

THE DEFINITIONAL IMBALANCE BETWEEN COPYRIGHT AND THE FIRST AMENDMENT

Travis J. Denneson[†]

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“Careful what you wish . . .

Careful what you say . . .

Careful what you wish, you may regret it!

Careful what you wish, you just might get it!”

—Metallica, *King Nothing* (1996)¹

[†] Travis J. Denneson graduated from the University of Minnesota with a B.A. in philosophy in 1999, receiving Phi Kappa Phi honors. He earned his J.D. from William Mitchell College of Law in June 2003.

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1. METALLICA, *King Nothing*, on *LOAD* (Elektra Records 1996). After disgruntling many of their fans by playing a substantial role in the legal crusade to shut down Napster, Metallica found themselves embroiled in a public relations catastrophe. The band has since taken more congenial measures to discourage illegal online file sharing and recover lost fan appreciation, including setting up a web site where fans can download live concert tracks of the band for free. The “catch,” however, is that the web site can be accessed only by using a special code number obtained with the purchase their latest album, *ST. ANGER* (2003). See Kirk Miller, *Free Metallica: Metal Giants Give Away Tracks Online—But There’s a Catch*, *ROLLING STONE*, July 10, 2003, at 16.

I. INTRODUCTION

A. *Ownership of Speech*

Where artists and entertainers are concerned, it is difficult to imagine a set of legal protections more important than those provided by both copyright and the First Amendment.² Without the exclusive rights granted by copyright laws, authors³ might have a difficult if not impossible time earning a living from their creations.⁴ Without the free speech guarantee of the First Amendment, the specter of state-sanctioned censorship could loom over authors endeavoring to challenge artistic or societal norms. The fear of poverty, punishment, or both might well be enough to keep most of our creative minds quietly confined to their day jobs.

At first blush, the protections offered by copyright and the First Amendment seem perfectly complementary. The Copyright Act⁵ works to provide a particular set of pecuniary incentives⁶ while

2. Other substantive areas of law often encountered by artists, entertainers, and their attorneys include contracts, trademark, labor, tax, business organizations, bankruptcy, family law, immigration, and criminal law. See WILLIAM D. HENSLEE, ENTERTAINMENT LAW CAREERS, 1-9 (2d ed. 1998).

3. The term "author" in this article does not refer simply to a writer of a book, but rather to a creator of a work rendered in any medium. Generally, an author is "[o]ne who produces, by his own intellectual labor applied to the materials of his composition, an arrangement or compilation new in itself. A beginner or mover of anything; hence efficient cause of a thing; creator; originator; a composer, as distinguished from an editor, translator, or compiler." BLACK'S LAW DICTIONARY 133 (6th ed. 1990). See *infra* notes 71-74 and accompanying text for a discussion of the different media in which works may enjoy copyright protection.

4. Some, however, would find this idea debatable. At least one commentator has suggested that our current body of federal copyright and patent statutes might be unnecessary:

[W]e should regard even extant copyright and patent protections skeptically. Perhaps creators would do just as well without such legal fripperies. We appear to suffer no shortage of creative perfumes, recipes, clothes designs, furniture, car bodies, or uninhabited architectural structures, even though U.S. law affords no effective protection to them *qua* original expressions or novel inventions. Perhaps the same would hold true of subject matter now covered by copyrights or patents were their protections removed.

Tom W. Bell, INDELICATE IMBALANCING IN COPYRIGHT AND PATENT LAW, IN COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE 9 (Adam Thierer & Clyde Wayne Crews Jr. eds., 2002) (internal citations omitted). For purposes of this article, however, the efficacy of copyright's incentive function in encouraging original works is assumed.

5. See Copyright Act of 1976, 17 U.S.C. §§ 101-810, 1101 (2000).

6. See *infra* text accompanying notes 69-78.

the First Amendment serves to remove the possibility of certain punitive disincentives.⁷ As such, both encourage the advancement of art and human discourse. However, closer scrutiny reveals that there is an inherent tension between copyright interests and First Amendment values. In order to protect an author's work from financial exploitation by others, copyright must necessarily make that author's speech off limits to all but the copyright holder.⁸ The First Amendment expressly states that "Congress shall make no law . . . abridging the freedom of speech,"⁹ but federal copyright laws make it illegal in many circumstances to use the expression of others in one's own speech.¹⁰ On a fundamental level, therefore, copyright entails congressional action specifically designed to abridge freedom of speech. The resulting quandary is that we are free to express ourselves however we wish,¹¹ as long as we are careful not to make use of someone else's copyrighted expression in the process.¹²

If resolving this basic inconsistency were simply a matter of pitting a constitutional amendment against a congressional act, the First Amendment very likely would limit the scope of our current copyright regime. However, copyright, like the First Amendment, is firmly anchored in the United States Constitution. Article I, Section 8, Clause 8 expressly grants Congress the power "[t]o

7. See *infra* text accompanying notes 49-57.

8. See *infra* text accompanying notes 71-78 for a discussion of the exclusive rights and remedies copyright grants to authors.

9. U.S. CONST. amend. I. The First Amendment also applies to state action through the Fourteenth Amendment. See *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

10. See 17 U.S.C. § 501 (2000).

11. With certain narrow exceptions. See *infra* text accompanying note 34.

12. Theoretically speaking, two authors can independently create identical works without access to each other's and both can be copyrighted. To be copyrightable, a work need only be "original" in the sense that it originates from the author and possesses more than a *de minimus* amount of creativity. There is no "novelty" requirement as in patent law. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 363 (1991) (explaining that, however unlikely, two poets can independently create identical poems and both are copyrightable because each poem originates solely from its respective author). In practice, however, where proof of access to the work is absent, "striking similarity" will be sufficient to allow the infringement question to go to the jury. See *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir. 1987). Moreover, copyright infringement requires no showing of intent, and can even be done subconsciously. See *ABKCO Music Inc. v. Harrison's Music Ltd.*, 722 F.2d 988 (2d Cir. 1983) (holding that George Harrison, in writing "My Sweet Lord," subconsciously copied The Chiffons's "He's so Fine" and was thus liable for copyright infringement).

promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings . . .”¹³ Often referred to as the “Copyright Clause,” this constitutional provision gives Congress the authority to enact a broad range of federal statutes designed to protect authors’ financial interests in their creations.¹⁴ The 1976 Copyright Act, which comprises our current body of federal copyright laws, is the product of this exercise of congressional power.¹⁵

Because the First Amendment and copyright law are both securely rooted in the U.S. Constitution, courts have had to find a means of creating a proper equilibrium between them. In the landmark case of *Harper & Row Publishers, Inc. v. Nation Enterprises*,¹⁶ the Supreme Court set out the metes and bounds of copyright and First Amendment territory. In doing so, the Court employed a seemingly elegant specimen of doctrinal parsing called the “definitional balance.”¹⁷ Specifically, the Court held that “copyright’s idea/expression dichotomy ‘strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.’”¹⁸ The Court also incorporated fair use into the equation, stating in sum that “First Amendment protections [are] already embodied in the Copyright Act’s distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use . . .”¹⁹ The Court also added historical support for its holding, noting that “it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and

13. U.S. CONST. art. I, § 8, cl. 8.

14. See *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare . . .”).

15. See, e.g., *infra* Part IV.A (incorporating the fair use defense in the 1976 Copyright Act).

16. 471 U.S. 539 (1985) (holding that the *Nation* magazine had no rights under either the First Amendment or fair use to lift quotations from President Ford’s as yet unpublished memoirs).

17. *Id.* at 556.

18. *Id.* (quoting the Second Circuit Court of Appeals in *Harper & Row Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 203 (2d Cir. 1983)).

19. *Id.* at 560.

disseminate ideas.”²⁰ The conclusion to be drawn from the *Harper & Row* decision, therefore, is that copyright, *by definition*, adequately incorporates—and even facilitates—the objectives of the First Amendment.

This proposition has spurred volumes of commentary, and a number of scholars have questioned whether the Court’s definitional balance scheme truly leaves adequate room for the full range of legitimate First Amendment concerns.²¹ With the ascension of the Internet and novel digital media formats, the tension between content owners’ rights and the public’s free speech rights has continued to escalate, and content owners have, as of late, been gaining an upper hand.²² Now, more than ever, this issue demands more careful scrutiny than the federal courts have traditionally afforded it.²³

Recently, the Supreme Court revisited the definitional balance doctrine in *Eldred v. Ashcroft*.²⁴ In this case, the Court was presented with an opportunity to provide a more rigorous analysis of the areas of tension between copyright and the First Amendment. The

20. *Id.* at 558.

21. *See, e.g.*, RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT, § 12 (1994); Stephen Fraser, *The Conflict Between the First Amendment and Copyright Law and Its Impact on the Internet*, 16 CARDOZO ARTS & ENT. L.J. 1, 21 (1998); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 42 (2001); Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 709 (1992); Michael A. Einhorn, *Miss Scarlett’s License Done Gone!: Parody, Satire, and Markets*, 20 CARDOZO ARTS & ENT. L.J. 589, 603 (2002); Niels B. Schaumann, *An Artist’s Privilege*, 15 CARDOZO ARTS & ENT. L.J. 249, 252 (1997); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work’s “Total Concept and Feel,”* 38 EMORY L. J. 393, 411 (1989).

22. *See infra* note 79.

23. In essence, the courts have been applying 1970s thoughts to twenty-first century problems. The definitional balance scheme is gleaned from early scholarly explorations of the issue during its infancy. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556-59 (1985) (citing such early works as Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1615 (1982); Lionel S. Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. (ASCAP) 43, 78 (1971); Janice E. Oakes, Comment, *Copyright and the First Amendment: Where Lies the Public Interest?*, 59 TUL. L. REV. 135 (1984)). The ball appears to have started rolling with a well-known law review article written by Melville Nimmer in 1970 and another written by Paul Goldstein. *See Melville B. Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970).

24. 537 U.S. 186 (2003).

Court instead chose, in terse fashion, to punt the issue away.²⁵ Nevertheless, the Court did, in fact, make one important clarification—a holding that has become the primary impetus for this article.

B. The Eldred v. Ashcroft Decision

The *Eldred* case traces its beginnings to 1998, when Congress passed the Sonny Bono Copyright Term Extension Act (CTEA).²⁶ This legislation added another twenty years to the duration of all copyright terms originally set out in the 1976 Copyright Act.²⁷ The term extension applied not only to copyrighted works created subsequent to the CTEA's effective date, but also to copyrighted works already in existence.²⁸ The result was that the CTEA tacked an extra twenty years of bonus copyright protection onto works that were about to lapse into the public domain.

Somewhat upset by this, a group of individuals and businesses with plans to utilize works whose copyrights were about to expire brought suit in the United States District Court for the District of Columbia, seeking a declaration that the CTEA was unconstitutional.²⁹ One of the plaintiffs' principal claims was that the CTEA violated the First Amendment's free speech guarantee by robbing the public of the right to freely use speech that, but for the CTEA, would lapse into the public domain.³⁰ However, the district

25. The Court's treatment of the petitioners' First Amendment claim takes up a mere page and a half in the Supreme Court reporter. *See* 123 S.Ct. 769, 788-90 (2003).

26. Pub. L. No. 105-298, Title I, §102(b), (d), 112 Stat. 2827 (1998) (amending 17 U.S.C. §§ 302, 304 (1976)).

27. *Id.*

28. *See* 17 U.S.C. §§ 302, 304 (2000).

29. *Eldred v. Reno*, 74 F. Supp.2d 1 (D.D.C. 1999). The principal plaintiff, Eric Eldred, runs a Web site called the "Eldritch Press," where he publishes the works of a number of classic literary authors. Access to the works is free to the public. *See* <http://www.eldritchpress.org> (last visited March 13, 2004).

30. *See* Plaintiffs' Second Amended Complaint ¶¶ 75-81, *Eldred v. Reno*, 74 F. Supp.2d 1 (D.D.C. 1999) (No. 1:99CV00065 JLG), *available at* http://cyber.law.harvard.edu/openlaw/eldredvashcroft/cyber/complaint_amd2.html (last visited March 13, 2004). The petitioners also challenged the CTEA under the Copyright Clause's "limited Times" provision. *See id.* ¶¶ 56-67. The Copyright Clause issue is an entirely different can of worms, and hence far outside the scope of this article. For some interesting materials and discussion regarding the *Eldred* decision as a whole on the World Wide Web, *see generally* <http://cyber.law.harvard.edu/openlaw/eldredvashcroft/> (last visited March 13, 2004).

court rejected this claim, holding simply that “there are no First Amendment rights to use the copyrighted works of others.”³¹ In a subsequent appeal, the District of Columbia Circuit Court of Appeals similarly disposed of the plaintiffs’ free speech claim, declaring *Harper & Row* to be an “insuperable bar[] to plaintiffs’ First Amendment theory”³² and holding that “*copyrights are categorically immune from challenges under the First Amendment.*”³³ After encountering defeats at both the trial and appellate levels, the plaintiffs petitioned to the U.S. Supreme Court, which granted certiorari to hear the case.³⁴

The Supreme Court, however, gave the petitioners no quarter. Downplaying the petitioners’ First Amendment challenge to the CTEA,³⁵ the Court held that it would not impose “uncommonly strict scrutiny on a copyright scheme that incorporates its own speech-protective purposes and safeguards.”³⁶ By way of support, the Court simply reasserted the definitional balance doctrine upon which it had previously relied in *Harper & Row*. First, the Court explained, copyright law protects only *expression*, and not *ideas*.³⁷ Therefore, it does not place any strain on the First Amendment’s overarching purpose, which is to ensure the free dissemination of ideas.³⁸ Moreover, the Court reemphasized, copyright law is “intended . . . to be the engine of free expression,” in that it provides an incentive for people to create more original works, which in turn fosters the spread of ideas.³⁹ Second, the fair use doctrine permits the copying of another’s *expression* in certain

31. Eldred v. Reno, 74 F. Supp. 2d at 3.

32. Eldred v. Reno, 239 F.3d. 372, 375 (D.C. Cir. 2001).

33. *Id.* (emphasis added). The D.C. Circuit relied on the Supreme Court’s decision in *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985), as well as its own decision in *United Video, Inc. v. F.C.C.*, 890 F.2d 1173 (1989). *Id.*

34. Eldred v. Ashcroft, 534 U.S. 1126 (2002) (order granting writ of certiorari).

35. By this time, the plaintiffs had significantly honed their First Amendment argument, alleging more specifically that the CTEA is a content-neutral regulation of speech that does not satisfy intermediate scrutiny review because it re-allocates the right to use certain speech from a waiting public back to a privileged few without any relation to copyright’s incentive to create. *See* Brief for Petitioners at 39, Eldred v. Ashcroft, 534 U.S. 1126 (2002) (No. 01-618).

36. Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

37. *Id.* A thorough discussion of the idea/expression dichotomy appears *infra* Part III.

38. *Id.*

39. *Id.* (“Indeed, copyright’s purpose is to *promote* the creation and publication of free expression.”).

circumstances, such as education, criticism, and even parody.⁴⁰ Hence, as Justice Ginsberg put it, the Copyright Act “contains built-in First Amendment accommodations.”⁴¹

Although the Supreme Court’s holding in *Eldred* seems to have solidified its adoption of the definitional balance approach to copyright and First Amendment tensions, the Court did overrule the D.C. Circuit on one crucial issue. Apparently thinking it imprudent to declare a blanket bar on all future First Amendment claims against copyright, the Court held that “the D.C. Circuit spoke too broadly when it declared copyrights ‘categorically immune from challenges under the First Amendment.’”⁴² The ramifications of this holding are significant: It leaves the door ajar, albeit only slightly, for courts to consider First Amendment values in copyright cases where free speech principles might outweigh content owners’ financial concerns.

Under what circumstances should courts give added consideration to First Amendment concerns? After *Eldred*, it would seem that the vast majority of First Amendment challenges to copyright will be rebuffed by courts under the definitional balance doctrine. The territory covered by the *Eldred* decision, however, should extend only to the points at which the definitional balance begins to break down and First Amendment interests remain vital. Therefore, it is crucial to analyze the true complexities involved in balancing free speech concerns with the creative incentive function of the copyright system in order to identify the ways in which the definitional balance falls short of providing an adequate accommodation for First Amendment liberties. The purpose of this article is to provide such an analysis in order to reveal the narrow circumstances under which courts, in light of *Eldred*, might yet allow First Amendment values to overcome the economic interests of copyright holders.⁴³

40. *Id.* at 220.

41. *Id.* at 219.

42. *Id.* at 221 (quoting *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001)).

43. This article will focus mainly on bolstering the consideration of First Amendment values in the arena of copyright infringement cases. Although the *Eldred* decision involved a First Amendment attack on a congressionally enacted copyright law, its holding applies equally to the use of the First Amendment as a defense to copyright infringement. In the Court’s own words:

We are not persuaded by petitioners’ attempt to distinguish *Harper & Row* on the ground that it involved an infringement suit rather than a declaratory action of the kind here presented. As respondent observes, the same legal question can arise in either posture. *In both postures, it is*

Part II of this article explains the foundations of both copyright law and the First Amendment, and provides a brief discussion of the increasing tensions between copyright interests and First Amendment liberties in modern society.⁴⁴ Part III first expounds the legal and conceptual framework underlying the idea/expression dichotomy in copyright and then offers arguments to show where it fails to account for overarching First Amendment concerns.⁴⁵ Part IV begins by delving into an explication of the fair use defense, followed by a discussion elucidating reasons why the defense currently lacks the teeth necessary to protect certain legitimate free speech rights from being subsumed by copyright.⁴⁶ Part V concludes that the objectives of both the First Amendment and copyright would be better served by allowing greater flexibility with regard to invoking the First Amendment where the definitional balance falls short in accommodating important First Amendment values.⁴⁷

II. A “DEFINITIONAL BALANCE”

The First Amendment to the United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”⁴⁸ With certain narrow exceptions, the First Amendment ensures that the content of an individual’s speech will not lead to criminal prosecution or civil liability.⁴⁹ That is, the ideas one expresses, as well as the manner in

appropriate to construe copyright’s internal safeguards to accommodate First Amendment concerns.

Id. at 221 n.24 (internal citations omitted) (emphasis added). Therefore, the Court’s holding that copyrights are *not* “categorically immune” from First Amendment challenges applies in copyright infringement cases as well as declaratory judgments.

44. *See infra* Part II.

45. *See infra* Part III.

46. *See infra* Part IV.

47. *See infra* Part V.

48. U.S. CONST. amend. I.

49. First Amendment protection from content-based government regulation generally does not extend to the sale of obscenity, “fighting words,” libel and defamation, deceitful advertising, or speech inciting imminent lawless or violent behavior. *See, e.g.,* *Miller v. California*, 413 U.S. 15 (1973) (maintaining that obscene speech falls outside of First Amendment protection); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (holding, somewhat opaquely, that speech can be prohibited if a person of common intelligence would deem such words likely to cause an average person to fight); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980) (holding that states may prohibit

which those ideas are expressed, are subject to a broad scope of protection from government interference. The First Amendment shields many controversial forms of speech, including sexually “indecent” speech,⁵⁰ hate speech,⁵¹ criticism of public figures and officials,⁵² public use of “offensive” words,⁵³ and even symbolic speech, such as the burning of the U.S. flag.⁵⁴ Although First Amendment freedoms have never been held absolute,⁵⁵ those who choose to advance minority viewpoints and engage in controversial modes of expression are usually spared from governmentally imposed censorship.⁵⁶

There is no better evidence of the high premium that our jurisprudence places on freedom of expression than the regime of heightened scrutiny our judiciary applies to government regulations of speech. Any state regulation of speech based on content or viewpoint is subject to strict scrutiny review, requiring

commercial speech that is either misleading or concerns illegal activity); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that public figures and officials may recover for defamatory falsehood if they can prove actual malice on the part of the speaker); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that advocacy of illegal behavior cannot be prohibited except where it is directed toward inciting or producing imminent lawless action and is likely to incite or produce such action).

50. See *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 885 (1997) (holding Communications Decency Act of 1996 unconstitutional because it impinges on the First Amendment rights of adults to access explicit speech on the Internet).

51. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-96 (1992) (holding City of St. Paul’s hate crime ordinance unconstitutional under the First Amendment because it unjustifiably regulates speech based on content and viewpoint).

52. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) (holding that First Amendment values require public figures and officials to carry the burden of proving actual malice on the part of the speaker in defamation suits). See also *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (holding that public figures and officials cannot recover for intentional infliction of emotional distress without a showing of *New York Times* malice).

53. See *Cohen v. California*, 403 U.S. 15, 26 (1971) (holding that the First Amendment prevented plaintiff Cohen from being prosecuted for publicly donning a jacket emblazoned with the words “Fuck the Draft”).

54. See *Texas v. Johnson*, 491 U.S. 397, 418 (1989) (holding Texas’ anti-flag burning statute unconstitutional under the First Amendment). See also *United States v. Eichman*, 496 U.S. 310, 317-19 (1990) (holding Federal Flag Protection Act of 1989 likewise unconstitutional).

55. See *supra* notes 49-53.

56. However, community censorship of controversial speech is often achieved in ways other than outright government regulation through legislative action. See generally MARJORIE HEINS, *SEX, SIN, AND BLASPHEMY: A GUIDE TO AMERICA’S CENSORSHIP WARS* (1993) (providing a comprehensive discussion of the myriad ways in which unpopular speech can be suppressed).

that the regulation in question be narrowly tailored to achieve a compelling government interest.⁵⁷ In order to satisfy the narrow tailoring requirement, the government's regulation must provide the *least restrictive* means of achieving the government's interest.⁵⁸ Strict scrutiny imposes a strong presumption of the government regulation's invalidity and almost invariably dooms the regulation.⁵⁹ Content-neutral regulations of speech⁶⁰ are subject to a somewhat lower yet still rigid standard of review, called intermediate scrutiny.⁶¹ To be deemed content-neutral, a government regulation must be "unrelated to the suppression of free expression" and only have an "incidental effect" on speech.⁶² Intermediate scrutiny requires that the government regulation be narrowly tailored to serve a *substantial* government interest.⁶³ Narrow tailoring for the purposes of intermediate scrutiny requires that the regulation does not "burden substantially more speech than is necessary to further the government's legitimate interests."⁶⁴ In addition to being subject to one or another form of heightened scrutiny, government

57. *Sable Communications of Cal. v. F.C.C.*, 492 U.S. 115, 126 (1989).

58. *Id.*

59. *See id.*

60. Content-neutral regulations of speech usually involve some kind of restriction on the time, place, or manner in which the speech may be made. The government's regulation must also leave open adequate alternative channels for communication. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (holding that city may impose volume limit on outdoor public rock concert); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 63 (1986) (upholding zoning ordinance prohibiting adult theaters from being within 1000 feet of any residential zone, park, school, or church because it is purportedly aimed at combating "secondary effects" such as crime and the reduction in value of surrounding property).

61. *Universal Studios, Inc. v. Corley*, 273 F.3d 429, 442 (2d Cir. 2001).

62. *Id.* at 450.

63. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994). Intermediate scrutiny does not always entail the same standard of review in each case. The level of scrutiny can range from just short of strict to something a notch above a rational basis test. Depending on the nature of the constitutional right involved, courts have used terms such as *substantial*, *important*, and *significant* in setting the level of government interest and the degree to which the regulation in question is tailored to achieving that interest. For example, under the Equal Protection Clause of the Fourteenth Amendment, state-imposed classifications based on gender must be substantially related to an important government purpose, and the government has the burden of showing an "exceedingly persuasive justification" for such classifications. *See United States v. Virginia*, 518 U.S. 515, 531 (1996).

64. *Corley*, 273 F.3d at 450 (citing *Turner Broad.*, 512 U.S. at 662 (quoting *Ward*, 491 U.S. at 799)).

regulations of speech also can be struck down for being overbroad⁶⁵ or too vague.⁶⁶

Copyright law, on the other hand, has its own constitutional underpinnings. Article I, Section 8, Clause 8 of the U.S. Constitution provides that Congress shall have the power “[t]o promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings.”⁶⁷ The function of copyright is to provide an economic incentive for individuals to create original works, with the ultimate goal of benefiting the public.⁶⁸ The Supreme Court’s view is that “the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”⁶⁹ As a means of giving practical effect to this incentive, the Copyright Act allows authors to legally prevent others from copying “original works of authorship fixed in any tangible medium of expression.”⁷⁰ These include literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, audiovisual, and architectural works, as well as sound recordings.⁷¹ It grants copyright holders the exclusive rights to the reproduction, adaptation, distribution, public performance, and public display of copyrighted works.⁷² Furthermore, because of the CTEA, the term of copyright in works created by individual persons now lasts the life of the author plus an additional seventy years.⁷³ Copyright holders have the right to sue others for using the expression contained in their original works. Liability can result in injunctions,⁷⁴ orders to pay damages,⁷⁵ and, in some instances,

65. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 258 (2002) (holding the Child Pornography Prevention Act of 1996 unconstitutional under the First Amendment because it prohibits more protected speech than necessary to achieve its ends).

66. See *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997) (finding provisions of the Communications Decency Act impermissibly vague).

67. U.S. CONST. art. I, § 8, cl. 8.

68. See *supra* note 14.

69. *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 558 (1985).

70. Copyright Act of 1976, 17 U.S.C. § 102(a) (2000).

71. *Id.* § 102(a)(1-8).

72. *Id.* § 106.

73. *Id.* § 302. In the case of anonymous works, pseudonymous works, and works made for hire, “copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first.” *Id.* § 302(c).

74. *Id.* § 502.

orders to pay attorneys' fees.⁷⁶ Moreover, violators may be subject to federal criminal sanctions, which can involve steep fines, prison terms, or both.⁷⁷

It is clear that the Copyright Act is a federal statutory scheme that regulates speech. It imposes criminal and civil penalties on authors who use the copyrightable expression of others in violation of the Act.⁷⁸ Although authors rely on the copyright system to make a living from their work, the copyright system can also be used against them. Big-business interests such as Hollywood, the recording industry, and software developers have wielded their financial power in Congress⁷⁹ and in courts to provide themselves with a strong upper hand in the evolution of our federal copyright law.⁸⁰ The result is that a large swath of today's popular culture is subject to some claim of copyright ownership. The mass media,

75. *Id.* § 504.

76. *Id.* § 505.

77. *Id.* § 506.

78. For example, Jeff Koons, discussed *infra* in text accompanying notes 156 and 169-72, is a postmodern artist who has been successfully sued in copyright infringement actions for his Warhol-esque appropriation of copyrighted pop culture figures. In each case, his work was forfeited, and he was ordered to pay hefty damages.

79. Big-business content owners are heavily involved in lobbying Congress, where advancing technologies have prompted calls for tougher legislation. Jack Valenti, the well-known and highly influential spokesperson for the Motion Picture Association of America, has been a rabid lobbyist on Capitol Hill for tighter statutory protection for copyrights in film. *See, e.g., Copyrights: Government, Industry Leaders Hail Copyrights as "Jewel" in U.S. Trade Crown*, BNA PATENT, TRADEMARK & COPYRIGHT LAW DAILY NEWS, Dec. 17, 1999, Westlaw, BNA-PTD, 12/17/1999 PTD d2 (quoting Valenti's claim that intellectual property protection has to be the "highest priority of Congress"). The Digital Millennium Copyright Act, which many say goes too far in protecting digital copyright management systems, is a result of lobbying efforts by Valenti and others. *See* 17 U.S.C.A. §§ 1201-1205 (West 2002).

80. Examples of recent power grabs achieved by big-business content owners are: *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), *aff'g in part and rev'g in part*, 114 F. Supp. 2d 896 (N.D. Cal. 2000) (finding that Napster online file-sharing service contributorily infringed copyrights in sound recordings); *Universal City Studios, Inc. v. Corely*, 273 F.3d 429 (2d Cir. 2001) (upholding an injunction under the Digital Millennium Copyright Act barring the defendant from posting the code of a DVD decryption program called "DeCSS" on his web site); *Recording Indus. Ass'n of Am. v. Verizon Internet Servs.*, 2003 U.S. Dist. LEXIS 681 (D.D.C. 2003) (enforcing subpoena granted under Digital Millennium Copyright Act requiring Internet service provider, Verizon, to disclose identities of individuals using its service for suspected illegal online music file trading). For a discussion of peer-to-peer technology and the ramifications of the *Napster* decision, see Niels Schaumann, *Copyright Infringement and Peer-to-Peer Technology*, 28 WM. MITCHELL L. REV. 1001 (2002).

mostly owned by large corporate interests, dominate our culture through sounds, images, and expressions that are plastered throughout television, radio, newspapers, magazines, billboards, and the Internet. Because so many of these elements of culture are increasingly subject to copyright protection, authors—especially those who wish to make artistic or political statements about society—are left with fewer and fewer raw materials with which to work.⁸¹ These limitations can create serious fundamental problems for freedom of speech.

Copyright infringement litigation, therefore, has become a powerful weapon for stifling the speech of business competitors, critics, and artists whose works comment on popular culture.⁸² This threat of expensive and time-consuming litigation, not to mention the consequences of losing such a lawsuit, can have a profound chilling effect on expression—especially for the all-too-common “starving artist” with limited financial resources.

The ramifications of such expansionist trends in the protection of intellectual property strongly point toward a need to scrutinize more closely what the Supreme Court calls the “definitional balance” between First Amendment rights and the goals of the copyright protection.⁸³ Any attempt to find the proper equilibrium between protecting an author’s right to freedom of expression on the one hand and ensuring an author’s ability to make a living from her work on the other requires examining whether the idea/expression dichotomy and fair use doctrine

81. See Schaumann, *An Artist’s Privilege*, *supra* note 21, at 249. Professor Schaumann discusses the ownership of popular culture by corporate mass media outlets and the negative impact this has had on certain post-modern artists, most notably Jeff Koons. *Id.* at 251. Schaumann goes on to propose that an “Artist’s Privilege” exception should be made available to accommodate creators of fine art whose genre entails the appropriation of various copyrighted images. *Id.* at 256.

82. For a discussion of the Koons cases see *infra* notes 156 and 169-72 and accompanying text. In regard to business competitors in particular, the software industry has been a copyright litigation battleground. See, e.g., *Computer Assocs. Int’l v. Altai*, 982 F.2d 693 (2d Cir. 1992); *Mfrs. Techs., Inc. v. Cams, Inc.*, 706 F.Supp. 984 (D. Conn. 1989); *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222 (3d Cir. 1986); *Sony Computer Entm’t, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000). In cases such as these, courts have struggled with issues concerning the protectable elements of programming code. In another area of concern, The Church of Scientology has successfully used copyright law to shield church doctrine from outside criticism. See *Religious Tech. Ctr. v. Netcom Online Communication Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

83. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985)).

together adequately accommodate the totality of First Amendment rights.

III. THE IDEA/EXPRESSION DICHOTOMY

A. *Copyright Protection Does Not Extend to Ideas*

An integral component of the “definitional balance” lies in what is called the idea/expression dichotomy. This dichotomy is based on the fact that copyright protection does not extend to ideas. A person may create a work that uses someone else’s ideas, as long as the expression used to advance those ideas is not taken. The Supreme Court case commonly cited for this well-settled principle is *Baker v. Selden*.⁸⁴ In this decision, the Court held that Selden’s description of his system of accounting in a book did not render the system in question subject to copyright protection.⁸⁵ The fact that Selden explained his accounting methods in a published literary work, accompanied by illustrations, did not alter the fact that his methods were ideas.⁸⁶ If Baker had copied verbatim, or even closely paraphrased, Selden’s *explanation* of his accounting system, i.e., Selden’s *expression*, then Baker would have been liable for copyright infringement.⁸⁷ However, Baker used only the methods described in Selden’s book—not the expression Selden used in order to describe those methods.⁸⁸ As the Court properly concluded, Baker had every legal right to make use of Selden’s ideas.⁸⁹

Congress incorporated this all-important principle into section 102 of the 1976 Copyright Act.⁹⁰ Section 102(a) states that “[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression,” and section 102(b) makes it clear that “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained,

84. 101 U.S. 99 (1879). However, the Court described this distinction in terms of “use” versus “explanation,” as opposed to “idea” versus “expression.” *Id.* at 105.

85. *Id.* at 107.

86. *Id.* at 103.

87. *Id.* at 104.

88. *Id.* at 101.

89. *Id.* at 107.

90. Copyright Act of 1976, 17 U.S.C. § 102 (2000).

illustrated, or embodied in such work.”⁹¹

Ideas are the province of the patent system, which has its own set of rules and standards for determining whether something—such as a particular functional design, method of operation, or process—is worthy of protection.⁹² Copyright law, on the other hand, protects only the particular expression that an author uses to convey an idea.⁹³ For example, the order and choice of words in this essay are subject to copyright protection, but the legal arguments and factual statements advanced herein are not. The arguments and facts are ideas, and anyone may use them without engaging in copyright infringement.⁹⁴ To use another example, the particular selection and arrangement of shapes, colors, and other images in a painting are protected because these things represent the painter’s own individual expression.⁹⁵ Whatever “message” or “meaning” may be contained in the painting, however, is an unprotectable idea.⁹⁶ These examples illustrate how the idea/expression dichotomy is viewed as a crucial component of the definitional balance between copyright law and the First Amendment.

Clearly, an important purpose of the First Amendment is to further the spread of ideas and information. This is sometimes referred to as the “enlightenment function.”⁹⁷ If ideas were subject

91. *Id.* § 102(b).

92. *See generally* Patent Act, 35 U.S.C. §§ 100-105 (2003) (explaining conditions of patentability for “any new and useful process, machine,” etc.).

93. 17 U.S.C. § 102 (2000).

94. Here it is appropriate to differentiate between copyright infringement and plagiarism. Plagiarism is essentially the intentional taking of another’s expression and/or ideas without giving due credit to the actual source and subsequently holding such ideas out as one’s own. Thus, copyright and plagiarism are fundamentally different in two respects: (1) it is possible to plagiarize another’s work without using the original author’s particular expression and (2) copyright infringement does not require that the unauthorized taking of the original author’s expression be done intentionally. In that sense, copyright infringement is based in strict liability. However, willful copyright infringement and plagiarism go hand in hand, and can subject the infringer to harsher civil penalties. *See* 17 U.S.C. § 504(c)(2) (2000) (allowing increased damages for willful infringement). The basic difference is that plagiarism is merely unethical (it could subject one to academic discipline as a student or tarnish one’s reputation as a professional), while copyright infringement is illegal.

95. *See, e.g.,* Franklin Mint Corp. v. Nat’l Wildlife Art Exch., Inc., 575 F.2d 62 (3d Cir. 1978).

96. *See id.* at 65 (“Since copyrights do not protect thematic concepts, the fact that the same subject matter may be present in two paintings does not prove copying or infringement.”).

97. *See* SMOLLA, *supra* note 21, § 12.05[2].

to copyright protection, the “marketplace of ideas” would likely become barren.⁹⁸ Authors would be unable to publish works that build upon the ideas of others. They would either have to obtain some kind of licensing agreement or risk being sued, both of which would seriously squelch the advancement of knowledge and understanding.

To their credit, the federal courts have been fairly vigilant in ensuring that ideas remain freely usable and have gone beyond the principles espoused in *Baker v. Selden* in order to spare them from copyright protection. One example is the “merger doctrine,” which provides that if there is only a very limited number of ways to express an idea, then the idea and expression are said to have “merged.”⁹⁹ The merger doctrine is a judicially created principle designed to prevent people from securing copyright ownership in an idea.¹⁰⁰ It is not generally treated as an affirmative defense like fair use, but rather it is used as an argument for denying that the expression the defendant took from the plaintiff was copyrightable subject matter.¹⁰¹ Another example lies in the Supreme Court’s decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*,¹⁰² which provides that a work must “possess more than a *de minimis* quantum of creativity” in order to satisfy the originality requirement for copyrightable subject matter.¹⁰³ Hence, not only are facts and ideas uncopyrightable, but any selection, arrangement, and coordination of facts or ideas that is “so mechanical or routine as to require no creativity whatsoever” is likewise precluded from copyright protection.¹⁰⁴ The Supreme Court has indeed gone to some length to create a strong buffer zone of uncopyrightability around ideas and facts. Nevertheless, deeper analysis reveals that the idea/expression dichotomy does not make as well-positioned a fulcrum for definitional balancing as

98. The “marketplace of ideas” concept originated in Justice Holmes’ dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919), in which he wrote of the importance of “free trade in ideas” and “the power of the thought to get itself accepted in the competition of the market.”

99. See *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678-79 (1st Cir. 1967).

100. See *id.*

101. However, some courts, for reasons of practicality, treat the merger doctrine as an affirmative defense. See, e.g., *NEC Corp. v. Intel Corp.*, 1989 WL 67434 (N.D. Cal. Feb. 6, 1989).

102. 499 U.S. 340 (1991).

103. *Id.* at 363.

104. *Id.* at 362.

one might suppose.

B. Difficulties Inherent in the Idea/Expression Dichotomy

A major problem with the idea/expression dichotomy is that ideas are not always easily distinguishable from the expression used to convey them. For this reason, the use of the term “dichotomy” to describe the relationship between idea and expression is essentially a misnomer.¹⁰⁵ Many ideas are impossible to convey without copying the particular expression used to convey them. For example, a photograph of the My Lai massacre, as Melville Nimmer and Rodney Smolla point out, is a work that contains an idea that cannot realistically be conveyed without copying the photograph itself and consequently copying the photographer’s expression.¹⁰⁶ The dissemination of the photograph, unchecked by copyright law, serves the First Amendment’s “enlightenment function” in a way that a verbal or written description cannot:

In the case of My Lai, a denial that in fact any deaths had occurred would have been devastatingly refuted by the photographs in a way that the verbal reports of the deaths simply could not do. Anyone who would have to pass on their “ideas,” i.e., the fact that dead bodies were seen sprawled on the ground, would be at least as suspect as those who originally reported the occurrence of the deaths. The photographs themselves—the “expression of the idea,”—made all the difference.¹⁰⁷

Here, Nimmer and Smolla illuminate how written reports of an incident such as this—one so unbelievably terrible—simply fail to get the message across like a photograph can.

Another example is the famous Zapruder film of the Kennedy assassination. In *Time Inc. v. Bernard Geis Associates*, the defendant published a book describing his theories regarding the Kennedy assassination.¹⁰⁸ The book contained sketches copied from the key frames of Zapruder’s film, which *Life* magazine had previously purchased the exclusive rights to use.¹⁰⁹ *Life* sued for copyright

105. A “dichotomy” is defined as the “division of a class into two opposed subclasses, as *real* and *unreal*.” WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 505 (2d ed. 1983).

106. SMOLLA, *supra* note 21, § 12.05[2][c][ii].

107. *Id.*

108. 293 F. Supp. 130, 131 (S.D.N.Y. 1968).

109. *Id.* at 132.

infringement, and the defendant raised both the First Amendment and fair use as defenses.¹¹⁰ The court, per Judge Wyatt, avoided the First Amendment issue and held that the defendant's copying was a fair use because the "public interest in having the fullest information available on the murder of President Kennedy" outweighed the copyright interest held by *Life* magazine.¹¹¹ Although the court characterized the defendant's rights in terms of fair use and not freedom of speech, the case represents a rare application of the fair use doctrine and constitutes judicial recognition of the fact that the images from the film convey ideas that cannot be extracted from the means used to express them.¹¹²

This raises a serious question concerning the Supreme Court's reliance on the idea/expression dichotomy. In *Harper & Row*, the Court articulated and justified the idea/expression dichotomy in the context of a literary work, reasoning that copying is not necessary when authors can put the expression of others in their own words.¹¹³ However, it is much easier to formulate alternative words and phrases to express another's written idea than it is to find different ways to convey an idea expressed in a pictorial, graphic, or sculptural work. For example, to convey the idea of the sheer horror of the Holocaust, an article could be written by an eyewitness at Auschwitz describing the conditions of the camp. In turn, someone else who had never been to Auschwitz could use the facts and ideas from that article in writing a book about the Holocaust, as long as that author did not use the original eyewitness's expression. Leaving aside for now the varying degrees of impact certain words might have on the reader, the same general idea would come across in both the original article and the book. But if photographs capturing images of the conditions at Auschwitz were taken by an eyewitness, the ideas conveyed by the

110. *Id.*

111. *Id.* at 146.

112. Judge Wyatt's decision has been the subject of ongoing controversy. Critics, including Melville Nimmer, have criticized Wyatt's application of fair use in lieu of a First Amendment defense for a variety of reasons, one being his express failure to consider *Life* magazine's potential market for derivative works, and another being that the overall "public interest" is not technically a factor in determining fair use. Arguably, the implication is that Judge Wyatt held in favor of the defendants under the First Amendment *sub silentio*, but clothed his arguments in fair use terms. For a discussion of the fair use and First Amendment implications of the *Zapruder* film case, see Fraser, *supra* note 21, at 21-31.

113. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985).

photographs would likely provide a much deeper and more convincing sense of the inhumanity and cruelty that transpired there.

The ideas conveyed by such photographs, which are qualitatively different than a written account, simply could not be relayed to others without displaying or distributing copies of the photographs themselves. As Nimmer and Smolla further elaborate:

[The] definitional balance breaks down in those special instances where the expression for a given idea may not be independently supplied by an idea copier. One who wished to convey fully the “idea” of the My Lai massacre photographs could do so only by copying the expression as well as the idea of the photographs. To attempt a simulated photograph with models posing as dead bodies in order to express the idea of the original My Lai photographs would be ludicrous. The expression must be copied along with the idea not because it is onerous for an idea copier to create his own expression, but rather because the idea cannot be conveyed unless the expression is also copied.¹¹⁴

What we should take from Nimmer and Smolla’s My Lai illustration is the understanding that explaining the distinction between idea and expression is a much tidier job when done in the context of literary works. The written word lends itself more easily to alternative ways of conveying a particular idea. However, once we attempt to separate idea and expression in the contexts of other media, whatever clarity the distinction might have had all but disappears.

Nimmer specifically suggests that there should be a “news photograph” First Amendment exception for use of copyrighted images in order to protect the public interest in obtaining information, and that such an exception would shore up any remaining imbalance between the First Amendment and copyright.¹¹⁵ Nimmer’s suggestion, although laudable in its own right, is shortsighted. Nimmer’s proposed solution does not go far enough to accommodate the overall universe of free speech concerns, and is symptomatic of a rather vexing tendency among scholars and the courts to conflate the objectives served by the Speech Clause and the Press Clause whenever copyrights are at

114. SMOLLA, *supra* note 21, § 12.05[2][d] (citation omitted).

115. *Id.* § 1205[3].

stake.¹¹⁶ This confusion is partly to blame for the fact that so much emphasis is placed on the so-called “enlightenment function” of the First Amendment, upon which the viability of the idea/expression dichotomy seems to rest.

Although some overlap certainly exists, the Speech and Press clauses of the First Amendment serve two otherwise distinct functions.¹¹⁷ The purpose of the Press Clause is to ensure journalistic freedom from government interference.¹¹⁸ A free press will serve as a “watchdog” by keeping the public informed as to the actions of their government and the events in their community.¹¹⁹ The Framers strongly regarded an informed electorate to be an indispensable element of a successfully functioning democratic society.¹²⁰ In their eyes, a guaranteed free press under the First Amendment would ensure the unbridled gathering and dissemination of ideas, knowledge, and information.¹²¹

The Speech Clause, on the other hand, is designed with the personal, expressive freedom of an individual in mind.¹²² As Professor C. Edwin Baker explains:

[T]he First Amendment should distinguish the Speech and Press Clauses. Freedom of speech protects a broad realm of individual expressive liberty. Speech freedom is an embodiment of one of the most fundamental human values, the right of an individual to make her own choices

116. See C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 897 (2002).

117. See *Thomas v. Collins*, 323 U.S. 516, 530 (1945). “It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, *though not identical*, are inseparable.” *Id.* (emphasis added).

118. See Baker, *supra* note 116, at 919.

119. *Id.* at 951 n.140 (citing C. EDWIN BAKER, MEDIA, MARKETS AND DEMOCRACY 125-213 (2002)). See also David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. Rev. 455, 491-92 (1983).

120. Leslie Yalof Garfield, Note, *Curtailment of Early Election Predictions: Can We Predict the Outcome?*, 36 U. FLA. L. REV. 489, 520 (1984). Garfield notes that the theory of “first amendment protection of free speech [as being] essential to an intelligent self-government in a democratic society was strongly advocated by Alexander Meiklejohn.” *Id.* at 495 n.28 Garfield goes on to note that “Meiklejohn asserted that the objective of the framers was to help American citizens understand their own political institutions.” *Id.* (citing A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (1948)).

121. See *Thomas*, 323 U.S. at 530 (noting that rights to freedom in speech and press were coupled with the right to assemble).

122. See *supra* notes 48-56 and accompanying text.

about the values she expresses. This notion of speech freedom emphasizes the normative requirement that the state respect a person's autonomy and not make paternalistic decisions about what she can express. This is the free speech right that Justice Brennan has described as "inviolable;" the free speech right that an earlier Court explained protected the child who refuses to salute the flag. That is, the Constitution requires respect for individual autonomy and mandates protection of individual speech choices.¹²³

The dissemination of ideas and facts, i.e., the "enlightenment function" to which Nimmer and the Supreme Court often allude, is more closely aligned with the objectives of the Press Clause than with the Speech Clause. As Professor Baker correctly argues, the First Amendment places "protection of individual liberty at the heart of the Speech Clause and protection of democratic communications structures at the heart of the Press Clause."¹²⁴ Therefore, even if the Supreme Court were to adopt Nimmer's "news photograph" exception or even Judge Wyatt's fair use stance on *Life's* monopoly over the *Zapruder* films,¹²⁵ it would only serve to alleviate a First Amendment shortcoming of the copyright system with respect to the Press Clause.

Put simply, the First Amendment does not protect ideas alone. It also protects the way in which an individual chooses to express those ideas. The Supreme Court has struck down numerous state and federal attempts to suppress controversial and unpopular forms of expression, notwithstanding the fact that there may be less incendiary, disruptive, intrusive, or offensive ways of conveying the particular idea expressed—even certain forms of conduct that qualify as "symbolic speech," such as burning the American flag.¹²⁶ As the Court so eloquently stated in *Cohen v. California*,¹²⁷ "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."¹²⁸ Nevertheless, this crucial First Amendment

123. Baker, *supra* note 116, at 897-98 (citations omitted).

124. *Id.* at 951.

125. See *supra* notes 114-116 and accompanying text.

126. See *supra* note 54.

127. 403 U.S. 15 (1971). Another fact that many in copyright and First Amendment circles find interesting about this case is that it was none other than Melville Nimmer himself who represented and ultimately exonerated Mr. Cohen.

128. *Id.* at 26. Justice Brennan made a similarly lucid observation in his famous dissent in *F.C.C. v. Pacific Found.*, 438 U.S. 726 (1978) (ruling that the

principle becomes lost on the Court whenever freedom of speech is invoked as a defense to a claim of copyright infringement.

It has been shown that there is a certain precariousness involved in trying to surgically extract pure ideas from the expression in which those ideas are embedded. The idea/expression dichotomy, therefore, does not provide a sufficiently careful balancing of First Amendment liberties with the objectives of copyright protection. Even so, the textbook response to any set of arguments exposing the free speech protective inadequacy of the idea/expression dichotomy involves an appeal to the fair use doctrine. As will be shown, however, the fair use defense, as it is currently applied, makes for a woefully inadequate free speech “accommodation.”

IV. THE FAIR USE DEFENSE

A. *Fair Use Explained*

Long before the enactment of the 1976 Copyright Act, courts had developed a common law safety valve for defendants accused of copyright infringement.¹²⁹ A defendant was entitled to argue that the copying of the plaintiff’s work was a fair use.¹³⁰ Justice Story’s oft-quoted formulation of the doctrine asked courts to “look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work” in determining whether the defendant’s use

Federal Communications Commission may prohibit indecent speech on the radio during daytime hours when children are likely to be inadvertently exposed):

The idea that the content of a message and its potential impact on any who might receive it can be divorced from the words that are the vehicle for its expression is transparently fallacious. A given work may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image. Indeed, for those of us who place an appropriately high value on our cherished First Amendment rights, the word “censor” is such a word.

Id. at 773 (Brennan, J. dissenting).

129. See *Folsom v. Marsh*, 9 F.Cas. 342, 346-47 (C.C.D. Mass. 1841) (No. 4,901) (holding that letters written by George Washington were exclusively copyrighted and defendants were enjoined from further publishing the letters in their book). The 1976 Copyright Act’s predecessor, the 1909 Copyright Act, contained no provision for fair use. See generally 1909 Copyright Act, Pub. L. No. 60-349, 35 Stat. 1075 (1909) (current version at 17 U.S.C. §§ 101-1332 (2000)).

130. *Folsom*, 9 F.Cas. at 348.

of the plaintiff's expression was fair and thus prevented the plaintiff from recovering.¹³¹

While drafting the 1976 Copyright Act, Congress wrote fair use into section 107, which provides:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.¹³²

Fair use has been held to be an *affirmative* defense,¹³³ which requires a court to first find that the defendant's use infringes the plaintiff's work. Only after the infringement issue is fully litigated or the defendant concedes infringement can the fair use issue be examined.¹³⁴ A fair use analysis requires a court to apply the factors listed in section 107 on a case-by-case basis, according to the nature of the defendant's use.¹³⁵ Some factors will be more applicable

131. *Id.*

132. 17 U.S.C. § 107 (2000).

133. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985).

134. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574 (1994) ("It is uncontested here that 2 Live Crew's song would be an infringement of Acuff-Rose's rights in 'Oh, Pretty Woman,' under the Copyright Act of 1976, but for a finding of fair use through parody.") (internal citations omitted).

135. *Id.* at 577 (citing to *Harper & Row*, 471 U.S. at 560).

than others depending on the facts of each particular case.¹³⁶ In addition, the list of factors in section 107 is nonexclusive, which gives courts some latitude in arriving at a finding of fair use based on other considerations.¹³⁷

In practice, the first and fourth factors, namely “the purpose and character of the use” and “the effect of the use upon the potential market for or value of the copyrighted work,” are usually given the most weight.¹³⁸ In *Campbell v. Acuff-Rose Music, Inc.*,¹³⁹ the Supreme Court held “transformative” uses to be strong candidates for fair use protection.¹⁴⁰ A transformative use “adds something new, with a further purpose or different character, altering the first with [a] new expression, meaning, or message,” as opposed to a work that merely “supplants” the original in the marketplace.¹⁴¹ A parody of another’s work, for instance, is now a well-recognized transformative use because “it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.”¹⁴² The fourth factor is also given greater weight because if there is little or no impact on the plaintiff’s current or potential market, then no damage is done to the financial incentive function of the copyright monopoly.¹⁴³ The first and fourth factors usually go hand-in-hand because the more transformative a use is, the less likely it will substitute for the original in the marketplace, and the less relevant the second and third factors are to the analysis.¹⁴⁴

The fair use defense is viewed as a prophylactic against the draconian enforcement of the exclusive rights provided to copyright holders under sections 106 and 106A.¹⁴⁵ It absolves defendants of liability for infringement by permitting certain uses

136. *See id.* at 577-78 (emphasizing the “illustrative” nature of the text and that the factors must be analyzed “in light of the purposes of copyright”).

137. *Harper & Row*, 471 U.S. at 560-61.

138. *See id.* at 566 (describing the last factor, the effect on the market, as being “undoubtedly the single most important element of fair use”). *See also Campbell*, 510 U.S. at 578-86 (analyzing the first factor of section 107 and placing considerable emphasis on whether the work is transformative).

139. 510 U.S. 569 (1994) (ruling 2 Live Crew’s rap parody of Roy Orbison’s “Pretty Woman” to be fair use).

140. *Id.* at 579 (“[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”).

141. *Id.* (quoting *Harper & Row*, 471 U.S. at 462).

142. *Id.*

143. *Id.* at 590-94 (analyzing the fourth factor of section 107).

144. *Id.* at 581 (contrasting parodies based on the risk of market substitution).

145. 17 U.S.C. §§ 106, 106A (2000).

that are consistent with the ultimate end of the copyright system, which is to benefit the public.¹⁴⁶ Fair use requires courts “to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”¹⁴⁷ In other words, it attempts to prevent copyright from becoming self-defeating. Although the Supreme Court has never expressly ruled fair use a constitutional requirement,¹⁴⁸ it has long recognized that certain latitude must be allowed for scholarship, comment, and criticism in order to prevent the copyright system from stunting the advancement of human thought.¹⁴⁹ The Court also maintains that because the fair use exception carves out a significant swath of permissible copying for these purposes, First Amendment freedoms are adequately accommodated as well.¹⁵⁰

B. The Shortcomings of the Fair Use Defense

Reliance upon the fair use doctrine, as it is currently applied, to shore up the imbalance between free-speech rights and copyright interests is misguided. Probably the most compelling reason to consider fair use an inadequate free-speech accommodation is that it is an *affirmative* defense. Again, this fact necessarily entails that anyone considering making questionable use of copyrighted material must first be sued for infringement and then endure a period of time-consuming and prohibitively expensive litigation before fair use can be of any avail, if at all. Furthermore, since fair use is not a “bright-line” rule and is decided only on a case-by-case basis,¹⁵¹ the success of a fair use defense is in many cases difficult to predict. The threat of being sued, by itself, can have a profound chilling effect on a person’s speech. Coupled with the difficulty of predicting a successful defense, the potentially high price of losing looms large and renders the chilling effect on

146. *Harper & Row*, 471 U.S. at 546.

147. *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (quoting *Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos.*, 651 F.2d 57, 60 (2d Cir. 1980)).

148. However, the Court has come pretty close. “From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts.’” *Campbell*, 510 U.S. at 575-76 (quoting the U.S. Constitution, art. I, § 8, cl. 8).

149. *Stewart*, 495 U.S. at 236 (highlighting some of the categories enumerated in 17 U.S.C. § 107 (1988 ed.)).

150. *Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003).

151. *Campbell*, 510 U.S. at 577.

speech all the more potent. This gives copyright holders a strong upper hand in compelling someone with an otherwise viable fair use claim to enter into a licensing agreement or to cease and desist altogether.¹⁵² Based on such realities, it is difficult to see how the fair use exception offers any real solace for an average garage band member or starving artist, who typically does not have the financial wherewithal to defend a copyright infringement claim.

Another reason fair use is inadequate is that it fails to recognize the merits of certain forms of artistic expression and social commentary. Although the Supreme Court ruled in *Campbell* that copying for the purposes of parody is a fair use, it allowed fair use protection only for works that aim their criticism at the original work from which the expression was taken.¹⁵³ Works of ordinary satire, the Court held, comment on society in general, and hence fall outside the boundaries of fair use.¹⁵⁴ This distinction makes things difficult for creators of satire who make use of copyrighted works in order to comment on social and cultural ills. Jeff Koons, for example, is a well-known postmodern artist who found himself on the losing side of a number of copyright infringement suits just prior to the *Campbell* decision.¹⁵⁵ Koons's work appropriates images from various commercial media and "recontextualizes" them in a manner that levels criticism toward popular culture. In each of these lawsuits, Koons's fair use defense was unavailing because the critical elements of his works were not held to be primarily aimed at the originals from which they were taken, but rather at modern

152. Other commentators have explored the chilling effects of copyright regulation on speech as well. See generally Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001). See also Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 709 (1992); Jessica Litman, *Electronic Commerce & Free Speech*, 1 ETHICS & INFO. TECH. 213, 217-218 (1999), at <http://www.msen.com/~litman/freespeech.pdf> (last visited March 13, 2004).

153. *Campbell*, 510 U.S. at 580-81.

154. *Id.* at 581.

155. See *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) (ruling Koons's appropriation of Art Rogers "String of Puppies" photograph was not fair use); *Campbell v. Koons*, No. 91 Civ. 6055, 1993 WL 97381 (S.D.N.Y. Apr. 1, 1993) (finding Koons's appropriation of Barbara Campbell's "Boys with Pig" photograph not a fair use); *United Feature Syndicate, Inc. v. Koons*, 817 F.Supp. 370 (S.D.N.Y. 1993) (holding Koons's appropriation of "Odie" character from "Garfield" comic strip series not a fair use). Interestingly enough, the Supreme Court denied certiorari only two years before, handing down its decision regarding 2 Live Crew's parody in *Campbell*. See *Koons v. Rogers*, 506 U.S. 934 (1992) (order denying certiorari).

society in general.¹⁵⁶ The Supreme Court's delineation of "true" parody from ordinary satire thus provides no vindication for artists like Koons and serves only to induce hesitation in anyone considering the use of another's work for the purposes of social or artistic commentary.

In *Campbell*, the Supreme Court justified its distinction between satire and parody on its view that "[p]arody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collectively victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing."¹⁵⁷ This line of reasoning is based on the fears that a satirical work, which merely criticizes society at large, runs a greater risk of being sold or licensed out as a market substitute or derivative work because it is more likely to fail in "conjuring up" and differentiating itself from the original.¹⁵⁸ In the *Campbell* Court's view, a parody is said to conjure up the original work by altering it in a manner that lampoons the original directly, thereby creating a greater likelihood that consumers will not confuse it with the original work.¹⁵⁹ A satire, on the other hand, need not be altered in order to serve a satiric purpose.¹⁶⁰ Hence, consumers are less likely to see the connection between a satirical work and the original, and might consequently mistake a satire for the original or a licensed derivative in the marketplace.¹⁶¹ Furthermore, a satirist, unlike a parodist, is perfectly able to poke fun at society by creating her own original expression or by using works that are in the public domain.¹⁶²

This argument justifying the Court's distinction between parody and satire is flawed, however, and it raises rather serious First Amendment concerns. As Michael Einhorn points out, uses

156. See *Rogers*, 960 F.2d at 310; *Campbell*, 1993 WL 97381 at *3; *United Features Syndicate*, 871 F.Supp. at 383-84.

157. *Campbell*, 510 U.S. at 580-81.

158. See *id.* at 588.

159. See *id.*

160. See *id.* at 581.

161. See *id.*

162. William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumption, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 714 (1993) ("If the defendant is commenting on something that has nothing to do with the plaintiff's work, he has no need to use the plaintiff's work to make that comment. He can equally well create his own expression, or use material in the public domain."). Patry and Perlmutter's article is cited approvingly in the *Campbell* decision. See *Campbell*, 510 U.S. at 578.

for the purposes of social criticism fulfill First Amendment values at least as much, if not more than, direct criticism of a particular individual or work, and are just as likely to be refused licensing by the original copyright holder:

From an economic perspective, a distinction in licensing procedures regarding parody and satire can be justified only if there is a market failure inherent in the licensing of one but not the other. The distinction between the two here can seem contrived. The comedic criticisms of satire and parody would seem equally transformative and usurping of demand for the original. Regarding the difficulty of obtaining a license, the chances for obtaining a purely voluntary license for disseminating either a parody or a number of satires—particularly involving political content or cultural criticism—may be equally slim. As a general matter, it is also questionable to contend that satirists denied access to one work may always find a suitable substitute among others. The gains to the general public from satire, if anything, seem greater than in parody. There are profound benefits to be had when artists and writers can make use of recognized artifacts and icons to ridicule or criticize political institutions, cultural values, or media presentations. From an economic perspective, these gains from social or political criticism are public benefits that cannot be appropriated in two-party exchange and cannot be readily priced. To widen opportunities for political expression and facilitate cultural exchange, it would be beneficial to facilitate many of these satiric uses, which implicate critical dimensions that are no part of a directed parody. It is difficult to understand how parodies that directly ridicule individual works would be of greater social importance.¹⁶³

In addition, the line between satire and parody is substantially blurred. The Supreme Court even admits this much in *Campbell*, stating that “parody often shades into satire when society is lampooned through its creative artifacts . . . [and] a work may contain both parodic and nonparodic elements.”¹⁶⁴ A gray area of this magnitude creates an intolerable degree of legal uncertainty. It exacerbates copyright’s chilling effect on speech by leaving

163. Michael A. Einhorn, *Miss Scarlett’s License Done Gone!: Parody, Satire, and Markets*, 20 CARDOZO ARTS & ENT. L.J. 589, 603 (2002).

164. *Campbell*, 510 U.S. at 581.

speakers—not to mention their attorneys—with little guidance as to whether a court will consider their work a satire or a parody. Such distinctions are hopelessly murky and wholly unnecessary. Judges should not have to call upon their artistic insights to categorize works into particular genres in order to make fair use determinations.

If First Amendment values cannot overcome content owners' financial concerns in order to protect social critics making use of copyrighted material, the ability of artists and social commentators to create relevant and effective satires of modern-day society will continue to diminish. Today, as mentioned herein, the mass media dominates our culture, and most of the products of mass media are subject to copyright protection.¹⁶⁵ Artists who wish to comment on society, therefore, find themselves faced with a dwindling "aesthetic vocabulary" of raw materials with which to work:

With advancing technology . . . it has become both possible and profitable to saturate entire populations with images. As a result, privately owned images have become ubiquitous. In Sherrie Levine's words, "[t]he world is

165. In addition to material subject to copyright protection, there are vast quantities of names, slogans, symbols, sounds, icons, and designs that are subject to trademark protection. Trademark infringement and dilution litigation has been used against speakers in much the same manner as copyright infringement. The outcomes have varied by circuit. See, e.g., *Dallas Cowboys Cheerleaders v. Pussycat Cinema, Ltd.*, 467 F. Supp. 366, 376 (S.D.N.Y.), *aff'd*, 604 F.2d 200 (2d Cir. 1979) (upholding an injunction against the use of a promotional poster for the adult film "Debbie Does Dallas," which featured porn actress Bambi Woods donning a cheerleading uniform that resembled those worn by the Dallas Cowboys cheerleaders); *Mutual of Omaha Insurance Co. v. Novak*, 836 F.2d 397, 403 (8th Cir. 1987) (finding trademark infringement where defendant sold caps and T-shirts featuring a decayed Indian head and the slogans "Mutant of Omaha" and "Nuclear Holocaust Insurance" as a form of political protest of Mutual of Omaha's involvement in nuclear proliferation); *Anheuser-Busch, Inc. v. Balducci Publications et al.*, 28 F.3d 769 (8th Cir. 1994), *cert. denied*, 513 U.S. 1112 (1995) (holding that "Michelob Oily" parody of Anheuser-Busch logo in 1989 issue of *Snicker* magazine was infringing). But see *L.L. Bean Inc. v. Drake Publishers Inc.*, 811 F.2d 26 (1st Cir.), *appeal dismissed*, 483 U.S. 1013 (1987) (holding that High Society magazine's erotic parody of L.L. Bean clothing catalogues, entitled "L.L. Bean's Back-to-School-Sex-Catalog," was not infringing); *Jordache Enters., Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482 (10th Cir. 1987) (ruling that defendant's use of a pig's head logo and "Lardasche" mark on jeans did not infringe upon Jordasche's trademark); *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161 (C.D. Cal. 1998) (holding defendant entitled to summary judgment because his "Bally's Sucks" web site did not infringe Bally's mark). For a recent, shining example of what an entirely meritless trademark infringement and dilution case looks like, see *Fox News v. Penguin Group and Al Franken*, as discussed in *Fox Sues Al Franken*, N.Y. TIMES, Aug. 12, 2003, at B1.

filled to suffocating. Man has placed his token on every stone. Every work, every image is leased and mortgaged.’” Thus, artists are deprived of their vocabulary, their source materials, and ultimately, the basic elements of their expression.¹⁶⁶

A biting satire exposing the folly of today’s hyper-commercialized culture and vapid consumerism, for example, might not be especially poignant without at least some use of copyrighted materials. Works in today’s public domain seem like fairly impotent substitutes for modern, copyrighted works because corporate copyrights now last ninety-five years from the date of publication or 120 years from the date of creation, whichever comes first, and individual copyrights last the life of the author plus seventy years.¹⁶⁷ It is therefore laughable to suggest that materials created at the turn of the twentieth century can provide any satiric applicability to today’s society, or that materials copyrighted today will carry any significant satiric worth at the turn of the twenty-second century. Without First Amendment protection for transformative, satiric uses of copyrighted material, artists who attempt to hold a mirror up to society will be stuck with little more than anachronisms and irrelevancies.

When an artist does hold a mirror up to society, reflecting back its images and icons in a critical light, the creators and owners of those images and icons are naturally going to be upset. In these instances, use of the work is just as unlikely to be licensed as a use that lampoons the copyrighted work itself directly. Excluding satire from fair use while protecting parody simply leaves the door wide open for copyright holders to engage in purely retaliatory, rent-seeking litigation. Returning to the case of Koons, for example, it is difficult to believe that the plaintiffs were actually concerned about their market for derivative works when they brought their lawsuits. More likely, they felt insulted that Koons was singling their works out as part and parcel of the banality of popular culture.¹⁶⁸ There can be little doubt that patrons of Koons’s work

166. See Schaumann, *supra* note 81, at 252 (internal citations omitted).

167. 17 U.S.C.A. § 302(c) (2003). Of course, the Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 1998 U.S.C.C.A.N. 112 Stat. 2827, has helped tremendously in exacerbating this state of affairs.

168. In all fairness, however, this was likely coupled with the fact that his works were selling for six figures. All the same, neither of these facts should make a difference in the analysis when Koons’s works were not actually substituting for the originals in the marketplace.

shared in his disgust with the insipidity of modern popular culture and would not have had any interest in purchasing an approved sculpture either made or licensed by the plaintiffs.¹⁶⁹ Likewise, fans of the plaintiffs' works would not find Koons's sculptures an acceptable substitute for or attractive derivative of the originals due to the derogatory light in which Koons cast them. Therefore, it should go without saying that the plaintiffs would have flatly refused to license the use of their works to Koons, once alerted to his plans to incorporate them in a derisive art exhibit entitled, "Banality Show."¹⁷⁰ Koons is simply one of numerous authors who have been successfully sued because the copyright holders did not want their productions depicted in an unflattering light.¹⁷¹

The First Amendment concerns here are obvious and the implications are grave. The purpose of the Speech Clause is to prevent the government from tampering with an individual's right to make her own choices regarding how she expresses her own unique values. Allowing content owners to invoke the Copyright Act and the powers of the federal court system to suppress uses that

169. As Professor Niels Schaumann aptly puts it:

Suppose the plaintiff in *Rogers v. Koons* claimed harm to the market that would have arisen had he decided to make his own sculptures based on his postcard. Does anyone suppose that the art world would have treated the plaintiff's sculptures as equivalent to those of Koons? Certainly not; at least one feature making Koons's work desirable is that it is by Koons. Even when the copying work is virtually identical to the copied work, the art market is well equipped to distinguish between them. In cases where the copying and copied works are not identical, distinguishing between the works is even easier (and is even less likely to damage copyright's economic incentive to create). The art world is used to being faced with two works that appear identical; it does not treat such works as interchangeable.

Schaumann, *supra* note 81, at 277-78.

170. See *Rogers v. Koons*, 960 F.2d 301, 304 (2d Cir. 1992).

171. Koons's work is probably the most extreme form of copying. However, copying which comes more within the gray area between satire and parody has routinely been ruled an unfair use. See, e.g., *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978) (rejecting fair use for comic portrayal of Disney characters engaging in such anti-Disney activities as promiscuity and drug use), *cert. denied*, 439 U.S. 1132 (1979); *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997), *cert. dismissed*, 521 U.S. 1146 (1997) (upholding an injunction of a satirical book about the O.J. Simpson trial written in Dr. Seuss's poetic style); *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981) (upholding injunction on "Cunnilingus Champion of Company C" musical spoof on "Boogie Woogie Bugle Boy"); *Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. 1397, 1398 (S.D.N.Y. 1975) (male porn stars wearing Mickey Mouse ears in adult film while Mickey Mouse Club theme song played in the background held to be infringing).

are unflattering to their works rails against this most fundamental First Amendment liberty—especially when done under the pretext of protecting supposed potential markets for derivative works. As Professor Baker explains:

[C]ulturally challenging transformations . . . are precisely what the First Amendment most clearly should protect. (Properly interpreted, the Copyright Clause itself may not have authorized such legislative limitations on these uses.) The normative principle is that authors should have the right to contribute to, not exercise power over, cultural discourse and change

[T]he First Amendment should especially protect dissident or norm-challenging uses of copyrighted materials. This consideration provides the constitutionally required reason for an expansive reading of the privilege to engage in transformative uses. The privilege should be read to prevent any stifling of diverse, especially dissenting or non-mainstream, expression. These uses are also precisely the ones for which many copyright holders, even for a payment, are least likely to give consent. Thus, both the rationale for and the need for a privilege to ignore the author's copyright claim exists here at a heightened level.¹⁷²

Although it might not necessarily aim its ridicule directly at the work being copied, ordinary satire can be substantially transformative in nature. Koons's work, for example, is transformative in the sense that it recasts the copyrighted works in an entirely new light, regardless of the fact that the original images are copied verbatim. The images are presented in a manner that reveals them to be, in the eyes of both Koons and his admirers, expressions of an empty and vapid popular culture.

Social commentary of Koons's vein is easily distinguishable from the mindless manufacture of freeloading knock-offs. For example, if an author wished to satirize some aspect of society and did so by copying another author's satire that made a similar point, a clear case of copyright infringement would be afoot. In this situation, the two authors would share a common audience, and thus a common market. The copying author's work would have no transformative value because it would shed no new, critical light on

172. C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 941-42 (2002).

the original. Hence, the original author likely would be happy to negotiate a license for such a use because the resulting imitation would entail a form of flattery. Works of social criticism such as Koons's, by contrast, set their copied articles squarely within the universe of cultural folly held up to ridicule. By placing such an unwarranted emphasis on a blurred differentiation between parody and satire, the *Campbell* Court overlooked the transformative possibilities existing in uses for social commentary. Because the fair use defense, as currently applied, fails to protect certain transformative yet non-parodic uses, it is insufficient as a First Amendment accommodation.

V. CONCLUSION

It is clear that the "definitional balance," a principle that courts continue to exhume every time a First Amendment contention is raised against the backdrop of a competing copyright interest, succeeds only in obscuring the increasingly unstable relationship between copyright and the First Amendment. This article has set out to debunk the proposition that the idea/expression dichotomy and fair use provide a properly calibrated balance between First Amendment liberties and the goals of the Copyright Act. In doing so, this article has shown that there are circumstances, un contemplated under the definitional balance, in which courts should allow First Amendment values to overcome the economic interests of copyright holders.

An author should not be allowed to use the weight of the copyright system as a means of retaliation or suppression. First Amendment principles, if they mean anything, should be read to allow authors to use copyrighted works not only for certain news and press-related objectives as Nimmer suggests, but also for purposes of social criticism when there is little or no actual danger that the new work will usurp the original in the marketplace. The touchstone for identifying such uses should lie not in differentiating parody from satire, but in determining whether the new work is transformative in the sense that it recasts the original in a critical or unapproving light, one whereby the copyright holder would likely be unwilling, at any price, to grant a license. This would relieve judges of the need to enter the quagmire of parsing artistic genres while at the same time providing more legal predictability by removing judicial reliance on such hazy distinctions.

The best chance of facilitating such changes in the courts now probably rests with attempts to strengthen and expand the fair use doctrine. Prior to the *Eldred* case, some commentators had suggested that copyright be subjected to heightened First Amendment scrutiny in cases dealing with free speech issues.¹⁷³ The petitioners in the *Eldred* case, however, argued the same,¹⁷⁴ and the Court responded in no uncertain terms: “We reject Petitioner’s plea for imposition of uncommonly strict scrutiny on a copyright scheme that incorporates its own speech-protective purposes and safeguards.”¹⁷⁵ It now appears that any judicial entertainment of the use of heightened scrutiny is, at least for a while, out of the question. Nevertheless, well-crafted fair use arguments stressing First Amendment values could provide possible inroads to increased judicial recognition of essential free speech liberties in the face of copyright infringement claims.¹⁷⁶

Copyright is intended to carry out the noble purpose of ensuring that authors are capable of making a living from the objects of their creativity. It serves the indispensable function of helping to encourage the production of works of art, music, literature, film, and scholarship, all of which enrich our lives considerably. Artists, writers, musicians, and other authors may understandably rejoice in various expansions of their rights under the copyright system, but they must also remain wary of the ramifications an expanded copyright regime can hold for their equally cherished freedom of speech. Since most authors loathe censorship as much as infringement, they should take note of the fact that the copyright system itself can be used as an instrument of censorship. When copyright laws can be invoked for the purpose of suppressing speech that offends a copyright holder, the objectives of both copyright and the First Amendment suffer.

173. See, e.g. *Netanel*, *supra* note 152, at 86 (“Heightened scrutiny should be applied both to discern whether Copyright Act provisions burden more speech than essential . . .”).

174. Brief for Petitioners at 37-39, *Eldred v. Ashcroft*, 534 U.S. 1126 (2002).

175. *Eldred v. Ashcroft*, 534 U.S. 186, 218-19 (2003).

176. Legislative intervention to strengthen fair use under section 107 of the 1976 Copyright Act or to create new forms of compulsory licensing is also an option, but given the current trend of catering to rent-seeking content owners in Congress, such intervention seems highly improbable.