



2000

Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation

Rebecca Tushnet

Georgetown University Law Center, rlt26@law.georgetown.edu

This paper can be downloaded free of charge from:
<https://scholarship.law.georgetown.edu/facpub/278>

42 B.C. L. Rev. 1-79 (2000)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>



Part of the [Constitutional Law Commons](#), and the [Intellectual Property Law Commons](#)

GEORGETOWN LAW

Faculty Publications



February 2010

Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti- Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation

42 B. C. L. Rev. 1-79 (2000)

Rebecca Tushnet

Professor of Law

Georgetown University Law Center

rlt26@law.georgetown.edu

This paper can be downloaded without charge from:
Scholarly Commons: <http://scholarship.law.georgetown.edu/facpub/278/>

Posted with permission of the author

COPYRIGHT AS A MODEL FOR FREE SPEECH LAW: WHAT COPYRIGHT HAS IN COMMON WITH ANTI-PORNOGRAPHY LAWS, CAMPAIGN FINANCE REFORM, AND TELECOMMUNICATIONS REGULATION

REBECCA TUSHNET*

Abstract: Copyright raises real and troubling free speech issues, and standard responses to those concerns are inadequate. This Article aims to put copyright in the context of other free speech doctrine. Acknowledging the link between copyright and free speech can help determine the proper contours of a copyright regime that both allows and limits property rights in expression, skewing the content of speech toward change.

INTRODUCTION

What is “protected expression”? Suppose you write an article criticizing a public official. If the government cannot prosecute you for the article or award damages in a libel case brought by the official, your speech is protected. On the other hand, if the government can give you an injunction or award damages against someone who copies the article, your speech is protected. So your speech can be protected *against* the government, or *by* the government. These two common meanings of protected expression are each found in different areas of the law. Speech protected against the government is First Amendment speech, and speech protected by the government is intellectual property. The First Amendment declares that speech is free, while copyright means that people may be made to pay for speech. So, which is it?

* Associate, Debevoise & Plimpton. I owe Mark Tushnet a great debt for his comments and his self-restraint, and Jack Balkin for his assistance at every stage. Lawrence Lessig, Richard Primus, Kim Roosevelt, Zachary Schrag, and Tim Wu provided many helpful comments. As I have doubts about the concept of independent authorship, responsibility for any remaining errors is no more mine than responsibility for any insights. Comments are welcome at rebecca@tushnet.com.

The conventional answer is both.¹ The First Amendment gets government off speakers' backs, while the Copyright Act enables speakers to make money from speaking and thus encourages them to enter the private marketplace of ideas. But this apparently simple relationship hides some profound tensions. When one speaker wishes to use another's words, or even words that, taken as a whole, are "substantially similar" to someone else's words, the government may tell her that she cannot. If she has printed books with those words in them, her books may be seized and destroyed by U.S. marshals, or she may be enjoined from trying to sell them. When such situations arise, why does free speech apparently give way?²

This Article aims to put copyright in a context of other free speech doctrine. Part I considers how copyright raises real and troubling free speech issues and why the standard responses to those concerns are inadequate.³ The conventional responses do not defend copyright law because it promotes *speech*, but rather analyze copyright as if it furthers a generalized legitimate government goal, one like physical safety. From that perspective, the government is required to pursue its legitimate interest without using means that impermissibly trench upon free speech. The main aspects of copyright that prevent it from impermissibly restricting free speech, in this view, are the idea/expression dichotomy and the principle of fair use. This Part argues that neither principle adequately addresses the free speech concerns generally thought relevant in other areas of free speech law. Part I also sets forth potentially less restrictive alternatives to copyright as we know it and rejects the argument that the First Amendment is simply a property regime like copyright. Thus, Part I provides a cri-

¹ See, e.g., Brief of Amicus Curiae Association of American Publishers, Inc., Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) (No. 83-1632) ("[I]f the First Amendment is the moral force of publishing, copyright is its commercial foundation. . . . [C]opyright and the First Amendment are essentially complementary."); Harvey S. Perlman & Laurens H. Rhinelander, Williams & Wilkins Co. v. United States: *Photocopying, Copyright, and the Judicial Process*, 1975 SUP. CT. REV. 355, 404 ("While the First Amendment facilitates the flow of information by preventing government intervention, the copyright system encourages the development of information and its dissemination by providing incentives for publication. The conflict, if any, is in method not purpose."); Michael D. Britten, Note, *Constitutional Fair Use*, 20 WM. & MARY L. REV. 85, 92 (1978) ("[C]opyright seeks by actively encouraging what the first amendment seeks by strictly discouraging.").

² Brief of Gannett Co. et al., Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) (No. 83-1632) ("Read literally, the First Amendment would invalidate the Copyright Act"); see also Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 989 (1970); 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, 393-94 (1989).

³ See *infra* notes 8-126 and accompanying text.

tique of copyright from the perspective of standard First Amendment theory, but its aim is not to demonstrate that copyright is or might be unconstitutional. Rather, my goal is to make possible a rethinking of standard First Amendment theory in light of copyright's constitutionality.

Part II sets forth the free speech justification for copyright.⁴ Copyright is "the engine of free expression,"⁵ providing people with property incentives to speak and disseminate speech. The argument that copyright encourages speech may allow copyright to sweep further than purely speech-suppressing regulations. But copyright is not unique. Part II shows that the free speech issues raised by copyright are related to controversial claims about free speech laws in other contexts, such as hate speech, pornography, and campaign finance, which makes the lack of controversy over copyright law even more of a puzzle. These other arguments, concerning how private parties' speech may suppress others' speech, have not been integrated into prevailing free speech doctrine in the same way as the analytically similar argument about copyright. Properly understood, copyright can become the engine of free expression in a second sense: Not only does it enable free speech, but copyright can drive free speech theory in unexpected but important directions.

If we believe standard First Amendment theory, then we should believe that copyright is unconstitutional because it is designed to suppress some speech to generate other speech, a result the Supreme Court condemned in the campaign finance context. But that would be silly; copyright is constitutional, in large part because it does encourage speech by the people it protects. The problem is with the standard theory: Government is already involved in shaping available speech, and that's a good thing. Our objections to particular government regulations—and there are valid ones—must be to their bias or ineffectiveness, not to the mere fact of government action.

⁴ See *infra* notes 127–214 and accompanying text. This Article will not take up the debate over how well copyright writ large serves to generate more speech. That debate has been extensively addressed elsewhere. See, e.g., Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970); Robert M. Hurt & Robert N. Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. PAPERS & PROC. 421 (1966); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989). Instead, I will assume that, in general, people will do more of what they can get paid for. That this may not be true at the margin or in certain special cases will affect the boundaries of an ideal copyright regime, not the overall justification for the existence of copyright.

⁵ *Harper & Row Publishers, Inc., v. Nation Enters.*, 471 U.S. 539, 558 (1985).

The Supreme Court recognized the government's fundamental involvement with creating the conditions for speech in the recent *Turner Broadcasting* cases, which upheld a law requiring cable operators to carry local broadcast signals on some of their channels.⁶ The *Turner* cases offer a new way to evaluate government speech restrictions that are designed to promote certain kinds of speech. By requiring substantial evidence in support of a legislative conclusion that regulation will better promote speech than inaction, the Court is attempting to balance issues of institutional competence with fears that speech will be suppressed. The *Turner* analysis is different from most First Amendment tests because it explicitly concerns itself with the possibility that some speech will disappear if the state regulates, while other speech will disappear in the absence of regulation.

Consistent with *Turner*, free speech doctrine should acknowledge that the principles supporting copyright are applicable to other areas of the law. Otherwise, copyright will remain a free speech anomaly, an area of the law with a fully articulated speech-based justification that nonetheless contradicts the rest of accepted doctrine. We should not rest content with a copyright founded on special pleading.

Part III briefly applies the theory elaborated in the earlier parts to a few aspects of copyright.⁷ Essentially, we should recognize that copyright's limits are as important as the rights it grants to property owners in keeping "the engine of free expression" running properly. Acknowledging the link between copyright and free speech can help us determine the proper contours of a copyright regime that both allows and limits property rights in expression, skewing the content of speech toward change.

I. THE FIRST AMENDMENT ARGUMENT AGAINST COPYRIGHT

Copyright gives the government authority to seize books and enjoin their sale, award damages against booksellers, or even send them to jail. Following preliminary *ex parte* proceedings requiring only a modest showing, federal marshals may seize works accused of infringement and the machines used to reproduce those works.⁸ The

⁶ See *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) [hereinafter *Turner II*]; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) [hereinafter *Turner I*].

⁷ See *infra* notes 215-249 and accompanying text.

⁸ See 17 U.S.C. § 503(a) (1994) ("At any time while an action under this title is pending, the court may order the impounding, on such terms as it may deem reasonable, of all copies or phonorecords claimed to have been made or used in violation of the copyright

proceedings may be sealed so that the defendants will not get word of what is being alleged before the marshals burst in.⁹ If a jury finds that the accused works are infringing by a preponderance of the evidence, they may be destroyed.¹⁰ These steps in the process of suppressing copyright infringement are considered so routine and uninteresting that opinions justifying them are rarely even published.¹¹ If the justification were anything other than copyright, these sweeping powers would be seen as a gaping hole at the heart of free speech rights.

In standard First Amendment scholarship, claims that speech belongs to no one and that willing listeners have a right to hear anything they would like to hear are common.¹² The Supreme Court has held that potential audiences are generally not required to incur extra costs to get speech that someone wants to supply them.¹³ This holding

owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.").

⁹See, e.g., *Columbia Pictures Indus., Inc. v. Jasso*, 927 F. Supp. 1075 (N.D. Ill. 1996); *Century Home Entm't, Inc. v. Laser Beat, Inc.*, 859 F. Supp. 636 (E.D.N.Y. 1994).

¹⁰See 17 U.S.C. § 503(b) (1994).

¹¹See, e.g., *U2 Home Entm't, Inc. v. Sang Kim*, No. 98-CV-4159, 1998 U.S. Dist. LEXIS 17683 (E.D. Pa. Nov. 4, 1998); *Basquiat v. Baghoomian*, No. 90-CIV-3853 (LJF), 1992 U.S. Dist. LEXIS 7622 (S.D.N.Y. May 22, 1992) (concerning books made by collecting a successful artist's images); *D.C. Comics, Inc. v. "John Doe"* Nos. 1-25, No. 89-1669, 1989 U.S. Dist. LEXIS 7398 (D.D.C. June 26, 1989) (granting blanket permission to search for and seize allegedly infringing materials from street vendors in the District of Columbia); *Worlds of Wonder, Inc. v. Vector Intercontinental, Inc.*, No. C86-2671, 1986 U.S. Dist. LEXIS 15879 (N.D. Ohio Dec. 30, 1986); cf. Richard Harrington, *Drawing a New Crowd: Comics for the Rock-and-Roll Generation*, WASH. POST, Oct. 13, 1991, at G1 (discussing comic books about the rock groups Bon Jovi and Motley Crue that were destroyed as part of a settlement in an infringement suit).

¹²See, e.g., Gary Goodpaster, *Equality and Free Speech: The Case Against Substantive Equality*, 82 IOWA L. REV. 645, 673 (1997) (quoting CLAUDE LEFORT, *DEMOCRACY AND POLITICAL THEORY* 33 (David Macey trans., 1988)).

¹³The Court stated that:

We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is. Nor have we recognized any such limitation on the independent right of the listener to receive the information sought to be communicated.

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 757 n.15 (1976); see also *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (right to information on public events such as trials); *Linmark Assoc. v. Township of Willingboro*, 431 U.S. 85, 92 (1977) (right to receive commercial speech); *Young v. American Mini Theatre*, 427 U.S. 50, 77 (1976) ("The central First Amendment concern remains the need to maintain free access to the public to the expression."); *Kleindienst v. Mandel*, 408 U.S. 753, 760 (1972) (discussing the right to "receive information and ideas"); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("[T]he people as a whole retain . . . their collective right to have the medium function consistently with the ends and purposes of

should make copying a First Amendment activity, as a copier may offer an alternative source of information that the audience wants and can obtain more easily than by negotiating with the copyright owner.¹⁴

Yet courts easily reject First Amendment claims in copyright cases.¹⁵ Free speech belongs to no one, but copyrighted speech belongs to someone. Robert Denicola and Melville Nimmer have undertaken extensive defenses of copyright against First Amendment challenges; their work laid the foundations for any subsequent inquiry.¹⁶ They both recognize minor First Amendment limits on copyright in highly important news material, but in general they find that copyright itself provides the necessary limits to address any concerns about public access or free speech rights. Two internal limits have been critical to their thinking, and to all who followed: the idea/expression dichotomy and fair use.¹⁷

the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (free speech includes the right to speak, the right to distribute, and the right to receive speech).

¹⁴ See L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 3 (1987); Harry N. Rosenfield, *The Constitutional Dimensions of Fair Use in Copyright Law*, 50 NOTRE DAME L. REV. 790, 796–98 (1975); Lionel S. Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. (ASCAP) 43, 66 (1971).

¹⁵ See, e.g., *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978) (“[D]efendant’s [First Amendment] claim can be dismissed without a lengthy discussion.”); *Schnapper v. Foley*, 471 F. Supp. 426, 428 (D.D.C. 1979), *aff’d*, 667 F.2d 102 (D.C. Cir. 1981); *McGraw-Hill, Inc. v. Worth Publishers, Inc.*, 335 F. Supp. 415, 422 (S.D.N.Y. 1971). Most commentators react similarly. See, e.g., *NII Copyright Protection Act of 1995: Joint Hearing on H.R. 2441 and S. 1284 Before the Subcomm. on Courts and Intellectual Property of the House Judiciary Comm. and the Senate Judiciary Comm.*, 104th Cong. (1995) (testimony of Bruce Lehman, Commissioner of Patents) (“The First Amendment has always provided a completely different standard with regard to liability for actions that constitute speech as compared to actions that constitute copyright infringement. They’re really just apples and oranges. . . . [I]t does a disservice to both areas of law . . . to analogize from one to the other.”). Although Professor Nimmer’s important treatise on freedom of speech addresses copyright, see MELVILLE B. NIMMER, *NIMMER ON FREEDOM OF SPEECH* §§ 2–55 to 2–84 (student ed. 1984) [hereinafter NIMMER, *FREEDOM OF SPEECH*], the best-selling constitutional law casebook in the country devotes over 400 of its 1600-odd pages to freedom of expression, with only one sentence and three citations about copyright. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1289 (2d ed. 1991).

¹⁶ See Robert Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283, 289–99 (1979); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1190 (1970) [hereinafter Nimmer, *Copyright*].

¹⁷ While both Denicola and Nimmer were aware of copyright’s speech-generating features, they only used those features to prop up the defense of idea/expression and fair use as central speech-protective limits. Others examining the problem have similarly focused on idea/expression and fair use. See, e.g., *Los Angeles News Serv. v. Tullo*, 973 F.2d 791,

This Part addresses the claim that copyright's internal configuration is sufficient to avoid a First Amendment challenge. While Part II takes up the First Amendment-based argument for copyright, here I argue that non-speech arguments are insufficient on their own to defend copyright against free speech criticisms. In Section I.A., I show that the idea/expression dichotomy and the fair use defense do not eliminate free speech problems; if anything, they make copyright seem even less supportable, a confusing body of law likely to deter speakers from speech that might potentially be thought to infringe. Section I.B. suggests some less restrictive alternatives to copyright as we know it. The existence of such alternatives makes copyright seem like an excessive, and thus unconstitutional, response to the problem it was designed to solve. Finally, Section I.C. explains that recent property-based visions of the First Amendment cannot solve the problem by folding free speech law into a variant of an intellectual property regime.

A. Standard Responses to First Amendment Claims Against Copyright

1. The Idea/Expression Dichotomy

The idea/expression dichotomy, now embodied in § 102(b) of the Copyright Act, holds that only expression can be copyrighted, and not the idea, process, or other more general principle that underlies the particular expression.¹⁸ Because anyone who wishes can use the ideas found in any copyrighted work, there is, it is said, no free speech

795–96 (9th Cir. 1992); Floyd Abrams, *First Amendment and Copyright: The Seventeenth Donald C. Brace Memorial Lecture*, 35 J. COPYRIGHT SOC. 1, 3–4 (1987); Celia Goldwag, *Copyright Infringement and the First Amendment*, 29 COPYRIGHT L. SYMP. (ASCAP) 1, 4 (1983); Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1383 n.189 (1989) [hereinafter Gordon, *An Inquiry into the Merits*]; David E. Shipley, *Conflicts Between Copyright and the First Amendment After Harper & Row, Publishers v. Nation Enterprises*, 1986 BYU L. REV. 983, 998, 1042. Other ways in which the copyright law accommodates free speech concern are occasionally mentioned, but they generally take a back seat to these two primary limits. See, e.g., Brief of Gannett Co., Inc., *supra* note 2 (the exclusion of copyright for facts, the exclusion for works of the U.S. government, and the originality requirement); Stephen Fraser, *The Conflict Between the First Amendment and Copyright Law and Its Impact on the Internet*, 16 CARDOZO ARTS & ENT. L.J. 1, 13 (1998) (facts); Goldstein, *supra* note 2, at 1020–22 (originality); Goldwag, *supra*, at 4–5 (limited duration of copyright and originality); Nimmer, *Copyright*, *supra* note 16, at 1193–96 (limited term).

¹⁸ See 17 U.S.C. § 102(b) (1994) (“In 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, illustrated, or embodied in such work.”).

problem, as the copyright has not taken from the public domain anything of First Amendment value.¹⁹

a. *The First Amendment Value of Expression*

We tend to think of copiers, unlike other speakers, as pirates or lazy people whose speech does not further free speech values. Our image of a copier is not of an actor who recites a playwright's lines or a local politico reciting the party platform, though these people copy too. But, we assume that those people have the right to copy or need no permission to do so, and so we don't examine their merit. We only look at the value of unauthorized copies. While visceral reaction to pirates is natural, it does not sufficiently distinguish a copier—particularly one who is not copying wholesale and for profit—from other disreputable, but protected, speakers. In general, the First Amendment protects even speech which is not original to the speaker;²⁰ and the Supreme Court has stated that it protects individuals' right "not only to advocate their cause but also to select what they believe to be the most effective means to advocate their cause."²¹ "[A]s we know from the example of publishing houses, movie theaters, bookstores and Reader's Digest, communication occurs in selecting which speech to copy and distribute no less than in creating the speech in the first place."²²

Speakers are allowed to choose their preferred modes of expression because altering expression could well change the meaning and the impact of the message. Famously, the Supreme Court protected

¹⁹ See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985); see also *Air Pirates*, 581 F.2d 751; *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977) ("The 'marketplace of ideas' is not limited by copyright because copyright is limited to protection of expression."); *Wainwright Sec. Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977); *Fantasy, Inc. v. Fogerty*, 664 F. Supp. 1345, 1351 (N.D. Cal. 1987); *Reddy Communications, Inc. v. Environmental Action Found.*, 199 U.S.P.Q. (BNA) 630, 634 (D.D.C. 1977); NIMMER, FREEDOM OF SPEECH, *supra* note 15, § 2.05[C], at 2-66 ("It is exposure to ideas, and not to their particular expression, that is vital if self-governing people are to make informed decisions."); Denicola, *supra* note 16, at 290-91; Nimmer, *Copyright*, *supra* note 16, at 1189-93; Pamela Samuelson, *Revisiting Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TUL. L. REV. 836, 881-83 (1983).

²⁰ See Nimmer, *Copyright*, *supra* note 16, at 1181.

²¹ *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

²² *Turner I*, 512 U.S. 622, 675 (1994) (O'Connor, J., concurring and dissenting in part); see also *Hedges v. Wauconda Cmty. United Sch. Dist. No. 118*, 9 F.3d 1295, 1302 (7th Cir. 1993) ("A city may not limit booksellers to vending the works they write themselves; a state may not exclude newspapers printed outside its borders That adopting the expression of others is a form of speech we freely concede.").

Paul Cohen's right to wear a jacket proclaiming "Fuck the Draft" in public.²³ The Court held that the expression can often constitute the idea: "[W]e cannot indulge in the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."²⁴

These words may seem inapplicable to copyright, where generally the words are not suppressed but limited to a particular class of people who pay to use them.²⁵ But, if the owner will only authorize their use in contexts that are favorable to the author, then the state is enabling the owner to ensure that his expression will only have one meaning and will not be available to use in oppositional ways.²⁶ This is

²³ See *Cohen v. California*, 403 U.S. 15, 25–26 (1971); see also *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 458 (Cal. 1979); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 34–36 (arguing that, because persuasion is not fully rational, content and form are not separable in practice). Limits on use of another's expression may even be fundamentally offensive to a speaker's sense of self. When J.D. Salinger's biographer was sued for infringement for quoting Salinger's letters, he was asked why he did not paraphrase the contents with neutral words that did not use Salinger's expression. He replied that he would be ashamed to put his name to such awkward and gutted prose. See *Salinger v. Random House, Inc.*, 811 F.2d 90, 96–97 (2d Cir. 1987).

²⁴ See *Cohen*, 403 U.S. at 26.

²⁵ The idea/expression dichotomy might be a kind of "manner" restriction, like regulations that prohibit broadcasting any noise above a certain level. See, e.g., *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981). In the right of publicity context, the Tenth Circuit recently dealt with a similar claim:

[I]n the context of intellectual property, [the] "no adequate alternative avenues" test does not sufficiently accommodate the public's interest in free expression. Intellectual property, unlike real estate, includes the words, images and sounds that we use to communicate. . . . Restrictions on the words or images that may be used by a speaker, therefore, are quite different than restrictions on the time, place, or manner of speech.

Cardtoons, L.C. v. Major League Baseball Players Ass'n., 95 F.3d 959, 971 (10th Cir. 1996) (citations omitted). The idea/expression distinction fails the standard time, place and manner test, which requires that a regulation be "justified without reference to the content of the regulated speech" and that "ample alternative channels for communication of the information" remain. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Protecting expression from copiers depends on the content of the speech, since non-copied or fairly used expression and facts are all fair game; moreover, wherever a copier can speak, she will not be allowed to use the particular words at issue. But cf. Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1260–70 (1995) [hereinafter Post, *Recuperating First Amendment Doctrine*] (criticizing time, place and manner doctrine for its incoherence and its propensity for authorizing ever-increasing government restrictions on speech).

²⁶ Copyright claims are obviously motivated by disagreement with a defendant's message in some cases. See, e.g., *Religious Tech. Ctr. v. Scott*, 82 F.3d 423 (9th Cir. 1996) (one of a large number of cases brought by Scientology against critics); *United Christian Scientists v. Christian Science Bd. of Dirs.*, 829 F.2d 1152, 1156 n.18 (D.C. Cir. 1987) (discussing at-

troubling because an inability to use the most evocative expression possible diminishes the power of a speaker's message.²⁷ The Supreme Court has recognized that, if the government allows private parties exclusive control over cable systems and then allows them to screen out objectionable speech, the First Amendment may be violated.²⁸ The same argument can be made with respect to exclusive state-backed control over expression. Moreover, a payment requirement may put certain speech beyond the reach of a large group of speakers and listeners, which is in itself troubling.

There are two related points here: First, the idea/expression dichotomy recognizes no value in preserving a "breathing space" for free speech. In other areas, the Supreme Court has announced that we must tolerate a certain amount of valueless, destructive speech, because we want to avoid self-censorship by speakers who fear that juries or judges might find them liable.²⁹ If courts do not err on the side of finding unprotectable ideas instead of protectable expression, they run the risk of suppressing important speech.

Second, the relationship of ideas to expression explains why expression deserves strong First Amendment protection. Even if we are confident in theory that a thesaurus and some thought will produce an alternate way to say almost anything with almost as much grace, courts never actually make this inquiry and it would be hard to imagine them doing so. To decide whether it is possible to express a particular idea in a different way, we have to determine what is idea-ish about the idea and what is its expressive raiment. That is, we would have to decide what *Leaves of Grass* says and how to say it in another way while still communicating its exact idea. There will be nearly as many different answers to this question as there are readers, and that is what makes *Leaves of Grass* so very protectable. Similarly, "It's morn-

tempts by one group of Christian Scientists to use copyright to block the distribution of another group's unorthodox version of Mary Baker Eddy's writings); *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986) (pro-choice author sued anti-choice author for copyright infringement based on a quotation). In *Grundberg v. Upjohn Co.*, 137 F.R.D. 372 (D. Utah 1991), a manufacturer tried to use copyright to protect 90,000 pieces of litigation documents from dissemination by the media in order to prevent public access to the potentially embarrassing contents of those documents.

²⁷See *Int'l Olympic Comm. v. San Francisco Arts & Athletics*, 789 F.2d 1319, 1321 (1986) (Kozinski, J., dissenting).

²⁸See *Denver Area Ed. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 768 (1996).

²⁹See *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (citation omitted) (finding that the First Amendment required an actual malice standard for intentional infliction of emotional distress by a parody in a magazine in order "to give adequate 'breathing space' to the freedoms protected by the First Amendment.").

ing in America" is important for its expressive power in making a political point. The law protects expression (in free speech and copyright) because, in fact, expression is what makes speech worthwhile. Thus, it is incorrect to say that there is no First Amendment value in "expression," as opposed to ideas.

Yet copyright is reconciled to free speech with the claim that expression does not mean all that much to our shared artistic, intellectual, and political lives. The idea/expression dichotomy is troubling because it denigrates the value of expression while still attempting to justify the legal protection of expression as property. We protect expression from copying not because expression is unimportant to the free flow of ideas, as the idea/expression dichotomy suggests, but because it is *so* important that it must be encouraged by state-backed legal protections.³⁰

³⁰ NIMMER, FREEDOM OF SPEECH, *supra* note 15, § 3.01, at 3-6 to -9. The difficulty of denying expression's value has been recognized by defenders of the idea/expression distinction who have felt compelled to make exceptions for special cases. Melville Nimmer identifies limited cases in which "the 'idea' of a work contributes almost nothing to the democratic dialogue, and it is only its expression which is meaningful." Nimmer, *Copyright*, *supra* note 16, at 1197. He suggests that this is obviously true of much graphic art, though copyright should still protect artworks because society generally has little need of free copying of such works. *See id.* In the case of very important pictorial representation of newsworthy events, though, an exception should be made: copyright should not allow an author to control photographs of an event like the My Lai massacre. *See id.* at 1197-98. Unfortunately, what is important enough to qualify for this exception will be highly uncertain, like the rest of the infringement test.

There is also a subtle contradiction between the overall theory of free speech put forth by scholars such as Nimmer and the proposal to make exceptions for expression in really significant cases. For Nimmer, news pictures are more important to a democratic dialogue than verbal reports, no matter how eloquent, because people perceive pictures differently than words. If this is a correct understanding of how humans process information, however, then Nimmer's underlying commitment to rational self-government as the fundamental purpose of the First Amendment becomes more troublesome. If we are creatures who cannot reduce some of our deepest reactions to words, if our politics has to transcend words and look to symbols at crisis points, then we are not really talking about rational, coolly deliberative self-government. A picture is not an argument. If that picture is nonetheless vital to democratic self-governance, then maybe direct, point-by-point political argument is not the central value of speech. And if that is the case, then Nimmer's central distinction between politically important and decorative speech begins to break down:

Some of the most influential forces in our culture do not make an argument or appeal to the intellect: music, visual art, and a great deal of advertising (including political advertising) contribute to the "marketplace of ideas" through sound, imagery, and nonrational appeals to passion and desire. It would be difficult to say that a Madonna concert makes a strictly rational "argument," yet Madonna's "communications" have had at least as great an effect on our culture and political life as most books of analytic philosophy or

b. *Low-Value Speakers*

The argument that piracy is not valuable speech depends on the idea that a particular *speaker* is low-value, regardless of the actual content of the copied speech. The same speech by different (authorized) speakers would deserve the full range of constitutional protection. Speaker-based discrimination is not unknown to First Amendment law. The Supreme Court has, for example, approved a preference for broadcasters over cable operators in certain circumstances.³¹ But speaker preferences usually require the government to demonstrate that it is not discriminating on the basis of content or viewpoint and that it has a good reason for its actions.³² At the least, speaker-based discrimination should put a heavier burden of justification on copy-right.

Even assuming that the use of someone else's words provides a speaker only minor convenience, avoiding copying still burdens her speech somewhat. Generally, the state cannot impose liability on a speaker simply to protect another private party's interests. In *Pacific Gas & Electric Co. v. Public Utilities Commission*, the Supreme Court struck down a requirement that an electric company allow a consumer group to insert material in its billing envelopes.³³ While the electric company had no "right to be free from vigorous debate. . . it [did] have the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents."³⁴ Justice Marshall, concurring, wrote that: "[w]hile the interference with appellant's speech is, concededly, very slight, the State's justification—the subsidization of another speaker chosen by the State—is insufficient to sustain even that minor burden."³⁵ One might distinguish *Pacific Gas & Electric Co.* because the Court faced a

political science. . . . [O]ne cannot restrict First Amendment protection to the rational or "cognitive" without ignoring what works as persuasion in public discourse and vastly expanding the government's power to censor.

David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 125–26 (1994). Nimmer is of course entirely aware of the difficulty of determining what speech is important to self-governance, and he holds that overtly non-political speech serves valuable First Amendment goals. See NIMMER, FREEDOM OF SPEECH, *supra* note 15, § 3.01, at 3–6 to 3–9.

³¹ See *Turner II*, 520 U.S. 180 (1997).

³² I discuss good reasons for copyright below; the point here is that courts don't bother to make such an inquiry in copyright cases.

³³ 475 U.S. 1, 19 (1986).

³⁴ *Id.* at 14 (plurality opinion).

³⁵ *Id.* at 24 (citations and footnote omitted) (Marshall, J., concurring).

situation in which a speaker was forced to subsidize an enemy of that speaker's viewpoint. A copier, arguably, is not an enemy of a speaker's viewpoint. Thus, copyright does not restrict speech in order to enhance the relative voice of another, but restricts speech to let a viewpoint-identical but rights-holding speaker prevail.

This is not what really happens in many significant copyright cases, however. J.D. Salinger's biographer, for example, hardly shared Salinger's viewpoint, and yet was found to have infringed because he quoted Salinger's letters. Similarly, extensive quotations from L. Ron Hubbard's published and unpublished writings justified a finding of infringement in the Second Circuit, though those quotes were used precisely to show what a fraud Mr. Hubbard was. Here we seem to have speakers whose words (including their illustrative quotations from their targets) are being suppressed to enhance the relative voices of their opponents.

Copiers also add expression, as the *Nation* did when it excerpted parts of Gerald Ford's biography as part of a story on what the biography revealed about White House politics.³⁶ The underground cartoonists of *Air Pirates* created twisted caricatures of innocent Disney characters that required time, thought, and creativity,³⁷ as did a commentary on the O.J. Simpson murder trial done in the style of Dr. Seuss.³⁸ All were found to infringe. Particularly when it comes to non-literal copying, courts may be incapable of deciding what constitutes "opposition" to a copyright owner's viewpoint. What was Andy Warhol saying with those Campbell's soup cans, anyway? How many sides does an issue of artistic judgment have?

We could say that the expression taken by a copier is not valuable as speech, even if the rest of what she says is. (Of course, it is valuable as property, which is a bit embarrassing to the theory of value.) Thus, the law states that no pirate can defend against a claim of infringement by showing how much she created herself.³⁹ Yet other areas of free speech law resist such a conclusion. The test for obscenity, for example, requires that a work *as a whole* must lack literary, artistic, po-

³⁶ See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

³⁷ See *Air Pirates*, 581 F.2d at 758.

³⁸ See *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997).

³⁹ See, e.g., *Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir. 1992) ("[N]o copier may defend the act of plagiarism by pointing out how much of the copy he has not pirated."); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936) (L. Hand, J.) ("True, much of the picture owes nothing to the play; . . . but that is entirely immaterial; it is enough that substantial parts were lifted; no plagiarist can excuse the wrong by showing how much of his work he did not pirate.").

litical or scientific value in order that it may constitutionally be suppressed. Accused purveyors of obscenity *can* defend themselves by showing how much they created that was not obscene. In defamation and libel law, inaccurate statements of fact—even those made with knowledge or reckless disregard for their falsity—are constitutionally protected if the overall work is “substantially correct” or lacks malice.⁴⁰ In other words, defendants accused of defamation can prevail by showing how much of their work *was* true or in good faith.

The usual justification for looking at an accused work as a whole is that courts fear a chilling effect. If a fragment of a work could be punished for violating some prohibition, publishers would have a much more difficult time determining what was allowable; they would have to scrutinize each paragraph for possible offense if taken in isolation. Publishers would also be unable to rely on the overall message of the work, even though works are normally consumed in their entirety rather than as disconnected passages.⁴¹ The reported cases in which using small amounts of another’s copyrighted expression in a larger work led to liability are disturbing, because they allow suppression of an entire work for a small taint.⁴²

We could conceive of the low-value speech argument in this way: Free speech law recognizes a certain set of facts about the world as

⁴⁰ See, e.g., *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516–17 (1991) (holding that the law of libel overlooks minor inaccuracies and requires analysis of the challenged article as a whole); *New York Times Co. v. Sullivan*, 376 U.S. 254, 286 (1964) (holding that the fact that a published account was “substantially correct” provided a complete defense to a defamation claim even if parts were wrong); *Moldea v. New York Times Co.*, 22 F.3d 310, 319 (D.C. Cir. 1994) (holding that most of the allegations offered to support a particular conclusion were true so that one false allegation was not actionable even if maliciously made).

⁴¹ See *Saint Surin v. Virgin Islands Daily News, Inc.*, 21 F.3d 1309, 1317 (3d Cir. 1994) (“Words take on meaning in the company of other words. They are gregarious. They take on tone and color from syntax and context. In defamation actions, words should be construed as they would be understood by the average reader.”).

⁴² See, e.g., *Ringgold v. Black Entm’t Television*, 126 F.3d 70 (2d Cir. 1997) (finding that a preliminary injunction might be appropriate against a television show that displayed portions of a copyrighted poster in the background for 26 seconds total); *Woods v. Universal City Studios, Inc.*, 920 F. Supp. 62 (C.D. Cal. 1995) (finding the film *Twelve Monkeys* infringing because it used a copyrighted image of a chair); Aileen Fajardo, *Holy Case of Copyright Infringement, Batman!*, 4 UCLA ENT. L. REV. 263 (1997) (discussing a similar case over use of artwork in the film *Batman*); Francis X. Clines, *Creator of Religious Art Prevails in Devil Film*, N.Y. TIMES, Feb. 14, 1998, at A6 (discussing lawsuit against the film *Devil’s Advocate* for containing an image of a sculpture reminiscent of a sculpture on the National Cathedral). But see *Sandoval v. New Line Cinema Corp.*, 973 F. Supp. 409 (S.D.N.Y. 1997) (finding fair use in a momentary use of copyrighted photographs as background in the film *Seven*).

relevant when deciding whether or not certain speech is regulable; those facts are not contained in speech but determine the level of protection such speech gets. For example, whether a person is a public or a private figure will determine whether negligent misstatements of fact about that person will subject a speaker to liability.⁴³ Whether an exhortation to kill is made in a play or by one mobster to another will determine whether the speaker is guilty of criminal conspiracy. It could be that whether a speaker has paid the requisite fee to a copyright owner is that kind of fact.⁴⁴ Facts are relevant when they prove or disprove the existence in a particular case of the harms against which a speech regulation is directed.⁴⁵ The fact that a person has paid a fee to a copyright owner proves that there is no risk that her speech will negatively affect the incentives of future speakers to create copyrightable expression, or the fact that her appropriation was sufficiently transformative proves that punishing her would not serve the goal of encouraging new speech. But this justification is not based on any inherent feature of expression as opposed to ideas; it is a facet of the speech-based justification for copyright, which I take up in Part II.

c. *Self-Fulfillment and Stability*

First Amendment theorists have suggested that copyright infringement does not serve any value that free speech is generally thought to further. Lack of originality supposedly means that copying does not serve a self-fulfillment function, in which the speaker ex-

⁴³ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

⁴⁴ Once we scrutinize copyright with an eye to its relationship to free speech, Robert Post's claim that there is no one "free speech principle" that justifies the entire set of rights generally called "freedom of speech" seems much more persuasive. See ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 16 (1995); Post, *Recuperating First Amendment Doctrine*, *supra* note 25, at 1271-73. Conventional candidates for such an overarching principle such as "distrust of government regulation," see Geoffrey R. Stone, *Autonomy and Distrust*, 64 U. COLO. L. REV. 1171, 1178 (1993), and "individual self-realization," see Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982), do not seem to fit all that well into an area of law that holds that all speech should be free, as long as it is not owned by someone else.

⁴⁵ Cf. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (plurality opinion) ("When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices . . . the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.").

presses that which is most herself.⁴⁶ Likewise, no one is going to riot over a copyright dispute, and so there is no “safety valve” function involved.⁴⁷

The self-fulfillment and stability arguments are not very persuasive. The self-fulfillment point fails to look closely at the practices that many people actually do find fulfilling: expressing their commitment to certain cultural, political, or social groups in conventional and even stylized ways.⁴⁸ Indeed, the more that a member of a group adheres to that group’s script, the “better” a member she often is. Just as a personal choice protected by the First Amendment can consist of giving allegiance to an extant faith—choosing to be a Catholic or a Democrat rather than developing one’s own religion or political party—autonomy interests are also served when a person chooses to copy what someone else has said, endorsing it as her own.⁴⁹ Speech is not guaranteed only to the well-educated, with thesauruses at their fingertips, or the creative.⁵⁰

⁴⁶ See *United States v. Bodin*, 375 F. Supp. 1265, 1267 (W.D. Okla. 1974) (“We do not find any denial of freedom of expression to the ‘tape pirate’. What he seeks is not the freedom to express himself artistically or otherwise, but the right to make exact and identical copies of sound recordings produced by others.”); NIMMER, *FREEDOM OF SPEECH*, *supra* note 15, § 2.05[C], at 2–67; Goldwag, *supra* note 17, at 7 (“One who appropriates the expression of another is not engaging in self-fulfillment; rather, he is appropriating another’s labor without exerting any effort.”); Sobel, *supra* note 14, at 72; Leonard W. Wang, Note, *The First Amendment Exception to Copyright: A Proposed Test*, 1977 Wis. L. Rev. 1158, 1181.

⁴⁷ See NIMMER, *FREEDOM OF SPEECH*, *supra* note 15, § 2.05[C], at 2–66 to 2–67; Sobel, *supra* note 14, at 73.

⁴⁸ See JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* 27, 39 (1997) (discussing the ways in which using conventionalized expressions can actually increase the power of speech by evoking well-known associations). Professor Nimmer, who makes the argument that copying serves no self-fulfillment interest, writes in that “[T]here may be no audience at all, and yet the self-fulfillment function will sometimes be served by engaging in some forms of speech. An example of this is the satisfaction that may be experienced by singing a song aloud although there is no one to hear.” NIMMER, *FREEDOM OF SPEECH*, *supra* note 15, § 1.03 at 1–50. Though he *might* be imagining that the lone singer has composed her own song, he probably isn’t, and she probably hasn’t. She enjoys her performance nonetheless, just as many people gain fulfillment by retelling stories they have heard before, see JAN HAROLD BRUNVAND, *THE VANISHING HITCHHIKER: AMERICAN URBAN LEGENDS AND THEIR MEANINGS* (1981), or even by making up stories about popular (copyrighted) television and movie characters, see HENRY JENKINS, *TEXTUAL POACHERS: TELEVISION FANS AND PARTICIPATORY CULTURE* (1992); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651 (1997).

⁴⁹ See, e.g., *Stanton by Stanton v. Brunswick Sch. Dep’t*, 577 F. Supp. 1560 (D. Me. 1984) (graphic quote from *Time* describing capital punishment could not be barred from a yearbook simply because it was powerful).

⁵⁰ As noted by the Colorado Supreme Court:

The extension of protection to every speaker, however derivative, can be justified by reference to general democratic theory, which values the contribution of each citizen to the political process.⁵¹ The more people vote the better, even though they may well be choosing between only two options. The truth is that most equal, autonomous, choosing individuals do not have much revelatory to say; they contribute by participating, not by breaking new ideological ground. A person who recites John Stuart Mill chapter and verse is doing at least as much to further political discourse as someone who composes an original ode to liberalism. The Mill disciple will not contribute much to democratic *dialogue* if she is not in a position to offer cogent responses to questions from the people to whom she speaks. Even her ability to marshal quotations, however, is a contribution, since persuasiveness is not the test for protected speech.⁵² Moreover, a speaker's belief that Mill's words are appropriate to a particular political situation is itself a valuable interpretation of Mill, just as a politician who quotes the Bible in debate is taking a particular religious and political stance.⁵³

The ideas expressed by defendant's conduct may seem to some to be juvenile and inarticulate, and perhaps his actions are subject to interpretations other than we have given, but this does not strip his "speech" of constitutional protection. The First Amendment is not the exclusive property of the educated and politically sophisticated segment of our population; it is not limited to ideas capable of precise explication.

Colorado v. Vaughan, 514 P.2d 1318, 1322 (Colo. 1973); *see also* Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 569 (1995) ("[A] narrow, succinctly articulable message is not a condition of constitutional protection."); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (black armband signifying opposition to Vietnam War was protected speech despite lack of specific message); Ingber, *supra* note 23, at 33-34 (discussing how bans on disruptive speech are biased against the poor, the ill-educated, and social outcasts).

⁵¹ See Ingber, *supra* note 23, at 11.

⁵² See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 120 S. Ct. 897, 919 n.3 (2000) (Thomas, J., dissenting) ("We regularly hold that speech is protected when the underlying basis for a position is not given.").

⁵³ I am not claiming that democracy is the only real justification for free speech. My point is that even a Meiklejohnian democracy-promoting theory, which often seems to limit the scope of the First Amendment, does not justify excluding copying from the realm of protected speech activities. Meiklejohn did not think that it was important for everyone to speak, only that everything worth hearing be said. In that sense, his self-government theory is consistent with copyright. But speech worth hearing and copyright owners' speech will only overlap if copyright succeeds in the work I describe in Part II: generating new speech. Self-government is therefore unable to justify copyright without reference to copyright's speech-promoting function. In addition, the controls on dissemination that copyright allows may prevent people from receiving worthwhile speech.

As for the safety valve argument, it is probably true that there has never yet been a riot over the suppression of copyright infringement. But it is equally true that there has yet to be a riot over the suppression of books from school libraries or any number of speech restrictions that nonetheless were deemed impermissible; because of its speculative nature, the safety valve argument is generally a makeweight. And if we widen the criteria for what counts as a safety valve to include speech acts that prevent alienation from government and disrespect for the law,⁵⁴ copyright appears to be clogging a fair number of safety valves. Outrage at the apparent scope of copyright law and a declared intent to violate that law are reasonably prevalent on the Internet,⁵⁵ where people are more likely to publicize their dissatisfaction than when they are denied the ability to copy at Kinko's.⁵⁶ That such outlaws most likely will never be sued probably does not make them respect the broad scope of the law, and the randomness of enforcement may worsen the problem. This is certainly not a reason to reject copyright, but it does suggest that safety valve concerns are not absent in the area.⁵⁷

⁵⁴ Such widening could be defended on the grounds that the traditional articulation of the safety valve justification assumes a particular kind of speaker, namely a relatively powerful (white male) speaker who feels that he has the option of violence if he cannot say what he wants to say. See, e.g., Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 560–61 (1993); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justice of Rules and Standards*, 106 HARV. L. REV. 22, 42 (1992). Other kinds of speakers might react in different, but also damaging, ways, such as sabotage.

⁵⁵ See, e.g., *The Free Music Philosophy (V 1.1)*, at <http://www.ram.org/ramblings/philosophy/fmp.html> (last visited Mar. 31, 1998); Negativland, *Fair Use*, at <http://www.negativland.com/fairuse.html> (last visited Mar. 31, 1998); Negativland, *Stuff*, at <http://www.negativland.com/nmol/negmisc.html> (last visited Mar. 31, 1998) (advertising T-shirt with the logo “Copyright Infringement Is Your Best Entertainment Value”); *The Viral Communications Anti-Copyright Policy*, at <http://www.cyborganic.com/people/vir-comm/projects/anti-copy/> (last visited Mar. 31, 1998).

⁵⁶ See Wendy J. Gordon, *Asymmetric Market Failure and Prisoner's Dilemma in Intellectual Property*, 17 U. DAYTON L. REV. 853, 855 n.13 (1992) (“[L]egal prohibitions against copying pose noneconomic dangers that private modes of fencing-off do not, such as creating in the user population a perception of governmental compulsion, which could give rise to a species of resentment”); cf. Gordon, *An Inquiry into the Merits*, *supra* note 17, at 1345–46 (1989) (describing average consumers’ feeling that justice allows them to copy tapes they own or tape music off the air).

⁵⁷ Another related argument concerns the “checking value” of free speech. Vincent Blasi suggests that “the abuse of official power is an especially serious evil—more serious than the abuse of private power, even by institutions such as large corporations which can affect the lives of millions of people.” Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 538. Maybe we should not be so concerned about private parties’ control over the content of expression for that reason. This argument does

d. *Vagueness and Subjectivity*

Another basic problem with using the idea/expression dichotomy to resolve free speech concerns is that the distinction between an idea and the concrete form it takes is entirely too vague.⁵⁸ Indeed, the most famous and well-received explanation of the dichotomy appeals to its vagueness. Judge Learned Hand wrote:

Upon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the work is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended. Nobody has ever been able to fix that boundary, and nobody ever can.⁵⁹

It is unsurprising, then, that judges often disagree amongst themselves about when it is necessary to use a particular fragment of expression or whether the idea could have been expressed in some other, noncopying way.⁶⁰ Particularly since infringement can be found

not answer the question of what level of scrutiny to give to copyright: Public violence may be worse at its worst than private violence, but private abuse is worth considering. *See* Goldstein, *supra* note 2, at 997 (discussing the private monopoly power of large corporations with control over many copyrights); Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431 (1998) (suggesting that private enforcement may be more dangerous to speech because it may be more pervasive and effective).

⁵⁸ *See* Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321, 398 (1989) ("The idea-expression dichotomy simply does not lend itself to . . . precise and easy application. . . . Even in the definition of what is idea and what is expression, the doctrine probably incorporates just as many perplexing issues as does the first amendment itself."); Yen, *supra* note 2, at 396-97; 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).

⁵⁹ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930); *see also* *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) ("The test for infringement of copyright is of necessity vague. . . . Decisions must therefore inevitably be ad hoc. . . . [O]ne cannot say how far an imitator must depart from an undeviating reproduction to escape infringement.").

⁶⁰ *See, e.g.,* *Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1181 (5th Cir. 1980) (Brown, J., concurring in part and dissenting in part) (disagreeing with the claim that the "idea" of a *TV Guide* cover merged with its "expression" and claiming that the idea could have been represented without reproducing an actual *TV Guide* cover).

even without verbatim copying, in cases of "substantial similarity," it is difficult to distinguish idea from expression.⁶¹ Worsening the uncertainty, the modern idea of a work's "total concept and feel" allows a finding of infringement when the overall mood of two works is essentially the same, despite the fact that there might be no single element that is literally copied.⁶² Neil Netanel suggests that the problem of sorting idea from expression has become even less tractable now that derivative works—works based on other copyrighted works such as a film inspired by a novel—are explicitly protected.⁶³

A vague law that restricts speech is usually thought to be unconstitutional. Confused and uncertain, speakers will "steer far wider of the unlawful zone" than if the boundaries of the forbidden areas were clearly marked.⁶⁴ A standard that freely admits that one case will never provide much guidance for the next case seems about as bad a guide to safe conduct as one could imagine. Faced with a potentially devastating lawsuit, speakers will be well-advised to steer as far as possible away from any arguable copyright infringement, to spare themselves the risks of going before a judge or jury, and they should carefully limit the expression of those for whom they may be vicariously liable.⁶⁵ The potential chilling effect is thus particularly great when speakers, to reach an audience, need the help of publishers or Inter-

⁶¹ See Britten, *supra* note 1, at 78; Leslie A. Kurtz, *Speaking to the Ghost: Idea and Expression in Copyright*, 47 U. MIAMI L. REV. 1221, 1228, 1232–33 (1993).

⁶² See, e.g., *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1167 (9th Cir. 1977); *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970); Yen, *supra* note 2, at 410–11.

⁶³ See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 304 (1996).

⁶⁴ *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (citation omitted); see also *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (footnotes and internal quotes omitted) ("[W]here a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms.").

⁶⁵ See Yen, *supra* note 2, at 425. Yen argues that copyright cases are more dangerous than libel and defamation cases because juries can understand concepts of falsity, malice, and recklessness more easily than they can tease out the difficult line between idea and expression. A copyright jury will be unpredictable, and thus pose a greater threat of chilling speech. See *id.* at 426; see also Volokh & McDonnell, *supra* note 57, at 2439 ("No long-standing social consensus tells us what is 'idea' and what is 'expression'; no intuitively obvious line divides the two categories."). My argument is similar to that made by some recent critics of sexual harassment law. See Kingsley R. Browne, *Workplace Censorship: A Response to Professor Sangree*, 47 RUTGERS L. REV. 579, 581–82 (1995); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1811–12 (1992). I take no position here on Browne and Volokh's criticisms of Title VII; I merely wish to suggest that copyright, which sweeps far more broadly than harassment law and is unlimited in potential subject matter, presents great incentives to limit speech.

net service providers, whose institutional interests make one particular speaker's material not terribly important compared to a threat of legal action for infringement or contributory infringement.⁶⁶

Subjective standards for distinguishing between unlawful appropriation and legitimate citation in copyright cases are also suspect on free speech grounds. The influential Ninth Circuit infringement test requires first an objective evaluation of the similarity of two works, then a subjective evaluation.⁶⁷ Yet the Supreme Court has sharply limited the availability of actions for intentional infliction of emotional distress based on speech, holding that the distinction between outrageous and non-outrageous opinion "has an inherent subjectiveness about it" that would allow defendants to be held liable just because of a jury's "tastes" or preferences.⁶⁸ This concern is consistent with vagueness law's fear of decisions made "on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."⁶⁹ A jury's subjective evaluation of similarity may be very difficult to predict.⁷⁰

One could argue that infringement cases are unlikely to be systematically biased against the opinions of out-groups, whereas judg-

⁶⁶ See, e.g., *The X-Files/Millennium Protest* at <http://database.simplenet.com/x/pro-test.html> (last visited Oct. 30, 2000) (discussing an incident in which the Fox Network sent a threat letter to a university because of a student's web page, and the university cut off the student's internet access); cf. Browne, *supra* note 65; Volokh, *supra* note 65 (arguing that an employer's interests diverge from its employees' such that employers will suppress a broad range of employee speech in order to avoid the risks of a lawsuit). The Digital Millennium Copyright Act limits online providers' liability for users' infringement if they take down the accused material promptly. See 17 U.S.C. § 512 (1994). Though users can allege that their material is not infringing, the new law seems unlikely to change the basic dynamic.

⁶⁷ See *Shaw v. Lindheim*, 919 F.2d 1353 (9th Cir. 1990). This test has evolved from what was earlier labeled an "extrinsic" and an "intrinsic" test of similarity. See *Sid & Marty Krofft Television Prods.*, 562 F.2d at 1157. But it has maintained the two-step process of analytic dissection and then subjective, ordinary-observer comparison of the protected and allegedly infringing works.

⁶⁸ *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988).

⁶⁹ *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1971).

⁷⁰ Though the government does not often enforce the criminal copyright law, thus perhaps reducing the dangers of biased prosecution, the existence of a private right of action creates a large potential for arbitrary litigation, compounding the risks of the subjective test. The case law suggests that one may more readily criticize the Church of Latter-Day Saints using Mormon documents without fear of litigation than one may criticize Scientology using the same methods. See, e.g., *Religious Tech. Ctr.*, 82 F.3d at 423. Similarly, Disney engages in aggressive copyright enforcement, while Paramount is far more lenient for uses of its *Star Trek* characters and situations. Varying private responses, whether based on economic calculations or a concern for corporate "image," further increase the arbitrariness and uncertainty of copyright law as a whole.

ments of outrageousness or defamation are likely to be biased. We could decide that arbitrariness, in the sense of random enforcement that falls like lightning from the sky, is not constitutionally troubling in a speech regulation. But then we have substantially revised the concept of subjectivity, locating its harm in heuristic biases that subtly and routinely lead most people to judge in ways that can be predicted based on who is speaking and who is being attacked.⁷¹

Defined in this way, the problem of systematic bias is still present in copyright. Sympathetic plaintiffs are far more likely to have their rights expansively defined than unattractive plaintiffs. Thus, lovable Mickey Mouse gets lots of protection from a countercultural portrayal when Disney sues a small comic book publisher over its scandalous parody,⁷² while Howard Hughes has to lump it when a legitimate publisher publishes an unfavorable biography.⁷³ Copyright losers are often artists making unconventional art that attempts to mock or satirize society, or social critics using the expression of powerful or popular people for their own purposes. Although this group would not qualify for special protection from non-speech related laws, free speech's concern for protecting the oddball and the unpopular speaker applies here. In any event, the uncertainty and arbitrariness of the idea/expression distinction make it a poor candidate to defend copyright against a First Amendment challenge.

2. Fair Use

The 1976 Copyright Act codified previous judicial doctrine into a statutory exception for fair use of copyrighted materials as a defense to a finding of infringement.⁷⁴ The statute suggests four factors for deciding fair use claims: the nature of the copyrighted work; the purpose and character of the use, including whether it is commercial or noncommercial; the amount and substantiality of the use in relation to the copyrighted work as a whole; and the effect of the use on the market for the copyrighted work. Though the law allows courts to consider other factors, in practice they usually rely on the enumerated four. Fair use preserves ground for some use of and comment on

⁷¹ The Supreme Court has held that subjective employment practices can be suspect when they appear to cover for systematic biases. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 1000 (1987).

⁷² *See Air Pirates*, 581 F.2d at 758.

⁷³ *See Rosemont Enters, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966).

⁷⁴ *See* 17 U.S.C. § 107 (1994).

copyrighted works, and courts and scholars generally agree that it therefore protects First Amendment interests.⁷⁵

The “nature of the copyrighted work” factor allows courts to give more protection to fanciful works than to factual ones, preserving public access to facts and opinions about the world while fencing off the content of romance novels and police dramas.⁷⁶ As a free speech protector, this factor is particularly well-suited to a Meiklejohnian theory of central political speech and peripheral entertaining speech. The “nature” factor also allows courts to further First Amendment interests in remaining silent by protecting unpublished works from copying without good justification.⁷⁷

The “purpose and character of the use” factor enables courts to give more weight to uses that serve some greater good than uses that are simply made for the copier’s convenience. Educational or news-reporting uses receive more favor than pure entertainment. “Transformative” uses such as parody also get more leeway. In addition, courts also favor noncommercial uses under this factor, on the theory that someone who is not making money from a use is less likely to be a venal thief.⁷⁸ The “amount and substantiality” factor protects trivial and incidental uses from liability. The “effect on the market” factor, in some versions at least, protects uses that do not really hurt the copyright owner, so that speech is not restricted unless the restriction prevents an identifiable harm. All this, copyright’s defenders argue, supports First Amendment interests in the free flow of speech by limiting the scope of copyright.

⁷⁵ See, e.g., *New Era Publ’ns Int’l v. Henry Holt & Co., Inc.*, 873 F.2d 576, 584 (2d Cir. 1989); *Roy Export Co. Establishment v. Columbia Broad. Sys.*, 672 F.2d 1095 (2d Cir. 1982); *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957, 960 (D.N.H. 1978); Denicola, *supra* note 16, at 293–99; Perlman & Rhinelander, *supra* note 1, at 394.

⁷⁶ See, e.g., *Stewart v. Abend*, 495 U.S. 207, 237–38 (1990); cf. Blasi, *supra* note 57, at 553 (arguing that the First Amendment should vigorously protect facts, though “somehow we have come to think of the passionate, often uninformed, soapbox orator as the classic embodiment of our commitment to diversity”).

⁷⁷ See *Harper & Row, Publishers, Inc.*, 471 U.S. at 558.

⁷⁸ On the other hand, preferring noncommercial works arguably does little to promote First Amendment goals, because most widely disseminated works are done for profit even when they also have a news reporting or public debate-enhancing purpose; the *New York Times* does not come for free. See, e.g., *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966). If we accept the basic idea that one can promote speech by harnessing the profit motive to encourage speech production, then an excessive emphasis on the noncommerciality of a use, defined as the absence of profit-seeking, could actually conflict with the proper understanding of the relationship between copyright and the First Amendment. See *infra* notes 226–237 and accompanying text.

a. *Vagueness*

One significant problem with fair use is similar to the problem with the idea/expression dichotomy: It is too vague to provide enough guidance.⁷⁹ Even those who believe that fair use serves First Amendment purposes recognize its "infinite elasticity."⁸⁰ There are four named factors, but the statute suggests that the list is not exclusive, and there is little guidance for how to weigh one against another. After decades of litigation, it is still difficult to tell when and whether one can photocopy copyrighted materials, even for scientific research.⁸¹ Inconsistencies are common in copyright cases, where fact-specific analyses combined with the multifactor fair use test make cases almost impossible to categorize. Because the outcome of any particular case is uncertain, a potential infringer/fair user has to be willing to bear the substantial costs of litigation for a chance to escape liability. This seems quite likely to prompt self-censorship.⁸²

⁷⁹ See William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1692-94 (1988); Jessica Litman, *Reforming Information Law in Copyright's Image*, 22 U. DAYTON L. REV. 587, 612 (1997) [hereinafter, Litman, *Reforming Information Law*]; Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1137 (1990); Lloyd L. Weinreb, *Fair Use*, 4 FORDHAM L. REV. 1291 (1999); Wang, *supra* note 46, at 1176-77.

⁸⁰ See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106-07 (1990).

⁸¹ See, e.g., *Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381 (6th Cir. 1996); *American Geophysical Union v. Texaco*, 37 F.3d 881 (2d Cir. 1994); *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973); *Duffy v. Penguin Books*, 4 F. Supp. 2d 268 (S.D.N.Y. 1998); *Television Digest, Inc. v. United States Tel. Ass'n*, 841 F. Supp. 5 (D.D.C. 1993); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

⁸² See Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEXAS L. REV. 1853, 1867-68 (1991) [hereinafter Coombe, *Objects of Property*]; Litman, *Reforming Information Law*, *supra* note 79, at 612-13.

My favorite piece of evidence that fair use is not carrying its speech-protective weight comes from a 1997 pamphlet distributed by Kinko's. The guide informs the reader that copyrighted materials may not be reproduced by anyone without permission from the copyright owner. Fortunately, Kinko's provides a "Copyright/Trademark Permission Request Form." Assuming the customer can find the copyright owner, Kinko's will fax the form to any United States location for free. The customer is to check all intended uses for the copy, from a list of the following: "Personal," "News Reporting," "Scholarship/Research," "Commercial," "Comment/Criticism," "Teaching," and "Scan into Computer." *Copying Guidelines* (1997) (pamphlet).

This form is a perfectly rational response to uncertainty. The permission form identifies some fair use favorites, such as research and criticism, but only so that the copyright owner can decide whether or not to withhold permission. There is no indication that "Comment/Criticism" might justify copying *without* permission. Now, maybe the government cannot be held responsible for this distortion, though First Amendment libel law thinks so; maybe the well-known fact that the average copy shop ignores what happens at

b. *Fair Use and Content Discrimination*

Control of even one copyright can allow an owner to choke off democratic dialogue, if that copyright is very important for full discussion of a particular issue of public interest. Courts thus sometimes particularize the “purpose of the use” factor of the fair use test: Not just any news reporting or scholarship evokes a public interest test, but *this* report is important enough to justify stretching the boundaries of fair use.⁸³ The public interest test only increases the uncertainty generated by fair use. Apparently, it is in the public interest to find out more about Howard Hughes,⁸⁴ but not about Lenny Bruce⁸⁵ or Rudolph Valentino;⁸⁶ “who shot JFK” but not “who shot J.R.” The public interest test also requires suspect content judgments about the quality or value of the allegedly infringing work.⁸⁷

Even without the public interest subfactor, one might wonder whether fair use is unconstitutional because it discriminates on the basis of content. Fair use favors copying, even pure copying, for educational and news reporting purposes. The Supreme Court, evaluating an anticounterfeiting law that prohibited certain reproductions of images of currency but made exceptions for newsworthiness or educa-

its self-service copiers blunts the force of the pamphlet’s blanket assertions. But if fair use is supposed to serve First Amendment goals, there should be some indication that it actually does so in practice, not just in theory.

⁸³ See, e.g., *Rosemont Enters.*, 366 F.2d at 307; *Berlin v. E.C. Publ'ns*, 329 F.2d 541, 544 (2d Cir. 1964). Paul Goldstein has given particular attention to the risks of copyright monopoly. A large corporation may own a number of interlocking copyrights, and be able to leverage them to exert undue market power. In such a case, he suggests, antimonopoly principles are First Amendment principles. See Goldstein, *supra* note 2, at 987, 1043.

⁸⁴ See *Rosemont Enters.*, 366 F.2d at 303.

⁸⁵ See *Marvin Worth Prods. v. Superior Films Corp.*, 319 F. Supp. 1269 (S.D.N.Y. 1970).

⁸⁶ See *Rohauer v. Killiam Shows, Inc.*, 379 F. Supp. 723 (S.D.N.Y. 1974). As Celia Goldwag points out, “It is not the merits of the court’s assessment of the relative values of Hughes and Valentino but the subjective nature of its calculation that is disturbing.” Goldwag, *supra* note 17, at 19.

⁸⁷ See 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, 1637 (1982). Even analysts who disagree with Gordon’s economic focus sometimes endorse a public interest test that makes quality judgments about challenged works:

Most would agree that the Zapruder film adds more to the democratic dialogue than do the Sunday comics. Likewise, a more limited public interest in cartoon characters or posters of cheerleaders warrants a more limited application of the fair use doctrine, and thus greater hesitancy in limiting the rights of the copyright holder on first amendment grounds.

Stephen S. Zimmerman, *A Regulatory Theory of Copyright: Avoiding a First Amendment Conflict*, 35 EMORY L.J. 163, 197 (1986) (footnotes omitted).

tional value, found that these exceptions were impermissibly content-based.⁸⁸ There seems to be no reason that the exceptions would lose their content-based nature when applied to copyright.

Fair use also favors criticism and parody. Reviewers get leeway, as do users who humorously savage an original. These preferences are justified on the perfectly reasonable grounds that copyright owners have non-profit-based reasons to prevent uses that are critical of the original work.⁸⁹ In essence, fair use contains an analogue to the "right of reply" statute struck down in *Miami Herald Publishing Co. v. Tornillo*.⁹⁰ *Tornillo* invalidated a statute that allowed people who had been criticized in a newspaper a chance to respond on the same editorial pages. Anyone who had not first been criticized would have to pay to take out an ad or convince the editors to carry his or her viewpoint. Like citizens covered by a right of reply statute, fair users have a special privilege to copy a work so long as they are criticizing what came before. They may use another's property—a copyrighted work—without the owner's consent, just as a person criticized by the *Miami Herald* could use its printing press and newsprint without the owner's consent. If they do not disagree with the work, however, their use may trigger an obligation to pay, just like any other consumer/speaker.

Such protection for uses the copyright owner finds particularly objectionable evokes the taint of compelled affirmation, having one's property used to endorse a message with which one resolutely disagrees.⁹¹ It also seems to conflict with the Court's pronouncement in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group* that a speaker's own speech cannot be appropriated by the state as a public accommodation.⁹² The *Hurley* Court held that the organizers of a St. Patrick's Day parade could not be forced by state anti-discrimination law to allow marchers to display signs affirming their nonheterosexual Irishness because that would change the expressive message of the

⁸⁸ See *Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984).

⁸⁹ These reasons may also be profit-based, as criticism can destroy the market for a work even though it is not a substitute for that work. Courts refuse to consider negative press a cognizable harm, just as business lost by a restaurant when a competing restaurant opens up down the block will not be legally cognizable harm.

⁹⁰ 418 U.S. 241 (1974); cf. *Pacific Gas & Elec.*, 475 U.S. at 14 (striking down a regulation that awarded access to utility-company mailing envelopes to critics of the utilities and criticizing the regulation for awarding access "only to those who disagree with appellant's views and are hostile to appellant's interests").

⁹¹ See, e.g., *Pacific Gas & Elec.*, 475 U.S. at 11 (plurality); *Wooley v. Maynard*, 430 U.S. 705 (1977); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

⁹² See 515 U.S. 557, 573 (1995).

parade contrary to the organizers' intent. *Hurley* might be distinguished from fair use because there is only one parade, whereas the existence of a parody does not change the meaning of the original work. But, just as the Court recognized that signs announcing gay and lesbian identities would reflect on the meaning of the rest of the parade,⁹³ the existence of a parody may well lead consumers to reevaluate the meaning of the original.⁹⁴ Moreover, the point of copyright is that it generally gives owners rights in copies, not just in physical originals, so that a parody could fall within the scope of the author's exclusive rights were it not for the content-based fair use exception.

The transformative (including critical or parodic) uses escape court-backed prohibition because otherwise private owners would prohibit expression they disliked. Against a background of generally neutral copyright law, the government's hand appears to come between the speaker and the censor—but only if we accept that censorship can be carried on by private parties with state backing. And this vision of government's role in the speech market, I will show below, is precisely what justifies copyright as a whole, not simply the transformative use preference in fair use law.

B. *Less Restrictive Alternatives*

In general, regulations that restrict speech as such are required to meet fairly stringent tests. Even when a compelling government interest supports the regulation, courts seek to assure that no more speech is suppressed than necessary.⁹⁵ The appropriate inquiry, therefore, is not whether having copyright is important enough to outweigh First Amendment concerns, but whether the particular regime we have is a good way of protecting authors without unnecessarily infringing First Amendment interests.

There is a standard free speech argument that applies here: "more speech" and concerted action as a response to harmful

⁹³ See *id.* ("[T]he communication produced by the private organizers would be shaped by all those . . . who wished to join in with some expressive demonstration of their own.").

⁹⁴ As Fred Schauer writes, he cannot look at Leonardo DaVinci's *Mona Lisa* the same way after having seen the version with a mustache added. See Frederick Schauer, *The Ontology of Censorship*, in *CENSORSHIP AND SILENCING: PRACTICES OF CULTURAL REGULATION* 147, 157 (Robert C. Post ed., 1998) [hereinafter Schauer, *Ontology*].

⁹⁵ See *Police Dep't v. Mosley*, 408 U.S. 92, 101 n.8 (1972); *United States v. O'Brien*, 391 U.S. 367 (1968); *Cox v. Louisiana*, 379 U.S. 559, 562–564 (1965); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940); *Schneider v. State*, 308 U.S. 147, 164 (1939); *De Jonge v. Oregon*, 299 U.S. 353, 364–65 (1937).

speech.⁹⁶ Instead of regulating hate speech, for example, the targeted group should toughen up. Free speech “absolutists” argue that targeted groups should overwhelm their opponents in the marketplace of ideas by offering competing ideas, by educating the public that racism is bad.⁹⁷ Groups can refuse to deal with people whose speech offends them, and lobby others to do the same.

The argument for self-help exists in copyright, though it is not yet recognized as a free speech argument. There are numerous self-help mechanisms available for content providers who want to protect original expression. For example, publishers could use contractual mechanisms to prohibit copying and seek damages against anyone who violated the contract.⁹⁸ They could also attempt to enforce anti-copying norms by structuring the industry to allow authorized publishers lead time or other advantages, and punishing defectors with retributive “strike” editions.⁹⁹ Content providers could deal only with those who accepted their terms of service, which would include anti-copying agreements. Digital watermarking and other copy-protection technologies may allow content providers to defend their intellectual property against quick copying just as a fence around a plot of land hinders easy trespass.¹⁰⁰

This kind of self-help is likely to be significantly more effective than standard “more speech” self-help. Contracts are more persuasive as an inducement to respect copying rights than the aspirational language of equality is as a reason to respect other people. Of course, the

⁹⁶ See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) (holding that public figures do not need the protection of expansive libel law because they have access to the channels of communication to respond to attacks).

⁹⁷ See *Whitney v. California*, 274 U.S. 357, 375–76 (1926) (Brandeis, J., concurring).

⁹⁸ See Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 577 (1998); see also Henry H. Perritt, Jr., *Property and Innovation in the Global Information Infrastructure*, 1996 U. CHI. LEGAL F. 261, 283–85. Landes and Posner point out that the benefits of contractual anticopying provisions will vary greatly depending on how widely the work needs to be distributed to guarantee a return to the publisher and whether the work will be resold or publicly performed. See Landes & Posner, *supra* note 4, at 330. Thus, contractual provisions will not be particularly useful to some kinds of content providers. But the variable strength of contractual copying restrictions would, in a copyright-free world, shift content providers' production to creative works that could be easily protected using contractual and other self-help mechanisms; that the mix of works would change does not necessarily mean that creative expression would disappear or even decrease on the whole.

⁹⁹ See Gordon, *An Inquiry into the Merits*, *supra* note 17, at 1401; cf. Catherine Greenman, *Taking Sides in the Napster War*, N.Y. TIMES, Aug. 31, 2000, at E1 (discussing self-help measure of putting distorted “cuckoo’s egg” music files on free file-sharing services).

¹⁰⁰ See generally Bell, *supra* note 98.

private contract regime would still depend on the state as back-up, and so might seem to raise similar First Amendment problems, but at least no one would be able to control others' use of speech without their prior consent to the seller's terms. Furthermore, general private property and contract law, like that which protects printing presses, computer servers, and other enabling mechanisms of speech, would not be regulation specifically targeted at speech.¹⁰¹

As the cable industry does, content providers could also run public education campaigns against the theft of intellectual property, encouraging people to buy only from authorized providers and educating the public about how to determine if a book is an original or a knockoff.¹⁰² Noncontractual, self-help measures based purely on persuasion are available.¹⁰³ One example is shareware, software that is provided for free by the creator. Users are asked to pay a fee if they decide to continue to use the product after trying it out. Shareware thrives today, even though only an estimated ten percent of users accede to this moral suasion.¹⁰⁴ It might decrease profits, but the First Amendment arguably imposes certain costs on speakers, like the costs of developing a persuasive counter-message to unpleasant speech.

Given that there are ways for private actors to protect original content through voluntary transactions, the government arguably does not have a compelling interest in restricting speech through copyright. Yet a regime of self-help might be bad for readers and speakers in a variety of ways, as technical and contractual remedies would not have the same leeway for de minimis uses as the copyright

¹⁰¹ Maybe, though, effectiveness is not the point. Maybe ineffective counterspeech is constitutionally relevant, but effective countermeasures are mainly technical or legal, not speech themselves, and so they do not count. Yet contract and other forms of economic self-help have strong expressive components: the obvious message of a refusal to deal (or for that matter, of a password-protected system) is "do what I want or you may not have my business." See Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 524 n.288 (1995). Moreover, if effectiveness does not matter, then the possibility of counterspeech was a red herring from the beginning, covering up a judgment that certain speech cannot be suppressed no matter how harmful it is and how impossible it is to counter.

¹⁰² See *Macrovision Corporation Continues Its Support of The Anti-Theft Cable Task Force*, BUS. WIRE, Feb. 13, 1998, available in LEXIS, Nexis Library, Curnws File.

¹⁰³ Commentators have suggested many speech-based ways to make speech more enticing to convince consumers to choose a particular source, such as delivering it faster or more attractively, in order to maintain their market shares in the absence of copyright. See, e.g., Breyer, *supra* note 4, at 281; Gordon, *An Inquiry into the Merits*, *supra* note 17, at 1401; Perritt, *supra* note 98, at 283-85.

¹⁰⁴ See Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 222.

law, nor would they likely distinguish between fair and unfair use or the use of a work's idea rather than its expression.¹⁰⁵ Contract and technological countermeasures, therefore, might well impede the free flow of information contrary to constitutional ideals. Note, however, that the claim that copyright serves content users' speech interests better than the self-help alternative appeals to First Amendment values as such, not to a non-speech compelling government interest.

C. *Speech as Property*

One final way to solve the First Amendment problem is to redefine the ground rules: to say that it is property, not speech, at issue.¹⁰⁶ Copyright, the argument goes, recognizes the natural right of the creator to control and profit from his creation. The author brings the work into the world, creating it out of nothing, or out of the raw materials of experience, and is thus entitled to dispose of that which he has made, like Lear with his children.

If copyrightable speech is property, then copyright may no longer need a free speech justification. Courts occasionally say that it would be unfair to make a defendant pay for the material it used, because that would hurt free speech interests.¹⁰⁷ In standard First Amendment contexts, however, it is unremarkable that a person may need to pay

¹⁰⁵ See Julie E. Cohen, *A Right To Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981, 997-98, 1021-22 (1996); Litman, *Reforming Information Law*, *supra* note 79, at 601-02; Perritt, *supra* note 98, at 302. Bell argues that automated use licensing will benefit users, because "fair use never comes for free." Bell, *supra* note 98, at 580. Consumers incur search costs looking for information and opportunity costs when they photocopy, clip, or type quotes into their signature files. He argues that automated rights management will reduce such transaction costs, thus giving the consumer a net benefit despite the addition of a previously unnecessary payment to the copyright owner. See *id.* The conceptual flaw in Bell's reasoning is that if copyright owners could not charge for fair uses, consumers' net benefit would be much larger; the fact that they would retain some benefits if they had to pay does not prove that rights management is a good deal for them. (Arguably, many copyright owners will not allow their content to be made available electronically without rights management, but this is an empirical question whose answer is unknown.) Moreover, anyone who uses Yahoo!, LEXIS, or a variety of other electronic search engines is painfully aware that the new technology's effects on search costs are uncertain at best. If the technology allows more charges by copyright owners but does not improve substantially for users, it will be a bad bargain.

¹⁰⁶ Cf. *Nixon*, 120 S. Ct. at 905 (Stevens, J., concurring).

¹⁰⁷ See *Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 445 F. Supp. 875 (S.D. Fla. 1978); *Time, Inc. v. Bernard Geis*, 293 F. Supp. 130 (S.D.N.Y. 1968).

to speak in a particular way—to take out an ad in the paper, to print pamphlets, and so on.¹⁰⁸

In this vision, fair use is not a necessary part of copyright; the First Amendment has nothing to say about a requirement that a person has to pay or get an owner's consent before she can express herself in a particular way.¹⁰⁹ The government is simply barred from preventing willing sellers and buyers from making deals.¹¹⁰ The First Amendment and the Copyright Clause are in harmony because one protects information against government suppression and the other protects it against "private depredation."¹¹¹ Moreover, absolute property rules, under which any interference with rights can be enjoined and punished, are more appropriate than liability rules, under which a rights violator only has to pay for the value of what he took.¹¹²

Such a theory comes at the price of a good deal of what generally seems valuable about free speech. In fact, the state's refusal to intervene in the distribution of material goods in aid of free speech may only be palatable because speakers can choose fairly freely from the universe of ideas and expression. Jack Balkin points out that, if the government chose to close all public fora, leaving speakers to negotiate in the private market for space in which to speak, many people would sense a First Amendment difficulty.¹¹³

¹⁰⁸ Cf. *Loyd Corp. v. Tanner*, 407 U.S. 551, 570 (1972) (holding that a landowner may exclude unwanted speakers from his land).

¹⁰⁹ See Richard A. Posner, *When Is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 73 (1992) (arguing that the fair use defense should never be available for satiric uses because "as we do not suppose that writers should be allowed to steal paper and pencils in order to reduce the cost of satire, neither is there a compelling reason to subsidize social criticism by allowing writers to use copyrighted materials without compensating the copyright holder").

¹¹⁰ See John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 84–85 (1996).

¹¹¹ See *id.* at 79.

¹¹² See Hardy, *supra* note 104, at 217. I disagree with Hardy on many points, not least of which is his decision to remove several factors that favor latitude for copiers, such as the non-profit-based incentives that people have to produce speech, from his calculus of rights. See *id.* at 221. Hardy discounts the extent to which authors use others' works to spur their own creativity, assuming instead that a person who wishes to restrict access to his work to paying parties is making a choice that only affects his own incentives and ability to create. Hardy also gives the game away by restricting his analysis to situations in which copying is not amenable to a fair use analysis. See *id.* at 241. Deciding whether or not fair use applies often imposes a large transaction cost on its own; the difficulty of determining fair use in advance would justify a liability rule, particularly when a copier acted in good faith and mistook the limits of fair use.

¹¹³ See J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 400.

The property rights argument depends on certain unsound assumptions about the appropriate subjects and scope of ownership.¹¹⁴ It takes as a foundation the idea that government is supposed to protect my property, and that such protection does not count as "intervention" into the market or the private sphere.¹¹⁵ But this finesses the question of how information is converted into property. Why is something less "my own" if I did not think it up, so long as I said it, or made my own copy?¹¹⁶ Implicit in the argument is a modified "sweat of the brow" theory—information is mine if I worked to create it, and did not copy too much in the process.

The sweat of the brow theory is highly troublesome as a justification for anything like our current copyright regime. Not only has the Supreme Court rather resoundingly rejected it,¹¹⁷ sweat of the brow does not explain why facts and ideas are not copyrightable. In

[J]ust as a legal realist might argue that economic liberty is more than the right to sign contracts of adhesion, we understand that expressive liberty is not simply the right to make noises in the air directed to no one in particular. . . . Effective communication, or rather its substantive possibility, is an unavoidable component of the liberty of speech, just as effective bargaining, or its substantive possibility, is an essential component of economic liberty.

Id. at 401.

¹¹⁴ The economic modeling of the market for information faces a troubling conceptual problem: The perfectly functioning market assumes perfect information. But when information is itself a marketable commodity, how can there be freely circulating full information in the perfect market? Information does not fit well in the market model because it is a condition of the market's existence. See James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413, 1420, 1443-48 (1992). As a result, a purely property-based vision of information will misdescribe the way information exchange actually works.

¹¹⁵ See McGinnis, *supra* note 110, at 85 n.149, 123.

¹¹⁶ Wendy Gordon has recently offered a property theory that tries to avoid these problems by incorporating restraints on what authors may appropriate, using the Lockean proviso that an appropriator must leave "as much and as good" for later takers. See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993) [hereinafter Gordon, *A Property Right in Self-Expression*]. She believes that this approach accommodates free speech concerns without requiring explicit application of the First Amendment. See *id.* at 1539. The restraints she would impose look a lot like the idea/expression distinction and the fair use defense, though, and thus her property theory, while it avoids my criticisms of standard property theories, does not in my opinion adequately answer First Amendment questions about copyright.

¹¹⁷ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). The Court has generally maintained that copyright is a creature of statute, not natural right. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984) ("The protection given to copyrights is wholly statutory."); *id.* at 429-30 n.10 ("Copyright is not based upon any natural right the author has.").

theory, my idea is no less my own than my expression. Both are embodied in a creative work, and my idea may be far more valuable. One answer is that tracing the source of ideas (and facts) can be too difficult, and it is cost-unjustified for the law to allow suits for anything but copying expression.¹¹⁸ Even if this did not sound like a just-so story, we do have a relevant example of an intellectual property regime that does not capitulate to tracing difficulties: patent law. The first inventor of an idea or discoverer of a fact could be protected in similar fashion.

The property vision also cannot explain the peculiar rights that copyright allows authors, such as the right to control derivative works, even if those works would otherwise be independently copyrightable; the right to control public performances; and translation and abridgement rights.¹¹⁹ In all these cases, other people may do as much or more work to bring new expression into the world, but their work does not count. Their children are illegitimate. Moreover, the property rights theory makes the limited duration of copyright particularly hard to explain. Houses (and paper and ink) do not revert to a common pool after an owner has had control of them for a certain period of time. "If I may own Blackacre in perpetuity, why not also *Black Beauty*?"¹²⁰ The standard defense of limited duration from this perspective is that, eventually, tracing the copyright proprietor will become impossible. But surely this is only because the duration of copyright is limited: If it were unlimited, the market would generate institutions that could find owners, just as it is possible to find out who owns any particular piece of land. Plenty of permissions organizations already exist, such as ASCAP, BMI, and the Copyright Clearance Center. There is no reason from a property perspective that anything once in their catalogs has to be set free.¹²¹

But a property rights enthusiast could agree with all these criticisms, and argue that these limits should be abolished. Greater consistency would cause greater First Amendment concerns, though, and would still not answer tough questions about the scope of owner-

¹¹⁸ See McGinnis, *supra* note 110, at 83.

¹¹⁹ See *Goldstein v. California*, 412 U.S. 546, 570 (1973) ("[T]here is no fixed, immutable line to tell us which 'human productions' are private property and which are so general as to become 'free as the air.'"); Stephen M. McJohn, *Fair Use and Privatization in Copyright*, 35 SAN DIEGO L. REV. 61, 80-84 (1998) (arguing that any copyrighted work contains noncopyrightable elements that a property rights approach is ill-equipped to identify).

¹²⁰ See Nimmer, *Copyright*, *supra* note 16, at 1193.

¹²¹ See McJohn, *supra* note 119, at 77-78.

ship.¹²² Even if transaction costs are generally low in cyberspace, it will remain just as difficult to distinguish idea from expression or determine substantial similarity in bytes as it is on the printed page.¹²³

In addition, as Eugene Volokh and Brett McDonnell point out, any interest can be reconceptualized as a property interest to defeat a speech claim.¹²⁴ Your right to swing your fist ends at my face, but the law can define how far my “face” extends. There is no particular reason the law could not give me a property interest in physical and mental integrity that could be violated by exposure to pornography; no reason, that is, but the First Amendment as it is now understood.

D. Conclusion

This part examined standard justifications for copyright against free speech challenges. The usual suspects—the idea/expression distinction and fair use—attempt to provide a justification that does not depend on copyright’s speech-enhancing role. Unfortunately, neither idea/expression nor fair use bear the necessary weight, primarily because they are too vague to provide a speech user with any real certainty about what she may say.¹²⁵ There are also less restrictive alternatives to copyright as we know it that would not require nearly as much overt state intervention further weakening the conventional case for copyright. And, the proposal to assimilate speech law in its entirety to property law is ultimately incapable of avoiding the difficult questions

¹²² See David Fewer, *Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada*, 55 U. TORONTO FAC. L. REV. 175, 187–88 (1997) (noting that natural property rights concepts of copyright gloss over the dependence of authors on others’ expression).

¹²³ Cf. Hardy, *supra* note 104, at 219 (arguing that low transaction costs justify choosing property rules over liability rules for copyright).

¹²⁴ See Volokh & McDonnell, *supra* note 57, at 2445–46; see also Eugene Volokh & Mark Lemley, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998) (noting that a bill introduced in Congress would have declared the United States flag to be copyrighted and defined flag-burning and desecration as infringement).

¹²⁵ As several commentators have noted, the existence of two apparently quite different justifications for finding copyright protection consistent with the First Amendment has also caused practical difficulties. The contraction of each doctrine is justified by reassuring free speech partisans that the other doctrine is still available, so First Amendment concerns do not receive serious consideration. See Jessica Litman, *Copyright and Information Policy*, LAW & CONTEMP. PROBS. 185, 204–06 (1992) [hereinafter, Litman, *Copyright and Information Policy*]; Netanel, *supra* note 63, at 303. One answer to this problem might be to make a First Amendment analysis an explicit part of copyright decisions, rather than claiming that fair use and idea/expression are themselves sufficient. See NIMMER, FREEDOM OF SPEECH, *supra* note 15, § 2.05[C], at 2–73; Denicola, *supra* note 16, at 304–06; Litman, *Copyright and Information Policy*, *supra*, at 208; Wang, *supra* note 46, at 1159, 1177.

of how far to extend ownership of intellectual creation.¹²⁶ And yet it seems inconceivable that copyright could be unconstitutional, since it serves such an important public interest. Nor has my aim been to suggest that copyright is unconstitutional. Rather, its constitutionality depends on the fact that the government interest underlying copyright is the promotion of speech.

II. THE FIRST AMENDMENT ARGUMENT FOR COPYRIGHT

A. *How Copyright Serves First Amendment Values*

When the conflict between free speech and copyright was first theorized, the natural response was that the expressive and communicative interests involved in copyright protection were constitutionally cognizable. Therefore, every recent discussion of copyright and free

¹²⁶ One might also argue that applying First Amendment principles is unnecessary in copyright because the Framers took free speech into account when they wrote the Constitution. As a matter of constitutional history, this claim is debatable at best. Copyright was first developed as a tool of official censorship. See MARK ROSE, *AUTHORS AND OWNERS* 12, 15 (1993); Patterson, *supra* note 14, at 3. The presence of the Copyright Clause was one factor in the inclusion of the First Amendment in the Bill of Rights, because anti-Federalists feared that copyright could be used to reward favored authors and punish disfavored ones. See Fraser, *supra* note 17, at 19–20 & n.126. Furthermore, the claim that the Constitution already balanced free speech interests against copyright does not appear to distinguish the Copyright Clause from any other part of the Constitution, such as the Commerce Clause. See NIMMER, *FREEDOM OF SPEECH*, *supra* note 15, § 2.05[C] at 2–57.

The existence of the Copyright Clause certainly does not imply that the Copyright Act as it exists now comports with the First Amendment as it exists now. Modern speech theory itself is rather young, constitutionally speaking. See, e.g., *Schenk v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919). Before the First Amendment was applied against the states through the Fourteenth Amendment, see *Gillow v. New York*, 268 U.S. 652 (1925), very few people thought to challenge long-accepted practices such as bans on blasphemy, obscenity, libel, and politically subversive speech. On its side, copyright has expanded substantially in recent years. The demise of the registration requirement has made copyright easier to obtain and harder for a potential user to determine. The copyright term has doubled and redoubled. The media covered by copyright law have expanded to include new forms and some older ones, such as newspapers, that were previously considered too ephemeral to warrant copyright protection. Performance, translation, and derivative rights have been added to the original replication rights, giving to the copyright owner the sole right to authorize adaptations and reworkings that were once up for grabs. See, e.g., *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D. Pa. 1853); *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841). As both kinds of information policy expand their scope, it is not surprising that they would collide.

Another important point about the claim that the Copyright Clause itself does the free speech balancing job is that it finesses a crucial question of institutional competence. The claim is not really that the *Clause* balances free speech concerns with other goals, but that *Congress* does in the copyright law it enacts. I take up the issue of congressional balancing in Part III. See *infra* notes 217–251 and accompanying text.

speech calls attention to the Supreme Court's pronouncement in *Harper & Row, Publishers, Inc. v. Nation Enterprises*: "The Framers intended copyright itself to be an engine of free expression. By establishing a marketable right to use one's expression, copyright supplies the economic incentive to create and disseminate ideas."¹²⁷ While the Court was at the time mainly concerned with copyright's furtherance of the First Amendment privilege *not* to speak,¹²⁸ its language has generally been taken to have wider import, covering copyright's speech-productive incentives as well.¹²⁹ In a leading treatise on freedom of speech, Professor Nimmer takes the same position. He concludes that, though expression ordinarily deserves protection from government suppression, the idea/expression dichotomy is justified by the counter-speech value of encouraging authorship.¹³⁰ That is, a speech-promoting regulation can justifiably suppress more speech than a regulation with a permissible but non-speech-promoting aim.¹³¹

When government enforces copyright, it encourages a broad, diverse array of publicly available ideas and expressions, a core interest underlying the First Amendment.¹³² Free speech values, then, support affirmative government action to encourage speech by harnessing the power of the market. The marketplace is not just a forum where ideas compete for dominance, but a literal (if not always liter-

¹²⁷ 471 U.S. 539, 558 (1985). The contention that the Framers held this belief is probably wrong, given copyright's historical connection to censorship. See Fraser, *supra* note 17, at 19-20.

¹²⁸ See *Nation Enters.*, 471 U.S. at 559.

¹²⁹ See, e.g., Netanel, *supra* note 63, at 289.

¹³⁰ See NIMMER, FREEDOM OF SPEECH, *supra* note 15, § 2.05[C], at 2-66 n.184; see also Goldstein, *supra* note 2, at 990.

¹³¹ Cf. *Bd. of Regents v. Southworth*, 529 U.S. 217, 120 S. Ct. 1346, 1357-58 (2000) (Souter, J., concurring) (students' First Amendment objection to activity fee was less persuasive because the purpose of the fee was to increase speech); *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976) (per curiam) (upholding publicly financed campaign subsidies because they facilitated First Amendment self-government goals).

¹³² The Association of American Publishers expressed the point with understandable firmness:

Freedom of expression is meaningless unless works are created and distributed. . . . [T]he copyright law assures that there is opportunity for recoupment of the intellectual and financial investment of authors and publishers, that their creative efforts are maintained, and that their works are made available to the public. It is essential to the purpose of the First Amendment.

Brief of Amicus Curiae Association of American Publishers, Inc., *supra* note 1 (footnote omitted); see also Goldwag, *supra* note 17, at 23; Shipley, *supra* note 17, at 986-87; Wang, *supra* note 46, at 1177.

ary) marketplace where ideas get traded for money. What the “engine of free expression” argument means, simply enough, is that there are First Amendment interests on both sides of a copyright case. The plaintiff complaining about copying upholds the public interest insofar as a prohibition on copying preserves creators’ incentives to put creative material in the marketplace, just as the defendant upholds the public interest insofar as copying is necessary to enable broad access to information.

The full argument that there are First Amendment interests on both sides presupposes that the extent to which a speaker is heard is a constitutionally relevant fact.¹³³ Being heard is crucial to a speaker. The government cannot require speakers to speak in the middle of the night on an island off the mainland even if it provides speakers free transportation there. Speech values are harmed when government acts in ways that substantially impair speakers’ ability to communicate. Thus, copyright aids free speech because “[e]ffective dissemination of creative work costs money.”¹³⁴

Free speech theory sometimes seems to imagine a nation of speakers each yammering into a void. Copyright, by contrast, emphasizes the communal nature of creativity and speech. People only share their ideas because there is an audience, and copyright is limited because speakers depend on what was said before. Correspondingly, listeners are entitled to speech rights because they may choose to adopt the messages that others are sending and also because their varying interpretations may enrich our shared dialogue as much or more than the original message. The speech-interests-on-both-sides argument asserts that preserving a market share for speakers is constitutionally relevant because speakers often need an incentive to speak. If the government refuses to enforce copyright, the market for ideas will end up impoverished.

B. *Implications for General Free Speech Doctrine*

Copyright is not a constitutional anomaly. There are a series of areas in which First Amendment interests may be served by restricting and channeling speech. The reasons for government regulation are different, but they are analogous. To have a healthy, dynamic system of speech, there must be certain architectural limits on the system

¹³³ Cf. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 568 (1995) (noting that a parade’s expressive content is meaningless if no one sees it).

¹³⁴ Wang, *supra* note 46, at 1178.

that shape what occurs therein.¹³⁵ Many people agree with this claim as applied to property rights, but not to speech; intellectual property, which bridges the gap between the two, shows that speech cannot escape government structuring, because speech is often capable of suppressing other speech.

One major purpose of my comparison of copyright and other market failure or speech-versus-speech theories is to suggest that First Amendment absolutists, who have busied themselves fending off radical attacks in areas such as campaign finance, sexual harassment, pornography, and hate speech, should be attending to the apparently enormous exception to standard First Amendment doctrine embodied in copyright. Copyright, after all, covers every single fixed piece of expression,¹³⁶ not just isolated areas of the universe of free speech. But it is not unconstitutional, because its absence would be worse for speech. Broad indictments of regulations designed to promote some speech by controlling other kinds threaten to make copyright look unconstitutional; this is a reason to reject those broad theories, or at least to cabin them.

This section elaborates on the incentive argument for copyright, explaining how it is properly described as a market failure theory that enlists government to achieve a better balance of speech, and how copyright's incentive structure has predictable effects on content. In many cases of speech-versus-speech conflict, the market failure identified can only be addressed by some form of regulation that can be described as content-based. The question is not whether one has to accept all such regulations if one accepts any, because there are reasonable distinctions between the various kinds of market failures. Instead, my aim is to show that a basic problem of speech-versus-speech underlies several important kinds of regulations and proposed regulations, and that the case against them must *not* rely on the simple claim that the government has to be kept out of the world of speech.

I want to be clear that I remain uncertain about the wisdom of these various regulations. My understanding, however, is that many people support copyright and oppose one or more of the other speech regulations discussed in this section, usually without considering the relationship between those two positions, and I am interested in whether that is a consistent stance. My sense is that one's conclu-

¹³⁵ See, e.g., Cass Sunstein, *A New Deal for Speech*, 17 HASTINGS L.J. 137 (1994).

¹³⁶ And a few unfixed; for example, one can infringe by publicly performing a copyrighted work even if the performance is not fixed.

sion about whether copyright is fundamentally distinguishable from other regulations depends mainly on one's beliefs about the extent to which the First Amendment should invalidate laws that disproportionately burden the speech of disadvantaged groups that are not primarily defined by the content of their speech. The First Amendment, conventionally understood, regulates the conditions under which the law may disfavor people based on their beliefs and their speech (Communists, pornographers, copiers). But, at times, the disfavored categories precede the speech, and speech regulations only have a disparate impact on people in those categories rather than creating the categories. It is possible that the First Amendment is primarily concerned with laws that create a category of disfavored speakers, not laws that may enhance prior disadvantages by regulating speech. Yet that First Amendment seems impoverished and unrealistic to me.¹³⁷

1. The Basic Analogy Between Copyright and Other Market-Failure-Based Speech Regulations

The argument for government intervention is not unique to copyright. It is made by a number of prominent scholars discussing pornography, sexual harassment, hate speech, campaign finance, and new media.¹³⁸ For example, racist speech is said systematically to un-

¹³⁷ For example, African Americans and Jews who were drawn to Communism were, in part, responding to discrimination, while the racial and ethnic composition of the American Communist Party added extra impetus to the movement for its suppression; disfavored groups can define themselves, and be defined, through regulated speech. See JAMES GOODMAN, *STORIES OF SCOTTSBORO* 27–29, 74–84, 204 (1994) (African Americans); David Suchoff, *The Rosenberg Case and the New York Intellectuals*, in *SECRET AGENTS: THE ROSENBERG CASE, MCCARTHYISM, AND FIFTIES AMERICA* (Marjorie Garber & Rebecca L. Walkowitz eds., 1995) 153, 158–59, 161 (Jews). Moreover, I see no strong reason why the First Amendment should limit its protection to cases in which the suppression of a definable group's speech is intentional.

¹³⁸ See generally OWEN FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* (1996); *FREEING THE FIRST AMENDMENT: CRITICAL PERSPECTIVE ON FREEDOM OF EXPRESSION* 195–223 (David S. Allen & Robert Jensen eds., 1995); CATHERINE A. MACKINNON, *ONLY WORDS* (1993); MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 77–78 (1993); *THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH* (Laura J. Lederer & Richard Delgado eds., 1995); CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993); Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 694–95, 735 (1997); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987); Sangree, *supra* note 101, at 559–60 (arguing that sexual harassment law furthers

dermine and devalue the speech of minority groups, because racist speech silences minorities and makes their speech seem less credible when it does appear.¹³⁹ Unlimited campaign spending arguably distorts democratic dialogue by allowing wealthy donors and interest groups to set the public agenda, while political deliberation gets lost in the scramble for cash. Cable providers may exclude broadcasters from their former audiences by refusing to carry them as part of a cable package.

The analogy can be seen by describing copyright's incentive mechanisms in greater detail. Copying makes original authors less attractive to publishers because there is not much point in paying for what others will then take for free. Audiences will pay less attention to the original speaker if her work can be freely reproduced by others, perhaps even without attribution.¹⁴⁰ Ultimately, copying makes authors less willing to enter into the market in the first place. The argument for copyright explains how piratical speech can have negative effects on authors and audiences' access to speech, just as the radical case for speech regulation explains how hate speech can distort the speech incentives of minority-group members and the receptivity of potential audiences or how political donations can crowd certain views out of the public domain. Therefore, copyright and the radical theories have a family resemblance in that they identify certain mechanisms that operate through speech and that negatively affect the functioning of the marketplace for speech.

The similarity in the arguments for regulation is apparent, for example, in Catharine MacKinnon's argument for a civil rights remedy for pornography. Not only does MacKinnon argue that pornographic speech silences women's speech, her analysis converges with that of infringement doctrine. Both in evaluation of substantial similarity and in application of the fair use defense, copyright refuses to look at an accused work as a whole. This is because the critical issue is the harm the defendant may have done to the plaintiff by using a copyrighted work, no matter what else the defendant may have cre-

free speech values); Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935 (1993).

¹³⁹ See, e.g., Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 458-61; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323-26 (1989).

¹⁴⁰ Cf. David L. Marcus, *Faux Vonnegut Talk Sheds Light on Power of 'Net*, BOSTON GLOBE, Aug. 13, 1997, at D1 (discussing problems that occur when a creative work is widely misattributed).

ated in the course of so doing. MacKinnon likewise rejects the “work as a whole” standard of obscenity law: “[T]aking the work ‘as a whole’ ignores [the fact that] legitimate settings diminish the injury perceived to be done to those whose trivialization and objectification it contextualizes. . . . If a woman is subjected, why should it matter that the work has other value?”¹⁴¹ This agreement on what is essentially a detail of the respective regulatory schemes shows how both kinds of market-failure theories attend to what a regulable work *does* in the world and not to what it says in itself.¹⁴²

The incentive-based or speech-on-both-sides argument also appears where relatively new media are at issue and, lacking a tradition, their structure and function are contestable.¹⁴³ Government has to do *something* about new media, and the Supreme Court has recognized that government action will inevitably balance speech against speech in such cases. The Court has accepted the theory that the Federal Communications Commission was established because an unregulated radio spectrum led to chaos. So many people were trying to talk that they cancelled each other out.¹⁴⁴ While other forms of regulation, including a property regime based on first-in-time capture of spectrum, would also have worked, possibly better, some form of government-backed rights holding was necessary to enable broadcast speech.¹⁴⁵ Although broadcasters were private entities, their actions threatened to “snuff out the free speech of others.” The Court ultimately found that there was no right to do so, and that there was a

¹⁴¹ Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 21 (1985); see also CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 202 (1989).

¹⁴² Self-help arguments also align against copyright and hate speech/pornography regulation. See *supra* notes 27–40 and accompanying text.

¹⁴³ See Perlman & Rhinelander, *supra* note 1, at 408 (“To the extent that the copyright is perceived as an economic device to advance the public interest in dissemination of intellectual products it is comparable to a broadcast license. Both are monopolies granted by the government to facilitate the distribution of information. Both bear the same public interest burden.”); see also *Columbia Broad. Sys. v. Democratic Nat’l Comm.*, 412 U.S. 94 (1973); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

¹⁴⁴ See *Red Lion*, 395 U.S. at 376 (“Without government control, the medium would be of little use because of the cacaphony of competing voices, none of which could be clearly and predictably heard.”).

¹⁴⁵ See Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905 (1997) [hereinafter Hazlett, *Physical Scarcity*]; Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J. L. & ECON. 133 (1990) [hereinafter Hazlett, *Rationality*].

strong government interest in preventing such silencing.¹⁴⁶ In addition, the Court has found that there is a First Amendment interest in encouraging the dissemination of a diversity of views via broadcast media.¹⁴⁷

More recently, the Supreme Court upheld must-carry rules requiring cable providers to carry local broadcast stations in order to preserve the profitability of broadcast so that free local television will remain widely available.¹⁴⁸ Cable providers are required to subsidize broadcast television for the greater public good, just as fair use arguably requires some authors to subsidize others for the greater good.¹⁴⁹ The Court found the costs of must-carry rules to cable providers could be justified in large part because of concerns that cable could

¹⁴⁶ *Red Lion*, 395 U.S. at 387. In *Associated Press v. United States*, the Supreme Court upheld antitrust controls on newspapers on similar grounds: "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." 326 U.S. 1, 20 (1945) (footnote omitted). Because the First Amendment is based on the belief that a diversity of available views is essential to a free society, its "command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom." *Id.*

¹⁴⁷ See *FCC v. Nat'l Citizens Comm.*, 436 U.S. 775 (1978); see also *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 976 (D.C. Cir. 1996) (holding that public access to a diversity of views and sources of opinion is an interest "at the core of the First Amendment").

¹⁴⁸ See *Turner I*, 512 U.S. 622 (1994).

¹⁴⁹ The Supreme Court's recent decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), sheds some light on the question of when a group can be taxed to support others' speech. *Glickman* upheld industry-specific taxes to support generic advertising for that industry's products. Although people often have a right not to be compelled to pay for others' speech, the Court held that the government could assess fees for product advertising. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). The Court reached this conclusion because, first, no producer had to change or restrain its own advertising, even though the regulation decreased the money available to pay for such ads. Copyright limits, too, never restrain authors, even if some authors make less money because of them. Second, the regulations did not compel speech from anyone; no producer was required to associate itself with the generic ads. A copyright owner is not compelled to repeat or endorse a fair use out of his or her own mouth. Cf. *Pruneyard Shopping Ctr. v. Robins*, 445 U.S. 74, 88 (1980). Third, there was no compulsion to endorse or finance any political or ideological views. In copyright, fair users might well advocate for some ideological viewpoint, but the government would not have chosen any such message, and in that sense the burden is less than that imposed by a government decision to make a plum producer pay for ads that say that all plums are tasty. Inasmuch as fair use is decentralized, it is not as worrisome as taxes on magazines or paper. And, like a progressive income tax, it may weigh most heavily on the "richest" works. *Glickman*'s underlying point was that compulsory taxes for advertising were justified, even though some people objected, because the contributions increased the welfare of the producers as a whole, just as limits on copyright increase the welfare of authors as a whole by allowing them to draw on sources of inspiration and information.

take anticompetitive action against broadcast competitors, squeezing broadcasters out of the market.

That anticompetitive possibility, however, relies on the behavior of the television audience. Even if cable did not carry broadcast channels, television households could get the benefit of both if they used manual switches. But the average viewer is unwilling to use a switch. Because the television audience is composed of technologically inept couch potatoes, cable providers could exclude broadcasters from cable households. The Court characterized this interaction between cable providers and the market they face as a matter of providers' power: "A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch. The potential for abuse of this private power over a central avenue of communication cannot be overlooked."¹⁵⁰ Crucially, the power to silence depends not on any technological facts but on *behavioral* facts; not on characteristics of the speaker but of the audience.¹⁵¹ Insofar as they look to the appropriate conditions for the maximization of speech given the way that people actually behave, the must-carry rules have the same justifications as copyright, campaign finance reform, and regulation of hate speech and pornography.

Others have noted that copyright is relevant to more politicized free speech issues. Eugene Volokh and like-minded scholars, who think that the radical theories are a very bad idea, have also become nervous about copyright.¹⁵² Meanwhile, some of the radical theorists are arguing that courts' unhesitating acceptance of copyright, a speech restriction that serves the interests of the wealthy and power-

¹⁵⁰ *Turner I*, 512 U.S. at 656.

¹⁵¹ See Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 374 (1999) (noting that barriers to multiple cable operators competing for each viewer are not really physical or technological but economic).

¹⁵² See generally Volokh & Lemley, *supra* note 124; Volokh & McDonnell, *supra* note 57. See also Expert Report of Professor Lawrence Lessig, *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d. 896 (N.D. Cal. 2000) (Nos. 99-5183, 00-0074), available at <http://dl.napster.com/lessig.pdf> (last visited Oct. 31, 2000) (discussing intersection between free speech and copyright in the Napster Music file-sharing litigation); Brief of Amici Curiae Association of Am. Physicians & Surgeons, Inc. et al., *A & M Records, Inc. v. Napster, Inc.*, 2000 U.S. App. LEXIS 18688 (July 28, 2000) (Nos. 00-16401, 00-16403), available at http://dl.napster.com/amicus_physicians.pdf (last visited Oct. 31, 2000) (anti-abortion group opposing injunction against copyright infringement on the grounds that such injunctions could be used against other kinds of speech); Brief of American Civil Liberties Union et al., *A & M Records, Inc. v. Napster, Inc.*, 2000 U.S. App. LEXIS 18688 (July 28, 2000) (Nos. 00-16401, 00-16403), available at <http://www.aclunc.org/cyber/napster-brief.html> (last visited Oct. 31, 2000) (opposing copyright injunction on free speech grounds).

ful, is unprincipled and hypocritical when the radical theories of regulation are brushed aside as incompatible with free speech.¹⁵³ What the people on both sides of the issue—particularly the radical theorists—have not yet discussed, however, is that copyright is not just a run-of-the-mill speech restriction. It is a member of a family of speech restrictions unified by the claim that some government regulations improve the functioning of the market for speech by acting as the equivalent of a police force keeping order.¹⁵⁴ Copyright is the perfect demonstration of Stanley Ingber's point that marketplace theories readily lend themselves to arguments for government intervention. Once we decide that a market is valuable because it furthers individual choice, it becomes possible to argue that individuals should be regulated in aspects of their market behavior to increase the aggregate amount of choice.¹⁵⁵

The fact that incentives to speak have constitutional weight and deserve First Amendment consideration is important. If we accept the speech-enhancing justification for copyright, we cannot easily dismiss other market-failure claims. If copyright serves the First Amendment, we cannot say, as the Supreme Court has, that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."¹⁵⁶

a. *The Importance of Incentives for Future Speech*

One response to my claim of structural similarity between copyright and other market-failure theories is that copyright is not about

¹⁵³ See, e.g., Richard Delgado & Jean Stefancic, *Ten Arguments Against Hate-Speech Regulation: How Valid?*, 23 N. KY. L. REV. 475, 484 (1996); Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871, 892 (1994); Martin E. Lee, *The Price We Pay: The Case Against Racist Speech, Hate Propaganda and Pornography*, NAT'L CATH. REP., Oct. 4, 1996, at 17 (book review).

¹⁵⁴ The incentive-based argument is not limited to left-leaning academics even outside the copyright field. For example, Justice White, dissenting in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), argued that private individuals should not face high barriers to libel suits: "It is not at all inconceivable that virtually unrestrained defamatory remarks about private citizens will discourage them from speaking out and concerning themselves with social problems." *Id.* at 400 (White, J., dissenting). See also Richard A. Epstein, *Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 STAN. L. REV. 1003, 1033 (2000) (arguing that enjoining defamatory broadcasts would ultimately strengthen the press's information-gathering ability by increasing its credibility).

¹⁵⁵ See Ingber, *supra* note 23, at 4–5.

¹⁵⁶ *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976).

restricting A's speech to enhance the relative voice of B, even if it is about restricting A's speech to B's advantage. Because this characterization does not note that the advantage that copyright confers on B is based on the attractiveness of B's speech—people who want it will have to pay—this reformulation makes copyright sound even worse from a free speech perspective, like an aggressive libel law or restrictions on seditious speech or bans on comparative price advertising for alcohol, all of which benefit one group at another's expense. More importantly, the "advantage and not speech" characterization does not describe the reasoning that courts and theorists actually use to defend copyright, and it is this reasoning that is structurally similar to other, less favored arguments. Copyright is justified because of its systematic effects on future speakers—the profits that copyright makes possible will spur many people to invest in creating speech.

Once we concede that harm to market-based incentives to speak in the future is harm to First Amendment-protected interests, however, it makes little sense to limit the cognizable class of speech-suppressing private acts to that which merely copies and sucks off profits. It is not the profit-making or even the profit-stealing nature of the infringement that is constitutionally relevant. It is the decrease in the speaker's incentive to speak, which could also be caused by speech that derided her or by speech so pervasive that her message was lost, that triggers First Amendment interests on her side.¹⁵⁷ Put another way, it is descriptively false to say that First Amendment law is not concerned with silencing (defined as private parties' acts that decrease other private parties' incentives to speak) or crowding out (defined as private parties' speech that makes other private parties' speech less likely to be attended to).

We regulate when we think that incentives to speak deserve protection. Thus, we regulate copiers, but not people who tell other peo-

¹⁵⁷ Frank Michelman points out that "silencing" is usually as figurative as it is literal:

American constitutional law has long indulged in even more extended figurations of silencing, reaching back at least to the moment when it was resolved that punishment of speech already uttered, as well as prior restraint of yet-unuttered speech, can count as an abridgment of the freedom of speech and a cognate deprivation of liberty forbidden by the first and fourteenth amendments. The silencing wrought by criminalization of speech acts is less direct, more metaphorical, and no more reliably efficacious than that wrought (on Professor MacKinnon's account) by pornography.

Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 296 n.13 (1989) (citations omitted).

ple that they should not scream at their children. Though both decrease others' incentives to speak, only one group does so in a way we recognize as unjustified. Alternatively, if really good government decreased the public's incentive to speak out on public affairs, because there was no reason to complain, we would not worry about First Amendment problems. The distinction between acceptable silencing and unacceptable, thus regulable, silencing is necessary and valid. Since we can never escape choices about whose speech to favor, we should focus on why we choose one group over another.

The free speech justification for copyright may also seem distinct from other market failure arguments because it sounds in economics; it is about cold-blooded economic calculation, not artistry and the joy of creation.¹⁵⁸ By contrast, the explanations for why pornography, hate speech, or well-funded political campaigns can suppress others' speech seem psychological and mushy. Economic rationality works through psychological structures, of course, as any human motivation does, but we are not accustomed to thinking of it that way. It seems easier to say that people who feel threatened and oppressed by others' speech should just grit their teeth and fight back with better ideas than to say that people who are upset by others' copying should take pride in the joy of creation itself and should be glad that their expression reaches so many people. Nevertheless, the other market-failure theories can equally be described as problems of economic incentives, just as authorship and creativity can readily be described in romantic ways that ignore the influence of economic incentives.

The same is true on the audience's end. Jack Balkin has recently argued that all speech competes with other speech in an important way—audience time is limited, and someone who is watching *The X-Files* is not debating foreign policy at the local Republican Party headquarters.¹⁵⁹ The real scarcity that is relevant to First Amendment analysis is of people's time and attention, not of opportunities to speak in any particular medium. Competition exists in non-economic—or at least nonmonetized—registers as well.¹⁶⁰

¹⁵⁸ Standard copyright rhetoric merges the author and the entrepreneur, recognizing that the author who has an interest in making money will contract with people who can distribute her works. See Patterson, *supra* note 14, at 53–54. Even when we conceive of creativity as psychologically motivated, we expect that the impulse to get wide recognition for that creativity will be economic; why else would a creator sell her rights to a publisher?

¹⁵⁹ See Balkin, *supra* note 113, at 409.

¹⁶⁰ A related point is that speech is therefore, like other apparently unlimited “public” goods, vulnerable to slow erosion. Some theorists argue that using an idea never “depletes” it in the manner of a physical resource. See Mark A. Lemley, *The Economics of Improvement in*

Once we accept that speech trades off with speech, it is simply a matter of calculation to determine how much exposure to pornography decreases a woman's incentive to participate in public life, or how much spending by the major political parties decreases a new party's ability to reach potential converts.¹⁶¹ Then, if those disincentives are unjustified, we need to figure out how to counteract them. Maybe sometimes regulation would be more justified than in particular cases of copying for fun and profit.

b. *Copyright's Effects on Content*

Because the other market-failure theories are often rejected on the grounds that they impermissibly regulate the content of speech, it is useful to look in greater detail at copyright's effects on content. In a world without copyright, information would be distributed differently. There would probably be patrons of the arts, both governmental and private, and the content of that art would be shaped by patrons' preferences. Without copyright, coordination difficulties and free riding problems would make it difficult for the less wealthy to aggregate their resources and fund creativity; thus, as Neil Netanel argues, wealth and power would likely have more influence on the kinds of expression that would be readily distributed.¹⁶² Conversely, copyright encourages creators (and investors) toward works that may prove popular with some market segment. The desire to give a mass audience what it will pay for, while not dispositive of content, makes a significant difference in many creative decisions.¹⁶³ Copyright encour-

Intellectual Property Law, 75 TEX. L. REV. 989, 1045 (1997); McJohn, *supra* note 119, at 106-07. But overexposure can drain an idea, or a kind of expression derived from that idea, of vitality; consider *Seinfeld* and the Spice Girls. Whether copyright protects against such overexposure or encourages it is another question entirely.

¹⁶¹ Cf. RICHARD POSNER, *SEX AND REASON* 284-90 (1992) (providing equation to determine whether abortion should be banned). I do not mean that these calculations will be easy or exact, just that factfinders (such as Congress) could gather relevant evidence and judge its credibility.

¹⁶² See Netanel, *supra* note 63, at 288.

¹⁶³ See Benkler, *supra* note 151, at 400-08. Benkler argues that each increment of copyright protection encourages further centralization, which harms democracy and diversity. I understand him to be arguing about the negative effects of marginal increases in copyright, not copyright in general. See *id.* at 394 n.180, 401. I agree that a thin copyright focused on preserving incentives to create by protecting against wholesale, nontransformative copying would be best for speech. Especially as Benkler's explanation of why increased rights increase centralization relies heavily on large organizations' ability to create derivative (transformative) works from their stockpiles, I doubt his analysis would produce widely divergent results from mine.

ages the creation and dissemination of the speech of those who seek economic rewards, decreasing the relative voices of those who create for personal satisfaction, for the glory of God, or for the respect and praise of the audience.

Perhaps the model of television and radio programming would exist in some modified form in the absence of copyright, so that interesting stories would be available for free, their content pervaded with ads so that the average consumer would sit through the ads to get the story. In that case, we might expect that creators whose work does not fit well next to an ad for Burger King fries would have a harder time reaching an audience; as evidence for this proposition, consider that the markets for books and even film are much more varied than the television and radio markets.

Authorial self-help as described in Section I.C above would likely be popular, and media that would be easiest to copy-protect would receive the most investment—computer disks that could be read once and would then erase themselves, for example, instead of traditional books. Self-help would have effects on content as well as form. Copy-

I suspect, however, that Benkler romanticizes the possibility of a less-copyrighted world. He argues that concentrated media systems are likely to exclude challenges to the prevailing wisdom and translate unequal economic power into unequal power to set the terms of public debate. *See id.* at 377–78. But how would small, diverse sources obtain a wide audience without the possibility of large-corporation alliances for distribution, as his exemplar Matt Drudge (briefly) did? *Cf.* David Segal, *Big Record Labels Start to Like the Sound of Online Music*, WASH. POST, Jan. 30, 2000, at H1 (discussing large labels' distributional and content-sorting advantages). Also, because Benkler focuses on the individual as the source of meaning, he appears to discount the value of common culture—in today's economic language, the “network effects” of having *The Wizard of Oz* as a common referent.

Finally, Benkler does not fully defend the argument that concentrated media giants decrease diversity. Even Disney produces arguably blasphemous movies through an affiliate. Some economic theory suggests that large corporations will supply some content that appeals to specialized tastes as well as to the median taste in order to capture as much of the market as possible; if a provider can offer only one TV channel, it may well program for the median taste, but if it has three it may try to appeal to the top three groups. *See, e.g.*, Daniel L. Brenner, *Ownership and Content Regulation in Merging and Emerging Media*, 45 DEPAUL L. REV. 1009 (1996); Benjamin M. Compaine, *The Impact of Ownership on Content: Does it Matter?*, 13 CARDOZO ARTS & ENT. L.J. 755 (1995). Indeed, in my view, the risk that combining conglomerate power with the modern ability to target subsets of an audience will lead to too much fragmentation is at least as great as the risk of viewpoint homogenization. Every reader can now receive a personalized newspaper telling her only about things she already knows she cares about. The risk in this scenario is that we will lose any common culture. *See* Todd Gitlin, *Public Spheres or Public Sphericules?*, in *MEDIA, RITUAL AND IDENTITY* 168 (Tamar Liebes & James Curran eds., 1998); Elihu Katz, *And Deliver Us from Segmentation*, in *BREAKING UP AMERICA: ADVERTISERS AND THE NEW MEDIA WORLD* (Roger G. Noll & Monroe Joseph Turow eds., 1997). I believe that copyright and its limits can help us navigate a path between Scylla and Charybdis.

right encourages investment in entertainment over facts, as facts are not copyrightable. If authors had to use other means to protect their work, they would presumably be equally able to protect facts and fictions, and therefore there would not be a copyright-induced skew toward the fanciful.

The bias of copyright, pushing new work away from what has gone before it, also has systematic effects on content and viewpoint.¹⁶⁴ Copyright favors expression that looks like a creative genius'; the further an author gets from what has gone before, the more protection he will get.¹⁶⁵ It does not recognize value in folklore or other traditional art forms whose richness consists in repetition of traditional themes.¹⁶⁶ Copyright favors high and mass culture over counterculture and subculture, since marginal groups are more likely to express themselves by unauthorized reliance on popular and well-known materials, while large corporations that have a "library" of proven characters will reuse winning formulas.¹⁶⁷ Copiers who borrow without per-

¹⁶⁴ Cf. *FCC v. Pacifica Found.*, 438 U.S. 726, 776-77 (1978) (Brennan, J., dissenting) (discussing how certain groups are proportionally more likely to express themselves using the seven dirty words, so suppression of broadcasts using those words will be systematically biased against those groups and the viewpoints those groups are proportionally more likely to hold).

¹⁶⁵ Thus, facts get very little copyright protection no matter how hard it was to unearth them or express them, while fiction is heavily favored by comparison. Even within fiction, a hierarchy of creativity prevails. A hackneyed plot with stock characters gets a thin copyright, see *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1936) (Hand, J.), while innovative, whimsical puppets living on their own strange island get much stronger protection, see *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977). This allocation of rights favors the iconoclast, the author of *Infinite Jest* over the author of a Harlequin Romance. Harlequin and other romance publishers have style guidelines that indicate exactly what sort of plots are acceptable, what type of jobs the hero and heroine should have, what kind of premarital sexual activity is permissible, when first sexual contact should occur, and how many words the novel should contain. See CAROL THURSTON, *THE ROMANCE REVOLUTION: EROTIC NOVELS FOR WOMEN AND THE QUEST FOR A NEW SEXUAL IDENTITY* 223-26 (1987). Even one that met conventional standards of "good writing" would have trouble proving that anything other than verbatim copying constituted an infringement. Copyright also favors the kinds of creativity men have historically dominated over the kinds of creativity women have historically dominated, since women's art has often been variations on a theme, like quilting, instead of distinct creations. See Shelley Wright, *A Feminist Exploration of the Legal Protection of Art*, 7 CAN. J. WOMEN & L. 59, 90-94 (1994).

¹⁶⁶ See, e.g., Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1 (1997). I do not endorse Farley's notion that copyright's boundaries should be expanded and its term extended in perpetuity to protect folklore, but she cogently sets forth the ways in which copyright's definitions exclude what many people consider the most valuable aspects of traditional culture.

¹⁶⁷ See, e.g., *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978); JENKINS, *supra* note 48; Coombe, *Objects of Property*, *supra* note 82; Nels Jacobson, *Note, Faith, Hope &*

mission and then add their own content tend to be making fun, making light, attacking the conventional; they do not have a "stable" of well-recognized character and situations.¹⁶⁸ Such copiers do not set the agenda of public discussion. They generally lack name recognition on their own—to get people to pay attention, they may need to trade on names and situations we already know.¹⁶⁹ The owners of popular products, by contrast, have an incentive to keep their most popular products from close association with anything unpopular or unsettling.

Despite these predictable effects, copyright can be defended as content-neutral in aim. It could be that punishing copying that destroys the economic incentive to speak by substituting for a creator's speech and satisfying demand is like prohibiting the interruption of a public speaker. John Hart Ely persuasively argues that prohibiting interruption, even by "the most coherent and trenchant political commentary," would be perfectly constitutional because the underlying value protected by the regulation would be the right of the original speaker to speak and the audience to listen, and those rights are not dependent on the message of the interrupter or even on the fact that the interrupter has a message. Interruption that agrees or disagrees with the speaker threatens the values sought to be protected.¹⁷⁰ Likewise, pure copying, whatever the underlying intent, harms speech and thus can be prohibited. Yet, as Part I explained, many copyright cases do not involve pure copying. Also, questions remain regarding whether certain speakers are more likely to benefit from an anti-interruption/copying regulation and whether the regulation will prevent the interrupter/copier from speaking at all.

Parody: Campbell v. Acuff-Rose, "Oh, Pretty Woman," and *Parodists' Rights*, 31 Hous. L. Rev. 955, 1015–18 (1994). Rosemary Coombe notes that copyright piracy is often carried out by immigrants struggling to survive and others at the margin of American society. See Rosemary J. Coombe, *The Cultural Life of Things: Anthropological Approaches to Law and Society in Conditions of Globalization*, 10 AM. U. INT'L L. & POL'Y 791, 817–18 (1995).

¹⁶⁸ See Mark Gunderson, *Copyright . . . For Poorer or Richer*, at <http://www.icomm.ca/macros/copyrite.txt> (last visited Jan. 15, 1999); VirComm, *Copyright Law Is Wrong*, at <http://www.cyborganic.com/people/vircomm/projects/anti-copy> (last visited Jan. 15, 1999). This could be described as a problem of risk aversion—copyright owners do not want to risk the value of their property, and thus they are less likely to make really creative or controversial use of their works than copiers are. See McJohn, *supra* note 116, at 106.

¹⁶⁹ See, e.g., Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992) (one of several cases involving "appropriation artist" Jeff Koons who copies elements of popular works as sardonic commentary on them); *Air Pirates*, 581 F.2d 751.

¹⁷⁰ John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1499 (1975).

Frederick Schauer argues that mechanisms that repress speech are all-pervasive, in norms about polite or appropriate speech, in conventions that limit what will be understood as intelligible communication, and in other varied pressures that lead people to watch their words. In this view, censorship, in the sense of external forces bearing on individual communication, is everywhere; the question is what kinds the government should regulate when it participates, as it must, in shaping those forces.¹⁷¹ Meanwhile, Wendy Gordon argues for broad rights to use pre-existing creative works on the ground that some works essentially reach out and grab audiences. A person who has been powerfully affected by a work may feel a sense of constraint, a need to respond to the thoughts and feelings generated by exposure to the initial work.¹⁷²

Schauer and Gordon are describing two aspects of the same phenomenon, as prior works are part of the environment that shapes what stories we want to tell and even what we can imagine telling. Copyright generates works that affect what will be created thereafter, not just by prohibiting pure copying and by directly encouraging variation, but also by altering the background universe of information that provides the raw material for the next generation, in the literal sense of the word. Government thus participates in encouraging some kinds of content and discouraging others.

2. Differences Between Market-Failure-Based Regulations: Infringement Contrasted to Hate Speech and Pornography

Copyright is a regime that affects a large amount of speech, but seems relatively content-neutral, and in evaluating it we have to ask exactly how stringently the First Amendment requires us to evaluate content-neutral speech regulations. Perhaps surprisingly, the breadth of copyright's effects becomes a factor in its favor, while the more targeted radical theories seem more suspect. The following subsections explore the family of speech-versus-speech claims by contrasting copyright to the regulation of hate speech and pornography.

a. *Borrowing Versus Attacking*

What is really at stake in the evaluation of speech-versus-speech claims is a judgment about what options people should have to re-

¹⁷¹ See Schauer, *Ontology*, *supra* note 94.

¹⁷² See Gordon, *A Property Right in Self-Expression*, *supra* note 116.

pined to speech that in some way harms them. As Kent Greenawalt has noted, the democratic aim of promoting courageous citizens, "independent of mind and hardy emotionally," does not mean that all kinds of hardiness are equally desirable goals for First Amendment jurisprudence.¹⁷³ Greenawalt argues that fortitude in the face of serious and imminent threats of violence is not the kind of hardiness that is valuable for democratic citizenship; thus, penalizing such threats does not conflict with the goal of creating robust and vigorous citizen-communicators.¹⁷⁴ Similarly, willingness to create in the absence of the economic incentives generated by copyright is not the kind of hardiness that we should require of speakers. The question is what other kinds of hardiness government should or should not demand of its citizens.

One obvious distinction between copyright and the regulation of racist and pornographic speech is that the mechanisms by which "silencing" works in the two cases are different. Richard Delgado recently described the speech-versus-speech justification for regulating hate speech: "[h]ate messages also make the task of the minority speaker harder, because of the toll that they take on the credibility of speakers of color. . . . The *very same message* from a woman will register differently from one delivered by a man."¹⁷⁵ He concludes that

[b]ecause the message is the same, irrespective of the speaker, the reason for the different reception cannot lie in the words themselves . . . [T]he only possible origin of this different credibility lies in the system of stories and messages that we choose to tell about, and to, minorities and women—in short, hate speech.¹⁷⁶

The speech of A, then, deprives B of effective speech, the one value that a First Amendment absolutist cannot deny.¹⁷⁷

The economic motivations to buy or use an infringer's product can be unrelated to the literal message of the infringed material,

¹⁷³ KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 292 (1989).

¹⁷⁴ *See id.*

¹⁷⁵ Richard Delgado, *Toward a Legal Realist View of the First Amendment*, 113 HARV. L. REV. 778, 792–93 (2000) (reviewing Steven H. Shiffrin, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999)) (emphasis added).

¹⁷⁶ *Id.*

¹⁷⁷ *See id.* Copying and hate speech are not different just because a minority speaker's incentives and attractiveness are affected by speech distant in time and place. Copyright, too, assumes that the regime governing speech in general will affect future instances of speech.

while the connection between the cognitive biases invoked by racist/sexist speech and the oppressive messages of that speech is strong. In other words, racist speech may destroy a minority speaker's credibility or otherwise short-circuit cognitive mechanisms for evaluating speech, but the persuasive mechanism by which such suppression works is itself arguably deserving of protection. Infringement, on the other hand, makes a copyright owner's speech economically unattractive: Why buy a newspaper when you can get the stories for free? The copier is not the enemy of the creator's viewpoint, only of his or her livelihood.¹⁷⁸ The infringer is piggybacking on the first speaker, while other speakers are using their targets in an entirely different way—grinding them down. Where piggybacking is not primarily antagonistic to the first speaker, despite its negative effects on incentives, racist and pornographic speech is. Certainly, regulations of hate speech and pornography can be defended on the ground that such speech inflicts harm on the people it targets, but that rationale stands in contrast to copyright's encouragement of disagreement.

In fact, the fair use doctrine's preference for parody and criticism parallels the argument against regulating hate speech. The argument is as follows: There are some harms to incentives to speak that the government cannot take into account when considering whether or not to regulate. In copyright, those harms are (at least) harms to incentives that may occur when vicious reviews or parodies suppress demand for a work. This is either because the interpretation of the parodist/reviewer is more important to free expression than the diminished incentive to create new works that might be savaged, or because the effect on incentives comes not through pure economic substitution but through some other mechanism. I would argue that the former proposition is bound up with the latter.

Valuing criticism over "original" creation raises the specter of content bias. Yet it can be defended as a way to keep people believing in the marketplace of ideas, since a good review is probably more credible in a world that allows bad reviews. This is a concern for proper marketplace functioning, a regulatory concern. It also paral-

¹⁷⁸ As discussed in Section I.B, this distinction between copyright and the radical theories does not track the actual law of copyright, which often imposes liability on a copier whose viewpoint is clearly distinct from that of the copyright owner or who participates in a different market, for example by parodying the copyrighted material. Nevertheless, the distinction between types of speech incentives and disincentives can be defended if we distinguish economic harms from dignitary harms and defend copyright only as a response to the former.

lels the traditional truth-finding rationale for free speech; criticism, even false or erroneous criticism, is valuable because it tests the value of prior works and received wisdom. Furthermore, if criticism is allowed but pure substitution is not, there are still large incentives to create. Therefore, it is reasonable to value criticism or parody over an attacked work when the two come into conflict.

Perhaps racist speech and pornography are so much like criticism and parody that, even if they affect incentives to speak, they still should not be regulated. Nonetheless, the analogy between the two speech-conflict situations is still useful. In both cases we may recognize that an "unregulated" speech market is subject to skewing in favor of some speakers; there is no natural pregovernmental level of unconstrained speech. Furthermore, infringement and racist speech may operate by different noncognitive mechanisms, but the objection in both cases is that the mechanisms are fundamentally unfair. Proponents of hate speech regulation and the like believe that silencing through the coercive power of racial epithets is wrong, just as copyright defenders believe that silencing through the limitation of economic incentives is wrong.

b. The Relationship Between Content Neutrality and Mechanisms of Silencing

Copyright, unlike the radical theories, seems content- and viewpoint-neutral on its face. The decision to classify a regulation as content-based or content-neutral, however, depends upon the categorization of the mechanism by which dangerous speech does harm. That is, the neutrality argument is ultimately a characterization of the effects of the kinds of speech likely to be suppressed by regulation. To see this point, take a standard example: the regulation of inciting speech that creates a clear and present danger of violence. Unlike regulation of racially derogatory fighting words, regulation of the entire category seems viewpoint-neutral. Anyone who advocates imminent violence in a way that is likely to succeed in triggering such violence will be punished; whether the violence is in support of segregation or socialism, the advocacy is illegal. The proponent of violence could, however, characterize the regulation as viewpoint-based. People who express the belief that violence is a good idea—at least those who are likely to persuade others to agree—can be punished, but those who express the opposite viewpoint, that nonviolence is the appropriate way to effect change, will *never* be punished. As with a law dividing pregnant persons from nonpregnant persons, it turns out that only one side loses.

One response to this criticism is that the advocacy of imminent violence does what it does in a different way than the advocacy of peaceful change, by destroying the audience's ability to reflect on what it hears, which brings us back to the different-mechanisms argument.¹⁷⁹ The argument that speech that destroys a listener's ability to abstain from violence is not persuasion but coercion is one plausible characterization, but there are others. In a real sense, if I say "Let's take the damn street now" and my followers do so, I have been persuasive even if I have also been inarticulate. The persuasive power of any argument often depends on an audience's preexisting biases and favored concepts or code words, and deciding that some argument operates outside the register of persuasion is tricky business. I will not attempt to resolve the issue; I use the example simply to demonstrate that the determination that a regulation is content- or viewpoint-neutral will ultimately depend on judgments about how different kinds of speech work.

Therefore, an infringer, particularly one who takes only parts of a copyrighted work, could well argue that infringement expresses the viewpoint that copying is good and that there is nothing new under the sun.¹⁸⁰ Popular anti-copyright rhetoric contains many such statements.¹⁸¹ No matter what the content of the infringed material, only infringement can express this viewpoint in the most persuasive way, because only infringement shows the audience what infringement is good for.

Copyright protects noninfringing materials, never infringing materials; it embodies the viewpoint that infringement is bad. This is only neutral if infringement operates on the universe of available speech in a way that differs from noninfringement, a way whose harms are more extensive than the harms of other kinds of speech. The harmful incentive effects of infringement make it plausible to treat copyright

¹⁷⁹ Kent Greenawalt makes a similar move. He recognizes that prohibitions on encouraging political assassination and violent revolution favor peaceful ideologies over violent ones, but argues that "the preference for urging obedience to law over urging violence is not itself the kind of preference that is strongly at odds with a principle of free speech," even if it may have uneven effects on differing viewpoints. GREENAWALT, *supra* note 173, at 122. To him, the ban on criminal advocacy (if cabined to require an imminent likelihood of harm) is an acceptable content judgment, perhaps like other acceptable content judgments that favor local television stations over cable providers or creators of copyrightable works over infringers (also narrowly tailored).

¹⁸⁰ Cf. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 611 n.6 (1998) (Souter, J., dissenting) (discussing the "communicative element inherent in the very act of funding [art] itself").

¹⁸¹ See *supra* note 55.

as a neutral regulation, since copyright targets a mechanism of speech-suppression and not a viewpoint as such. Note, however, that arguments for regulating hate speech, pornography, and campaign finance similarly characterize their targets as behavior with effects on the market for speech. Under the radical theories, it is acceptable to say that women are inferior or that the rich should pay no taxes, so long as that speech does not use the (particularly powerful) mechanisms of sexually explicit subordination or saturation political advertising.¹⁸²

The distinction between copyright and pornography or hate speech regulation is therefore bottomed on an evidentiary disagreement. Both theories look at audience response to regulation or a lack thereof. We are confident enough about how economic rationality works that we can predict how unredressed infringement will affect the production of speech. Without copyright, some people will create because creation is independently satisfying, and some people will still pay creators, whether as patrons of the arts or out of a sense of moral obligation, but the addition of economic incentives has a significant effect on the level of speech. By contrast, mechanisms of silencing through racist speech and pornography are far less clear. Theories of human psychology can explain the mechanisms, but they seem less intuitively obvious to many people today than the idea that money motivates action.¹⁸³ Pornography and hate speech promote inequality, and one effect of that is to harm the victims as speakers, but the process seems more diffusely connect to silencing than infringement is, even if the amount of silencing is as great or greater.

In addition, much discomfort with proposed regulations of pornography (and hate speech) comes from the perceived impossibility of tailoring regulation to that which silences women. A variety of non-sexually-explicit demeaning images and stories affect women's ability to speak and be heard. Against that background, it is hard to imagine that eliminating pornography would materially affect women's speech incentives or credibility. Ironically, copyright's breadth seems more acceptable as an incentive scheme because its wide coverage makes it more likely to achieve its goal. Inquiry into mechanisms of silencing suggests a version of a tailoring requirement. A speech-promoting speech restriction should be targeted to cover bad, speech-

¹⁸² See, e.g. MACKINNON, *supra* note 138, at 108.

¹⁸³ But cf. Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 HARV. L. REV. 1149 (1998); Weinreb, *Fair Use*, *supra* note 79, at 1305-06 (noting the absence of significant empirical evidence about copyright's incentive effects).

suppressing speech. If it covers substantially more or less than that, then the law is not really promoting speech. Copyright law does not currently work this way, but it should.

c. *Diversity*

Copyright seems to be content-neutral because it regulates all speech.¹⁸⁴ By contrast, racist and pornographic speech often have a predictable and politically charged content. Yet, copyright's interest in promoting diversity and new expression is, ultimately, content-based in the sense that the term is usually used. We usually demand that mechanisms of speech regulation be content-neutral because we fear government oppression, but we have a legitimate content-based preference for a rich and diverse array of speech.¹⁸⁵ Thus, copyright suggests that certain broad content-based preferences are acceptable justifications for government regulation.

When courts and commentators declare that protecting authors' expression ensures a wide variety of expression rather than a flood of copies, they invoke diversity principles.¹⁸⁶ Diversity is a preference for certain kinds of content: new expression that would be less prevalent in the absence of regulation.¹⁸⁷ Ex ante, diversity might seem neutral, because Congress cannot be sure when it establishes a copyright law whose ox will be gored, just as legislatures cannot be sure who will use a libel law. The content discrimination comes in ex post, when a preference for variety over repetition punishes copiers and favors transformative uses.¹⁸⁸ In the case of libel law, at least, the ex post effects

¹⁸⁴ See Fraser, *supra* note 17, at 10.

¹⁸⁵ See *Associated Press v. United States*, 326 U.S. 1, 19 (1945) ("[The First Amendment] rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.").

¹⁸⁶ See *Turner I*, 512 U.S. at 677 (O'Connor, J., concurring and dissenting in part) ("Preferences for diversity of viewpoints, for location, for educational programming, and for news and public affairs all make reference to content.").

¹⁸⁷ See *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 20 (1986) ("[T]he State's asserted interest in exposing appellant's customers to a variety of viewpoints is not—and does not purport to be—content neutral."); Lemley & Volokh, *supra* note 124, at 2447. Then-Justice Rehnquist's dissent, by contrast, argues that government decisions that affect the mix of content available to the public are not problematic unless the action "approximates that of direct content-based suppression of speech." *Pacific Gas*, 475 U.S. at 29 (Rehnquist, J., dissenting).

¹⁸⁸ See Volokh & McDonnell, *supra* note 57, at 2447 ("[C]opyright liability turns on the content of what is published. True, the law draws no ideological distinctions. . . . But while this might make the law viewpoint-neutral, it doesn't make it content-neutral.").

that disadvantage defendants are enough to subject libel law to fairly intense judicial scrutiny.¹⁸⁹

The upshot of the diversity preference is that copyright has a disparate impact on various kinds of works and speakers. Yet it is not clear that the First Amendment erects any barrier to neutral laws that, although reasonable and limited, nonetheless have a disparate impact on some group, especially if that group is not historically disadvantaged.

Radical theorists argue for a change in government regulation precisely on the grounds that the speech suppressed under the current regime should be more widely available. We need government to balance the scales so that certain disfavored people have a chance to be heard. Some of the radical theorists think they know what these unheard voices would say; others remain more agnostic. As a matter of democratic self-governance, it may be troubling that any group is silenced no matter what it might say, and particular attention to the silence of historically disadvantaged groups makes constitutional sense (for Fourteenth Amendment, *Carolene Products*-type reasons).

Perhaps copyright is less troubling than other market-failure theories because copyright promotes diversity of *expression*, not diversity of ideas, and only the latter is a troubling kind of diversity preference. But recall the argument of Part I.A that expression and ideas are intertwined in ways that are difficult to sort out. Ideas have no form without expression. Furthermore, without copyright, no one would have property rights in ideas in any event; the incentive to have a “new” idea and clothe it in expression could well be diminished without copyright. Therefore, copyright’s protection for ideas works in tandem with its protection of expression.¹⁹⁰

The bias of copyright may differ in another way from the biases in other speech-promoting regulations. Copyright’s goal is not just

¹⁸⁹ The fear is either that libel law will have a disparate impact on certain groups that will be impossible to tease out case-by-case or that too much speech will be suppressed regardless of whether any identifiable group is affected. As I argued in Section I.A, one could make the same case against copyright.

¹⁹⁰ While copyright’s main incentive function is to encourage varied expression, that in itself tends to encourage different viewpoints and different subjects. Even the relatively idea-free example of Hollywood moviemaking shows how the principle works. *Titanic* was a success, but only one studio reaped the direct monetary benefits of the movie; others had to figure out how to take advantage of the audience’s passion for the story. Thus Leonardo DiCaprio gets to star in many other movies, with different stories; thus we get another summer of disaster films; thus we get a slew of period pieces. All these are strategies for taking part of *Titanic*, some part that copyright does not protect, and turning it into copyrighted gold. In the process, we get different ideas, not just different expression.

diversity but *amount* of speech—let a thousand novels bloom. I do not believe that the distinction between diversity and amount of speech is meaningful, however. One could make the same claim about campaign finance reform, hate speech regulation, antipornography ordinances, and so on. Such restrictions would enable many voices heretofore silent to begin speaking, regardless of what those voices might say. More fundamentally, the spatial metaphor for measuring speech becomes fairly useless at this point. Assume that, without copyright, people would spend less time communicating their thoughts to one another, since there would be less profit in it. We would have to make up our own stories to entertain ourselves individually. Would there really be “fewer” stories? Or would we have the “same” number of thoughts, only less advanced because they would not be enriched by others? While I believe that two people may well improve the logic and persuasiveness of their beliefs by exchanging ideas, I am not sure it is appropriate to say that the “number” of ideas changes through communication. Copyright lends itself to counting more easily than other forms of speech regulation, perhaps, because it is easier to measure the number of magazines on a shelf than it is to measure diversity of viewpoints. But that still does not tell us whether a billion copies of a biography of Leonardo DiCaprio is a better free speech goal than ten thousand copies each of ten thousand different biographies.

“More” speech is not just about having more alternative viewpoints or novels from which to choose, but about having more tools with which to make new speech. Diversity in the marketplace is usually conceived of at static slices of time: more choices for consumers means more diversity. Diversity of speech is a different animal, as the theory behind copyright demonstrates; the variety available at one time affects what will be available later on. The preference for a dynamic diversity, one that allows speakers to generate new speech, is a content preference, but it is a justified one.

Whatever one thinks of the regulation of hate speech and pornography, comparison with copyright theory is useful to identify grounds on which one could promote or condemn particular government actions that penalize some speakers to encourage others. In the end, whether a regulation is “content-based” may not be as important as whether we can define and defend its predictable effects on various groups of speakers.

3. Campaign Finance Reform

Campaign finance reform raises similar questions of whether a speech regulation designed to improve one group's access to speech, which therefore has a predictable disparate impact on a different group, is legitimate.

The strongest justifications for campaign finance reform rest on some theory that lack of regulation has poisoned the system by which information about candidates gets to voters.¹⁹¹ The general idea is that no one really *wants* the situation we have, but that most participants are forced to play the big-spending game because of a collective action problem, a Prisoner's Dilemma. Some proponents of reform argue that unlimited spending by candidates leads to a system in which challengers (who may have difficulty getting contributions when challenging a proven candidate) or less wealthy candidates are drowned out.¹⁹² Large modern campaigns require huge "war chests," which in turn drives politicians to solicit wealthy donors or interest groups, creating a system in which money buys influence.¹⁹³ Justice Breyer has thus endorsed the proposition that campaign finance regulation is justified as a speech-promoting speech restriction, preventing the few from drowning out the many.¹⁹⁴

Still another argument for reform is that modern campaigning is an "arms race" in which, for defensive reasons, politicians have to spend so much time on fund-raising that they have no time for governance. Some speech and deliberation—fund-raising speech—crowds out speech and deliberation about what to do in office. Campaign finance reform, then, will not necessarily change the range of views available to the public, but it will improve the quality of public service. Regulation of campaign finance will, it is argued, produce

¹⁹¹See David A. Strauss, *What Is the Goal of Campaign Finance Reform?*, 1995 U. CHI. L. GAL. F. 141 (discussing various justifications proffered by reformers).

¹⁹²See, e.g., Owen M. Fiss, *Money and Politics*, 97 COLUM. L. REV. 2470, 2479–80 (1997) [hereinafter Fiss, *Money and Politics*] (arguing that a democratic understanding of the First Amendment requires the equalization of political opportunity through regulations on campaign spending).

¹⁹³See *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496–97 (1985) (stating that "preventing corruption or the appearance of corruption" is "the only legitimate compelling government interest thus far identified for restricting campaign finances"); Fiss, *Money and Politics*, *supra* note 192, at 2478–79 (arguing that unrestricted campaign finance spending gives untoward power to the wealthy, distorting political equality contrary to First Amendment principles).

¹⁹⁴*Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 120 S. Ct. 897, 905 (2000) (Breyer, J., concurring).

more democratic deliberation.¹⁹⁵ Just as copyright can be attacked for promoting the interests of wealthy corporations, campaign finance reform is often criticized as an incumbent-protection measure. Incumbents have greater access to non-monetary assets such as an ability to get free media exposure and name recognition. Therefore, the argument goes, campaign finance reform, by restricting campaign expenditures, will increase the relative importance of these incumbent-favoring assets.

In the campaign finance context, the Supreme Court held that it is a content preference to fear that some speech, because it is backed by deep pockets, will drown out other speech. To the Court, campaign finance regulations evinced a content-based concern with communicative impact.¹⁹⁶ Campaign finance reformers, by contrast, consider regulation content-neutral, a concern with the volume of speech rather than its ideas. But, because the “volume” of political ads bears a fairly clear relationship to their ability to persuade, and the volume of a loudspeaker does not, the Court saw content discrimination. Like the different-mechanisms argument discussed in the preceding subsection, this judgment depends on the characterization of money as something that enables speech rather than as a mechanism by which certain speech makes its mark on the world.

In tandem with its characterization of limits on campaign spending as content-based, the Supreme Court rejected the democratic, speech-equalization rationales for campaign finance reform, on the theory that the speech of some should not be suppressed to enhance the relative voice of others.¹⁹⁷ Like copyright, there is no *ex ante* restriction, but once the political season begins, the restrictions affect who can speak or what can be said.¹⁹⁸ Also like copyright, campaign finance reform challenges us to recognize the relation between money and speech—money generates speech, in copyright by financing the production and distribution of speech, and similarly in

¹⁹⁵ See, e.g., Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994).

¹⁹⁶ See *Buckley v. Valeo*, 424 U.S. 1, 17 (1976).

¹⁹⁷ See, e.g., *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298–300 (1981); *Buckley*, 424 U.S. at 48–49. Academic critics of campaign finance reform also argue that government nonintervention is the natural baseline for a regime of free speech. See, e.g., Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1260–61 (1994).

¹⁹⁸ See Blasi, *supra* note 195, at 1292 (discussing ways in which facially neutral campaign finance reform might favor certain ideological interests over others).

campaign finance. The desire for money affects the content of individual speakers' speech, as publishers seek to produce popular material or candidates solicit the support of wealthy donors.

Copyright and campaign finance reform are linked not only by their market-failure theories but also by a concern for democracy, in the sense that both theories postulate that citizens should have access to many speakers saying many different things. Some people criticize the radical theories because they seem to make the state responsible for deciding what is good for people, deciding which stories have not been sufficiently successful in reaching a sympathetic audience. Robert Post, for example, finds Owen Fiss's emphasis on getting information out into the public sphere so that people can decide how to vote unappealing because it "offers a strikingly passive image of the democratic citizen, who can be brought to identify with collective self-determination merely by being provided with . . . full and accurate information."¹⁹⁹

The radical theorists, however, disagree with this characterization because to them there should be no easy line between speakers and audiences. Currently, some people talk too much when they should be listening, and vice versa, but that is not inevitable. Integrating copyright into other theories about how the state constructs the conditions for speech helps illuminate how no citizen, on either the creative/speaking or the copying/listening side, is passive. Copyright's understanding of how audiences can rework expression to suit their own purposes suggests that even what we think of as passive listening may be more active than sharp distinctions between listening and speaking admit. Access to multiple viewpoints is important not just so citizens can choose, but so they can create their own viewpoints. Campaign finance reform has similarly democratic aspirations, as it attempts to enhance the political voice of groups that may currently lack the means to be heard, both by directly decreasing the importance of money and by eliminating the fund-raising pressures that may lead politicians to devote insufficient time to the issues.

A distinction between campaign finance reform and copyright may therefore rest on predictions about the groups affected by the two regulations. Campaign finance reform affects rich people, a group that seems smaller and more stable—thus more politically vul-

¹⁹⁹ Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1526 (1997) (reviewing OWEN FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH & THE MANY USES OF STATE POWER* (1996)).

nerable—than the authors protected by copyright (never mind that the real beneficiaries of copyright are often from the same group).

Various aspects of First Amendment law are structured to minimize disparate effects on identifiable groups, as with libel law, where we predict that unconstrained juries will be too sympathetic to the powerful and unsympathetic to their challengers to preserve vigorous reporting and editorializing. Campaign finance reform raises the same concerns. Similarly, we ought to see copyright, and its exceptions, as a law with predictable content-based effects, which should therefore be subject to some heightened review. Because of copyright's breadth, however, the standard tests for constitutionality of speech regulations may be too stringent; copyright, and perhaps other regulations, may deserve scrutiny limited to the reasonableness of Congress's line-drawing. But when speech is directly regulated, is the inquiry ever limited to mere rationality as with a standard economic regulation, or must courts demand something more from Congress? The next section addresses that question.

4. *Turner Broadcasting* and Semi-Content-Neutral Regulation

Must-carry regulations are the only speech-promoting regulations upheld in their entirety in recent years. The Court's articulation of a theory that allowed these regulations to persist, despite their substantial and direct effects on cable providers' speech, provides valuable guidance for what serious First Amendment analysis of copyright would look like.

Must-carry regulations ensure that cable systems carry local broadcasters at no charge, if the broadcasters so desire. The fear that prompted enactment of the must-carry law was that cable providers would shut local broadcasters out of their systems, thus destroying the local stations that had served regional populations for decades before the development of cable. Local stations, in theory, carry local news, as well as educational and informational programming that might not otherwise be found on cable.²⁰⁰ The crowding-out of local stations was linked to cable technology, which made it inconvenient for a viewer to switch back and forth between cable and local broadcast.

²⁰⁰ This is in part because the government requires broadcast licensees to serve the public interest by offering such programming, while it does not similarly demand public interest programming from cable providers, though it does require that cable providers allow certain favored groups (local government and educational organizations) to access some cable channels.

The *Turner I* Court held that “the mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media.”²⁰¹ The Court emphasized that laws that single out the press are always subject to some heightened First Amendment scrutiny.²⁰² The Court then invoked *United States v. O’Brien*²⁰³ as the basis for its analysis, despite very different situations. *O’Brien* concerned a regulation banning the destruction of draft cards that was used to prosecute an antiwar protester. It set forth a test for conduct regulations that have an incidental impact on expression, whereas the Cable Act directly regulated expression.

The *Turner I* Court used *O’Brien* because it found that none of Congress’s interests in must-carry were related to the suppression of free expression.²⁰⁴ In fact, the multiplication of information sources is “a governmental purpose of the highest order.”²⁰⁵ The Court, however, demanded a showing that the threatened harms to free television, diversity of information sources, and fair competition in the programming market were real and that regulation would alleviate those harms in a direct and material way.²⁰⁶ In addition, the government had the burden of showing that its regulation did not burden substantially more speech than necessary.²⁰⁷ Thus, the Court deferred to Congress as a fact-finder; once it determined that Congress had carried out its fact-finding responsibilities, it accorded great weight to the problems Congress identified and the remedies Congress chose. At the same time, the Court scrutinized the Cable Act carefully in order to determine whether, if the facts were as Congress found them to be, the Act regulated only as much speech as necessary to achieve Congress’s aims.

The *Turner I* Court justified its somewhat relaxed test for direct regulation of speech on the ground that the must-carry law was con-

²⁰¹ *Turner I*, 512 U.S. at 640.

²⁰² *See id.* at 640–41.

²⁰³ 391 U.S. 367 (1968).

²⁰⁴ *See Turner I*, 512 U.S. at 662.

²⁰⁵ *Id.* at 663. Justice Breyer’s *Turner II* concurrence explicitly recognized that the Court was balancing speech interests on both sides—cable carriers on one, the public interest in having a wide variety of sources available on the other. *See Turner II*, 520 U.S. at 226 (Breyer, J., concurring). Because important First Amendment interests existed on both sides, Justice Breyer found that the key question was one of “fit.” The Court had to determine whether significantly less restrictive alternatives existed and whether the balance between speech-enhancing and speech-restricting functions was reasonable. *See id.*

²⁰⁶ *See Turner I*, 512 U.S. at 664.

²⁰⁷ *See id.* at 664–65.

tent-neutral. The test for content neutrality, it stated, was whether the government adopted a regulation because of agreement or disagreement with a message.²⁰⁸ Also, laws that “by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.”²⁰⁹ This definition seems like a better description of viewpoint regulation, since we usually think of content-based regulations as covering obscenity, libel, or other classes of speech that may have a broad range of “messages.” Indeed, Justice O’Connor declared in dissent that Congress’s preference for the *topics* covered by broadcast stations—local news, public affairs, educational programs, etc.—constituted a content preference.²¹⁰

²⁰⁸ See *id.* at 642.

²⁰⁹ *Id.* at 643.

²¹⁰ *Turner I* also seems to conflict with *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), the parade case. *Hurley* noted that the organizers of Boston’s St. Patrick’s Day parade let in multiple messages, often disconnected from one another, so that it was hard to say that there was any particular theme to the parade. See *id.* at 569. Yet “a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.” *Id.* at 569–70. Even though there was no particular message, the parade could not be forced to add another message-thread to the overall tapestry.

Hurley distinguished *Turner I* because the *Hurley* Court thought that people would believe that the organizers endorsed any signs in the parade, even though the evidence showed that the organizers almost never exercised control over signs. See *id.* at 575. The Court found that parades are not disconnected units like television programming but unified wholes, even when they lack a unified message. See *id.* at 576. This distinction seems mistaken. Like a parade, television is often perceived as a unified experience, with disparate interlaced segments reflecting on one another. See, e.g., JAMES B. TWITCHELL, *CARNIVAL CULTURE: THE TRASHING OF TASTE IN AMERICA 195–96* (1992) (discussing studies on television watching habits that reveal that average viewers treat watching as a process rather than as a series of discrete events). Moreover, cable operators cannot disclaim any endorsement of NBC or PBS, because they are prohibited by law from altering the broadcast signal on retransmission, so the Court’s conclusion that cable operators can dissociate themselves from must-carry channels is not persuasive. The Court believed that “given cable’s long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator.” *Turner I*, 512 U.S. at 655. That long history, however, was not produced by must-carry; carriage was voluntary, and the natural assumption of the average viewer would more likely be that broadcast carriage, like carriage of HBO and Showtime, was and continued to be the result of the cable operator’s choice. The Court noted that viewers are frequently apprised of the broadcaster’s identity. See *id.* Yet parade-goers in Boston were apprised of GLIB’s identity, and the bill recipients were apprised of the public interest group’s identity in *Pacific Gas & Electric Co. v. Hudson*. It was the forced inclusion of another’s views, despite the explicit identification of that other, that the Court found objectionable in those cases. Finally, the *Hurley* Court also invoked monopoly considerations to distinguish *Turner I*: “The Government’s interest in *Turner Broadcasting* was not the alteration of speech, but the survival of speakers.” *Hurley*, 515 U.S. at 577. The Court also emphasized that it was clear which message the parade

Despite the conceptual difficulties, however, the Court found that the must-carry provisions were content-neutral because they required carriage of broadcast stations regardless of the views those stations expressed.²¹¹ The Court also found that the congressional purpose of maintaining access to free television for all Americans was content-neutral. According to the Court, Congress was not saying that broadcast was more valuable than cable, just that it had value.²¹² This seems disingenuous, since Congress fairly clearly was expressing a preference for local programming over the alternatives that would otherwise appear on the cable channels reserved for must-carry. It might be more accurate to say that must-carry is reasonably content-neutral, and that the categories of speech it prefers are broad enough to be acceptable, especially given the inevitable clash between cable and broadcast speech created by the characteristics of the television-viewing audience.

Turner I and *Turner II*, which upheld Congress's balancing of interests after a full examination of the record, leave a very uncertain impression of what kind of congressional findings will suffice to justify a speech regulation.²¹³ *O'Brien* itself did not distinguish between situations in which Congress was attentive to fact-finding and those in which it was not. It applied a very deferential test in a case where Congress did not have much evidence before it. But the *Turner* cases appear to modify that test, applying it to direct regulation of expression and holding that deference is appropriate, while requiring that

organizers disfavored, by letting in so many and excluding so few. *See id.* at 574. It is less clear which message cable providers were trying to exclude when they opposed must-carry.

²¹¹ *See Turner I*, 512 U.S. at 643-44. When the D.C. Circuit analyzed other provisions of the Cable Act, it used *Turner* analysis to uphold provisions mandating leased access to a percentage of channels on cable systems reserved for programmers unaffiliated with cable operators. The Court held that there was no content discrimination involved because the law's preference operated in favor of certain speakers—those unaffiliated with cable companies—and not in favor of any message. *See Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 969 (D.C. Cir. 1996) (distinguishing "sources" of information from "substance"). The analogy to copyright is simple: Congress can prefer author-sources to copier-sources.

²¹² *See Turner I*, 512 U.S. at 648. The burden on cable operators was also content neutral, because the reduction in channel capacity available for their own choices operated across the board and not upon channels with a particular viewpoint. *See id.* at 645.

²¹³ *See, e.g.,* William E. Lee, *Manipulating Legislative Facts: The Supreme Court and the First Amendment*, 72 TUL. L. REV. 1261 (1998); Comment, *Constitutional Substantial-Evidence Review? Lessons from the Supreme Court's Turner Broadcasting Decisions*, 97 COLUM. L. REV. 1162 (1997); Note, *Deference to Legislative Fact Determinations in First Amendment Cases After Turner Broadcasting*, 111 HARV. L. REV. 2312 (1998).

Congress be attentive to fact-finding.²¹⁴ The Court stated that its “sole obligation” was to assure that Congress drew reasonable inferences based on substantial evidence, because Congress is better equipped than the courts to amass and evaluate the vast amounts of data involved in complex regulation.²¹⁵

One implication of this reasoning is that, without data, Congress is *not* in a better position to draw reasonable inferences than the Court.²¹⁶ Unaided speculation is not enough; Congress at least needs some help speculating. The Court may also have been influenced by the fact that economics and technology played large roles in *Turner*, whereas the justification for regulation in *O'Brien* was essentially based on the psychology of draft dodging. In cable regulation, and in copyright, there are clear economic principles that explain the justification for the regulation, although the application of those principles may be hotly contested.

Possibly, as in *Turner II*, a speech-protective justification for regulation will make the Court's scrutiny less exacting than it would have been had the law been enacted to protect children from corruption. When speech interests exist on both sides of an issue, the courts must tread carefully. They cannot just analyze the reasonableness of the restriction, and they cannot assume that they know better than Congress even if there are content-based elements to a regulation. If speech is opposed to speech, a decision not to regulate, or to regulate in some other way, will also have content-based results. If the standard for legislation is set too high, speech will actually suffer, as it probably would if the Court struck down the Copyright Act in its entirety; if the standard is too low, interest groups may capture the legislature and overprotect some speech at the expense of other speech. (This is what has occurred for years with copyright term extension, expanded rights of various sorts, and legal protection for anti-copying measures that prevent even fair uses.)

²¹⁴ See *Turner II*, 520 U.S. at 191–95. Essentially, the *Turner* cases applied the standard rule that a content-neutral regulation will be sustained if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary, but took the requirement that the regulation actually advance the identified government interest more seriously than *O'Brien* had. See, e.g., *id.* at 191 (referring to Congress's “explicit factual findings” and predictions codified in the statutory statement of purpose).

²¹⁵ *Id.* at 195.

²¹⁶ See Comment, *supra* note 213, at 1175–76.

III. CODA: A FEW IMPLICATIONS FOR THE SCOPE OF COPYRIGHT

Just as copyright's free speech justifications have implications for the evaluation of other speech restrictions, free speech has implications for copyright. In the next few pages, I hope to offer a few examples of those implications, though many other things could be said. Reconceiving copyright as speech-promotion law helps us understand not just how to make copyright efficient at what it does, but what it should do.

For example, I began this Article with a discussion of copyright's vagueness. I conclude, perhaps surprisingly, that vagueness is the necessary price of the benefits of copyright. (And the same might be true of other speech-promoting speech regulations, though the evidence is much less clear.)

Similarly, rethinking copyright as a speech-promotion device has several implications for fair use; I will only discuss one. The fair use preference for "noncommercial" uses should take account of what general First Amendment law recognizes, which is that speech for profit is not necessarily robustly "commercial." Much profit-seeking speech is nonetheless easily suppressed or deformed, and commerciality as it has been understood in fair use doctrine should be narrowed in a manner more consistent with general free speech law.

Finally, I suggest a framework for evaluating copyright's effects on speech that takes account of Congress's ability to find relevant facts, an endeavor that *Turner* puts at the center of free speech analysis and that will be vital for any other speech-promoting speech regulation.

A. *The Importance of Vagueness*

The problems of vagueness discussed in Part I seem particularly problematic given that there are speech interests on both sides of any copyright dispute. Assuming that people are generally risk averse,²¹⁷ vagueness chills speech on both sides, although vagueness is almost

²¹⁷ Even if insurance can make some entities risk-neutral, all that is really required to make this argument work is that some entities are risk-averse and that they are randomly distributed between the universes of potential copyright plaintiffs and potential defendants, universes which overlap. Volokh and McDonnell discuss the possibility that copyright liability is just a cost of doing business, not a drag on speech. As with libel law, expansive copyright will deter even risk-neutral entities from producing material with a lower profit potential because of the risk of liability, thus changing (perhaps even decreasing, when investors shift from newspaper to toilet paper) the kinds of speech available. See Volokh & McDonnell, *supra* note 57, at 2448.

universally discussed as detrimental to the interests of a copier.²¹⁸ We get less original production because authors (and their publishers) cannot be certain of capturing enough of the gains of creativity, and we get less copying because legitimate users cannot be sure they will be able to fend off infringement claims. This seems like a lose-lose situation.

Eugene Volokh and Brett McDonnell have offered one way for courts to decrease First Amendment-copyright tensions. Appellate courts could review *de novo* findings of infringement where the case rests on substantial similarity. They argue that this practice would allow the circuits to build a body of case law that would enhance predictability.²¹⁹ They take as models to be emulated the appellate-court-supervised development of the law of fair use, libel and defamation, obscenity, and the Fourth Amendment.

This list, however, does not really recommend itself as a set of models of adjudicative deliberation and clarity. In fact, every one of these areas is pretty much a mess, the Fourth Amendment most of all, despite the fact that appellate courts spend appalling amounts of time and paper sorting out Fourth Amendment cases.²²⁰ Even if libel and the like formed coherent bodies of law, I am not sure how well the lesson would apply. Libel, defamation, and obscenity lack the infinite variety of copyright. In libel and defamation, the actual malice requirement does most of the speech-protective work, and the doctrine is further limited to the subset of speech that is widely understood to be damaging to the target. Obscenity is confined to the graphically sexual; the potential variations between challenged publications are on the order of "Insert Tab A into Slot B." In copyright, by contrast, it is difficult to understand how a finding in one case will aid others in any but the vaguest of ways. Substantial similarity rests on comparing the plaintiff's work to the defendant's, not to any social consensus or paradigm work. Volokh and McDonnell do not actually offer any vision of what concrete, explicit principles of substantial similarity might look like, and their silence highlights the difficulty involved when trying to analogize from an infringement case over *12 Mon-*

²¹⁸ See *supra* note 58 and *supra* note 79. Volokh and McDonnell are the first to recognize the vagueness problem on both sides. See Volokh & McDonnell, *supra* note 57, at 2449. I suspect this belated recognition stems precisely from the increasing convergence of copyright's "speech on both sides" paradigm with the radical theories of speech.

²¹⁹ See Volokh & McDonnell, *supra* note 57.

²²⁰ See William Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

keys²²¹ to one over *The Devil's Advocate*. Are four points of similarity enough? How does similar color stack up against similar shape?²²² Whatever predictability results from the Volokh and McDonnell proposal would largely stem from the numbers—there are fewer potential three-judge panels than juries.²²³

The attempt to decrease uncertainty substantially is futile, because vagueness in defining the scope of copyright is the price we pay for speech.²²⁴ Arguably, most vagueness law serves to contract the number of situations in which the government can punish speech, as it is harder to define punishable speech than to identify it in practice. In copyright, though, it would be very difficult to live without an idea/expression distinction or a fair use exception. More certain regimes (no copyright at all, for example) would be even worse for speech.²²⁵

B. Commercial Speech: Turning Two Meanings into One

The Supreme Court's recent decision in *Reno v. American Civil Liberties Union* gives some guidance about what other aspects of a First

²²¹ See *Woods v. Universal City Studios, Inc.*, 920 F. Supp. 62 (S.D.N.Y. 1990).

²²² The copyright lawyers consulted by Volokh and McDonnell seem fairly split on the question of whether more appellate review of idea/expression cases would help. Some thought that nothing would clarify the distinction. See Volokh & McDonnell, *supra* note 57, at 2456. One thought that "the more cases decided, the more likely it is that you can find a rationale for your argument because not all courts are going to agree." *Id.* at 2457 (quoting Blaine Greenberg). David Nimmer thought that life would be easier "if there were fewer benchmark cases." *Id.*

²²³ Cf. Volokh & McDonnell, *supra* note 57 (discussing copyright lawyers' reasons for paying more attention to circuit court cases than to district court cases). That's not peanuts, but it's not terribly principled either.

²²⁴ Cf. Weinreb, *Fair Use*, *supra* note 79, at 1309 (arguing that unpredictability cannot be eliminated from fair use because the doctrine is inherently multifaceted and situation-dependent).

²²⁵ My defense of vagueness resembles the argument in Dan M. Kahan, *Ignorance of Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127 (1997). Kahan argues that vagueness in the criminal law is often a good thing, because it encourages moral behavior rather than immoral adherence to the letter of the law. Copyright's vagueness may be desirable inasmuch as bright-line rules would be more destructive of authors' incentives (whether as primary creators or as users of elements of copyrighted material). One significant distinction between Kahan's argument and mine is that Kahan sees the "chilling" effect of vague criminal laws as a good thing, whereas I suspect that the dangers created by copyright are a necessary price for flexibility. However, Kahan's argument that good citizens should ask themselves whether their conduct is right, as well as whether it is lawful, resonates in copyright. Copyright may be easiest to obey when it tracks our moral norms about ownership, plagiarism, and rights in one's own books and tapes. See Weinreb, *Fair Use*, *supra* note 79, at 1307–08.

Amendment-influenced copyright would look like.²²⁶ The Court struck down portions of the Communications Decency Act which exposed people and entities using the Internet to liability if minors could access indecent speech. In the process, the Court's opinion repeatedly emphasized the dangers posed by the Act to noncommercial speakers, for whom the profit motive did not operate as a counterbalance to the threat of liability and who would therefore be more easily deterred from speaking than commercial speakers.²²⁷ This reasoning suggests a free speech justification for narrowing the commerciality prong of fair use.

The current explanation of the commercial/noncommercial part of the fair use test states that commercial uses are more likely than noncommercial uses to capture the copyright owner's market. Not only is this highly debatable—certainly repeated and widespread noncommercial use can eliminate a potential market, say for videotapes of popular shows or sound files of popular recordings²²⁸—it also faces substantial baseline problems defining what exactly the copyright owner's "market" should be. This explanation invites claims that, if liability is imposed, a market authorized by the copyright owner *will* develop; these claims then produce the conclusion that economic harm is caused by the challenged use because the authorized market never materializes.²²⁹

The circularity of the market-based argument creates a need for a better justification, and free speech has it in standard explanations for regulating commercial speech. Commercial speech is robust enough, because of the profit motive, to generate a broad range of works.²³⁰ A defendant who believes that she has made a commercially successful product may be more willing to litigate a potential infringement, whereas a defendant making a noncommercial use will likely have

²²⁶ 521 U.S. 844 (1997).

²²⁷ See *id.* at 850.

²²⁸ The current distinction also invites courts to stretch the meaning of "commercial" when they really mean that a noncommercial use may cause market harm. See, e.g., *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000) (finding that copying religious text that was given away was "commercial" because it attracted new members to a church); *A & M Records v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000) (finding individuals' free music file-sharing "commercial" because carried out on a large scale among strangers).

²²⁹ See, e.g., *American Geophysical Union v. Texaco*, 60 F.3d 913, 937 (2d Cir. 1995) (Jacobs, J., dissenting); Weinreb, *Fair Use*, *supra* note 79, at 1296.

²³⁰ Cf. *Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n*, 447 U.S. 557, 564 n.6 (1980); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 772 n.24 (1976).

neither the resources nor the inclination to risk a large judgment against her. But this would also invite courts to look more carefully at what a “commercial” use is. Not every part of a publication is “commercial” in the same way, even when the publisher wants to make money; advertisements are commercial speech in First Amendment law but the news stories right above them in the newspaper are not.²³¹ A publisher is probably more willing to suppress the content of any particular story for fear of liability, whether for copyright infringement or another reason, than to suppress an ad. Therefore, unless near-verbatim copying is at issue—suggesting that the publisher is getting commercial advantage from copying and has not done anything else to attract consumers—courts should not let profit-seeking weigh very heavily in a non-advertising commercial use. And courts should be leery of imposing *any* liability for nonprofit uses, because they are more fragile and easily suppressed.

This interpretation would bring the meaning of “commercial” in copyright closer to its meaning in free speech law. In copyright, “commercial” use is defined broadly, as any speech disseminated for profit. Although the Supreme Court in *Campbell* rejected the proposition that a profit-seeking use is presumptively unfair when the use is also transformative, it did not reject the idea that anything that people pay for is commercial use as far as copyright is concerned. By contrast, in the First Amendment context commercial speech is determined by three factors: whether the speech is an advertisement; whether it refers to a specific product or service; and whether the speaker has an economic motive for the speech.²³²

There is an underlying relationship between commerciality in free speech and in copyright. The first two factors of the free speech test have less to do with the justification for lessened protection for commercial speech—its robustness—than the third. The first two factors instead cabin the principle of commercial robustness against the expansion of speech regulation. If the speech is an advertisement that refers to a specific product or service, it may be easy for the speaker to communicate its core message even in the presence of government regulation. In other cases, the core of the message may not have much intrinsic relationship to the commercial motive, as when a publisher chooses to publish books it believes will be best-sellers, regardless of whether the topic is *Chicken Soup for the Teenage Soul* or *101 Uses*

²³¹ See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

²³² See Bolger v. Young Drug Prods. Corp., 463 U.S. 60, 66–67 (1983).

for a Dead Cat. Where the message and the motive have a looser relationship, the content of speech is vulnerable to government-induced deformity even though the speaker intends to keep saying *something* despite regulation. Thus, such speech is not “commercial” in general free speech law; it is noncommercial speech for profit.

Noncommercial speech for profit is the speech on which copyright’s incentive function operates. Advertisements do not need the inducement of copyright; the profit to be gained from selling the underlying goods would support Madison Avenue in any event. Copyright is designed to encourage precisely those creators (or, more accurately, those investors in creative work) who want to make money and whose profit motive is not as strongly tied to the message of the copyrighted work.

We can therefore identify three kinds of message-motive connections. For ads, the message is “buy X,” and the motive is profit from selling X. For general speech sold in the market, the message varies and the motive is profit from selling the speech, and maybe proselytizing, too. Finally, for nonprofit speech, the message varies and the motive is something other than profit.²³³ The first class of speech is particularly robust,²³⁴ although the Supreme Court has recently cautioned that the government still needs substantial justification to regulate it.

The second class is susceptible to deformation and needs greater protection from regulation.²³⁵ Government regulation of such speech may be particularly disturbing for the very reason that a profit-motivated speaker may keep speaking, only with different content, if the government regulates speech. The market will appear robust and free, but it will be pervaded by government-induced distortion. Profit-

²³³ Cf. *Maxtone-Graham v. Burtchell*, 803 F.2d 1253, 1262 (2d Cir. 1986); William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667,679–81 (1993) (suggesting a continuum of commerciality).

²³⁴ Cf. Leval, *supra* note 80, at 1116 n.53 (“Perhaps at the extreme of commercialism, such as advertising, the statute provides little tolerance for claims of fair use.”).

²³⁵ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (1994) (holding that commercial use weighs against a finding of fair use, but it is only one factor and “even the force of that tendency will vary with the context”); *Maxtone-Graham*, 803 F.2d at 1262 (holding that “the commercial nature of a use is a matter of degree” and that an anti-abortion book sold for profit was first and foremost a work of political opinion such that its commercial character did not weigh against a finding of fair use); *Wojnarowicz v. American Family Ass’n*, 745 F. Supp. 130, 144 (S.D.N.Y. 1990) (holding that, while a fundraising motivation for a political pamphlet had some commercial purpose, its preeminent purpose was to express a political viewpoint, and the latter purpose outweighed the commerciality).

seeking should therefore not inherently weigh against the defendant in a fair use analysis.

The third class lacks even a generalized profit motive and is likely to be particularly fragile and deserving of heightened scrutiny when regulated. The absence of profit suggests that the motive has something to do with the specific message being communicated, which deserves special consideration in a free speech analysis.²³⁶ Noncommercial copyright uses may have market effects, but they still deserve special favor because they represent communication that could easily be suppressed.²³⁷

C. Institutional Competence

Who will decide where to draw the line, Congress or the courts? Though courts will defer to congressional judgments about many factual situations, the Supreme Court has repeatedly emphasized that the judiciary must ultimately determine whether laws are consistent with the First Amendment. Where First Amendment interests compete, however, the difficulties are compounded. Assuming that copyright contains some speech-enhancing elements, a range of possible regimes could work, depending on an assessment of the empirical

²³⁶ Distinguishing message from motive can also distinguish various types of ads. Therefore, I disagree with the statement in *Campbell* that parodying a work to advertise an unrelated product is entitled to less protection than the sale of a parody for its own sake. See *Campbell*, 510 U.S. at 585. An ad that evokes copyrighted material to make an unrelated product attractive, such as a beer ad that satirizes ads for batteries, see *Eveready Battery Co. v. Adolph Coors Co.*, 765 F. Supp. 440 (N.D. Ill. 1991), or imitates a rap group's performance, see *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826 (S.D.N.Y. 1990), is arguably *more* deserving of fair use protection than an ad for a product that itself contains copyrighted work and trades on the appeal of that work to sell the product, see *Dallas Cowboy Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184 (5th Cir. 1979). An ad can potentially try to sell beer and lampoon social phenomena at the same time. If the Coors family can donate beer money to political causes, it should also be allowed to get extra bang for its advertising bucks by social commentary in ads—the advertising version of doing good by doing well. Cf. Nina Munk, *Levi's Ongoing Quest for Street Cred*, *FORUM*, Feb. 1, 1999, at 40 (discussing Levi's campaign in which young people talk "frankly" about cutting school and the benefits of inequality under capitalism).

²³⁷ The true believer, of course, may well continue to proselytize (or infringe) no matter what the sanctions; punishment may even seem like vindication to him. See *Negativland*, *supra* note 55. But many people may not have the ability to continue to communicate their messages if their websites are shut down or their presses forfeited. They may continue to believe, but their beliefs will not be readily available to the rest of us.

validity of claims about encouraging rewards for creativity versus allowing creators to draw on what has come before.²³⁸

The Court has rejected suggestions that it should evaluate the extent of a patent monopoly to determine whether it was the best way to promote the useful arts.²³⁹ The Court emphasized the explicit constitutional grant of power to Congress: "When as here the Constitution is permissive, the sign of how far Congress has chosen to go can come only from Congress."²⁴⁰ Yet in *Graham v. John Deere Co.*, the Court held that the Copyright and Trademark Clause is

both a grant of power and a limitation. . . . [Congress may not] enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.²⁴¹

Most recently, in *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Court held that the constitutional scope of copyright contained a requirement of originality; Congress was not free to allow copyright in facts or in non-original works.²⁴² It is difficult to imagine that a copyright of infinite term would be constitutional, and Congress could probably not enact a copyright law in the old English censorial form, giving exclusive rights (and ensuring profitable production) only to

²³⁸ In *Turner I*, Justice Kennedy found that congressional judgments are entitled to substantial deference, but that courts must still exercise independent judgment when First Amendment rights are at issue. He defined the judicial obligation as assuring that "Congress has drawn reasonable inferences based on substantial evidence." 512 U.S. 622, 666 (1994); see also Perlman & Rhinelander, *supra* note 1, at 405 (arguing that courts should not disrupt congressional judgment about the particular balance in copyright cases).

²³⁹ See *DeepSouth Packing Co. v. Laitram Corp.*, 406 U.S. 518 (1972).

²⁴⁰ *Id.* at 530.

²⁴¹ 383 U.S. 1, 6 (1966).

²⁴² See 499 U.S. 340 (1991). Jane Ginsburg has argued that Congress can do under the Commerce Clause what it may not do under the Copyright Clause, at least for factual compilations such as yellow pages. See Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information After Feist v. Rural Telephone*, 92 COLUM. L. REV. 338, 367-84 (1992). I assume for my purposes that if the First Amendment invalidates a particular vision of copyright, a similar law passed under the Commerce Clause would also fail. Given the speech-promoting functions of copyright, we should be suspicious of attempts to make information policy through the Commerce Clause when the copyright power appears inadequate.

state-approved works.²⁴³ If a court were to determine that Congress had failed to identify a speech-based justification for some aspect of copyright and the law suppressed more speech—maybe a lot more—than it promoted, it would be obligated to tell Congress to try again.

With limited empirical evidence at hand, Congress would need at least a persuasive economic theory to explain why its preferred copyright regime did not limit substantially more speech than necessary.²⁴⁴ The justification would not, however, require that each work protected increased the incentive to speak, since the marginal contribution of any one work is minimal. Instead, the effect of a decision to grant rights in the copyright owner or in the user should be generalized, to see what the effects on speech would be if a right or a use became widespread.²⁴⁵ As Justice Souter recently suggested in the campaign finance context, “the quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.”²⁴⁶

Jessica Litman has examined the legislative history of the 1976 Copyright Act, and concludes that Congress adopted compromises between industry groups. Producers and large consumers of information such as libraries were represented, and ordinary viewers and readers were not. The result was expansive definitions of copyright holders’ rights coupled with narrow exceptions to protect the few in-

²⁴³ See *United Christian Scientists v. Christian Sci. Bd. of Dirs.*, 829 F.2d 1152 (D.C. Cir. 1987) (rejecting a congressional attempt to extend the copyright in Mary Baker Eddy’s works for an extra period as unconstitutional favoritism toward religion). *But see San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987) (discussing various super-intellectual property rights that have been granted to favored organizations such as the U.S. Olympic Committee).

²⁴⁴ In Jane Ginsburg’s opinion, for example, Congress can supply content to the Copyright Clause by defining the limits of copyright. See Ginsburg, *supra* note 242, at 375–82. Yet note how uncertainty worked for the Religious Freedom Restoration Act. Without evidence of widespread suppression of religious practices, Congress was not allowed to expand protection for religion beyond that which courts were prepared to give. See *City of Boerne v. Flores*, 521 U.S. 507 (1997). In the case of copyright, a claim that authors will have to stop writing if they cannot get more years of exclusive rights, strengthened performance rights or the like cannot really suffice to justify expanded protection. Instead, courts should demand rigorous findings from Congress that adequately set forth the reasons for altering the balance. Cf. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (finding evidence of trademark infringement by states insufficient to justify abrogation of Eleventh Amendment immunity).

²⁴⁵ See *Mitchell Bros. Film Corp. v. Cinema Adult Theater*, 604 F.2d 852, 860 (5th Cir. 1979) (holding that Congress can find that a class of works promotes the useful arts without requiring proof that each work in the class does so).

²⁴⁶ See *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 120 S. Ct. 897, 900 (2000).

formation users at the bargaining table.²⁴⁷ Congress, and individual members, did not understand or even agree with the particulars of the law adopted. Rather, the legislature brokered a series of deals between industries and then wrote them into law.²⁴⁸ This is not our ideal of policymaking, and it does not fit the *Turner* vision of serious congressional consideration of the values at stake. The process was probably a good way of allocating copyright ownership as between the various contenders (authors, publishers, etc.) who were all represented, but it was a bad way of defining the scope of copyright against other parties.²⁴⁹ This history, and the similar genesis of industry-sponsored legislation to increase rights in information in years since, provides another reason for courts to scrutinize specific assertions of rights against information-users with greater care.²⁵⁰

The *Turner* cases suggest that Congress needs credible evidence that its copyright law enhances speech. A speech-sensitive analysis would make expansions of copyright owners' rights such as the addition of moral rights to copyright, protection for derivative works, and the recent retroactive extension of the copyright term²⁵¹ look highly suspect.

²⁴⁷ See Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987) [hereinafter Litman, *Compromise*]; see also Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 22–23 (1996) [hereinafter Litman, *Revising*].

²⁴⁸ Sometimes even the industry members who agreed on compromise positions did not agree on what those provisions meant. See Litman, *Compromise*, *supra* note 247, at 877, 887–88.

²⁴⁹ See *id.* at 894–95.

²⁵⁰ See Robert C. Denicola, *Freedom to Copy*, 108 YALE L.J. 1661, 1685–86 (1999). History should make us particularly leery when a Congress pressured by established media industries tries to protect them from new media, which have in the past thrived in the absence of specific regulation. See Litman, *Revising*, *supra* note 247, at 27–29; see also *Home Recording of Copyrighted Works: Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee*, 97th Cong. (1982) (testimony of Howard Wayne Oliver, AFTRA) (testifying that audio and video tape recording had to be curtailed to save movies and TV). New media usually mean new market participants, new voices and new listeners, see Litman, *Revising*, *supra* note 247, at 29; this connection to the First Amendment's diversity-promotion goal should not be ignored because of fears that established firms will not be able to compete.

²⁵¹ Pub. L. No. 105–298, 112 Stat. 287 (1998) (codified at scattered sections of 17 U.S.C.). See Netanel, *supra* note 63, at 369; Nimmer, *Copyright*, *supra* note 16, at 1193 (“[W]hen we consider copyright protection beyond the life expectancy of the author's children and grandchildren the balance between speech and copyright must shift. The real, if relatively slight, speech interest in expression remains constant, while the copyright interest in encouraging creativity largely vanishes.”). Nimmer's assessment of the balance of incentives is probably biased in favor of copyright; given the present discounted value of the revenues that will accrue to an author's grandchildren, even if the copyright remains

CONCLUSION

Copyright poses a serious First Amendment problem. It restricts speech pervasively and powerfully, and its contours are ill-defined. Its saving grace is that it is better for free speech than its absence would be. This article made the First Amendment case against and for copyright, concluding that copyright is justified as a way for government to promote a wide range of speech. Nevertheless, copyright's wide-ranging effects on speech require careful balancing so that the needs of future creators are not lost in the name of protecting the property rights of those who have already spoken.

The implications of taking market-based and incentive theories seriously can justify the Supreme Court's new approach to evaluating speech-generating regulations in the *Turner* cases. Although the Court treated must-carry as a free speech issue, not a property ownership issue, the Court clearly saw a market opposed to a government regulator rather than a soapbox-pounding speaker fighting Big Brother. Cable operators are not very much like orators or authors in the Romantic sense. They are shopkeepers who price and deliver a product. As such, treating must-carry as a problem of potential market failure and monopoly made sense. But, because the problem was also a First Amendment problem—having appeared after the First Amendment became a significant constraint on government action rather than before, like copyright—the Court applied a higher standard to this market regulation than it does when non-speech markets are at issue.

Like must-carry, copyright is about economics and speech. The challenge of reconciling modern constitutional doctrine on economic and social regulation with modern free speech doctrine may be the most serious constitutional difficulty of our time. Copyright forces us to recognize that government has an essential role to play in creating the conditions for speech. Furthermore, that government role is predicated on specific judgments about the value of broad classes of speech, and has systematic effects on content and expression. If government intervention and value judgments are inevitable, free speech inquiry should not focus on the necessity of government intervention, a useless debate, but rather on the kinds of value judgments that are acceptable in distinguishing speech that may be prohibited—in copyright, infringing speech—from speech that will be protected against and by government intervention.

quite valuable throughout a lengthened term, the incremental incentive to creativity of a copyright that extends much after an author's death is vanishingly small.

The conceptual separation between copyright and free speech doctrine stems from a general assumption that speech as free speech is not about profit but about politics or self-expression, while people using speech as a profitable commodity have no real investment in its actual content. Although the reality is that the same words often play both roles, a speech claim is created by characterizing words as matters of private choice, while a copyright claim is created by characterizing them as salable property. The challenge of modern copyright law is to explain how words can be both meaningful and profitable, protected speech and protected property.

.