

Discrimination in the Copyright Clause

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This Article considers whether content-based copyright denial is permissible under Congress's copyright power. Neither courts nor scholars have considered this question, despite the fact that lawmakers are presently seeking a means to control negative effects of specific content. This Article posits that the copyright power provides Congress that means. The Copyright Clause's mandate to promote the progress of science suggests a power to grant copyright only to content that Congress deems likely to promote progress. At the same time, denying copyright to content that is unlikely to promote progress would not prevent content creators from engaging in, and even profiting from, any speech protected by the First Amendment. The Article therefore concludes that the Copyright Clause implies a power to exercise content discrimination. Copyright is the constitutional tool for Congress to fix content-based problems.