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The Copyright Act's Mandatory-Deposit Requirement: Unnecessary and Unconstitutional

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THE COPYRIGHT ACT'S MANDATORY-DEPOSIT REQUIREMENT: UNNECESSARY AND UNCONSTITUTIONAL

*Drew Thornley**

Many people are unaware of a federal copyright statute that requires owners of material published in the United States to furnish the federal government with two copies of each item published. Section 407(a) of the Copyright Act of 1976 (17 U.S.C. § 407) states that “the 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—(1) two complete copies of the best edition; or (2) if the work is a sound recording, two complete phonorecords of the best edition, together with any printed or other visually perceptible material published with such phonorecords.” A recent lawsuit highlights constitutional problems with this statutory provision and the undue burdens it can place on publishers.

Valancourt has published more than 400 books and adds about twenty new titles yearly; but unlike traditional publishers, Valancourt does not keep copies in stock. Rather, it employs a print-on-demand model, wherein “James edits each book and lays out galleys, but nothing is physically printed until a customer or retailer actually orders a book.” Not keeping books in stock proved problematic when Valancourt received an email on June 11, 2018, from the United States Copyright Office, stating that Valancourt was not complying with the mandatory-deposit requirement and that if he did not comply, he could face large fines. After an unsuccessful attempt to resolve the matter, Valancourt filed a lawsuit in federal court, challenging the constitutionality of section 407, in light of the Fifth Amendment’s Takings Clause and the First Amendment’s protections of freedom of speech and freedom of the press.

This Article argues that the mandatory-deposit requirement is unnecessary and, on at least three grounds, unconstitutional.

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I. INTRODUCTION

Many people are unaware of a federal copyright statute that requires owners of material published in the United States to furnish the federal government with two copies of each item published. Section 407(a) of the Copyright Act of 1976 states:

[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—(1) two complete copies of the best edition; or (2) if the work is a sound recording, two complete phonorecords of the best edition, together with any printed or other visually perceptible material published with such phonorecords.¹

A recent lawsuit highlights constitutional problems with this statutory provision and the undue burdens it can place on publishers. Part II of this Article highlights the details of section 407. Part III reveals the story behind the lawsuit. Part IV outlines legal arguments against section 407.

II. SECTION 407 OF THE COPYRIGHT ACT

Section 407(a) of the Copyright Act of 1976 (the “Act”) states that, subject to certain exceptions discussed below,

the 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—(1) two complete copies of the best edition; or (2) if the work is a sound recording, two complete phonorecords of the best edition, together with any printed or other visually perceptible material published with such phonorecords.²

This requirement is known as the “mandatory-deposit requirement.”³ A mandatory deposit, which can also be referred to as a “legal

1. 17 U.S.C. § 407(a) (2012).

2. *Id.*

3. See U.S. COPYRIGHT OFFICE, THE COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES: CHAPTER 1500 66, <https://www.copyright.gov/comp3/chap1500/ch1500-deposits.pdf> (Sept. 29, 2017).

deposit,”⁴ is made to “the Copyright Office for the use or disposition of the Library of Congress”⁵ but is not required in order to receive copyright protection.⁶ The United States Copyright Office’s Copyright Acquisitions Division administers the Act’s mandatory-deposit requirements.⁷

This Article focuses on the non-sound-recording deposit requirement that “two complete copies of the best edition”⁸ must be submitted to the United States Copyright Office. Per the clear language of the statute, it is not sufficient to submit any two copies of a work. Rather, two “complete” copies of the “best” edition of a work must be deposited.⁹ A “complete” copy “includes all elements comprising the unit of publication of the best edition of the work, including elements that, if considered separately, would not be copyrightable subject matter or would otherwise be exempt from mandatory deposit requirements under paragraph (c) of this section.”¹⁰ The “best” edition is “the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.”¹¹

4. *Id.* at 1.

5. *See* 17 U.S.C. § 407(b) (2012).

6. *See id.* § 407(a). The deposit requirements of section 407 are distinct from the deposit requirements of section 408, which concerns copyright registration. Regarding copyright deposit, *see* 37 C.F.R. § 202.20 (2019).

7. U.S. COPYRIGHT OFFICE, THE COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES: CHAPTER 100 1 <https://www.copyright.gov/comp3/redlines/chap100.pdf> (Sept. 29, 2017).

8. *Id.*

9. 17 U.S.C. § 407(a) (2012).

10. 37 C.F.R. § 202.19 (2018).

11. *Id.* § 202.19(b)(1)(i). Appendix B to 37 C.F.R. § 202 describes the “best edition” requirement in more detail, stating,

The criteria to be applied in determining the best edition of each of several types of material are listed below in descending order of importance. In deciding between two editions, a criterion-by-criterion comparison should be made. The edition which first fails to satisfy a criterion is to be considered of inferior quality and will not be an acceptable deposit. Example: If a comparison is made between two hardbound editions of a book, one a trade edition printed on acid-free paper, and the other a specially bound edition printed on average paper, the former will be the best edition because the type of paper is a more important criterion than the binding.

37 C.F.R. § 202, Appendix B (2019). The criteria for “printed textual matter” are as follows:

A. Paper, Binding, and Packaging: 1. Archival-quality rather than less-permanent paper. 2. Hard cover rather than soft cover. 3. Library binding rather than commercial binding. 4. Trade edition rather than book club edition. 5. Sewn rather than glue-only binding. 6. Sewn or glued rather than stapled or spiral-bound. 7. Stapled rather than spiral-bound or plastic-bound. 8. Bound

The Act gives the Register of Copyrights the authority to exempt certain works from the deposit requirement,¹² and a party may request

rather than looseleaf, except when future looseleaf insertions are to be issued. In the case of looseleaf materials, this includes the submission of all binders and indexes when they are part of the unit as published and offered for sale or distribution. Additionally, the regular and timely receipt of all appropriate looseleaf updates, supplements, and releases including supplemental binders issued to handle these expanded versions, is part of the requirement to properly maintain these publications. 9. Slip-cased rather than nonslip-cased. 10. With protective folders rather than without (for broadsides). 11. Rolled rather than folded (for broadsides). 12. With protective coatings rather than without (except broadsides, which should not be coated). B. Rarity: 1. Special limited edition having the greatest number of special features. 2. Other limited edition rather than trade edition. 3. Special binding rather than trade binding. C. Illustrations: 1. Illustrated rather than unillustrated. 2. Illustrations in color rather than black and white. D. Special Features: 1. With thumb notches or index tabs rather than without. 2. With aids to use such as overlays and magnifiers rather than without. E. Size: 1. Larger rather than smaller sizes. (Except that large-type editions for the partially-sighted are not required in place of editions employing type of more conventional size.)

37 C.F.R. § 202, Appendix B (2019). A party may request “special relief” from the “best edition” requirement. *See* 37 C.F.R. § 202, Appendix B (2019) (“Under regulations of the Copyright Office, potential depositors may request authorization to deposit copies or phonorecords of other than the best edition of a specific work (e.g., a microform rather than a printed edition of a serial), by requesting ‘special relief’ from the deposit requirements. All requests for special relief should be in writing and should state the reason(s) why the applicant cannot send the required deposit and what the applicant wishes to submit instead of the required deposit.”).

12. *See* 17 U.S.C. § 407(c) (2012) (“The Register of Copyrights may by regulation exempt any categories of material from the deposit requirements of this section, or require deposit of only one copy or phonorecord with respect to any categories. Such regulations shall provide either for complete exemption from the deposit requirements of this section, or for alternative forms of deposit aimed at providing a satisfactory archival record of a work without imposing practical or financial hardships on the depositor, where the individual author is the owner of copyright in a pictorial, graphic, or sculptural work and (i) less than five copies of the work have been published, or (ii) the work has been published in a limited edition consisting of numbered copies, the monetary value of which would make the mandatory deposit of two copies of the best edition of the work burdensome, unfair, or unreasonable.”). 37 C.F.R. § 202.19(c) lists twelve categories of works that are exempt from subsection (a)’s mandatory-deposit requirements. 37 C.F.R. § 202.19(c) (2018) (“(c) *Exemptions from deposit requirements.* The following categories of material are exempt from the deposit requirements of section 407(a) of title 17: (1) Diagrams and models illustrating scientific or technical works or formulating scientific or technical information in linear or three-dimensional form, such as an architectural or engineering blueprint, plan, or design, a mechanical drawing, or an anatomical model. (2) Greeting cards, picture postcards, and stationery. (3) Lectures, sermons, speeches, and addresses when published individually and not as a collection of the works of one or more authors. (4) Literary, dramatic, and musical works published only as embodied in phonorecords. This category does not exempt the owner of copyright, or of the exclusive right of publication, in a sound recording resulting from the fixation of such works in a phonorecord from the applicable deposit requirements for the sound recording. (5) Electronic works published in the United States and available only online. This exemption includes electronic serials available only online only until such time as a demand is issued by the Copyright Office under the regulations set forth in § 202.24. This exemption does not apply to works that are published in both online,

“special relief” from the mandatory-deposit requirement to be granted at the discretion of the Register of Copyrights.¹³ Non-compliance with the deposit requirement can lead to a range of financial penalties.¹⁴

electronic formats and in physical formats, which remain subject to the appropriate mandatory deposit requirements. (6) Three-dimensional sculptural works, and any works published only as reproduced in or on jewelry, dolls, toys, games, plaques, floor coverings, wallpaper and similar commercial wall coverings, textiles and other fabrics, packaging material, or any useful article. Globes, relief models, and similar cartographic representations of area are not within this category and are subject to the applicable deposit requirements. (7) Prints, labels, and other advertising matter, including catalogs, published in connection with the rental lease, lending, licensing, or sale of articles of merchandise, works of authorship, or services. (8) Tests, and answer material for tests when published separately from other literary works. (9) Works first published as individual contributions to collective works. This category does not exempt the owner of copyright, or of the exclusive right of publication, in the collective work as a whole, from the applicable deposit requirements for the collective work. (10) Works first published outside the United States and later published in the United States without change in copyrightable content, if: (i) Registration for the work was made under 17 U.S.C. 408 before the work was published in the United States; or (ii) Registration for the work was made under 17 U.S.C. 408 after the work was published in the United States but before a demand for deposit is made under 17 U.S.C. 407(d). (11) Works published only as embodied in a soundtrack that is an integral part of a motion picture. This category does not exempt the owner of copyright, or of the exclusive right of publication, in the motion picture, from the applicable deposit requirements for the motion picture. (12) Motion pictures that consist of television transmission programs and that have been published, if at all, only by reason of a license or other grant to a nonprofit institution of the right to make a fixation of such programs directly from a transmission to the public, with or without the right to make further uses of such fixations.”)

13. See 37 C.F.R. § 202.19(e) (2018) (“(e) Special relief. (1) In the case of any published work not exempt from deposit under paragraph (c) of this section, the Register of Copyrights may, after consultation with other appropriate officials of the Library of Congress and upon such conditions as the Register may determine after such consultation: (i) Grant an exemption from the deposit requirements of section 407(a) of title 17 on an individual basis for single works or series or groups of works; or (ii) Permit the deposit of one copy or phonorecord, or alternative identifying material, in lieu of the two copies or phonorecords required by paragraph (d)(1) of this section; or (iii) Permit the deposit of incomplete copies or phonorecords, or copies or phonorecords other than those normally comprising the best edition; or (iv) Permit the deposit of identifying material which does not comply with § 202.21 of these regulations. (2) Any decision as to whether to grant such special relief, and the conditions under which special relief is to be granted, shall be made by the Register of Copyrights after consultation with other appropriate officials of the Library of Congress, and shall be based upon the acquisition policies of the Library of Congress then in force. (3) Requests for special relief under this paragraph shall be made in writing to the Chief, Examining Division, shall be signed by or on behalf of the owner of copyright or of the exclusive right of publication in the work, and shall set forth specific reasons why the request should be granted. (4) The Register of Copyrights may, after consultation with other appropriate officials of the Library of Congress, terminate any ongoing or continuous grant of special relief. Notice of termination shall be given in writing and shall be sent to the individual person or organization to whom the grant of special relief had been given, at the last address shown in the records of the Copyright Office. A notice of termination may be given at any time, but it shall state a specific date of termination that is at least 30 days later than the date the notice is mailed. Termination shall not affect the validity of any deposit made earlier under the grant of special relief.”)

14. 17 U.S.C. § 407(d) (2012) (“At any time after publication of a work as provided by subsection (a), the Register of Copyrights may make written demand for the required deposit on any of the persons obligated to make the deposit under subsection (a). Unless deposit is made within

Parts of section 407's house report¹⁵ are worth noting. For starters, it comments on the distinction between the mandatory-deposit requirement and copyright registration, stating,

Under the 1909 statute, deposit of copies for the collections of the Library of Congress and deposit of copies for purposes of copyright registration have been treated as the same thing. The bill's basic approach is to regard deposit and registration as separate though closely related: deposit of copies or phonorecords for the Library of Congress is mandatory, but exceptions can be made for material the Library neither needs nor wants; copyright registration is not generally mandatory, but is a condition of certain remedies for copyright infringement. Deposit for the Library of Congress can be, and in the bulk of cases undoubtedly will be, combined with copyright registration.¹⁶

Secondly, works first published abroad and subsequently published in the United States are (with exception¹⁷) subject to the deposit requirement:

Although the basic deposit requirements are limited to works “published with notice of copyright in the United States,” they would become applicable as soon as a work first published abroad is published in this country through the distribution of copies or phonorecords that are either imported or are part of an American edition.¹⁸

three months after the demand is received, the person or persons on whom the demand was made are liable—(1) to a fine of not more than \$250 for each work; and (2) to pay into a specially designated fund in the Library of Congress the total retail price of the copies or phonorecords demanded, or, if no retail price has been fixed, the reasonable cost to the Library of Congress of acquiring them; and (3) to pay a fine of \$2,500, in addition to any fine or liability imposed under clauses (1) and (2), if such person willfully or repeatedly fails or refuses to comply with such a demand.”).

15. H.R. REP. NO. 94-1476 (1976) (Conf. Rep.).

16. *Id.* at 150.

17. 37 C.F.R. § 202.19(c)(10) (2018).

18. H.R. REP. NO. 94-1476, at 151 (1976) (Conf. Rep.). Likewise, the mandatory-deposit requirement applies to a work that is published simultaneously in the United States and another country. U.S. COPYRIGHT OFFICE, *supra* note 3, at 69 (“The mandatory deposit requirement only applies to works published in the United States. Unpublished works and works that are published solely outside the United States are not subject to this requirement. Mandatory deposit does apply to works that are published simultaneously in both a foreign country and in the United States. It applies to works that are first published in a foreign country and then subsequently published or distributed in this country.”).

Finally, the house report remarks on possible exemptions from the deposit requirement and its flexibility in balancing the needs of the Library of Congress versus the burdens of the deposit requirement on the owners of published works, stating that

the fundamental criteria governing regulations issued under section 407(c), which allows exemptions from the deposit requirements for certain categories of works, would be the needs and wants of the Library. The purpose of this provision is to make the deposit requirements as flexible as possible, so that there will be no obligation to make deposits where it serves no purpose, so that only one copy or phonorecord may be deposited where two are not needed, and so that reasonable adjustments can be made to meet practical needs in special cases. The regulations, in establishing special categories for these purposes, would necessarily balance the value of the copies or phonorecords to the collections of the Library of Congress against the burdens and costs to the copyright owner of providing them.¹⁹

Originally, per the Copyright Act of 1790,²⁰ the nation's first federal copyright law, depositing pre-publication copies of works with the federal government was required for copyright registration.²¹ The United States Copyright Office explains,

In May 1790, when Congress enacted the first federal copyright law, the U.S. Copyright Office did not yet exist. Instead, authors and publishers recorded their claims with federal district courts and submitted copies of their works (in those days, book [*sic*], maps, and charts) in support of their applications. These works, known as deposits, were stored in a variety of places, including in the U.S. Department of State and the U.S. Department of the Interior.²²

In addition, post-publication deposits to the United States Secretary of State were required within six months after publication.²³ This system remained until the second general revision of the Copyright Act in July

19. H.R. REP. NO. 94-1476, at 151 (1976) (Conf. Rep.).

20. Copyright Act of 1790, 1 Stat. 125.

21. See Copyright Act of 1790, 1 Cong. ch. 15, § 3, 1 Stat. 125.

22. U.S. COPYRIGHT OFFICE *supra* note 7, at 1.

23. Copyright Act of 1790, 1. Cong. ch. 15, § 4, 1 Stat. 125, 125.

1870, which centralized the copyright system in the Library of Congress, which became the lone repository for deposits.²⁴ The United States Copyright Office writes, “No legislation was more important to the development of the Library than that law, which required all authors to deposit in the Library two copies of every book, pamphlet, map, print, and piece of music registered in the United States.”²⁵ In February 1897, Congress established the United States Copyright Office, which, among other functions, administers the mandatory-deposit requirement.²⁶

III. VALANCOURT BOOKS

Valancourt Books (“Valancourt”) is “an independent small press specializing in the rediscovery of rare, neglected, and out-of-print fiction,” including “[g]othic, horror, and supernatural fiction” and LGBT-interest titles.²⁷ Since “far too many great books remain out-of-print and inaccessible,” in 2005, James Jenkins founded Valancourt “to restore many of these works to new generations of readers.”²⁸ Jenkins and his husband, Ryan Cagle, run Valancourt out of their house in Richmond, Virginia, with no employees.²⁹

Valancourt has published more than 400 books and adds about twenty new titles yearly;³⁰ but unlike traditional publishers, Valancourt does not keep copies in stock.³¹ Rather, it employs a print-on-demand model, wherein “James edits each book and lays out galleys, but nothing is physically printed until a customer or retailer actually orders a book.”³² Not keeping books in stock proved

24. *United States Copyright Office: A Brief Introduction and History*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/circs/circ1a.html> (last visited Feb. 23, 2020).

25. *Id.*

26. *See id.*

27. *Our History*, VALANCOURT BOOKS, <http://www.valancourtbooks.com/our-history.html> (last visited Feb. 23, 2020).

28. *Id.*

29. Nick Sibilla, *Why Is the Federal Government Threatening an Indie Book Publisher with \$100,000 in Fines?*, FORBES (Aug. 30 2018, 9:30 AM), <https://www.forbes.com/sites/nicksibilla/2018/08/30/why-is-the-federal-government-threatening-an-indie-book-publisher-with-100000-in-fines/#737e28691335>.

30. *Id.*

31. *Id.*

32. *Virginia Books: Outdated Federal Law Threatens Unique Richmond Publisher*, INST. FOR JUST., <https://ij.org/case/virginia-books/> (last visited Feb. 23, 2020). The couple has painstakingly typed out manuscripts from microfiches and rare print editions (including from the only surviving copy for some books) and converted them to digital formats. So when a customer orders a book,

problematic when Valancourt received an email on June 11, 2018, from the United States Copyright Office, stating that Valancourt was not complying with the mandatory-deposit requirement and that if he did not comply, he could face large fines.³³ The Institute for Justice (IJ) writes,

To comply with the government’s demand, James would have to go online, order every single book from Valancourt’s back catalog, and then physically package each one up to ship to the Copyright Office. (The government’s demand letter contained 341 individual notices that, for tracking purposes, had to be included with each individual book James was supposed to send.) The process would have taken days and cost thousands of dollars.³⁴

Valancourt will send the digital files to a printing vendor, who then prints a single-bound volume. “This way, the books stay in print indefinitely,” Jenkins explained. Sibilla, *supra* note 29.

33. *Virginia Books Outdated Federal Law Threatens Unique Richmond Publisher*, *supra* note 32; see 17 U.S.C. § 407 (2012). Writes Nick Sibilla,

Failure to comply could result in fines of up to \$250 per book, plus the book’s retail price. The government could further fine Valancourt up to \$2,500 for “willfully or repeatedly” failing to comply with the deposit demand. (It’s unclear whether or not the “willful” fine could apply just once to Valancourt’s case or if it could apply to each individual book.) Fines could quickly reach six figures. “Sending hundreds of our books to the government will cost us thousands of dollars and many hours of time, which cuts into our already limited resources for our mission to rescue rare and important literature,” Jenkins said. “But if we don’t send the books, the Copyright Office says they will fine us out of existence.”

Sibilla, *supra* note 29.

34. *Virginia Books Outdated Federal Law Threatens Unique Richmond Publisher*, *supra* note 32. According to IJ, “the only way that Valancourt can obtain copies of its works is by ordering them from the printer through its own online retail portal.” Complaint for Declaratory and Injunctive Relief at 11, *Valancourt Books, LLC v. Claggett*, No. 1:18-cv-01922 (D. D.C. Aug. 16, 2018).

Moreover, Valancourt is actively expanding its catalog every year. Valancourt intends to continue publishing multiple books per year, but it does not want to send copies of each new work to the Copyright Office. Jenkins’ past experience participating voluntarily in the Cataloging-in-Publication program gives him direct knowledge that sending a copy of every single new title to the federal government is both expensive and time-consuming. Complying with the mandatory-deposit requirement on a forward-looking basis would result in at least hundreds of dollars in additional annual costs to Valancourt in addition to many hours of time diverted from its two-person staff’s already limited resources.

Id. at 13. IJ writes,

To make matters worse, James had *already given* many of these books to the federal government. When Valancourt first started publishing, it participated in the Library of Congress’s “Cataloging in Publication” program, in which

On June 12, 2018, Jenkins replied to the Copyright Office's email, requesting it withdraw its demand.³⁵ On August 9, 2018, the Copyright Office replied to Jenkins's email, attaching a new demand letter for 240 books (rather than the 341 listed in their initial demand).³⁶ On August 16, 2018, represented by IJ, Valancourt filed a lawsuit in federal court, challenging the constitutionality of 17 U.S.C. § 407, in light of the Fifth Amendment's Takings Clause and the First Amendment's protections of freedom of speech and freedom of the press.³⁷ The complaint states,

Valancourt was unaware that it was legally obligated to deposit copies of every book it produced with the federal government until it received a written demand from the United States Copyright Office that it provide the government with copies of virtually every book in its catalog—341 in total—on pain of fines that could extend into six figures. Valancourt is now faced with an untenable choice: Comply with the Copyright Office's demand for its past publications and deposit copies of each book it publishes

publishers provide the Library with a free copy of a book in exchange for a Library of Congress catalog number that is meant to facilitate processing for libraries. After depositing more than 100 books this way, James eventually decided that providing these copies was too expensive and yielded little benefit, and so he stopped—but the Copyright Office was demanding that he give them additional copies of many of those 100 books anyway. James immediately explained all of this in an email he sent in response to the demand letter. Two months later, the Copyright Office finally replied—to inform him that he still needed to provide copies of books that contained any “copyrightable” material, even if he had already sent them to the Library of Congress for other reasons. For unexplained reasons, the new letter dropped the number of books demanded down to 240, but it still threatened crippling fines and warned Valancourt not to keep publishing books without sending copies to the federal government.

Virginia Books Outdated Federal Law Threatens Unique Richmond Publisher, *supra* note 32. Nick Sibilla writes,

To comply with the government's demand, each book would have to be ordered, printed, bound, packed, and shipped individually. Jenkins estimates that compliance could cost \$2,000 to \$3,000—a significant sum for a niche publisher. “That’s a lot of money for a small business and it would take away from our mission, which is to publish these books,” Jenkins explained. “With the \$2,000 or \$3,000, that’s several new titles we could resurrect and bring back.”

Sibilla, *supra* note 29.

35. Complaint for Declaratory and Injunctive Relief, *supra* note 34, at 11.

36. *Id.* at 12.

37. *Id.* at 1.

in the future (which would impose substantial burdens in terms of time and financial cost) or await a lawsuit from the Copyright Office seeking crippling fines. It therefore brings this action to clarify its rights and obligations under 17 U.S.C. § 407 and the Constitution of the United States.³⁸

IV. ARGUMENTS AGAINST SECTION 407'S MANDATORY-DEPOSIT REQUIREMENT

My chief objections to the mandatory-deposit requirement are that it is unnecessary and unconstitutional. An examination of each objection follows.

A. *Unnecessary*

Historically, there have been two purposes of a mandatory-deposit requirement: “to identify the copyrighted work in connection with copyright registration, and to provide copies for the use of the Library of Congress.”³⁹ The former is the original purpose, while the latter emerged decades afterward.⁴⁰

The first purpose (“to identify the copyrighted work in connection with copyright registration”) is no longer applicable and is, thus, a non-starter. Per the Copyright Act of 1976, registration of a work is no longer a requirement of copyright protection, which accrues automatically, whenever the work is created.⁴¹ However, the 1976 Act did not remove the mandatory-deposit requirement. So, the deposit mandate remained, but its initial reason for being did not. “Simply put,

38. *Id.* at 2. The Copyright Office’s demand letter to Valancourt instructed Valancourt to ship each of the 341 books separately, along with a copy of the relevant notice for each book. *See id.* at 10.

39. S. COMM. ON THE JUDICIARY, SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS, 83RD CONG., STUDY NO. 20: DEPOSIT OF COPYRIGHTED WORKS, PREPARED BY ELIZABETH K. DUNNE (Comm. Print 1960), <https://www.copyright.gov/history/studies/study20.pdf> [hereinafter STUDY NO. 20: DEPOSIT OF COPYRIGHTED WORKS].

40. “From 1790 to 1870 the function of deposit was chiefly to serve as record evidence of the work covered by the copyright claim . . . From 1870 to 1909, under a completely centralized registration system at the Library of Congress, the deposit of two copies of each work provided equally for the maintenance of a copy as record evidence, as in the previous period, and as a means of enriching the Library.” *Id.* at 11.

41. 17 U.S.C. §§ 102, 407(a) (2012).

the rationale for the book-deposit mandate went away decades ago,” writes IJ.⁴²

The second purpose (“to provide copies for the use of the Library of Congress”) remains but is insufficient. The proffered justification for this purpose is that it is culturally important to make deposits available to the Library of Congress.⁴³ Perhaps the leading proponent of this view was Ainsworth Spofford, who served as the nation’s sixth Librarian of Congress.⁴⁴ Spofford “envisioned it as the national library” and “was also convinced of the value of the copyright deposit to such an institution.”⁴⁵ Ellen C. Dement writes that, after being named Librarian of Congress,

Spofford immediately set to work establishing the Library’s national role, and he pursued this cause with energy and

42. *Virginia Books Outdated Federal Law Threatens Unique Richmond Publisher*, *supra* note 32.

43. See STUDY NO. 20: DEPOSIT OF COPYRIGHTED WORKS, *supra* note 39. “The great value of the copyright deposit to the collections of the Library of Congress since 1870 has been recognized many times. In the past it has materially assisted the Library in building its collections on all aspects of American history, literature, law, music, and social culture.” *Id.* at 30. “The great value to the public of supplying copies of published works to a national library has long been recognized in the United States and in other countries.” *Id.* at 34.

In 1846 the act establishing the Smithsonian Institution provided that one copy of each work for which a copyright should be secured under act of Congress should be delivered to the Librarian of the Smithsonian Institution and to the Librarian of Congress within 3 months after publication. The librarian appointed to the Smithsonian, Charles Jewett, felt that the copyright deposit had great importance for a national library: “To the public, the importance, immediate and prospective, of having a central depot, here all the products of the American press may be gathered, year by year, and preserved for reference, is very great. The interest with which those who in 1950 may consult this library would view a complete collection of all the works printed in America in 1850, can only be fully and rightly estimated by the historian and bibliographer, who has sought in vain for the productions of the past. . . . Thus, in coming years, the collection would form a documentary history of American letters, science, and art. It is greatly to be desired, however, that the 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 be important in future centuries?”

Id. at 12 (quoting BD. OF REGENTS OF THE SMITHSONIAN INST., FOURTH ANNUAL REPORT OF THE BOARD OF REGENTS OF THE SMITHSONIAN INSTITUTE, S. MISC. DOC. NO. 120 (1850)).

44. Spofford was appointed to the position on December 31, 1864, by President Abraham Lincoln and held the position until July 1, 1897. See *Ainsworth Rand Spofford (1825–1908)*, LIBR. CONGRESS, <https://www.loc.gov/item/n90613873/ainsworth-rand-spofford-1825-1908/>. He “served as the de facto Register of Copyrights until the position of Register was created in 1897.” *United States Copyright Office: A Brief Introduction and History*, *supra* note 24.

45. STUDY NO. 20: DEPOSIT OF COPYRIGHTED WORKS, *supra* note 39, at 13.

political skill. . . . In his annual reports to Congress, Spofford continually emphasized that a national library should be a permanent, comprehensive collection of national literature that represented “the complete product of the American mind in every department of science and literature.” Comprehensiveness was essential, for in his view the American national library should serve both the American citizenry and its elected representatives. Books and information were needed about all subjects and, as the library of the American government, the Library was the natural site for such a comprehensive collection.⁴⁶

Dement provides valuable insight into the larger context of these efforts by Spofford to create a national library and, thus, of the second purpose for mandatory deposits, writing that the rhetoric used to promote the idea of a national library was part of a nationalistic effort to establish the United States’ place in the educated, cultured world.⁴⁷ She writes,

46. *Ainsworth Rand Spofford (1825–1908)*, *supra* note 44 (citing AINSWORTH RAND SPOFFORD: BOOKMAN AND LIBRARIAN (John Y. Cole ed., 1975)). Ellen C. Dement writes that Spofford had a

vision of the Library of Congress as a national library which would help the country gain intellectual and cultural preeminence in western culture. The cornerstone of this project was the Copyright Law passed on July 8, 1870, which centralized all copyright activities at the Library and required a copy of every copyrighted work in the United States to be deposited there. By passing this law, Spofford argued to Congress, the legislature would provide a repository of American culture which would be “an invaluable aid to thousands” because “the Public intelligence and welfare are promoted by every extension of the means of acquiring knowledge.” The Copyright Law consolidated the vast majority of material published in America into what Spofford called “one truly great and comprehensive library, worthy of Congress and the nation.”

Ellen C. Dement, *The Making of a National Library*, VAND. HIST. REV., Spring 2017, at 74, 74–81.

47. Dement, *supra* note 46, at 74–81 (“This paper explores the transformation of the Library of Congress from simply a legislative library into the national library of the United States. This process occurred during Ainsworth Rand Spofford’s tenure as Librarian of Congress from 1864 to 1897, and he was instrumental in establishing the institution’s status as the national library. I argue that Spofford’s key accomplishments, the Copyright Law of 1870 and the construction of a separate Library of Congress building between 1886 and 1896, were inextricably linked with the broader culture of late nineteenth century America. Without this cultural context, the Library would not have become the national library of the United States. The paper begins with an overview of the antebellum Library, which demonstrates its limited scope relative to the institution’s later expansion while recognizing developments during the period that contributed to its national character. I then move to a discussion of the Library under Spofford’s direction, examining the

The late nineteenth century witnessed a desire to create a uniquely American culture and edify the nation's public on that culture. This desire was reflected in the transformation of the Library of Congress into America's national library, which functioned as a symbolic center of the nation's intellectual achievements. . . . [T]hrough the efforts of Spofford and his contemporaries, the Library of Congress became a truly national library that embodied the ideal of a national culture, freely accessible to all Americans, and an indispensable proponent of knowledge in the United States.⁴⁸

Since registration of a publication is no longer required in order to receive copyright protection, furnishing copies of works to the Library of Congress is the only reason for maintaining the mandatory-deposit requirement. It is unclear precisely what this second purpose is truly about. Is it about building the country's intellectual and cultural reputation—the early rhetoric mentioned above indicates as much—or about meeting the needs of the Library of Congress? These are entirely different propositions, but my position is that, in either case, the reason is insufficient to justify the mandatory-deposit requirement.

Regarding the former case (building the country's intellectual and cultural reputation), even if one accepts, as I do not, that, earlier in our country's history, building up a robust national library in order to solidify our cultural standing in the world was sufficient justification for requiring publishers to send copies of their works to the Library of Congress, the times have changed enough that this justification is no longer legitimate. The United States' cultural place in the world is

rhetoric used to promote and disseminate the idea of a national library to Congress and the nation. Next, I connect this rhetoric to the larger growth of public libraries in the United States, with both the Library of Congress and municipal libraries presented as instruments to provide 'culture' to the American public. These establishments propagated a unified and homogenous definition of American culture ordained by an intellectual elite, who hoped that doing so would firmly establish America as a western civilization. The final section of this paper analyzes the construction of a separate Library of Congress building, which was used—particularly through its interior decorations—as a pedagogical tool to further advance a westernized definition of American culture by giving the American public 'an insight into the colossal array of knowledge which the human mind has accumulated and still gathers together.' Thus, the transformation of the Library of Congress into America's national library was a direct manifestation of the 'spirit of the age,' coupling the nation's nationalistic ambitions with its faith in the power of public institutions to cultivate learning and culture.”)

48. *Id.* at 80.

firmly entrenched, and publications are only a part of what makes the country culturally important. As such, we need not endeavor to establish ourselves as a center of education and culture via a comprehensive, centralized national library, certainly not at the literal expense of publishers. More fundamentally, a nation does not earn its intellectual and cultural stature by maintaining a repository of publications. Rather, it does so by its citizens' producing those works in the first place. The true value to the public is found in the content of published works, not in their being collected.

As for the latter case (meeting the needs of the Library of Congress), the mandatory-deposit requirement is not necessary to achieve the goals of the Library of Congress. According to the Library of Congress,

The primary function of the Library of Congress is to serve the Congress. In addition, it provides service to government agencies, other libraries, scholars, and the general public through over twenty reading rooms and research centers. The Library welcomes public use of its collections and reference services, and endeavors to offer the widest possible use of those collections consistent with their preservation and with the Library's obligation to serve the Congress and other government agencies.⁴⁹

Readily admitting that I certainly do not know all that is required by Congress and the various federal agencies, I offer that their respective functions and efforts would not be materially impeded were publishers not required to furnish copies of their works to the Library of Congress. Are Congress's needs less served without copies of Valancourt Books' "rare, neglected, and out-of-print fiction, including 18th century gothic novels, Victorian horror novels, forgotten literary fiction, and early LGBT fiction"?⁵⁰ Are they less served without copies of children books? Was Congress ill-served before the imposition of the legal-deposit requirement? Is Congress materially benefitted by the continual addition of works to a library that already

49. *Using the Library's Collections*, LIBR. CONGRESS (last visited Feb. 23, 2020), <https://www.loc.gov/rr/useofcollections.html>.

50. See Complaint for Declaratory and Injunctive Relief, *supra* note 34, at 3.

houses more than 140 million works?⁵¹ The main (and original) purpose of the Library of Congress is to serve Congress, not to be a warehouse of all of a country's publications. More to the point, the former can be accomplished without the latter. Simply, the mandatory-deposit requirement creates an obligation on publishers that is not necessary to serve the chief purpose of the Library of Congress.

That said, even if a centralized local library is necessary for Congress and federal agencies, I find dubious the “great value to the public of supplying copies of public works to a national library.”⁵² Early proponents of establishing the Library of Congress as a national library emphasized that such a library would provide a central location for a comprehensive collection of publications.⁵³ However, strictly in terms of the time and money it would cost most Americans to visit the Library of Congress, I fail to see a value to the public that would justify the mandatory-deposit requirement's burden on publishers. The public is not owed free access to any commercial publication, much less the vast majority of publications. Public libraries, which are scattered throughout the country, are public privileges, not public rights. In addition to free access to the vast amount of publications available at public libraries—libraries that are more accessible and convenient for almost all citizens than is the Library of Congress—the public has an array of options for accessing various publications: purchasing from bookstores; viewing via the Internet; borrowing from friends, family, colleagues, or others; etc. As is the case with public libraries, these options are also more accessible and convenient for most Americans than is a visit to the Library of Congress. Even if one finds tremendous value in having a copy of most publications on file at the Library of Congress in Washington D.C., free to view, such value is overridden

51. See *Using the Library's Collections*, *supra* note 49 (“The enormous size and variety of its collections make the Library of Congress the largest library in the world. Comprised of approximately 142 million items in virtually all formats, languages and subjects, these collections are the single most comprehensive accumulation of human expression ever assembled.”); *Research and Reference Services: Frequently Asked Questions*, LIBR. CONG., <https://www.loc.gov/rr/res-faq.html> (last visited Feb. 23, 2020) (“While virtually all subject areas are represented in the collections, the Library does not attempt to collect comprehensively in the areas of clinical medicine and technical agriculture, which are covered by the National Library of Medicine and the National Agricultural Library, respectively. Researchers should also note that the Library of Congress is distinct from the National Archives, which is the major repository for the official records of the United States government.”).

52. See STUDY NO. 20: DEPOSIT OF COPYRIGHTED WORKS, *supra* note 39, at 34.

53. *Id.*

by the burden imposed on the publisher. Publishers shouldn't have to pay for the free availability of their publications to the general public.

B. Unconstitutional

In her 1960 committee report, Elizabeth K. Dunne wrote, "If a 'legal deposit' system covering all domestic publications without regard to copyright were desired, the constitutional [*sic*] basis for requiring the deposit of works not under copyright would need to be considered"⁵⁴ Indeed, the constitutionality of the mandatory-deposit requirement needs to be considered. When it is, it fails on at least three bases.

1. Fifth Amendment: Takings Clause

*"[N]or shall private property be taken for public use, without just compensation."*⁵⁵

The requirements of 17 U.S.C. § 407(a) are a clear violation of the Takings Clause of the Fifth Amendment to the United States Constitution, which states private property cannot be taken for public use without payment of just compensation to the property owner.⁵⁶ The United States Supreme Court has long acknowledged that the Takings Clause clearly covers physical appropriations of private property for public use, stating in 1871 that the Takings Clause "has always been understood as referring only to a direct appropriation."⁵⁷ On several occasions, the United States Supreme Court has held that

54. *Id.* at 33.

55. U.S. CONST. amend. V.

56. *Id.*

57. *Knox v. Lee*, 79 U.S. 457, 551 (1871); *see also* ROBERT MELTZ, CONG. RESEARCH SERV., 97-112, TAKINGS DECISIONS OF THE U.S. SUPREME COURT: A CHRONOLOGY (2015) ("The modern period, 1978 to the present, has seen the Court settle into a taxonomy of four fundamental types of takings—total regulatory takings, partial regulatory takings, physical takings, and exaction takings. The Court in this period also has sought to develop criteria for these four types, and to set out ripeness standards and clarify the required remedy. In the preceding period, 1922 to 1978, the Court first announced the regulatory taking concept—the notion that government regulation alone, without appropriation or physical invasion of property, may be a taking if sufficiently severe. During this time, however, it proffered little by way of regulatory takings criteria, continuing rather its earlier focus on appropriations and physical occupations. In the earliest period of takings law, 1870 to 1922, the Court saw the Takings Clause as protecting property owners only from appropriations and physical invasions, two forms of government interference with property seen by the Court as most functionally similar to an outright condemnation of property. During this infancy of takings law, regulatory restrictions were tested under other, non-takings theories, such as whether they were within a state's police power, and were generally upheld.").

the “classic taking” is one “in which the government directly appropriates private property for its own use.”⁵⁸ Such *per se* takings require just compensation to be paid to the deprived property owner.⁵⁹

This is precisely the case with section 407(a)’s mandatory-deposit requirement: it is a “classic taking,” as a book subject to the mandatory-deposit requirement is personal property physically taken by the government for public use, without compensation. And the Takings Clause applies to personal property (such as books), not just real property. In *Horne v. Department of Agriculture*,⁶⁰ the Supreme Court held,

The first question presented asks “Whether the government’s ‘categorical duty’ under the Fifth Amendment to pay just compensation when it ‘physically takes possession of an interest in property,’ applies only to real property and not to personal property.” The answer is no.

There is no dispute that the “classic taking [is one] in which the government directly appropriates private property for its own use.” Nor is there any dispute that, in the case of real property, such an appropriation is a *per se* taking that requires just compensation.

Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.

The Takings Clause provides: “[N]or shall private property be taken for public use, without just compensation.”

58. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 324 (2002); see *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2425 (2015); *E. Enters. v. Apfel*, 524 U.S. 498, 522 (1998).

59. See *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 321–22 (“The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property. Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules.”).

60. *Horne*, 135 S. Ct. at 2425.

It protects “private property” without any distinction between different types.⁶¹

At issue in *Horne* was the United States Department of Agriculture’s California Raisin Marketing Order (CRMO),⁶² which required, “[A] percentage of a grower’s crop must be physically set aside in certain years for the account of the Government, free of charge. The Government then sells, allocates, or otherwise disposes of the raisins in ways it determines are best suited to maintaining an orderly market.”⁶³ Raisin farmers Laura and Marvin Horne challenged the law as a violation of the Takings Clause, and the Supreme Court sided with them, holding, “The reserve requirement imposed by the Raisin Committee is a clear physical taking. Actual raisins are

61. *Id.* at 2425–26 (citations omitted) (quoting U.S. CONST. amend. V and *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 324). In fact, protections against takings of personal property have a longer history than do protections against takings of real property. See William Michael Treanor, *The Original Understanding of the Takings Clause*, GEO. ENVTL. L. & POL’Y INST. PAPERS & REP. 2 (1998), https://scholarship.law.georgetown.edu/gelpi_papers/2/ (“In historical context, the narrow scope of the Takings Clause is hardly surprising. The clause provided greater protection for the property owner than the property owner had traditionally received. England’s Magna Carta did not require compensation for government seizure of land. It only required compensation when the government took personal property. Thus, crown officials were barred from ‘tak[ing] anyone’s grain or other chattels, without immediately paying the money.’ Magna Carta, Art. 28. In contrast, the sole limitation on government seizure of land was one of procedural regularity: ‘No free man shall be dispossessed . . . except by the legal judgement of his peers or by the law of the land.’ Magna Carta, Art. 39. Early colonial charters were similarly limited in scope. Only the Massachusetts Body of Liberty, adopted in 1641, required compensation when personal property was taken. No colonial charter required compensation for the seizure of land. While property owners, in practice, commonly were paid when their land was seized, no colony had a constitutional obligation to do so, and, in fact, compensation was not always paid.”); see also *James v. Campbell*, 104 U.S. 356, 358 (1882) (“[A patent] confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser . . .”).

62. 7 C.F.R. § 989 (2004); see also Raisins Produced from Grapes Grown in California; Order Amending Marketing Order No. 989, 83 Fed. Reg. 53,965, 53,968 (Oct. 26, 2018) (to be codified at 7 C.F.R. pt. 989).

63. *Horne*, 135 S. Ct. at 2424 (“The Agricultural Marketing Agreement Act of 1937 authorizes the Secretary of Agriculture to promulgate ‘marketing orders’ to help maintain stable markets for particular agricultural products. The marketing order for raisins requires growers in certain years to give a percentage of their crop to the Government, free of charge. The required allocation is determined by the Raisin Administrative Committee, a Government entity composed largely of growers and others in the raisin business appointed by the Secretary of Agriculture. In 2002-2003, this Committee ordered raisin growers to turn over 47 percent of their crop. In 2003-2004, 30 percent.”).

transferred from the growers to the Government. Title to the raisins passes to the Raisin Committee.”⁶⁴

In the same way, per section 407(a), the government requires deposits to the federal government of published works from private-property owners, so there is a clear physical taking, and title to the works passes from their owners to the government. The Institute for Justice writes, “The federal government can’t simply force someone to turn over their personal property for the government’s own use without paying them for it.”⁶⁵ So, just compensation is required to be paid to the deposits’ owners for the deposits. This means that the government must use its own funds to pay for the books. The Supreme Court has held that “[t]he Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁶⁶ Thus, the mandatory-deposit requirement’s financial burden properly belongs to the federal government, not with those obligated by the requirement, such as Valancourt. Quite simply, the government is forcing Valancourt to deposit books that it otherwise would not, and Valancourt is paying to do so, when the tab properly belongs with the government. As Valancourt’s complaint states, “[i]f the government wishes to acquire books, it should purchase them with funds raised through general taxation.”⁶⁷

The fact of section 407(a)’s unconstitutionality is amplified, considering the raisin growers subject to the CRMO held a contingent interest “in any net proceeds from sales the Raisin Committee makes, after deductions for the export subsidies and the Committee’s administrative expenses.”⁶⁸ The *Horne* Court was not persuaded that the contingent interest kept the requirement from constituting a taking, writing,

The reserve requirement imposed by the Raisin Committee is a clear physical taking. Actual raisins are

64. *Id.* at 2428.

65. *Virginia Books Outdated Federal Law Threatens Unique Richmond Publisher*, *supra* note 32.

66. *See* *Armstrong v. United States*, 364 U.S. 40, 40 (1960).

67. *See* *Complaint for Declaratory and Injunctive Relief*, *supra* note 34, at 14.

68. *See Horne*, 135 S. Ct. at 2424.

transferred from the growers to the Government. Title to the raisins passes to the Raisin Committee. The Committee's raisins must be physically segregated from free-tonnage raisins. Reserve raisins are sometimes left on the premises of handlers, but they are held "for the account" of the Government. The Committee disposes of what become its raisins as it wishes, to promote the purposes of the raisin marketing order.

Raisin growers subject to the reserve requirement thus lose the entire "bundle" of property rights in the appropriated raisins—"the rights to possess, use and dispose of" them—with the exception of the speculative hope that some residual proceeds may be left when the Government is done with the raisins and has deducted the expenses of implementing all aspects of the marketing order. The Government's "actual taking of possession and control" of the reserve raisins gives rise to a taking as clearly "as if the Government held full title and ownership" as it essentially does.⁶⁹

Likewise, publishers affected by section 407(a) lose their entire bundle of property rights but, unlike the raisin growers subject to the CRMO, do not retain any contingent interest. Thus, given that the CRMO, which left affected property owners with at least some remaining interest in the property, was held to violate the Takings Clause, section 407(a) is an even more blatant violation, given that it leaves affected property owners with zero interest in their property taken. The *Horne* Court's reference to the Supreme Court's holding in *Loretto v. Teleprompter Manhattan CATV Corp.*⁷⁰ that a physical appropriation of private property "is perhaps the most serious form of invasion of an owner's property interests" because it deprives the property owner of "the rights to possess, use and dispose of" said property expresses the gravity of the deprivation of property caused by section 407(a).⁷¹

69. *Id.* at 2428; *see also* *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 n.25 (2002) (citations omitted) (explaining that under the Supreme Court's physical takings cases, "it would be irrelevant whether a property owner maintained 5% of the value of the owner's property, so long as there was a physical appropriation of any of the parcel").

70. 535 U.S. 302 (2002).

71. *See Horne*, 135 S. Ct. at 2427 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)); *see also Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 324 (discussing

Forcing publishers, at their own expense, to submit copies of their published works to the federal government, for use by the federal government, is a *per se* taking—an actual, physical, and complete taking of private property for public use that requires payment of just compensation to said publishers. As such, unless and until such just compensation is paid, application of the mandatory-deposit requirement is quite clearly an unconstitutional taking.

2. First Amendment: Freedom of Speech

*“Congress shall make no law . . . abridging the freedom of speech, or of the press.”*⁷²

Section 407(a) is clear violation of the First Amendment’s mandate that “Congress shall make no law . . . abridging the freedom of speech, or of the press,” for it restricts the speech freedoms of publishers like Valancourt, by forcing them to speak more broadly than they might wish to speak (and then pay for such unwanted speech).⁷³ Thus, the mandatory-deposit requirement compels speech. Just as a publisher is free to publish a particular work, that publisher is free not to publish that particular work. Valancourt, like all other publishers, has a fundamental right to choose what to publish, but section 407(a) forces Valancourt to publish works it otherwise would not publish. In other words, publishers have the right to choose when to speak, but section 407(a) forces them to speak.

The First Amendment protects one’s freedom of speech, meaning both the freedom to speak and the freedom not to speak. In *West Virginia State Board of Education v. Barnette*,⁷⁴ the Supreme Court held,

The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at

the distinction between physical takings and regulatory takings: “Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights.” (emphasis added)).

72. U.S. CONST. amend. I.

73. *Id.*

74. 319 U.S. 624 (1943).

all, except insofar as essential operations of government may require it for the preservation of an orderly society,—as in the case of compulsion to give evidence in court.⁷⁵

In his concurring opinion, Justice Murphy spoke of “the freedom of the individual to be vocal or silent according to his conscience or personal inclination.”⁷⁶ In *Wooley v. Maynard*,⁷⁷ the Supreme Court held,

We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of “individual freedom of mind.” This is illustrated by the recent case of *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), where we held unconstitutional a Florida statute placing an affirmative duty upon newspapers to publish the replies of political candidates whom they had criticized. We concluded that such a requirement deprived a newspaper of the fundamental right to decide what to print or omit⁷⁸

Individual freedom fundamentally includes the freedom not to speak, not to express oneself—the freedom to be silent. This is true not just for individuals but also the press. In *Miami Herald Publishing Co. v. Tornillo*,⁷⁹ the Supreme Court held,

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive

75. *Id.* at 645 (Murphy, J., concurring).

76. *Id.* at 646.

77. 430 U.S. 705 (1977).

78. *Id.* at 714 (citations omitted).

79. 418 U.S. 241 (1974).

receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.⁸⁰

Anna M. Taruschio writes, “The Court based its decision on editorial, not individual, autonomy, holding that the marketplace of ideas interest held out by the state in its mandatory right of reply statute could not defeat the newspaper’s editorial autonomy interest in deciding what to print in its own pages.”⁸¹ Likewise, publishers are free to decide what to print and what not to print, when to print and when not to print. The First Amendment protects these rights.⁸² Of the right not to speak, Taruschio writes that “a fundamental premise of right not to speak doctrine” is “that compelled speech, by infringing on an autonomy right, triggers First Amendment protection.”⁸³ According to Taruschio, “the First Amendment always protects an individual’s autonomy interest.”⁸⁴

But, of course, First Amendment protections are not absolute. The government can restrict fundamental freedoms, provided such restrictions survive the requisite constitutional scrutiny. In general, commercial speech⁸⁵ is subject to intermediate constitutional scrutiny,

80. *Id.* at 258.

81. Anna M. Taruschio, *The First Amendment, the Right Not to Speak and the Problem of Government Access Statutes*, 27 *FORDHAM URB. L.J.* 1001, 1015 (2000).

82. U.S. CONST. amend. I.

83. Taruschio, *supra* note 81, at 1036.

84. *Id.* at 1037. Taruschio writes of

the dual nature of the protection that the right not to speak affords: first, the right to disassociate oneself from speech with which one disagrees, and second, the right to control over the right to speak or not to speak at all. Thus, the right not to speak comprises both the autonomy right to resist compelled speech and also the absolute right to remain silent unless and until one chooses to break that silence.

Id. at 1039. She states that “the autonomy promised by the Bill of Rights and repeatedly affirmed by Supreme Court jurisprudence protects the right not to speak.” *Id.* at 1051.

85. Commercial speech is speech “related solely to the economic interests of the speaker and its audience.” *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980). It is speech that proposes a “commercial transaction.” *Id.* at 562.

meaning any law restricting commercial speech must advance a substantial government interest and must not be any broader than is necessary to advance such interest.⁸⁶ But reviewing the mandatory-deposit requirement under intermediate scrutiny is problematic for at least two reasons.

Firstly, the speech compelled by the mandatory-deposit requirement is not commercial in nature. Forcing publishers to deposit to the Library of Congress copies of their works is not within the realm of commercial speech. Publishers are not depositing works for financial gain. They are not choosing to participate in commerce. This is not advertising. Rather, the speech involved here is speaking, generally. It is the fundamental freedom not to speak at all, commercially or otherwise. Such speech merits higher scrutiny than that afforded commercial speech.

Secondly, the mandatory-deposit requirement does not restrict speech but, rather, compels it; so a standard for reviewing laws *restricting* speech would not seem to apply to a law *compelling* speech. However, one can view forcing someone to speak as a restriction on speech, because it restricts that person's freedom not to speak. Viewed as such, all that would remain would be the first issue: the speech is not commercial in nature. That said, one could make the argument that publishers publish for financial gain—that they publish copies that are for sale—and that this makes the speech commercial in nature. This argument would likely advance the notion that though the specific copies affected by the mandatory-deposit requirement are not part of any commercial market, commerce is the reason for the original publishing of those works. If this argument prevails, then the correct standard of constitutional review for the mandatory-deposit requirement is intermediate scrutiny.

On the other hand, if one rejects the argument that the speech mandated by the mandatory-deposit requirement is commercial speech, then the appropriate level of constitutional review for the

86. *Id.* at 566 (“In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”).

mandatory-deposit requirement should be the highest level—strict scrutiny—because section 407(a) compels speech. According to the Supreme Court, “[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech.”⁸⁷ So, the mandatory-deposit requirement is a content-based regulation of speech, since it mandates speech that publishers would not otherwise necessarily make. The Supreme Court has written,

The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest. . . . The Government may serve this legitimate interest, but to withstand constitutional scrutiny, “it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.” It is not enough to show that the Government’s ends are compelling; the means must be carefully tailored to achieve those ends.⁸⁸

Thus, for a law to survive strict scrutiny, that law must be narrowly tailored to a compelling state interest and must be the least-restrictive means of achieving that interest. So, which standard of constitutional review should apply: intermediate scrutiny or strict scrutiny? Or perhaps a standard that lies between those two?

The type of speech compelled by the mandatory-deposit requirement is not the type of compelled speech that forces someone to profess a belief or speak an opinion with which she disagrees. If it were, strict scrutiny would certainly apply.⁸⁹ This is also not a

87. *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 781 (1988). The Supreme Court continued, “We therefore consider the Act as a content-based regulation of speech. *See* *Miami Herald Publ’g Co. v. Tornillo*, 418 U. S. 241, 256 (1974) (statute compelling newspaper to print an editorial reply “exact[s] a penalty on the basis of the content of a newspaper”).” *Id.* at 795.

88. *Sable Commc’ns of Cal., Inc. v. Fed. Commc’ns Comm’n*, 492 U.S. 115, 126 (1989) (citations omitted) (quoting *Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 637 (1980)).

89. *See Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 220–21 (2013) (“But the Policy Requirement goes beyond preventing recipients from using private funds in a way that would undermine the federal program. It requires them to pledge allegiance to the Government’s policy of eradicating prostitution. As to that, we cannot improve upon what Justice Jackson wrote for the Court 70 years ago: ‘If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.’ *Barnette*, 319 U.S., at 642. The Policy Requirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the

compelled commercial disclosure, in which the government requires a seller of goods or services to include certain messages in advertisements, meant to inform the public about the goods or services. If it were, rational-basis scrutiny would certainly apply.⁹⁰ Rather, the mandatory-disclosure requirement is simply a requirement that a publisher produce and submit to the federal government extra copies of a published work (i.e., non-commercial speech). The message contained therein is the choice of the speaker's, but the decision to express that message via the mandated copy disclosure is not.

Government program. In so doing, it violates the First Amendment and cannot be sustained.”); *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (“We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so.”); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

90. *See Zauderer v. Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626, 650–51 (1985) (“We have, to be sure, held that in some instances compulsion to speak may be as violative of the First Amendment as prohibitions on speech. *See, e. g., Wooley v. Maynard*, 430 U.S. 705 (1977); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974). Indeed, in *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), the Court went so far as to state that ‘involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.’ *Id.* at 633. But the interests at stake in this case are not of the same order as those discussed in *Wooley*, *Tornillo*, and *Barnette*. Ohio has not attempted to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.’ *Id.* at 642. The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, *see Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), appellant’s constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. Thus, in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech, ‘[warnings] or [disclaimers] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.’ *In re R.M.J.*, 455 U.S. 191, 201 (1982). Accord, *Cent. Hudson*, 447 U.S. at 565; *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977); *Va. Pharmacy Bd.*, 425 U.S. at 772, n.24. We do not suggest that disclosure requirements do not implicate the advertiser’s First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”).

Since non-commercial speech is more protected than is commercial speech⁹¹ and since a restriction on commercial speech is generally subject to intermediate scrutiny (though, as stated above, compelled commercial disclosures are subject to rational-basis review, and though some commercial-speech restrictions have been subjected to heightened scrutiny⁹²), it stands to reason that the mandatory-disclosure requirement, which forces non-commercial speech, would, at a minimum, be reviewed under intermediate scrutiny. And, at most, it is akin to the forced-profession/opinion variety that would be judged under strict scrutiny.

For purposes of this Article, I give the benefit of the doubt (about where the speech mandated by the mandated-disclosure requirement falls on the speech continuum) to the government and accept that the speech affected by the mandatory-deposit requirement is more protected than compelled commercial disclosures but less protected than being compelled to profess a certain belief. In such case, intermediate scrutiny would apply; and my contention is that when reviewed under intermediate scrutiny, the justifications for the mandatory-deposit requirement are insufficient to outweigh its injuries to publishers. As such, the mandatory-deposit requirement would also not survive any level of review more stringent than

91. *See* *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562–63 (1980) (“Nevertheless, our decisions have recognized ‘the “commonsense” distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.’ The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.” (citations omitted)).

92. *See* *Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72 & n.24 (1976) (“In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does ‘no more than propose a commercial transaction,’ and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.” (citation omitted)); *see also* *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566–67 (2011) (“The State argues that heightened judicial scrutiny is unwarranted because its law is a mere commercial regulation. It is true that restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct.”).

intermediate scrutiny, including strict scrutiny. Thus, regardless of which level of review that could legitimately be applied to it, the mandatory-deposit requirement should not survive constitutional scrutiny and should, therefore, be invalidated.

To survive intermediate scrutiny, the government must show⁹³ that the mandatory-deposit requirement (1) directly advances a substantial government interest; and (2) that is no more extensive than necessary to advance that interest.⁹⁴ At best, the mandatory-deposit requirement meets the first requirement but not the second requirement. At worst, it meets neither.

a. First requirement

Though I believe the mandatory-deposit requirement does not advance a substantial government interest,⁹⁵ I will concede on this element, for the case against me on this element is far more legitimate than is the case against me for the second element. And I believe that, without a doubt, the second element is not met, so conceding the first element is not fatal to my position, since both elements are required, in order to pass the requisite constitutional scrutiny.

So, for purposes of concession, the mandatory-deposit requirement directly advances the government's interest in supplying copies of publications to the Library of Congress. As previously noted, the first purpose of the mandatory-deposit requirement "to identify the copyrighted work in connection with copyright registration"⁹⁶ is no longer applicable and is, thus, not a substantial government interest. Ainsworth Spofford's goal of creating a comprehensive, national

93. See *Cent. Hudson*, 447 U.S. at 564 ("The State must assert a substantial interest to be achieved by restrictions on commercial speech.").

94. *Id.* at 566 ("In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.").

95. See generally Part IV, Section A (It is unclear precisely what this second purpose is truly about. Is it about building the country's intellectual and cultural reputation—the early rhetoric mentioned above indicates as much—or about meeting the needs of the Library of Congress? These are entirely different propositions, but my position is that, in either case, the reason is insufficient to justify the mandatory-deposit requirement.).

96. STUDY NO. 20: DEPOSIT OF COPYRIGHTED WORKS, *supra* note 39.

library to serve the needs of Congress and the public is worthwhile, directly relating to educating our nation's leaders and citizenry and to establishing and maintaining our intellectual and cultural standing in the world. Surely, this is a substantial interest directly advanced by the mandatory-deposit requirement.

b. Second requirement

Accepting that the mandatory-deposit requirement directly advances a substantial government interest, it is certainly more extensive than necessary to advance that interest. So, even if the first requirement of intermediate scrutiny is satisfied, the second is not, as there are other means to advance the government's interest that impose less of a burden on publishers than does the mandatory-deposit requirement.

Plainly, if the federal government's acquiring copies of published works serves to advance a substantial government interest, there are ways to acquire such copies other than by requiring publishers to furnish, on their own dime, copies of their publications to the government. On this point, Valancourt's complaint states,

There is no government interest served by the deposit requirement that could not be served equally well by less restrictive means such as the government purchasing the works it desires or by relying on the many avenues (like the cataloging-in-publication program or the deposit requirement for publishers who wish to register their copyrights) by which the government can acquire works voluntarily.⁹⁷

Each of the three options mentioned in the complaint would be less burdensome on Valancourt and other publishers than is the mandatory-deposit requirement.

Firstly, and obviously, if the federal government purchases publications, then the burden on publishers is drastically diminished. Thus, the mandatory-deposit requirement, which forces publishers to bear the costs of furnishing works to the federal government, is more extensive than necessary to advance any substantial government interest in obtaining copies of published works. Granted, publishers

97. See Complaint for Declaratory and Injunctive Relief, *supra* note 34, at 15.

would still bear the burden of using their time and effort to submit the required deposits, but this burden is much less than the burden of time, effort, and expense.

Secondly, publishers can freely choose to submit to the Library of Congress copies of their publications, as required by the Library of Congress's Cataloging in Publication Program,⁹⁸ which offers publishers certain benefits. According to the Library of Congress,

[a] Cataloging in Publication record (aka CIP data) is a bibliographic record prepared by the Library of Congress for a book that has not yet been published. When the book is published, the publisher includes the CIP data on the copyright page thereby facilitating book processing for libraries and book dealers.⁹⁹

Publishers like Valancourt are not forced to take part in the program but are free to do so, so the program is less burdensome on publishers than is the mandatory-deposit requirement. And every copy submitted to the Library of Congress for purposes of the program is another copy that helps advance any substantial government interest in obtaining copies of published works. Admittedly, the optional program presumably would not yield as many copies as the mandatory-deposit requirement, but it would still advance any substantial government interest in obtaining copies of published works. That it would not advance it as much as a mandatory program does not nullify its ability

98. *About CIP*, LIBR. CONGRESS, <http://www.loc.gov/publish/cip/about/index.html> (last visited Feb. 23, 2020).

There is no charge for CIP processing. However, participating publishers are obligated to send a complimentary copy of all books for which CIP data was provided immediately upon publication. Publishers failing to meet this obligation may be suspended from the program. Please note that all books submitted to the Library of Congress in compliance with the CIP Program are property of the Library of Congress.

Frequently Asked Questions, LIBR. CONGRESS, <http://www.loc.gov/publish/cip/faqs/> (last visited Feb. 23, 2020). Note:

There is no relationship between the CIP Program and Copyright. The main purpose of copyright records is to document the intellectual or creative ownership of a work. The main purpose of a CIP record is to record the bibliographic data elements of a work and facilitate access to it in library catalogs. Separate deposits are required to fulfill either mandatory deposit (Section 407) or copyright registration (Section 408) of US Copyright Law.

Id.

99. *Cataloging in Publication Program*, LIBR. CONGRESS, <http://www.loc.gov/publish/cip/> (last visited Feb. 23, 2020).

to satisfy the second requirement of intermediate scrutiny. Since the mandatory-deposit requirement is, well, mandatory, it is more restrictive to the freedom of publishers than is the optional Cataloging in Publication Program. Thus, it is more extensive than necessary to advance any substantial government interest in obtaining copies of published works.

Finally, section 408 of the Copyright Act requires a copy of any work for which copyright registration is filed.¹⁰⁰ This certainly advances any substantial government interest in obtaining copies of published works. And like the Cataloging in Publication Program, copyright registration is optional, so it doesn't force publishers to submit to the federal government copies of their works. Thus, the copyright-deposit requirement is less burdensome to publishers than is the mandatory-deposit requirement, which is, as a result, more extensive than necessary to advance any substantial government interest in obtaining copies of published works.

What binds each of these and, thus, what makes each less burdensome to publishers than the mandatory-deposit requirement is that a publisher either freely chooses to furnish a copy of a publication to the federal government or is forced to do so but is paid just compensation for doing so. By contrast, the mandatory-deposit requirement forces publishers to submit copies of their works yet does not pay them for doing so; instead, the publishers bear the expenses.

In summary, section 407(a) violates the First Amendment's requirement that "Congress shall make no law . . . abridging the freedom of speech, or of the press,"¹⁰¹ because it forces publishers like Valancourt to speak, when the First Amendment's guarantee of freedom of speech includes the freedom not to speak. Thus, the mandatory-deposit requirement compels speech and does so without sufficient justification, at least without one strong enough to survive intermediate constitutional scrutiny. As such, section 407(a) is unconstitutional on First Amendment grounds.

100. 17 U.S.C. § 408 (2005).

101. U.S. CONST. amend. I.

3. Fifth Amendment: Equal Protection via the Due Process Clause

*“No person . . . deprived of life, liberty, or property, without due process of law.”*¹⁰²

Another possible objection to the mandatory-deposit requirement is that it violates the equal-protection guarantees of the Fifth Amendment to the Constitution, as it does not treat all publishers equally, exempting certain published works from the requirement.¹⁰³ 37 C.F.R. § 202.19(c) lists twelve categories of works that are exempt from the mandatory-deposit requirement.¹⁰⁴ Thus, the mandatory-deposit requirement forces some publishers, but not others, to deposit works, depending on the type of publication.

For example, unlike most physical books, e-books are exempt from section 407(a).¹⁰⁵ In addition, many types of physical publications are not subject to the mandate. Among others; “Greeting cards, picture postcards, and stationery”; “Lectures, sermons, speeches, and addresses when published individually and not as a collection of the works of one or more authors”; “Prints, labels, and other advertising matter, including catalogs, published in connection with the rental lease, lending, licensing, or sale of articles of

102. U.S. CONST. amend. V.

103. *See* 17 U.S.C. § 407(c).

104. 37 C.F.R. § 202.19 (2018).

105. U.S. COPYRIGHT OFFICE, CIRCULAR 7D: MANDATORY DEPOSIT OF COPIES OR PHONORECORDS FOR THE LIBRARY OF CONGRESS, <https://www.copyright.gov/circs/circ07d.pdf> (last updated Mar. 2019) (“As noted elsewhere in this circular, the mandatory deposit requirement applies only to works published in the United States. Accordingly, unpublished works and works that are published solely outside the United States are not subject to this requirement. Most works that are published only online are not subject to mandatory deposit. Under Copyright Office regulations, the following categories of published works are also exempt from mandatory deposit because they are not selected for addition to the Library of Congress collections or for use in national library programs. NOTE: A work exempt from mandatory deposit is not exempt from the deposit requirements for copyright registration. • Tests and answer material published separately from other works; • Individually published speeches, sermons, lectures, and addresses; • Works originally published as part of a collective work (although the collective work itself may be subject to mandatory deposit); • Literary, dramatic, and musical works published only in phonorecords (although the recording itself may be subject to mandatory deposit from the copyright owner or publisher of the sound recording); • Motion picture soundtracks (although the motion picture itself may be subject to mandatory deposit); • Motion pictures published solely through a license or grant to a nonprofit institution to make a fixation of that program directly from a transmission to the public; • Scientific or technical diagrams, models, plans, or designs; • Advertising materials, including catalogs; • Three-dimensional sculptural works; • Jewelry; • Dolls, toys, and games; • Plaques; • Floor coverings, wallpaper and similar commercial wall coverings, textiles and other fabrics; • Packaging materials; • Useful articles; and • Online-only electronic works, with the exception of electronic serials that have been demanded by the Copyright Office”).

merchandise, works of authorship, or services”; “Works first published as individual contributions to collective works”; and “Works first published outside the United States and later published in the United States without change in copyrightable content” are exempt from the mandatory-deposit requirements of section 407(a).¹⁰⁶ Therefore, the statute does not treat all publishers the same, based on the medium or content of their publications. It forces some speech but not other speech. Such disparate treatment by the federal government clearly triggers equal-protection analysis.

That said, an argument can be made that attacking the mandatory-deposit requirement on equal-protection grounds might be unnecessary, given that the free-speech protections of the First Amendment provide a sufficient basis for arguing for the unconstitutionality of the requirement. In his article *Basic Equal Protection Analysis*,¹⁰⁷ Russell W. Galloway, Jr. writes,

In recent years, the Court has suggested that the fundamental rights strand of equal protection theory may be redundant and slated for cancellation. If government action infringes the claimant’s fundamental right, strict scrutiny should be applicable on that basis alone without reference to the equal protection clause. For example, a content-based infringement of free speech rights of labor unions triggers strict scrutiny under the first amendment itself, so the equal protection clause is not needed. Similarly, selective interference with the right of privacy can be curtailed under the due process clauses without help from equal protection theory.¹⁰⁸

Thus, it is possible that using the First Amendment to argue against the mandatory-deposit requirement, as explored above, is enough. But if only to attempt to solidify the case against the legality of the

106. See 37 C.F.R. § 202.19(c)(2), (3), (7), (9), (10) (2018). “Works first published outside the United States and later published in the United States without change in copyrightable content” are exempt from the mandatory-deposit requirements of § 407(a) only if only if “[r]egistration for the work was made under 17 U.S.C. 408 before the work was published in the United States; or (ii) [r]egistration for the work was made under 17 U.S.C. 408 after the work was published in the United States but before a demand for deposit is made under 17 U.S.C. 407(d).” *Id.* § 202.19(c)(10)(i)–(ii).

107. Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121 (1989).

108. *Id.* at 150 (footnotes omitted).

requirement, I will assume the Equal Protection Clause is not redundant; and I will, thus, explore the requirement from an equal-protection perspective.

Under traditional First Amendment free-speech analysis, for content-neutral speech rules (e.g., exemptions based on medium of publication), intermediate scrutiny applies.¹⁰⁹ For content-based speech rules (e.g., exemptions based on subject matter of publication), strict scrutiny applies.¹¹⁰ But as explored in the section above, under either intermediate or strict scrutiny, section 407(a) does not survive constitutional scrutiny, under traditional free-speech-restriction analysis.

But this third possible objection is not based on the First Amendment's guarantee of free speech but rather on the Fifth's guarantee of equal protection under the law. Here, section 407(a) does not impact all forms of speech to the same degree. On the contrary, some speech is forced, while some is unaffected. All published works are not treated equally by the federal government; and when the federal government fails to protect everyone equally under the law, its actions are judged with the appropriate level of constitutional scrutiny.

Here, the appropriate level of constitutional scrutiny should be strict scrutiny, the highest level of scrutiny, which applies when a

109. R. George Wright, *Content-Neutral and Content-Based Regulations of Speech: A Distinction That Is No Longer Worth the Fuss*, 67 FLA. L. REV. 2081, 2084 (2016) ("In contrast to the most typical approaches to speech restrictions categorized as content-based, content-neutral regulations commonly receive less exacting, less demanding, mid-level judicial scrutiny. There are certainly variations among the content-neutral test formulations, but the most broadly applied formulations seem to require a significant or substantial government interest." (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989) and *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)) (citing *McCullen v. Coakley*, 573 U.S. 464, 486 (2014)).

110. *See* *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) ("The Son of Sam law establishes a financial disincentive to create or publish works with a particular content. In order to justify such differential treatment, 'the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.'" (quoting *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 231 (1987))); *see also* Wright, *supra* note 109, at 2083 ("To illustrate the basic problem through the most recent case law, it is helpful to begin with a brief reminder of the differences in the judicial tests applied to regulations of speech, which are contingent upon the initial classification as content-neutral or content-based. Once a court has made the initial classification, content-based regulations of speech are generally subjected to a particularly rigorous and exacting degree of judicial scrutiny. Traditionally, this strict scrutiny encompasses two requirements. Specifically, the speech regulation in such a case must promote a compelling or overwhelmingly important government interest, and the regulation must be necessary to the narrowly tailored promotion of that interest." (footnotes omitted)).

fundamental right is affected;¹¹¹ the mandatory-deposit requirement impacts free speech, a fundamental right guaranteed by the First Amendment.¹¹² To survive strict scrutiny, a law must serve a compelling government interest and be necessary to promote that interest. In addition, the law must be narrowly tailored, and there must be no less restrictive means available to promote that interest.¹¹³ As is

111. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.” (citations omitted)).

112. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972)) (stating that free speech is entitled to “comprehensive protection under the first amendment.”).

113. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31 (1973) (“In subjecting to strict judicial scrutiny state welfare eligibility statutes that imposed a one-year durational residency requirement as a precondition to receiving AFDC benefits, the Court explained: ‘(I)n moving from State to State . . . appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.’”); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (“At the outset, we reject appellants’ argument that a mere showing of a rational relationship between the waiting period and these four admittedly permissible state objectives will suffice to justify the classification. The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.” (citations omitted)); see also *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (“But if it was not clear then, it is certainly clear now that a more exacting test is required for any statute that ‘place[s] a condition on the exercise of the right to vote.’ This development in the law culminated in *Kramer v. Union Free School District*, *supra*. There we canvassed in detail the reasons for strict review of statutes distributing the franchise, noting *inter alia* that such statutes ‘constitute the foundation of our representative society.’ We concluded that if a challenged statute grants the right to vote to some citizens and denies the franchise to others, ‘the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest.’ This is the test we apply here.” (citations omitted)); *id.* at 338–39 (“Although in *Shapiro* we specifically did not decide whether durational residence requirements could be used to determine voting eligibility, we concluded that since the right to travel was a constitutionally protected right, ‘any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.’” (citations omitted)); *id.* at 342 (“In sum, durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are ‘*necessary* to promote a *compelling* governmental interest.’” (first emphasis added) (citations omitted)); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626–27 (1969) (“‘In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.’ And, in this case, we must give the statute a close and exacting examination. ‘Since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.’ This careful examination is necessary because statutes distributing the franchise constitute the

true when intermediate scrutiny applies, when strict scrutiny applies, the burden is on the government to overcome a presumption of unconstitutionality.¹¹⁴

Publishers are not treated equally under the law when they are forced to speak, while certain others are not. The disparate treatment—the unequal protection under the law—of publishers is clear. What is left to decide is whether such unequal protection is constitutionally permissible, under strict-scrutiny review. It is not.

Even if it is found that the government's interest in acquiring public works for use in a national library is compelling (I do not believe it is¹¹⁵) and that the mandatory-deposit requirement is necessary to promote that interest (I do not believe it is), it is certainly not the case that the mandatory-deposit requirement is narrowly tailored to promote that interest, or that there are no less restrictive means for promoting that interest. Clearly, there are other ways to achieve the government's objective, most notably the government's paying just compensation to publishers for any and all published works the government desires. Additionally, the legislature could change federal copyright law to make deposits a requirement of copyright protection. Also, the Library of Congress's voluntary Cataloging in Publication Program, discussed above, could be the primary way the government acquires copies of published works. Each of these means is less intrusive than a requirement that, unrelated to copyright protection, forces a publisher to submit and pay for copies of published works.

In sum, strict scrutiny is the appropriate test to apply to the mandatory-deposit requirement, which forces certain publishers to

foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government. Thus, state apportionment statutes, which may *dilute* the effectiveness of some citizens' votes, receive close scrutiny from this Court. No less rigid an examination is applicable to statutes *denying* the franchise to citizens who are otherwise qualified by residence and age. Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." (citations omitted).

114. See *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980) ("The burden, however, is on those defending the discrimination to make out the claimed justification . . .").

115. See *Wright*, *supra* note 109, at 2099 ("Formalistically, a compelling interest is described as 'of the highest order,' 'overriding,' or 'paramount.'" (footnotes omitted)).

speak, based on the content and/or medium of their publication; and the mandatory-deposit requirement does not survive strict scrutiny. But even if intermediate scrutiny (law must advance a substantial government interest and must not be any broader than is necessary to advance such interest) applies to the mandatory-deposit requirement, the requirement still does not survive, since it is broader than necessary to advance the government's interest, given that there exist other less-intrusive means to advance said interest.¹¹⁶

V. CONCLUSION

The mandatory-deposit requirement of section 407(a) of the Copyright Act of 1976 is unconstitutional. It takes private property from publishers for public use, without the payment of just compensation to the publishers, in violation of the Takings Clause of the Fifth Amendment. Additionally, by forcing publishers to speak, mandatory-deposit requirement impermissibly restricts the free-speech rights of publishers, which include the right not to speak, as guaranteed by the First Amendment. Finally, by forcing certain publications to be deposited, while others are exempted (based on the content and/or medium of publication), the mandatory-deposit requirement does not give publishers equal protection under the law, as required by the Due Process Clause of the Fifth Amendment.

As such, my recommendation is to repeal section 407(a). In its absence, should the federal government decide to pursue its goal of collecting copies of published works for public use at the Library of Congress (or elsewhere), several options are available to the federal government to advance its goal, each of which is less burdensome to publishers than section 407(a).

116. *See* *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring) (“Under this four-part test a restraint on commercial ‘communication [that] is neither misleading nor related to unlawful activity’ is subject to an intermediate level of scrutiny, and suppression is permitted whenever it ‘directly advances’ a ‘substantial’ governmental interest and is “not more extensive than is necessary to serve that interest.”).

