Content-Based Copyright Denial

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No principle of First Amendment law is more firmly established than that government may not restrict speech based on its content. It would seem to follow, then, that Congress may not withhold copyright protection for disfavored categories of content, such as violent video games or pornography. This Article argues otherwise. This Article is the first to recognize a distinction in the scope of coverage between the First Amendment and the Copyright Clause. It claims that speech protection from government censorship does not imply speech protection from private copying. Crucially, I argue that this distinction in the scope of coverage between copyright and free speech law does not suggest a tension between them. To the contrary, the distinction enables copyright to further the purpose of free speech under the marketplace-of-ideas speech theory. Through copyright, Congress may alleviate failures in that marketplace which stem from individuals determining the value of speech for the societal collective. Furthermore, the possibility of Congress abusing this discriminatory power poses relatively minimal threat to speech because copyright denial does not altogether prevent speakers from realizing profit from their speech. This fact, coupled with viewpoint-neutrality and rational-basis restraints, alleviates the usual risks associated with government influencing content in the marketplace. Additionally, free-speech doctrine gives place for the sort of discrimination that Congress would exercise in defining copyright eligibility according to content. Doctrines governing limited-public forums and congressional funding allow for content discrimination akin to content-based copyright denial.

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