

**A BILL WITHOUT BITE: WHY EFFECTIVE COPYRIGHT
MONITORING WAS NOT A FAIR TRADE-OFF FOR MAKING
COLLEGE MORE AFFORDABLE**

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Senator Harry Reid proposed S. 1642, an amendment to the Higher Education Act of 1965. This amendment was a diluted version of his original amendment, S.A. 2314, which was proposed as an addition to the College Cost Reduction Act. Each of these amendments proposed procedures that would work to monitor copyright infringement more effectively on college campuses, especially in the areas of peer-to-peer sharing and digital downloading. Under constitutional standards established in South Dakota v. Dole, Senator Reid's original amendment would not have passed constitutional muster, as its purpose was not reasonably related to the stated governmental interest. The purpose of the College Cost Reduction Act is to make college more affordable. Cutting college costs is unrelated to the goal of effectively monitoring copyright infringement, and therefore Congress would seem to be attempting to sneak a control on peer-to-peer sharing through a seemingly innocuous and beneficial statute. The possible constitutional problem, combined with the public outcry in response to S.A. 2314, resulted in the watered-down version now sitting as a potential amendment to the Higher Education Act of 1965. However, as Congress is continually trying to adjust copyright monitoring to advances in technology, the concerns voiced by the public and by Senator Reid have not been completely resolved.

I. INTRODUCTION

Affordability for college education in the United States is of growing importance as the number of students who attend college increases.² Moreover, when students are contemplating the cost

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² As evidenced by websites such as the Center for College Affordability and Productivity, <http://collegeaffordability.blogspot.com/> (last visited Nov. 16,

and consequences of attending college in the near future, they are uncomfortably close to considering the possibility of becoming a part of the federal government's "most-wanted" list for copyright infringers. This classification includes a full report complete with personal information and detailed accounts of a person's forays into the world of technology-based peer-to-peer sharing. The disconnect between college affordability and copyright monitoring is the issue with which the public and this paper are concerned.

The Higher Education Amendments of 2007 (S. 1642)³ are proposed amendments to the Higher Education Act of 1965 (HEA).⁴ This legislation, in conjunction with the already existing text of the HEA, would assist in making college more affordable nationwide and would also encourage the continued improvement of the education system in the United States.⁵ In an additional effort to accomplish this goal, Congress recently signed the College Cost Reduction and Access Act (CCRA or College Cost Reduction Act) into law.⁶ The CCRA institutes methods for increasing grant funding and decreasing the cost of student loans, as well as ensuring an increase in the number of excellent teachers and minority-sensitive colleges and universities.⁷

The original form of S. 1642, S.A. 2314,⁸ was an amendment that proposed implementing a "campus-based digital theft prevention" system.⁹ As part of this preventative system, colleges

2007) (on file with the North Carolina Journal of Law & Technology); Measuring Up: The National Report Card on Higher Education, <http://measuringup.highereducation.org/commentary/collegeaffordability.cfm>, (last visited Nov. 16, 2007) (on file with the North Carolina Journal of Law & Technology).

³ Higher Education Amendments of 2007 § 477 (2007).

⁴ Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965).

⁵ Higher Education Amendments of 2007, S. Amend. 1642, 110th Cong. § 477. The Act proposed many ways that would make college more affordable, from increasing grants to making financial aid more affordable.

⁶ College Cost Reduction and Access Act of 2007, Pub. L. No. 110-84 (2007) [hereinafter CCRA] (signed into law by President Bush Sept. 27, 2007).

⁷ *Id.*

⁸ 153 CONG. REC. S9514 (daily ed. July 17, 2007) (Reid amendment, Senate Amend. 2314).

⁹ *Id.*

and universities participating in CCRA would have been required to implement a process for identifying and reporting students involved in copyright infringement as a result of “technology-based . . . illegal downloading or peer-to-peer distribution of intellectual property.”¹⁰ The amendment would have required the college or university to compile and report information to the federal government regarding the date and time of infringement and specific information about the infringing user.¹¹

This recent development considers the constitutionality of the original proposed amendment to the CCRA, S.A. 2314. It shows that the original amendment was a violation of Congress’ constitutional spending clause power under the five-part test articulated in *South Dakota v. Dole*.¹² The resulting public outcry in response to the original amendment and the relevant First Amendment issues fueling this outcry are also analyzed. Finally, the revised version of the amendment, S. 1642, is considered, including an analysis of its seemingly diluted form and the reasons why such a revision was necessary.

II. STATEMENT OF PROPOSED LEGISLATION: S. 1642 – AMENDMENT TO THE HIGHER EDUCATION ACT OF 1965

Congress originally passed the Higher Education Act (HEA) to “strengthen the educational resources of our colleges and universities and to provide financial assistance for students in postsecondary and higher education.”¹³ Every five years, the HEA is revisited and reevaluated for any relevant and necessary changes and updates.¹⁴

¹⁰ *Id.* § 494(a)(3).

¹¹ *See id.* § 494(b)(1).

¹² 483 U.S. 203 (1987).

¹³ Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965).

¹⁴ *See* Texas Guaranteed Student Loan Corp. website, <http://www.tgslc.org/hea/> (last visited Nov. 4, 2007) (on file with the North Carolina Journal of Law & Technology) (TG is a non-profit corporation that assists families and students with accessing information and details about the educational system, e.g. affordability, loan options, and requirements).

There have been numerous proposed amendments to the CCRA and the HEA.¹⁵ Of particular interest was S.A. 2314, introduced by Senator Reid as an amendment to the CCRA. The purpose of this amendment was to encourage colleges and universities to implement systems designed to deter students from participating in technology-based copyright infringement and illegal peer-to-peer (P2P) sharing of intellectual property.¹⁶ In order to fulfill its purpose, the amendment stipulated that the Secretary of Education (“Secretary”) first identify which of the participating institutions were required to implement such a deterrent.¹⁷ Once the Secretary identified the target institutions, these institutions were then required either to create or to re-evaluate their policies and procedures for deterring “illegal downloading and distribution of copyrighted materials by students,” and to submit these policies and procedures to the Secretary for approval.¹⁸ The Secretary would then report the required information regarding the infringing users to the federal government.¹⁹

¹⁵ CCRA, *supra* note 6 (having a total of 38 proposed amendments); Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965) (also having numerous proposed amendments).

¹⁶ 153 CONG. REC. S9514, *supra* note 8.

¹⁷ *Id.* § 494(b). S.A. 2314 required the Secretary to identify the top twenty-five institutions that had received the most notices of copyright infringement over the past calendar year. Of these top colleges or universities, only the ones who received more than one hundred copyright infringement notices were subject to the stringent standards of the amendment. *Id.*

¹⁸ *Id.* § 494(a)(1). These institutions would then provide proof to the Secretary that they had, in fact, “developed a plan for implementing a technology-based deterrent to prevent the illegal downloading or peer-to-peer distribution of intellectual property.” *Id.* § 494(a)(3).

¹⁹ *See supra* notes 17-18 and accompanying text. Senator Reid’s amendment specifically targeted technology-based and online copyright infringement as a result of P2P sharing in the college and university-setting. 153 CONG. REC. S9514, *supra* note 8.

S. 1642, a revised version of S.A. 2314,²⁰ is a proposed amendment to the CCRA.²¹ S. 1642 recommends more relaxed requirements for the deterrence of copyright infringement. This amendment pushes universities and colleges to implement policies and procedures that deal with possible infringement claims and provides students with notice of the university's policies regarding copyright infringement.²² Although these proposals now seem reasonable, the amendment was not always so agreeable.

The diluted amendment, as it now reads in S. 1642, merely requires "an annual disclosure that explicitly informs students that unauthorized distribution of copyrighted material, including unauthorized peer-to-peer file sharing, may subject students to civil and criminal liabilities."²³ The amendment also requires institutions to furnish the Secretary of Education with a "description of the institution's policies" for dealing with illegal P2P file sharing.²⁴ This is a substantially less burdensome

²⁰ Compare Higher Education Amendments of 007, S. Amend. 1642, 110th Cong. § 477 (2007), and 153 CONG. REC. S9514 *supra* note 8; see also Kevin Guidry, *Mandatory Network Filtering to Prevent Copyright Infringement*, MISTAKEN GOAL: WHERE STUDENT AFFAIRS AND TECHNOLOGY MEET, July 21, 2007, <http://mistakengoal.com/blog/2007/07/21/mandatory-network-filtering-to-prevent-copyright-infringement/>.

²¹ See S.A. 2314, 110th Cong. (2007); compare Higher Education Amendments of 2007 § 477, and 153 CONG. REC. S9514 *supra* note 8.

²² See *supra* note 5. The amendment, as it stands after dilution, requires "an annual disclosure that explicitly informs students that unauthorized distribution of copyrighted material, including unauthorized peer-to-peer file sharing, may subject students to civil and criminal liabilities. . . ." Higher Education Amendments of 2007 § 477(1)(P)(i). The amendment also requires the institution to furnish the Secretary of Education with a "description of the institution's policies" for dealing with illegal peer-to-peer file sharing. *Id.* § 477(1)(P)(iii). The amendment also required the college or university to provide a "description of the actions that the institutions takes to prevent and detect unauthorized distribution of copyrighted material on the institution's information technology system," and the disciplinary actions that are to be taken when an infringement has been detected. *Id.* § 477(1)(P)(iv), (ii).

²³ *Id.*

²⁴ *Id.* § 477(1)(P)(iii). The college or university is required to provide a "description of the actions that the institution takes to prevent and detect unauthorized distribution of copyrighted material on the institution's

requirement for universities and colleges participating in the federal education program as they are currently only required to implement the policies and notify their students of these policies.²⁵ The Secretary is not required to identify and target any specific university or college.²⁶

As of September 27, 2007, the CCRA was signed by the President and became Public Law No. 110-84.²⁷ As of July 27, 2007, S. 1642 is still being held at desk after being passed by the Senate with a ninety-five to zero vote.²⁸ As this draft is only one of many HEA reauthorizations that have periodically arisen for Congressional consideration, the likelihood is good that the bulk of S. 1642 will be passed.²⁹

Due to the tumultuous process that this amendment has gone through, from its original form in S.A. 2314 to its revised form in S. 1642,³⁰ it is of particular interest that the original version was not adopted into the CCRA.³¹ As with all legislation, there may be a variety of different motivating factors for this outcome. However, the relevant constitutional issues and the fervent public resistance to the original amendment may provide the best insight

information technology system” and to describe the disciplinary actions to be taken when an infringement has been detected. *Id.* § 477(1)(P)(iv), (ii).

²⁵ See *supra* notes 21–22 and accompanying text.

²⁶ *Id.*

²⁷ CCRA, *supra* note 6.

²⁸ See S. 1642, Library of Congress Thomas website, <http://thomas.loc.gov/cgi-bin/bdquery/D?d110:1:/temp/~bdy9JY:@@L&summ2=m&/bss/d110query.html> (last visited Nov. 4, 2007) (on file with the North Carolina Journal of Law & Technology).

²⁹ See *id.*; see also *supra* note 14 and accompanying text.

³⁰ Compare Higher Education Amendments of 2007, S. Amend. 1642, 110th Cong. § 477 (2007), and 153 CONG. REC. S9514, *supra* note 8; see also Guidry, *supra* note 20.

³¹ CCRA, *supra* note 6; see also Higher Education Amendments of 2007 § 477; Library of Congress Thomas website, <http://thomas.loc.gov/cgi-bin/bdquery/D?d110:1:/temp/~bdy9JY:@@L&summ2=m&/bss/d110query.html> (last visited Nov. 4, 2007) (on file with the North Carolina Journal of Law & Technology).

as to why S.A. 2314 has ultimately been diluted and whittled away into a bill without bite.³²

III. CONSTITUTIONAL STANDARDS: FEDERALISM - *SOUTH DAKOTA V. DOLE*³³

In order to avoid being overturned by the courts, congressional legislation must pass constitutional muster.³⁴ Legislation will be overturned if it conflicts with any constitutional provision.³⁵ The applicable standard when analyzing whether a federally funded program implemented among the many states passes constitutional muster can be found in *South Dakota v. Dole*.³⁶ *Dole* articulates a five-part test to be applied to a constitutional analysis of congressional legislation enacted under the spending clause of the Constitution.³⁷ The five-part test is as follows: (1) for the general welfare, (2) requirements are clearly stated, (3) not in violation of any other constitutional provision, (4) not unrelated to the federal interest in the spending program, and (5) not impermissibly coercive of state power.³⁸

³² See Declan McCullagh, *Universities Win Senate Fight Over Anti-P2P Proposal*, CNET: NEWS.COM, July 24, 2007, http://www.news.com/8301-10784_3-9749071-7.html (on file with the North Carolina Journal of Law & Technology); Janko Roettgers, *D.C.'s P2P Summer Spectacle*, NEWTEEVEE.COM, July 28, 2007, <http://newteevee.com/2007/07/28/dcs-p2p-summer-spectacle/>; John Quarterman, *Education Entertainment*, PEERFLOW.COM, July 24, 2007, http://riskman.typepad.com/peerflow/current_affairs/index.html; Adam Thomas, *RIAA-backed amendment to force campus network surveillance*, PRESSESC.COM, July 24, 2007, <http://pressesc.com/news/76924072007/riaa-backed-amendment-force-campus-network-surveillance> (on file with North Carolina Journal of Law & Technology).

³³ 483 U.S. 203 (1987).

³⁴ CCRA, *supra* note 6; *see generally* U.S. Const. Art. III; *see also* *Marbury v. Madison*, 5 U.S. 137 (1803) (standing for the proposition that the Supreme Court's main obligation is to interpret and give meaning to the Constitution).

³⁵ *See New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

³⁶ 483 U.S. 203 (1987).

³⁷ *Id.* at 207-208.

³⁸ *Id.* at 207-208, 211.

A. *South Dakota v. Dole Five-Part Test:*

The Court found that the piece of congressional legislation at issue in *Dole* met the first consideration in that it was ultimately for the general welfare.³⁹ Under the federal statute,⁴⁰ the Secretary of Transportation was authorized to “withhold a percentage of federal highway funds otherwise allocable” to the State⁴¹ if the drinking age was not raised to twenty-one.⁴² The Court found that the statute’s condition on the federal allocation of highway funds was for the general welfare because Congress had an interest in protecting the public by deterring young people from drinking and then driving on interstate highway systems.⁴³ This problem, the Court stated, required a “national solution,” and Congress had the inherent power to shape matters pertaining to general welfare.⁴⁴ Ultimately, the Supreme Court held that the statute in *Dole* passed constitutional muster under each of the five considerations of the articulated test.⁴⁵

B. *Application of the Dole test to S.A. 2314*

If S.A. 2314 was added as an amendment to the CCRA, there was enough public resistance to the original form of the amendment to reasonably believe that litigation would soon follow.⁴⁶ There was immediate public frustration and resistance to

³⁹ *Id.* at 208.

⁴⁰ 23 U.S.C. §158 (1982).

⁴¹ *Dole*, 483 U.S. at 205.

⁴² *Id.*

⁴³ *Id.* at 208.

⁴⁴ *Id.*

⁴⁵ *Id.* at 212. Another example of the nexus between federal funding and state autonomy is the No Child Left Behind Act (Pub. L. No. 107-110 (2001)). Congress makes money available to the states to assist with their individual educational systems, under the condition that they follow the rules of the federal program dictated in the statute. This is a permissible condition because the rules in the statute are rationally related to the legitimate purpose of improving educational systems across the country; therefore, this federal spending power is not in violation of state power. *Id.*

⁴⁶ See 153 CONG. REC. S9514, *supra* note 8; McCullagh, *supra* note 32; Janko Roettgers, *D.C.’s P2P Summer Spectacle*, NEWTEEVEE.COM, July 28, 2007, <http://newteevee.com/2007/07/28/dcs-p2p-summer-spectacle> (on file with the North Carolina Journal of Law & Technology); John Quarterman, *Education*

the original form of the amendment being added to the bill.⁴⁷ If a court analyzed the bill under *Dole*, it would have good reason to reject this amendment as it was originally drafted.⁴⁸ S.A. 2314 would not have passed constitutional muster and would have failed under at least two of the five parts of the *Dole* test.⁴⁹

Under the first part, the proposed legislation must be for the general welfare.⁵⁰ The courts rarely invalidate congressional legislation under this part of the test.⁵¹ The federal government's purposes for the CCRA and for the Higher Education Act are to make college more affordable and maintain high standards of education.⁵² These requirements would almost certainly be considered in the best interests of the general welfare, especially with the regularity with which students enter college after completing high school.

Education and copyright protection not only foster creation and innovation, but also promote a richer and fuller society for everyone. It would be difficult to contest the government's interest in encouraging student access to institutions of higher education and ensuring a high standard of education within those institutions. It would be equally difficult to argue that protecting creative works and encouraging the free flow of ideas does not ensure continual growth and innovation for society.⁵³ These interests seem to be

Entertainment, PEERFLOW.COM, July 24, 2007, <http://riskman.typepad.com/peerflow/2007/07/education-enter.html>; Adam Thomas, *RIAA-backed Amendment to Force Campus Network Surveillance*, PRESS.ESC.COM, July, 24, 2007, <http://pressesc.com/news/76924072007/riaa-backed-amendment-force-campus-network-surveillance> (on file with the North Carolina Journal of Law & Technology).

⁴⁷ See McCullagh, *supra* note 32; see also Section IV *infra*.

⁴⁸ See McCullagh, *supra* note 32.

⁴⁹ *Dole*, 483 U.S. at 203.

⁵⁰ *Id.* at 207.

⁵¹ See generally *Sabri v. United States*, 541 U.S. 600 (2004) (failing for not being related to a federal interest); *New York v. United States*, 505 U.S. 144 (1992) (finding that the statute was overly coercive and therefore violated the Tenth Amendment); *Hurst v. Tex. Dep't. of Assistive & Rehab. Servs.*, 482 F.3d 809 (5th Cir. 2007) (failing for not including a sufficiently clear statement).

⁵² See CCRA, Pub. L. No. 110-84 (2007); Higher Education Amendments of 2007 § 477.

⁵³ See U.S. Const. art. I, § 8, cl. 8

more for the general welfare and are more closely tied to the spirit of the Constitution than the interest the government has in ensuring safe interstate highway travel, which the Supreme Court ultimately found to satisfy the general welfare part of the *Dole* test.⁵⁴ Thus, S.A. 2314 is very likely to satisfy the first prong of the test by promoting the general welfare.

The second part under *Dole* is to analyze whether the financial incentives and consequences of the statute at issue are clearly stated.⁵⁵ The plans and steps for implementing the CCRA, and the purposes for the act, are clearly stated and laid out in detail.⁵⁶ The text of the act is lengthy and specifically details every proposed action and the function each action would fulfill in order to achieve the purpose of making college more affordable.⁵⁷ Colleges and universities participating in this program would be well aware of the assistance and incentives available to them. These institutions would also know the assistance and incentives they would forego if they decided not to participate in the program. The text of S.A. 2314 explicitly detailed the methods by which the Secretary would identify institutions and the information that these institutions would then have to provide to the federal government.⁵⁸ The legislation would have a low probability of failing under this part of the *Dole* test.⁵⁹

The third part of the *Dole* analysis determines whether the bill violates any other constitutional provisions.⁶⁰ This is the underlying foundation for much of the public distaste that resulted after Senator Reid proposed S.A. 2314.⁶¹ There was much debate about whether, if passed, S.A. 2314 would violate the First Amendment.⁶² There is often conflict between an individual's

⁵⁴ See *Dole*, 483 U.S. at 208-209.

⁵⁵ *Id.* at 207-212.

⁵⁶ CCRA, Pub. L. No. 110-84 (2007).

⁵⁷ *Id.*

⁵⁸ 153 CONG. REC. S9514, *supra* note 8.

⁵⁹ *But see* *Hurst v. Tex. Dep't. of Assistive & Rehab. Servs.*, 482 F.3d 809 (2007) (failing for not including a sufficiently clear statement).

⁶⁰ *Dole*, 483 U.S. at 208.

⁶¹ See McCullagh *supra* note 32.

⁶² See *id.*

rights in his copyright protected works and another individual's First Amendment right to freedom of expression and speech,⁶³ and as a result, there is often litigation surrounding these two concepts.⁶⁴ Since the Constitution already has "built-in First Amendment accommodations" within its text, copyright protection often takes precedence over First Amendment rights.⁶⁵

However, courts often have articulated the importance of First Amendment rights to freedom of expression and freedom of speech in the university and college setting.⁶⁶ The ability to freely exchange ideas and thoughts in institutes of higher learning is of great importance and requires heightened attention.⁶⁷ The

⁶³ *See id.*

⁶⁴ *See Eldred v. Ashcroft*, 537 U.S. 186 (2003), *reh'g denied*, 538 U.S. 916 (2003) (holding the Copyright Term Extension Act (CTEA) constitutional since the First Amendment provides no rights to copyrighted works); *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001) (holding that CTEA did not violate first amendment right to free speech); *Authors League of Am., Inc. v. Oman*, 790 F.2d 220 (2d Cir. 1986) (finding no First or Fifth Amendment rights violation, Fifth Amendment—manufacturing clause of Copyright Act of 1976 had rational relationship to a legitimate legislative purpose).

⁶⁵ *Eldred*, 537 U.S. at 220. The "built-in First Amendment accommodations" stem from what is known as the idea/expression dichotomy. Since the copyright clause of the Constitution explicitly only protects the expression of ideas, as opposed to the ideas themselves, there is still a free exchange of facts and ideas. Therefore, the copyright clause does not inhibit the free exchange of ideas, it only protects artistic expressions. *Id.*

⁶⁶ *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) ("[T]he university is a traditional sphere of free expression . . . fundamental to the functioning of our society."); *see generally Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (describing First Amendment in the public employment setting).

⁶⁷ *See id.* There is a lack of a parallel in terms of copyright law. A possible countervailing consideration may arise under case law analyzing the constitutionality of the CTEA. Much of the case law articulates an already existing First Amendment protection "built-in" to the copyright clause of the Constitution; therefore, there would be no constitutional conflict with the First Amendment. *Id.* However, these cases were focused solely on the CTEA and never addressed the issue of the First Amendment in college or university setting. *Id.* Therefore, although there are numerous cases on this issue, the CTEA does not provide much assistance in the constitutional analysis of the CCRA. However, the argument can also be made that because of this built-in First Amendment protection, a copyright infringer has no First Amendment rights to the infringed material. *See Eldred*, 537 U.S. at 220 (holding CTEA

importance of the First Amendment in the college setting had an effect on the public and would also have an effect on a constitutional analysis of S.A. 2314. By increasing the importance of First Amendment rights, the proposed amendment would become more suspicious under this part of the *Dole* test because it would inhibit the free flow of ideas through the means of peer-to-peer sharing and digital downloading.

Since there is a heightened awareness of First Amendment rights in the college setting,⁶⁸ and colleges and universities are a forum for the free exchange of ideas and expressions, S.A. 2314 likely would have been invalidated under this part of the *Dole* test. A piece of legislation will be subject to heightened scrutiny if it facially appears to burden First Amendment freedoms in order to comply with a specific governmental viewpoint:

[W]hen the government carries out its powers, including those emanating from the Spending Clause, in a manner whose substantial purpose or effect is to guide or burden choice by recipients of government benefits in the exercise of First Amendment freedoms so as to endorse the viewpoints the government favors or prescribes, such action distinguishes the case from other invocations of the Spending Clause power . . . and indeed demands a heightened level of scrutiny.⁶⁹

constitutional under the First Amendment, finding no First Amendment rights to copyrighted works).

⁶⁸ It seems that First Amendment rights are always of heightened importance in a constitutional spending clause analysis—“in recognition of the disproportionate means bestowed on the state in our governmental plan, the First Amendment stands a source of constitutional protections which serves to establish and maintain that power alignment between the state and its citizenry . . . [i]t safeguards the individual’s right to speak, by free choice, either in accordance with the government’s position or in a dissonant voice.” *Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Development*, 430 F. Supp. 2d 222, 257 (S.D.N.Y. 2006).

⁶⁹ *Alliance*, 430 F. Supp. 2d at 251–252 (this case turned on a government agency making federal funding, under an act that sought to limit the spread of HIV/AIDS, dependent upon the organizations’ implementation of a policy that opposed prostitution). Although this case may have more explicitly coerced the organization to refrain from exercising their First Amendment free speech right, S.A. 2314 was even more suspicious in that it sought to regulate the exchange of free ideas and speech in a setting that should be fostering such activity (i.e. colleges). *Alliance* and the issues in this paper are related in that both seek to correct problems that are somewhat related to the goal of the federal spending

The government viewpoint favored in the context of S.A. 2314 is that copyright owners' rights are more important than the public's interest in the free exchange of ideas.⁷⁰ However, there is a strong countervailing interest in protecting the limited number of works available in the public domain.⁷¹ With the increasingly shrinking public domain⁷² and with the powerful lobbying that large copyright licensing conglomerates leverage against the public's interest in artistic works,⁷³ it seems that legislators' interests in protecting copyright owners is not without bias. It also seems clear that these legislators were attempting to "do indirectly what [they] may not properly do directly,"⁷⁴ by attempting to add a copyright infringement amendment to a federal spending program whose purpose was completely unrelated to copyright infringement or copyright monitoring.⁷⁵

The next, but closely related, part of the *Dole* test is whether the act was unrelated to the federal interest in spending program. A constitutional analysis of the CCRA under this part of the *Dole* test proves to be troublesome in relation to the possible First Amendment problem,⁷⁶ because "the lesser the degree of relatedness the greater the level of scrutiny accorded to the

program (preventing the spread of HIV/AIDS and making college more affordable); however, the relationships are simply too tenuous to merit mere rational basis analysis and must pass constitutional muster under heightened scrutiny. S.A. 2314, like the questioned statute in *Alliance*, would fail under heightened scrutiny.

⁷⁰ See 153 CONG. REC. S9514, *supra* note 8.

⁷¹ See U.S. CONST. art. I, § 8, cl. 8.

⁷² See Copyright Act of 1976, 17 U.S.C. § 102 (1976).

⁷³ Conglomerates such as Broadcast Music, Inc. (BMI), American Society of Composers, Authors, and Publishers (ASCAP), Society of European Stage Authors and Composers (SESAC), and even RIAA are not disinterested in the copyright owners' rights in their respective works, in fact they are copyright owner's biggest advocates and are in the position to have strong lobbying influences on legislators. See ASCAP website: <http://www.ascap.com> (last visited Nov. 26, 2007).

⁷⁴ *Alliance*, 430 F. Supp. 2d at 255.

⁷⁵ See CCRA, Pub. L. No. 110-84 (Sept. 27, 2007) (noting that the purpose of the CCRA is to make college more affordable, not to increase copyright owners' ability to monitor and expose copyright infringers).

⁷⁶ See *Dole*, 483 U.S. 203, 207-212 (1987).

enactment.”⁷⁷ As mentioned above, the purpose of the CCRA is to reduce the cost of college for students and to ensure a tradition of academic excellence in this country.⁷⁸ However, the stated purpose for S.A. 2314 is to ensure that participating colleges and universities implement policies and procedures for detecting, compiling, and reporting information regarding students who have allegedly infringed a valid copyright.⁷⁹ This amendment was proposed as a deterrent to copyright infringement via technology-based media, or other forms of P2P communication, at colleges and universities nationwide.⁸⁰

This inevitably leads to the next question: is the purpose for S.A. 2314 rationally related to Congress’ legitimate interest in making college more affordable? Is the condition that requires these colleges to detect, compile, and report information about students engaging in copyright infringement reasonably related to making college more affordable?

From a copyright standpoint, the purpose could be rationally related, in general, to higher learning because copyright protection was created to foster in fostering creativity by providing financial incentives and compensation to authors.⁸¹ If the purpose of the CCRA is defined more broadly, such as to encourage more students to attend college or to ensure that students get a better education while attending college, then there could be a rational relationship. Congress has an interest in ensuring that more students have access to colleges and universities and receive the best education possible. Part of that education will foster creativity and innovation.⁸² If these students understand that an author’s copyright interest in his protected works is an important and

⁷⁷ *Alliance*, 430 F. Supp. 2d at 256.

⁷⁸ CCRA, Pub. L. No. 110-84 (Sept. 27, 2007).

⁷⁹ See 153 CONG. REC. S9514, *supra* note 8.

⁸⁰ *Id.*

⁸¹ See *Harper & Row Publishers v. National Enters.*, 471 U.S. 539 (1985); *Mazer v. Stein*, 347 U.S. 201 (1954); *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932); *Golan v. Gonzales*, No. 05-1259, 2007 U.S. App. LEXIS 21199, at *21 (10th Cir. 2007).

⁸² See *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1385 (6th Cir. 1996).

enforceable right, then these students may be more likely to feel an incentive to continue to create and innovate. They will see the Constitutional copyright clause at work and will appreciate the value of creativity and the author's well-earned economic return for his contribution to society.

However, this is a bit of a stretch, especially if a court were to take the purpose of S.A. 2314 at face value. As stated in the text of the CCRA, its purpose is to make college more affordable. On the other hand, as was stated in the text of the amendment,⁸³ the purpose of S.A. 2314 was to implement deterrent systems for copyright infringement. These purposes are completely unrelated. The only connection between making college more affordable and monitoring copyright infringement is that both take place in a college setting. The relationship is tenuous at best. Thus, under the third and fourth parts of the *Dole* test, the CCRA would be subject to heightened scrutiny and would not be necessary to achieve a compelling state interest.⁸⁴

The final consideration under *Dole* is that the statute not be impermissibly coercive of state power. A court might find the requirement for colleges to implement the proposed infringement deterrent system to be an overly coercive condition.⁸⁵ This condition could be found impermissibly coercive in that it forces the states to enact deterrent systems if they want federal funding

⁸³ See 153 CONG. REC. S9514, *supra* note 8.

⁸⁴ See *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Development*, 430 F. Supp. 2d 222, 255 (S.D.N.Y. 2006) (“[A]ttaching a government condition that burdens constitutional rights to a public benefit must bear a sufficient relationship to the interests the government would serve by denying subsidy.”). In addition to S.A. 2314 failing under a heightened scrutiny constitutional standard, the amendment would have also failed under the “narrowly tailored” requirement, in that there were clearly less restrictive means to achieve the goal of deterring copyright infringement, such as not requiring the highly invasive reports that detailed infringers’ personal information. See *generally* *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (striking down the federal spending program as unconstitutional).

⁸⁵ See U.S. CONST. amend. X; *New York v. United States*, 505 U.S. 144 (1992). See also *Alliance*, 430 F. Supp. 2d at 255 (“[G]overnment conditions on public benefits need not be inherently coercive to constitute an impermissible burden on the exercise of constitutional liberties.”).

for their colleges and universities.⁸⁶ If the court found that the CCRA did not pass heightened scrutiny and, therefore, failed the third and fourth parts of the *Dole* test, it would probably find the Act to be impermissibly coercive of state power, in violation of the Tenth Amendment, and would then strike the legislation down as unconstitutional.⁸⁷

Ultimately, when considered in light of *Dole*, S.A. 2314 would probably have been struck down under a heightened scrutiny standard of constitutional analysis if allowed as an amendment to the CCRA in original form. However, S.A. 2314 no longer exists in its original form and has now taken a more diluted form under S.A. 1642.⁸⁸ Although no one besides Senator Reid will ever know why he withdrew his original amendment and submitted a diluted version, the prevalent and outspoken public resistance to S.A. 2314 may have contributed to this change.

IV. PUBLIC OUTCRY: THE COLLEGE SETTING AND P2P SHARING ISSUE

S.A. 2314 was of special interest in the context of the increasing popularity of P2P sharing. With an ever-evolving repertoire of technological advancements, today's college-aged youth has access to numerous avenues for such P2P communication and sharing.⁸⁹ With this increase in interconnection and communication, there has also been an increase in relevant legislation and litigation.⁹⁰ These

⁸⁶ See *Dole*, 483 U.S. 203, 207–212 (1987).

⁸⁷ See *id.*; see also *Printz v. United States*, 521 U.S. 898 (1997); *West Virginia v. U.S. Dep't of Health and Human Servs.*, 289 F.3d 281, 291 (4th Cir. 2002).

⁸⁸ But see 153 CONG. REC. S9514, *supra* note 8; Higher Education Amendments of 2007 § 477.

⁸⁹ See Ashley R. Hudson, *Can't Get No Satisfaction: The Rise (and Fall?) of Grokster and Peer-to-Peer File Sharing*, 59 ARK. L. REV. 889 (2007).

⁹⁰ See *id.* Congress is given the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8; see also Copyright Act of 1976, 17 U.S.C. § 106(a) (1976) (protecting works such as books, musical compositions, non-utilitarian sculptures, and motion pictures). In accordance with this constitutional power, Congress enacted the Copyright Act of 1976 “to promote progress of useful arts

considerations seem to have prompted the concern expressed by Senator Reid that the P2P front is the best place to fight the increase in copyright infringement that has accompanied our recent technological advancements.⁹¹

Senator Reid's amendment was not the only proposed action against copyright infringement in the college setting. The Recording Industry Association of America ("RIAA") has asked universities to "point fingers" at students engaging in copyright infringement, much like S.A. 2314 proposed to do.⁹² The overwhelming public reaction to the RIAA's request, just like the reaction to S.A. 2314, was one of outrage and overall disgust.⁹³

. . . by rewarding creativity . . . [the act] was designed to protect moral rights of artists in their works; moral rights protect artist's interest in proper use of artist's name and in maintaining physical integrity of artist's work." *Id.* There has been somewhat of an increase in copyright litigation in recent years, especially within the music industry. *See generally* Childers v. High Soc'y Magazine, Inc., 561 F. Supp. 1374 (S.D.N.Y. 1983); Zomba Enters v. Panorama Records, Inc., 491 F.3d 574 (6th Cir. 2007); Marcy Playground, Inc. v. Capitol Records, Inc., 6 F. Supp. 2d 277, 282 (S.D.N.Y. 1998); Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986) (finding no copyright infringement for comedic parody of song in a shortened version); Berlent v. Focus Features, No. 06-CV-2834, 2006 U.S. Dist. LEXIS 41095 (S.D.N.Y. June 8, 2006) (refusing to grant preliminary injunction as plaintiff failed to show any irreparable injury due to release of a similar song in a major motion picture); Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701 (9th Cir. 2007); C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077 (E.D. Mo. 2006); E.S.S. Entm't. 2000, Inc. v. Rock Star Videos, Inc., 444 F. Supp. 2d 1012 (D. Nev. 2006); Field v. Google, Inc., 412 F. Supp. 2d 1106 (C.D. Cal. 2006); Complaint of MoveOn.org Civic Action and Brave New Films, LLC, MoveOn.org Civic Action v. Viacom Int'l, Inc. (N.D. Cal. Mar. 21, 2007) (No. 3:07-cv-01657-MEJ) [hereinafter *Complaint of MoveOn.org*] (admitting error and conceding right to free speech regarding a parody of *Colbert Report* that was the center of a previous lawsuit). The increase in litigation has been paralleled by an increase in the dissemination of information via technology-based connections and an increase in the comedic parodies of original musical works.

⁹¹ *See* Complaint of MoveOn.org, *supra* note 90.

⁹² Charles R. Nesson & Wendy M. Seltzer, *Protect Harvard from the RIAA*, THE HARVARD CRIMSON: ONLINE EDITION, May 1, 2007, <http://www.thecrimson.com/article.aspx?ref=518638> (on file with the North Carolina Journal of Law & Technology).

⁹³ *See* McCullagh, *supra* note 32; Roettgers, *supra* note 46; Quarterman, *supra* note 46; Thomas, *supra* note 46.

Many students and faculty members at Harvard have expressed harsh disapproval of the RIAA's proposal and have offered alternative ideas on how to regulate P2P sharing while also upholding copyright protections.⁹⁴

In the case of S.A. 2314, the public seems to have been successful. Many bloggers and writers on the public forum have hypothesized that Senator Reid withdrew his original amendment in response to the growing resistance and call to action against his proposal.⁹⁵ Many were outraged that such an amendment was even considered to a bill that proposed to make college more affordable.⁹⁶ They found the tradeoff between cutting college costs and having their personal information handed over to the government to be unsavory, to say the least.⁹⁷ Not only was there a deep feeling that this amendment was intended to stifle free speech and expression, but there was also a feeling that S.A. 2314 was a tricky way to get a better foothold on copyright monitoring and regulation in the college setting.⁹⁸ Many felt that if S.A. 2314 was accepted and the CCRA was then passed, they would not only be open to scrutiny by the federal government, but that some of their most valuable freedoms as Americans would be taken away in return for the opportunity to go to college⁹⁹—a tradeoff that they were not willing to accept.

V. CONCLUSION

The proposed amendment to the CCRA, in original form, would probably have been considered an unconstitutional violation of Congress' spending clause power. The copyright infringement

⁹⁴ Thomas, *supra* note 46. They have suggested a system much like the one Noank Media has implemented. This is a system where shared music is free for all users and Noank Media pays applicable copyright fees "by serving as an aggregator, collecting payment through institutions such as libraries and schools, as well as Internet Service Providers."

⁹⁵ See Guidry, *supra* note 46; McCullagh, *supra* note 32.

⁹⁶ See Roettgers, *supra* note 46; Quarterman, *supra* note 46; Thomas, *supra* note 46.

⁹⁷ Guidry, *supra* note 46.

⁹⁸ *Id.*

⁹⁹ *Id.*

reporting conditions placed on institutes of higher education in adherence to the proposed program were unrelated to the federal interest of making college more affordable, and, therefore, would have failed the five-part test articulated in *Dole*. The Act's biggest obstacles would have been overcoming the apparent disconnect between the conditions placed on the states and its relation to the federal interest in the spending program, and the constitutional issue regarding the First Amendment. Accordingly, a court applying heightened scrutiny would likely find that deterring copyright infringement is not rationally related to making college more affordable and is also in violation of the First Amendment. Indeed, depriving college students of their rights of freedom of speech and expression, along with creating a backdoor to monitor copyright infringement probably would have proven to be a fatal combination for the original amendment.

Fortunately, future college students need not worry about S.A. 2314, at least for the time being. The diluted version, S. 1642, does not have nearly as much bite as S.A. 2314. It would only require colleges and universities either to create or reevaluate their policies and procedures for deterring copyright infringement and to notify their students about these policies. This notification, along with all the other paperwork students receive upon arrival at college, would most likely be discarded before being read, never to be seen again.¹⁰⁰ S. 1642, in its watered-down adaptation, is not akin to the tradeoff that had been taking place between universities and the federal government: receiving federal funding in return for "finger-pointing" and "tattling" on their students.¹⁰¹ However, as technology continues to advance, P2P sharing continues to expand, and copyright litigation continues to run rampant, this most likely will not be the last time we see the shadow of copyright monitoring and regulation sneaking into the college setting.

¹⁰⁰ See McCullagh, *supra* note 32.

¹⁰¹ See Nesson & Seltzer, *supra* note 92.