independent Business v. Sebelius*,[208] the Court found the Affordable Care Act's (ACA's) individual mandate, which fines individuals who do not have health insurance, invalid under the Commerce Clause.[209] It reasoned that the individual mandate regulated economic *inactivity*—not economic activity—putting it outside of the Commerce Clause's scope.[210] Yet the Court upheld the individual mandate under the Taxing and Spending Clause because (1) its fine cost less than health insurance, making it noncoercive; (2) the mandate had no scienter requirement; and (3) the IRS collected the fine directly.[211]

Here, the Taxing and Spending Clause similarly provides a constitutional basis for a *dépôt legal* system. Like the individual mandate in *Sebelius*, Congress can tax commercial publishers to encourage library deposits. Such a tax must meet three requirements.[212] First, the tax must be minimal enough to be

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203. *See supra* Part IV.

204. *See* U.S. CONST. art. I, § 8, cl. 1.

205. *See* United States v. Butler, 297 U.S. 1, 66 (1936) (noting that the "power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution"); South Dakota v. Dole, 483 U.S. 203, 206–07 (1987) (explaining how, under the Taxing and Spending Clause, "objectives not thought to be within Article I's 'enumerated legislative fields' may nevertheless be attained" by Congress). *See generally* Gerrit De Geest & Giuseppe Dari-Mattiacci, *The Rise of Carrots and the Decline of Sticks*, 80 U. CHI. L. REV. 341 (2013) (discussing "carrots and sticks").

206. *Butler*, 297 U.S. at 66; *Dole*, 483 U.S. at 206–07.

207. *Dole*, 483 U.S. at 206.

208. 567 U.S. 519 (2012).

209. *Id.* at 561.

210. *Id.* at 555.

211. *Id.* at 566.

212. *Id.*

noncoercive.[213] Just as the ACA's fine was less than the cost of health insurance in *Sebelius*, a library deposit tax should cost less than the expense of depositing the work. Second, the mandate must not include a scienter requirement.[214] For example, the tax cannot only apply to publishers who *knowingly* violate the library deposit mandate. It must instead apply to all authors even-handedly, just like the individual mandate in *Sebelius*. Third, the IRS must collect the tax directly—not the Copyright Office or the Library of Congress.[215] Given the substantial deference courts afford Congress's policy decisions, a library deposit tax incentive will likely be upheld. And like the individual mandate in *Sebelius*, a library deposit tax incentive would not offend the Takings Clause.

But a library deposit tax may offend the Framers' intent. The Copyright Clause is likely a product of James Madison's and Charles Pinckney's proposed congressional powers: patents, copyrights, education, and encouragements.[216] The means outlined in the proposed encouragements and education powers were not included in the Constitution.[217] But their *objectives* were.[218] That is, the Progress Clause bears high similarity to the objectives named in Madison's encouragements power and Pinckney's education power.[219]

TABLE 2: THE PROGRESS CLAUSE'S ORIGINS

| CONSTITUTION'S COPYRIGHT CLAUSE | MADISON'S ENCOURAGEMENTS POWER | PINCKNEY'S EDUCATION POWER |
|---|---|---|
| *To promote the progress of science and useful arts*, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries | *To encourage*, by proper premiums and provisions, *the advancement of useful knowledge and discoveries* | To establish seminaries for *the promotion of literature, and the arts and sciences* |

213. *Id.*
214. *Id.*
215. *Id.*
216. *See* PATTERSON, *supra* note 36, at 192–93; Dotan Oliar, *The (Constitutional) Convention on IP: A New Reading*, 57 UCLA L. REV. 421, 446–47 (2009); 5 JAMES MADISON, THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 487 (1787).
217. Oliar, *supra* note 72, at 1789 tbl.1.
218. *See id.*
219. *Id.*

TABLE 3: THE EXCLUSIVE RIGHTS CLAUSE'S ORIGINS

| CONSTITUTION'S COPYRIGHT CLAUSE | MADISON'S PATENT POWER | PINCKNEY'S COPYRIGHT POWER |
|---|---|---|
| To promote the progress of science and useful arts, *by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries* | *To secure to the inventors* of useful machines and implements *the benefits thereof for a limited time* | *To secure to authors exclusive rights for a certain time* |

Thus, *expressio unius est exclusio alterius*: "The expression of one thing implies the exclusion of others."[220] Under this interpretative canon, the means not expressly included in the Copyright Clause should be treated as intentionally excluded.[221] Because the Framers incorporated the pair's patent and copyright powers, their education and encouragements powers should be treated as intentionally excluded.[222] Had the Framers also intended to allow for a reward system to promote progress, they would have expressly included it in the Constitution—just as they expressly included the patent and copyright powers. Therefore, using monetary incentives or disincentives—taxes or expenditures, fiscal carrots or sticks—to promote progress is perhaps contrary to the Framers' intent.

### *C.* Dépôt Gratuit

Congress may also amend § 407's mandate to make library deposits voluntary. For example, Switzerland hosts a *dépôt gratuit* system, where Swiss publishers donate free copies of their publications to the Swiss National Library voluntarily.[223] Switzerland preferred this system because its constitution did not authorize a mandatory deposit system.[224] Swiss publishers were also "opposed to a system of obligatory deposit whose origins lay in political and religious censure," but they were "quite willing to give the books in the public interest."[225] Nearly 80 percent of the Swiss

220. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012).

221. *See id.*; Harold Anthony Lloyd, *Recasting Canons of Interpretation and Construction Into "Canonical" Queries: Further Canonical Queries of Presented or Transmitted Text*, 58 WAKE FOREST L. REV. 1047, 1051 (2023).

222. *Cf.* PATTERSON, *supra* note 36, at 193–95 (comparing the Pinckney's and Madison's proposals and suggesting that the Framers drafted the Copyright Clause with careful attention to every word).

223. *See Acquisition*, SWISS NAT'L LIBR. NL (2024), https://perma.cc/4WL2-N8SK; DUNNE, *supra* note 54, at 2.

224. DUNNE, *supra* note 54, at 9.

225. *Id.*

National Library's new items come from donations—roughly 45,000 works per year.[226]

Neither Switzerland's constitution nor the U.S. Constitution provide clear authority for a mandatory deposit requirement. But just as Switzerland adopted a voluntary library deposit system, the United States can do the same. Since publishers rather than copyright owners are the key actors in a *dépôt gratuit* system, the Copyright Clause could not underpin it. But the system could rest on the Commerce Clause or the Taxing and Spending Clause instead. And given its voluntary nature, a *dépôt gratuit* system does not violate the First or Fifth Amendments.[227]

### *D. Repeal § 407*

The most feasible response to *Valancourt Books* is to repeal § 407 altogether. Because the Copyright Office may give the Library of Congress the copies it receives through federal registration, § 408 makes § 407 duplicative and unnecessary.[228] And unlike § 407's mandate, the voluntary and beneficial nature of federal registration under § 408 spares it from offending the First and Fifth Amendments.

While § 407 applies to all works published in the United States, § 408's copyright deposit requirement only applies to those who wish to avail themselves of the benefits of federal registration.[229] Unlike the illusory benefit of selling raisins without being fined discussed in *Horne*, § 408 gives registrants a uniquely governmental benefit: standing for federal infringement claims.[230] Contrary to § 407's monetary penalty for noncompliance, there is no penalty for declining to register one's work under § 408.[231] As such, § 408's copyright deposit requirement does not violate the Takings Clause.

Section 408 also does not violate the First Amendment. As opposed to § 407's demand option, which enables impermissible content-based discrimination, the government cannot proactively enforce § 408.[232] And § 408's deposit requirement is distinct from § 407's mandate because it burdens no more speech than necessary. Unlike the unused works acquired under § 407, all works deposited under § 408 are initially used for recordation purposes.[233] Thereafter, the Library of Congress may choose to acquire some of the copies obtained through § 408 registration—bolstering the Library's archives without overburdening copyright owners. Thus, unlike many

226. *Acquisition*, *supra* note 223.

227. *Cf. supra* Section III.B.

228. Thornley, *supra* note 120, at 667; *see* 17 U.S.C. §§ 408, 704.

229. *Compare* 17 U.S.C. § 407, *with id.* § 408.

230. *See* Horne v. Dep't of Agric., 576 U.S. 350, 366 (2015); 17 U.S.C. §§ 408, 411–412.

231. *Compare* 17 U.S.C. § 407, *with id.* § 408.

232. *Compare id.* § 407(d), *with id.* § 408.

233. *See supra* Section III.B.

of the works deposited under § 407, each work deposited under § 408 serves an important—sometimes dual—purpose.

Repealing § 407 is the most practical response to *Valancourt Books* because it does not oppose the Berne Convention, offend the Framers' intentions, require Congress to rewrite the Copyright Act, or gamble with digital takings jurisprudence. While only a jury-rigged solution to the Copyright Act's spillage of issues, repealing § 407 is nevertheless the most feasible response for now.

## CONCLUSION

*Valancourt Books* loudened the call for Congress to revise and rebuild the federal copyright system. This overhaul should account for copyright law's intersection with new technology, international treaties, and other legal developments. Until then, the most feasible response to *Valancourt Books* is to repeal § 407, relying on § 408's copyright deposit requirement to enrich the Library of Congress instead. This response is the most practical because it does not require Congress to gut the Copyright Act or leave the Berne Convention. It also falls within the Copyright Clause's bounds without violating any affirmative limitations. As such, repealing § 407 is the most grounded response to *Valancourt Books*, but it should only serve as an interim solution that a new Copyright Act eventually supplants.