

Copyright Harm and the First Amendment

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Abstract

Copyright law is a glaring and unjustified exception to the general rule that the government may not prohibit speech without a showing that the speech causes harm. While the First Amendment sometimes protects even harmful speech, it virtually never allows the prohibition of *harmless* speech. Yet, while other speech-burdening laws, such as defamation and right of publicity laws, require demonstrable evidence that the defendant's speech causes actual harm, copyright law does not make harm a requirement of infringement. Although copyright law considers harm to the market for the copyrighted work as a factor in fair use analysis, harm is not always required and is so poorly defined that the concept has become circular. Moreover, the defendant ordinarily bears the burden of proof to show the *absence* of harm. As a result, courts often find liability for infringement (and therefore burden speech) where harm is purely speculative.

Potential explanations for copyright's anomalous treatment are unpersuasive. Copying involves speech as well as conduct, and the fact that copyrights are in some sense property does not come close to justifying its aberrant treatment. Moreover, copyright's role in encouraging creative expression does not obviate First Amendment concerns. Rather, it provides a way to reconcile copyright law and free speech. Drawing substantially from First Amendment cases holding that speech restrictions must be justified by a governmental interest, this article argues that the First Amendment requires real proof of harm to the copyright holder's incentives in order to impose liability for copyright infringement. It also explores the types of harm that might arise in copyright infringement cases and considers whether the First Amendment permits recognition of these types of harm. The article concludes that although demonstrable market harm is cognizable under First Amendment principles, recognition of harm to the reputation of copyrighted works, the author's right not to speak or associate, or the copyright holder's privacy interests is generally not compatible with the values of free speech.

I. Introduction

Once largely ignored, the conflict between copyright law and the First Amendment is now widely recognized and even considered "intractable."¹ As copyright

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¹ Compare Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970) (arguing that the conflict is "a largely ignored paradox, requiring exploration"), with Rebecca Tushnet, *Copy this Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves it*, 114 YALE L.J. 535, 546 (2004) (describing conflict as "intractable" because of speech value inherent in acts of copying). See also Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts after Eldred*, 44 LIQUORMART, and Bartnicki, 40 HOUS. L. REV. 697

law prohibits more and more uses of copyrighted expression, it encroaches upon the ability of others to express themselves through the use of copyrighted material. Many have advocated broader and more active First Amendment protection for uses of copyrighted works, and with good reason. The First Amendment is the constitutional bulwark against government restrictions on speech, and its protection is robust. It “protect[s] speech not because it is harmless, but despite the harm it may cause.”² Indeed, it even shields speech that encourages violent criminal acts, violates a rape victim’s privacy, or makes statements harmful to personal reputation.³ Although the First Amendment sometimes protects even harmful speech, it virtually never allows the prohibition of *harmless* speech. The one exception is in copyright law.

Because the First Amendment tolerates serious harm in order to encourage free expression, one might think that it would easily excuse uses of copyrighted material, especially when those uses cause little or no harm to copyright holders. Yet, courts frequently impose liability for infringement without proof that the copyright holder has been harmed in any way. Mere copying, not harm, is the touchstone for copyright infringement. While courts generally consider harm to the copyright holder as a factor in analysis of the fair use defense, it is not a strict requirement, and the burden of proof is on the defendant to show the *absence* of harm. Moreover, harm has been so poorly-defined that the concept has become circular. The failure to compensate the copyright holder for virtually any copying may be said to “harm” the copyright holder, simply because the defendant could have paid a license fee for the use. Finally, the damages provisions of the Copyright Act allow the plaintiff to recover defendant’s profits or statutory damages without a showing that the defendant’s copying has caused the plaintiff any real harm.

While other scholars have advocated greater First Amendment protection for uses of copyrighted material, they have not focused specifically on the issue of harm.⁴ Moreover, the Supreme Court has rejected the plea for First Amendment protection of uses of copyrighted works. In *Eldred v. Ashcroft*, the Supreme Court held that First Amendment scrutiny does not ordinarily apply to copyright infringement cases in the same way that it applies to other cases involving government burdens on speech. Rather, the Court relied on copyright law’s own statutory doctrines, including the idea/expression

(2003); Douglas J. Frederick, *Watching the Watchdog: Modifying Fair Use of Works Produced by the International Press*, 87 IOWA L. REV. 1059 (2002); Lawrence Lessig, *Copyright’s First Amendment*, 48 UCLA L. REV. 1057 (2001); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 NYU L. REV. 354 (1999); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 146 (1998); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970).

² Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1322 (1992) (arguing that the tradeoff between “harm-toleration and speech-protection is by no means inevitable” because the beneficiaries of robust speech protection could compensate those who bear the burdens of that protection).

³ See *infra* notes ___ and accompanying text.

⁴ See, e.g., NEIL WEINSTOCK NETANEL, *COPYRIGHT’S PARADOX* (Oxford Press 2008); Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J. L. & ARTS 429 (2007); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 NYU L. REV. 354 (1999).

dichotomy and the fair use doctrine, to protect speech concerns in most copyright infringement cases.⁵

There are essentially three possible reasons for the unusual approach to speech issues in copyright law. First, “copying” is not the same thing as “speaking.” As the Supreme Court said in *Eldred*, “The First Amendment securely protects the freedom to make – or decline to make – one’s own speech; it bears less heavily when speakers assert the right to make other people’s speeches.”⁶ If copying is merely conduct and not speech, then the First Amendment does not apply to copying. Second, even if copying is speech, it is not *protected* speech because it is inimical to the speech-enhancing purposes of both copyright law and the First Amendment. Because the constitutional framers intended copyright law to be “the engine of free expression,” copying that violates copyright law also violates First Amendment principles.⁷ Given that both laws encourage speech, “copyright’s built-in free speech safeguards” will usually be sufficient to protect speech concerns in copyright infringement cases.⁸ Third, copyrights are property, and the First Amendment does not require property holders to let others use their property for speech purposes.⁹

Unfortunately, the Court’s simplistic distinction between speaking and “making other people’s speeches” cannot support the analytical weight it is being forced to bear. The use of copyrighted material has substantial speech value to both the user and the public, whether or not it is copied.¹⁰ Moreover, although the Court is arguably correct that copyright law encourages free expression, in the absence of a harm requirement, the scope of copyright protection is much broader than is necessary or desirable for encouraging the production and dissemination of creative works. In addition, the nature of the property right inherent in copyrights is fundamentally different from other kinds of property in ways that matter a great deal for purposes of the First Amendment. Indeed, it is because copyright law is charged with encouraging free expression that the property rights it conveys should be limited where necessary to achieve that purpose.¹¹

This article argues that copyright law, at least as it is applied in many cases, is unconstitutional. When there is no harm to the copyright holder’s incentives, copyright law burdens speech without serving any countervailing governmental interest. Thus, the First Amendment requires proof of harm in copyright infringement cases. Consistent with the government interest in encouraging innovation, the harm requirement would allow a finding of infringement only where the copyright holder can show that the defendant’s use is likely to cause real harm to the copyright holder’s incentives to create or distribute copyrighted works. As such, the harm requirement would allow restrictions on speech only when necessary to keep the “engine of free expression” running. Although the harm requirement is no panacea for all speech issues in copyright law, it

⁵ See *Eldred v. Ashcroft*, 537 U.S. 186, 218-20 (2003).

⁶ See *id.* at 221.

⁷ See *id.* at 219 (citing *Harper & Row Pubs., Inc. v. Nation Enters.*, 471 U.S. 539 (1985)).

⁸ See *id.*

⁹ See *infra* text accompanying notes ____.

¹⁰ See, e.g., Tushnet, *supra* note 1; Volokh, *Some Thoughts*, *supra* note 1.

¹¹ See *infra* text accompanying notes ____.

would help courts to identify and eliminate cases involving false conflicts between the First Amendment and copyright – that is, cases in which there is arguably a speech interest in allowing the defendant’s use and no speech interest in prohibiting it.

Although direct First Amendment scrutiny is arguably the best way to protect speech concerns in copyright cases, the *Eldred* Court expressed a clear preference for dealing with First Amendment concerns through internal statutory doctrines such as fair use. Under this approach, fair use and other statutory provisions can be substantially modified to implement a meaningful harm requirement in infringement cases.

The article also attempts to define copyright harm according to First Amendment principles. It identifies several possible types of harm that can arise in copyright infringement and examines whether the First Amendment permits recognition of those harms. First, it argues that when a copyright holder proves market harm in the form of lost sales or licensing fees, and such harm seems likely to affect the incentives to create or disseminate copyrighted works, a finding of infringement is consistent with First Amendment principles, unless the speech value of the defendant’s use clearly outweighs the harm. Second, it asserts that, in light of the First Amendment interest in fostering a diverse marketplace of ideas, courts may not recognize harm to the image or reputation of a copyrighted work. Third, although the state action requirement precludes a copyright holder from asserting that a private infringer violates her right not to speak, a defendant’s publication of a copyright holder’s unpublished work without permission may be recognized as harm in copyright infringement cases because it is consistent with the First Amendment interest against compelling speech. With regard to uses of published works, however, copyright law probably may not recognize harm to the copyright holder’s right not to speak or associate. The First Amendment encourages the defendant’s use of copyrighted material even – or especially – when those uses are ones with which the copyright holder would not like to be associated. Fourth, a copyright holder’s assertion of harm to her privacy for unwanted publicity or exposure of copyrighted works – again with the possible exception of unpublished works – ordinarily will not be sufficient to allow suppression of most uses of copyrighted material.¹² Finally, when there is no harm of any kind, the First Amendment precludes a finding of infringement.

II. The First Amendment and the Role of Harm

The First Amendment provides robust protection of speech in order to promote democratic self-governance,¹³ enhance the marketplace of ideas,¹⁴ and protect rights of

¹² See *infra* pt. VI.

¹³ Arguably a “central” purpose of the First Amendment is to promote democratic self-governance by allowing people to speak out against government. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254, 273 (1964). Thus, “[t]here is little disagreement that political speech is at the core of that protected by the First Amendment.” See Erwin Chemerinsky, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 927 (3d ed. 2006).

¹⁴As Justice Holmes famously said, “the best test of truth is the power of the thought to get itself accepted in the competition of the market[.]” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Since then, the “marketplace of ideas” metaphor has become pervasive in First Amendment law and scholarship.

autonomy and self-expression.¹⁵ In a conventional First Amendment analysis, a court first determines whether the challenged law regulates speech or merely conduct. If it does regulate speech, then the court must decide whether that speech falls into the category of unprotected speech. Even if it does, however, the government may not make certain kinds of distinctions regarding that speech without a sufficient governmental interest. Content-based restrictions must be justified by a compelling government interest and must be the least speech-restrictive means of achieving that interest.¹⁶ Not surprisingly, content-based restrictions virtually always fail when subjected to such strict scrutiny. Content-neutral restrictions are subject to a lesser but still demanding standard of intermediate scrutiny. This level of scrutiny requires that the speech restrictions be justified by an important governmental interest and narrowly tailored to serve that interest.¹⁷

The harm caused by the speech has always played a central role in making these determinations. Generally speaking, the unprotected-speech category is reserved for harmful forms of speech such as speech that defames another's reputation, violates rights of privacy or publicity, or incites unlawful action or retaliation. As such, the governmental interest in restricting the speech is to prevent or remedy harms allegedly caused by or associated with the speech. The greater the harm, the stronger is the government's interest in prohibiting or regulating the speech that causes it.

Indeed, the line between harm-toleration and speech-protection accounts for numerous cases defining when speech is or is not protected by the First Amendment.¹⁸ The cases in which courts must make these distinctions cut across much of First Amendment law, with some involving public harms and others involving private tortious and property harms. What these cases have in common, however, is that they require proof that the speech has caused or is likely to cause harm – often serious harm – before speech can be burdened.

One such category of cases involves the “clear and present danger” test for speech that incites unlawful activity. In *Schenck v. United States*,¹⁹ the Supreme Court held that the First Amendment does not protect speech if it “create[s] a clear and present danger that [it] will bring about the substantive evils that Congress has a right to prevent.”²⁰ Subsequently, in *Brandenburg v. Ohio*,²¹ the Court reaffirmed “that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe

¹⁵ See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring) (“The First Amendment serves not only the needs of the polity but also those of the human spirit – a spirit that demands self-expression.”).

¹⁶ See, e.g., *United States v. Williams*, 128 S.Ct. 1830, 1841 (2008); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 577 (2001).

¹⁷ See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 517-21 (2001).

¹⁸ See Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1321-22 (1992).

¹⁹ 249 U.S. 47 (1919).

²⁰ *Schenck*, 249 U.S. at 52 (Justice Holmes explained that just as the First Amendment would not protect a person who falsely shouted “fire” in a theater, it did not protect persons who, during wartime, circulated a leaflet asserting that the draft was unconstitutional and advocating its repeal.).

²¹ 395 U.S. 444 (1969).

advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”²² The *Brandenburg* test thus requires an intent and likelihood to cause imminent illegal and harmful action.²³ It remains the most influential decision on point today. Subsequent Supreme Court cases applying *Brandenburg* have been highly protective of speech, holding that the First Amendment protects speech that advocates unlawful action unless the speech is likely to produce imminent lawless and harmful action.²⁴

A couple of years after *Brandenburg*, the Court decided *New York Times Co. v. United States* (the Pentagon Papers case).²⁵ There, the Court refused to grant a prior restraint against the New York Times’ publication of classified government documents regarding the United States’ involvement in Vietnam.²⁶ It did not matter to the Court that the New York Times was printing material belonging to others, or “making other people’s speeches.”²⁷ What mattered is that the government was requesting a prior restraint on speech where there was no convincing evidence that any real harm would occur. Although the nature of the harm alleged by the government (harm to national security) was weighty, the fact of harm was speculative.²⁸ Thus, despite the government’s protestations that national security depended on keeping the sensitive material secret, the interest in free speech prevailed.

Similarly, “fighting words” are unprotected due to the speech’s propensity to cause immediate injury. In *Chaplinsky v. New Hampshire*, the Court held that First Amendment protection does not protect “insulting or fighting words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”²⁹ The Court explained that such speech is unprotected because it so likely to lead to immediate harm and is of little speech value otherwise.³⁰ The Court has subsequently

²² *Id.* at 447 (citing *Dennis v. United States*, 341 U.S. 494 (1951), for this proposition, although *Dennis* itself would not seem to require a likelihood of harm if the magnitude of harm is great, such as in the case of incitement to overthrow the government).

²³ *Id.*

²⁴ *See, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (holding that NAACP official’s statement, “If we catch any of you going in any of them racist stores, we’re gonna break your damn neck,” was entitled to First Amendment protection because, under the circumstances, such rhetoric was not proved likely to produce imminent lawless action); *Hess v. Indiana*, 414 U.S. 105 (1973) (overturning conviction of individual who said, “We’ll take the fucking street later,” because it did not advocate imminent illegal action).

²⁵ 403 U.S. 713 (1971).

²⁶ *Id.* at 714.

²⁷ *See Tushnet, supra* note 1, at 563-64 (arguing that the New York Times “was not the author of the Pentagon Papers, but that mattered not a whit when the government (which was the author) sought to prohibit publication”).

²⁸ *See New York Times*, 403 U.S. at 725-26 (Brennan, J., concurring) (“The entire thrust of the Government’s claim throughout these cases has been that publication of the material sought to be enjoined ‘could,’ or ‘might,’ or ‘may’ prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.”).

²⁹ 315 U.S. 568, 571-72 (1942).

³⁰ *See id.*

narrowed the category of unprotected “fighting words,” allowing even more provocative speech to be protected.³¹

Likewise, in private actions involving allegedly tortious speech, courts find the speech tortious and therefore unprotected only where it clearly causes significant harm. In defamation cases, the plaintiff sues for reputational harm resulting from the defendant’s defamatory communication. Generally speaking, a communication is deemed to be defamatory only “if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”³² As such, defamation claims contain a built-in requirement that the allegedly defamatory statement is deemed likely to cause reputational harm. Although the common law rule sometimes allowed juries to presume some injury or damages from a defamatory publication, harm to reputation was still the focus of the claim, the wrong for which the law provided redress.³³

In addition to the common-law requirement that defamation is actionable upon a showing of a likelihood of harm, the Supreme Court has imposed additional constitutional requirements to protect speech in defamation cases. In *New York Times v. Sullivan*, the Court held that the First Amendment requires “a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”³⁴ There, the New York Times newspaper had run a political advertisement that implicitly criticized Alabama law-enforcement officials.³⁵ A police commissioner established in court that the advertisement contained misstatements about him that would have constituted libel per se under Alabama law.³⁶ Although the law allowed the newspaper to assert truth as a defense, the Court held that “a rule compelling the critic of official conduct to guarantee the truth of all his factual assertions” would chill protected speech.³⁷

The Court has taken different speech-protective measures in defamation cases brought by private individuals. In *Gertz v. Welch*, the Court refused to apply the *New York Times* “actual malice” requirement in such cases, concluding that private individuals need and deserve greater protection against defamation than public officials.³⁸ Rather, the *Gertz* Court opted for a rule that “allows the States to impose liability on the publisher

³¹ See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, 968-69 (3d ed. 2006) (describing cases in which the Court has refused to uphold fighting words convictions where words were “inherently inflammatory” but not “likely to provoke violent response”).

³² See RESTATEMENT (SECOND) OF TORTS § 559 (1977).

³³ See DAN B. DOBBS, THE LAW OF TORTS 1190 (2000) (“Harm to reputation itself, though often not quantifiable, is the chief item for which recovery is permitted.”).

³⁴ 376 U.S. 254, 279-80 (1964).

³⁵ *Id.* at 258.

³⁶ *Id.* at 262-63.

³⁷ *Id.* at 279.

³⁸ 418 U.S. 323, 344-46 (1974).

or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times*.”³⁹

Significantly, the *Gertz* Court held that states may allow private individuals to recover for defamation without showing knowledge of falsity or reckless disregard for the truth, but that the recovery must be limited to damages for *actual injury*.⁴⁰ The Court elaborated as follows on the constitutional need for proof of actual harm:

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damages to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury.⁴¹

Thus, *Gertz* held that where the plaintiff does not show that a defamatory statement was made with actual malice, the Court’s “less demanding” standard allows the plaintiff to recover damages only upon and to the extent of proof of actual injury. Moreover, while the Court said that it did not need to define “actual injury” given trial courts’ substantial experience in dealing with tortious harm, it did say that “juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury. . . .”⁴²

In addition, in *Zacchini v. Scripps-Howard Broadcasting Co.*, the Supreme Court held that the First Amendment did not protect a television station from a right of publicity claim when it broadcast an individual’s entire “human cannonball” performance without authorization.⁴³ The Court’s decision emphasized that “the broadcast of petitioner’s entire act pose[d] a substantial threat to the economic value of that performance.”⁴⁴ Thus, the Court explained that although its precedent protected the news media’s First Amendment right to report on events, no First Amendment case had held that there was a right “to broadcast or publish an entire act for which the performer ordinarily gets paid.”⁴⁵

³⁹ *Id.* at 348.

⁴⁰ *Id.* at 348-49.

⁴¹ *Id.* at 349.

⁴² *Id.* at 350.

⁴³ 433 U.S. 562 (1977).

⁴⁴ *Id.* at 575.

⁴⁵ *Id.* at 573.

Accordingly, the Court concluded that the news agency did not need to broadcast the performer's entire act in order to engage in protected news reporting. On the other hand, the harm to the performer could substantially interfere with the state's purpose in granting the right of publicity. Interestingly, it compared this purpose with the constitutional purpose in allowing Congress to grant copyrights. It explained:

[The state's] decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. The same consideration underlies the patent and copyright laws long enforced by this Court. . . . "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts. . . .'"⁴⁶

Harm to the performer – and, more importantly, harm to the purpose of granting the right of publicity – played a crucial role in the Court's decision that the First Amendment did not trump the right of publicity claim. The Court recognized that there was a particularly strong potential for harm on the facts of the *Zacchini* case. "[T]he broadcast of the petitioner's entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer."⁴⁷

Significantly, however, the Court held that the plaintiff would have to show that he had in fact been harmed as a result of the broadcast in order to recover damages. Indeed, the Court suggested that the plaintiff would have to show *net harm* in light of the possibility that "respondent's newsbroadcast increased the value of petitioner's performance by stimulating the public's interest in seeing the act live."⁴⁸

By contrast, where the harm to the performer is minimal and does not threaten to impede the purpose of the right of publicity, the defendant's First Amendment right to speak looms larger. For instance, in *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.* (the fantasy baseball case),⁴⁹ the Eighth Circuit held that the professional baseball players' right of publicity did not outweigh the defendant's First Amendment speech rights

⁴⁶ *Id.* at 576 (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)).

⁴⁷ *Id.*

⁴⁸ *Id.* at 575 n.12 (noting that although the news broadcast might have increased demand for the performance, "petitioner has alleged that the broadcast injured him to the extent of \$25,000, . . . and we think the State should be allowed to authorize compensation of this injury if proved" (internal citation omitted)).

⁴⁹ 505 F.3d 818 (8th Cir. 2007).

in creating and selling a fantasy baseball game that incorporated the players' real names and statistical performance records.⁵⁰ As an initial matter, the court found "no merit" in the argument that production of the game did not constitute speech. Although the defendant's fantasy baseball game appropriated "the 'names, nicknames, likenesses, signatures, pictures, playing records, and/or biographical data'" from the players, the court held that the use of this information in "an interactive form in connection with its fantasy baseball products" was "no less expressive [than] the pictures, graphic design, concept art, sounds, music, stories, and narrative present in video games" that the court had previously found entitled to First Amendment protection.⁵¹

Moreover, the Eighth Circuit held that, unlike the facts of *Zacchini*, the facts of the fantasy baseball case "barely, if at all, implicate the interests that states typically intend to vindicate by providing rights of publicity to individuals," including economic interests in protecting a performer's right to make a living, providing incentives to encourage performances of interest to the public, and preventing consumers from being confused by misleading advertising.⁵² While the news agency in *Zacchini* had taken the performer's entire act and broadcast it to the public, the creators of the fantasy baseball game merely used the names and statistics of the baseball players in a remote market. This use, the Court explained, threatened neither the players' ability to make a living by playing baseball nor any other interest underlying the right of publicity:

[M]ajor league baseball players are [already] rewarded, and handsomely, too, for their participation in games and can earn additional large sums from endorsements and sponsorship arrangements. Nor is there any danger here that consumers will be misled, because the fantasy baseball games depend on the inclusion of all players and thus cannot create a false impression that some particular player with 'star power' is endorsing CBC's products.⁵³

In all of these cases, the harm – or lack thereof – played a crucial role in drawing the line between protected and unprotected speech. While the First Amendment sometimes protects speech despite the harm it causes, it virtually never allows liability to be imposed in cases of *harmless* speech. As such, the harm requirement serves a sort of gate-keeping function, which helps to avoid placing unnecessary burdens on speech.⁵⁴

⁵⁰*Id.* at 820.

⁵¹*Id.* at 823.

⁵² *Id.* at 824 (adding that although some courts recognize non-monetary interests in granting rights of publicity, there is little merit in these interests when they are "compared with the interest in freedom of expression").

⁵³*Id.* at 823.

⁵⁴ The common law of torts also protects the First Amendment by including restrictions on torts caused by speech. For example, in intentional infliction of emotional distress claims, courts protect speech by imposing liability only where the plaintiff can prove that the defendant's speech caused "severe emotional distress." See RESTATEMENT (SECOND) OF TORTS § 46 (1966). The Comments to the *Restatement*

Moreover, the harm required to justify restrictions on speech is not subtle or speculative. It is not sufficient to show that the speech might cause harm to the government's interest in the future, that harm could occur on a different set of facts, or that the defendant benefited from the tort and could have allowed the plaintiff to share in those benefits.

III. Copyright Harm and the First Amendment

Like the foregoing speech-regulating laws, copyright law burdens self-expression by restricting what people can say and write.⁵⁵ Yet, while courts are generally vigilant in using the First Amendment to protect free speech in other types of cases, they almost never apply the First Amendment in copyright law cases. In *Eldred*, the Court refused to apply First Amendment scrutiny in a facial challenge to the Copyright Term Extension Act, relying instead on copyright's "traditional contours," such as fair use, to protect freedom of speech.⁵⁶ Likewise, courts have almost uniformly refused as-applied First Amendment scrutiny in individual copyright infringement cases.⁵⁷ As a result, although the governmental interest behind copyright law is to encourage the creation and dissemination of creative works, courts frequently find against the defendant's use (thereby prohibiting the defendant's speech) absent real proof that the use has harmed the copyright holder in a way that would be likely to reduce a copyright holder's incentives.

(*Second*) of Torts explain that proof of serious harm is required in order to make room for freedom of speech, even when that speech is not particularly valuable. They state:

The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. . . . There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam

RESTATEMENT (SECOND) OF TORTS § 46 Comment d.

⁵⁵ See, e.g., Tushnet, *supra* note 1; Volokh, *Some Thoughts*, *supra* note 1; Lessig, *supra* note 1; Netanel, *Locating Copyright*, *supra* note 1; Lemley & Volokh, *Injunctions*, *supra* note 1; Nimmer, *supra* note 1.

⁵⁶ See *Eldred*, 537 U.S. at 221 (so long as copyright law maintains its "traditional contours," internal statutory doctrines will ordinarily be sufficient to protect speech concerns in copyright law). *But see Golan v. Gonzales*, 501 F.3d 1179, 1184 (10th Cir. 2007) (applying direct First Amendment scrutiny in facial challenge to new provision of the Copyright Act where provision altered copyright's "traditional contours" by allowing works that had entered the public domain to be copyrighted).

⁵⁷ See, e.g., Netanel, *Locating Copyright*, *supra* note 1, at 2-4 ("To be certain, copyright's potential for burdening speech has long been recognized in U.S. case law, legislation, and commentary. Nevertheless, courts have almost never imposed First Amendment limitations on copyright, and most have summarily rejected copyright infringement free speech defenses."). There are very few exceptions in reported decisions. One of these exceptions involved a prior restraint. See, e.g., *Suntrust Bank v. Houghton Mifflin*, 252 F.3d 1165 (11th Cir. 2001) (district court's order granting preliminary injunction against publication of *The Wind Done Gone*, a parody of *Gone With the Wind*, constituted "an unlawful prior restraint"). The other is a district court decision that was affirmed on grounds other than the First Amendment. See *Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 445 F. Supp. 875 (S.D. Fla. 1978), *aff'd* on other grounds, 626 F.2d 1171 (5th Cir. 1980) ("Comparative advertising, as practiced by defendant in the case sub judice, is in harmony with the fundamental objectives of free speech and free enterprise in a free society.").

A. The Scope of Copyright Coverage and the Fair Use Doctrine

Largely as the result of special-interest influence, the Copyright Act grants copyright holders very broad control over uses of their copyrighted works.⁵⁸ Unlike most torts and statutory causes of action, the Copyright Act does not require proof of harm as an element of the prima facie case. Rather, mere copying constitutes the statutory wrong.⁵⁹ Moreover, prima facie infringement generally requires a low threshold of copying, and courts do not take into account the differences between the two works, such as the new material that the defendant has added. Indeed, copyright holders are given rights not only over copying their own original works, but also over making or performing any derivative works that “modify, transform, or adapt” the original work in any way.⁶⁰ Thus, copying constitutes prima facie infringement even if the nature, extent, or circumstances surrounding the copying make harm to the copyright holder very unlikely.⁶¹

Once the copyright holder proves prima facie infringement, the burden of proof typically shifts to the defendant to show fair use.⁶² Section 107 of the Copyright Act requires consideration of four factors in assessing fair use: (1) the purpose and character of the defendant’s use, including whether the use is commercial and whether the use is “transformative” of the plaintiff’s work; (2) the nature of the copyrighted work, including whether the work is unpublished and whether it is a factual or creative work; (3) the amount and substantiality of the portion taken; and (4) the harm to the market for the copyrighted work.⁶³

Although “harm to the market for the copyrighted work” is one statutory factor that courts consider in fair use, it is not a strict requirement. Moreover, what constitutes legally cognizable harm in copyright law is not well-defined. Indeed, there is a potential for circularity in the definition. A copyright holder can always argue that the defendant’s

⁵⁸ See Christina Bohannon, *Reclaiming Copyright*, 23 CARDOZO ARTS & ENT. L. J. 567, 581-92 (2005) (arguing that “the Copyright Act bears all of the hallmark characteristics of a special-interest statute”); Netanel, *supra* note 53, at 67-69; Stewart Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1216-17 (1996); Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 862-70 (1987).

⁵⁹ See 17 U.S.C. § 501 (“Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright. . .”).

⁶⁰ See 17 U.S.C. § 106(2).

⁶¹ For instance, the Copyright Act prohibits making a personal copy of lawfully-owned music, even though the copyist is very unlikely to purchase an additional copy of the music if the prohibition is enforced. See Jessica D. Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1871-79 (2007) (noting that “the recording industry has sued more than 20,000 individuals for making personal uses that can be characterized as ‘commercial’ only by redefining commercial to mean ‘unlicensed’”). See also Laura Heymann, *A Tale of Two Authors* (unpublished manuscript on file with author) (“Except in the presumably rare event that a single individual would, absent copyright law or [digital rights management laws], purchase more than one copy of a work, the copying of a work for personal use implicates no significant economic rights.”).

⁶² This was not always the case. It appears that when Justice Story first articulated the fair use factors in more than a century ago, those factors were used to assess infringement, not an affirmative defense. As such, it seems that the burden of proof was on the plaintiff to show that these factors favored finding infringement. See *infra* notes __ and accompanying text.

⁶³ See 17 U.S.C. § 107.

use caused her harm (and therefore is not fair) because the defendant could have been required to pay her a license fee for any unauthorized use. Yet, if the use is deemed fair, then no payment is required.⁶⁴ As Mark Lemley has argued, the result of this circularity “is to unmoor fair use from the traditional rationale of market loss and to potentially make any use for which the user could afford to pay into a use for which they must pay.”⁶⁵

This circularity also adds to the imprecision inherent in a multi-factor fair use test. The resulting vagueness in the scope of fair use is likely to cause a chilling effect on speech, as people might believe that even a small amount of harmless copying exposes them to liability.⁶⁶ Thus, people making works such as books and documentaries will forgo the use of reduced-size art images, video clips, and short samples of music lyrics that would enhance the works because of the time, money, and hassle involved in getting permission. Moreover, even if the author is willing to gamble on fair use, publishers and other intermediaries often refuse to rely on it and require the author either to get clearance or remove the material. For instance, a law school professor wishing to use small black and white reproductions of large color paintings in a book about the First Amendment’s treatment of art is told by his publisher to obtain permission or take the images out, despite his citing of cases to the publisher indicating that his use would be deemed fair.⁶⁷

In applying the statute, courts do not limit copyright infringement to copying that is likely to harm the copyright holder’s incentives to create and distribute works. For instance, in *Castle Rock Entertainment v. Carol Pub. Group, Inc.*,⁶⁸ the defendant produced trivia books based on the *Seinfeld* television show. There, the defendant created its own questions and answers regarding the events and characters on the show.⁶⁹ The court acknowledged evidence showing that the producers of *Seinfeld* had no intention of entering the trivia book market.⁷⁰ Yet, the court held that the defendant’s trivia book was infringing because the defendant copied the plaintiff’s copyrighted material, and copyright law should “respect” the plaintiff’s choice not to enter that market.⁷¹ Thus, the court essentially assumed that the copyright holder was entitled to control any and all copying of the work, even if the defendant’s copying did not make the copyright holder any worse off than it would have been otherwise.

⁶⁴ See, e.g., *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1386, 1387 (6th Cir. 1996); *Am. Geophysical Union v. Texaco*, 60 F.3d 913, 929 (2d Cir. 1994). See also Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 978 (2007); Mark A. Lemley, *Should a Licensing Market Require Licensing?*, 70-SPG LAW & CONTEMP. PROBS. 185, 190 (2007).

⁶⁵ See Lemley, *Licensing Market*, *supra* note __, at 190.

⁶⁶ See Robert Kasunic, *Preserving the Traditional Contours of Copyright*, 30 COLUM. J. L. & ARTS 397, 403-04 (2007) (“The uncertainty of the fair use defense, at a minimum, forces users toward a minimalist approach even if First Amendment interests support more expansive use.”).

⁶⁷ See, e.g., Randall P. Bezanson, *A Tale of Copyright* (unpublished manuscript on file with author) (chronicling experience writing a book on art and the constitution in which publishers refused to rely on several fair use cases that supported author’s use of reduced-size art images in scholarly work).

⁶⁸ 150 F.3d 132 (2d Cir. 1998).

⁶⁹ *Id.*

⁷⁰ *Id.* at 145.

⁷¹ *Id.* at 146.

In addition, in *Ty Inc. v. West Highland Publishing*,⁷² the defendant West Highland created a collector's book that provided information about Beanie Babies collectible stuffed animals, including essays, price assessments, and buying recommendations. Along with this information, the book also contained photographs of the Beanie Babies, which the court found infringed Ty's copyrights.⁷³ The court granted a preliminary injunction against the manufacturing and selling of the book, rejecting West Highland's argument that the book was a transformative fair use and finding that the book harmed Ty's market for derivative works.⁷⁴

Yet, the evidence of market harm was purely speculative. The book was not shown to supplant sales of the Beanie Babies stuffed animals themselves; nor was it likely that the book would compete with an ordinary book of Beanie Babies photographs. Moreover, Ty would not be in a position to exploit the market for a book of impartial assessments of the collectibles. Thus, there was no harm to markets that the plaintiff might reasonably exploit. Rather, the court observed the possibility that Ty *might* suffer some harm in the *distant future*. The court observed that “[b]y recurring shortages, Ty seeks to maintain the enormous demand and popularity of Beanie Babies for as long as possible, and consequently seeks to avoid overexposure or market saturation.”⁷⁵ Therefore, the defendant's “derivative works could have a negative long-term effect on the market for Ty's works by destroying the marketing image Ty has carefully created for its products. . . .”⁷⁶ Such speculative evidence of harm is not sufficient to justify a finding of infringement, much less a preliminary injunction on the defendant's speech.

Similarly, in *Princeton University Press v. Michigan Document Services*, the Sixth Circuit held that a copyshop's preparation of coursepack copies for college classes was infringing.⁷⁷ There, the speech value of the copying was obvious, because the copying directly contributed to a more educated citizenry. As Judge Ryan argued in dissent, “Society benefits when professors provide diverse materials that are not central to the course but that may enrich or broaden the base of knowledge of the students.”⁷⁸ What is more, there was no apparent harm to the copyright holders to justify the speech restriction. The publishers did not market compilations of their own,⁷⁹ and the record contained declarations from several professors indicating that they would not have assigned the full works whether or not the copying was allowed.⁸⁰ Thus, as Judge Merritt pointed out in dissent, it was mere speculation on the part of the copyright holders that the copying harmed them in any way:

⁷² 1998 WL 698922, at *15-16 (N.D. Ill. Oct. 5, 1998).

⁷³ *Id.* at *9.

⁷⁴ *Id.* at *15-16.

⁷⁵ *Id.* at *16.

⁷⁶ *Id.*

⁷⁷ 99 F.3d 1381, 1387 (6th Cir. 1996).

⁷⁸ *See id.* at 1404.

⁷⁹ *See id.* at 1386.

⁸⁰ *See id.* at 1409 (Ryan, J., dissenting); *id.* at 1398 (Merritt, J., dissenting).

[P]laintiffs here have failed to demonstrate that the photocopying done by defendant has caused even marginal economic harm to their publishing business. . . . The facts demonstrate that it is only wishful thinking on the part of the publishers that the professors who assigned the works in question would have directed their students to purchase the entire work if the excerpted portions were unavailable for copying. . . . The use complained of by plaintiffs here has been widespread for many years and the publishers have not been able to demonstrate any significant harm to the market for the original works during that time. . . .⁸¹

Moreover, the court did not make any findings on whether granting the copyright holders control over the market for coursepack copying was necessary to encourage them to create and disseminate their copyrighted works. Rather, it simply made the obvious point that the copyright holders would value the revenue stream that would flow from these uses.⁸² And even assuming that the market for coursepacks would provide important incentives to the copyright holders, the court did not make any findings regarding whether these particular professors would have paid the required license fee rather than forgo using the works altogether. As such, the court restricted speech without determining that the speech in this particular case caused any meaningful harm.

Finally, the damages provisions of the Copyright Act allow courts to award damages based on (1) actual harm to the copyright holder and any additional profits of the defendant, or (2) a statutory damages amount.⁸³ These provisions have been interpreted to allow damages based purely on defendant's profits or on a statutory amount without any showing of actual harm.⁸⁴ As a result, damages awards deter speech absent any proof that the defendant's use would diminish an ordinary copyright holder's incentives to create or distribute copyrighted works. For instance, in *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, the Ninth Circuit found that the plaintiff had suffered no demonstrable harm from the defendant MGM hotel's use of a small amount of plaintiff's music in performances of a variety show at the hotel.⁸⁵ The lower court "found that plaintiffs 'failed to establish *any* damages attributable to the infringement.'"⁸⁶ Accordingly, the appeals court concluded that "the district court was not clearly erroneous in finding that plaintiffs' theory of damages was uncertain and speculative."⁸⁷ The court explained that "[i]t is not implausible to conclude, as the court below apparently did, that a production presenting six minutes of music from *Kismet*, without

⁸¹ See *id.* at 1398 (Merritt, J., dissenting). See also *id.* at 1409 (Ryan, J., dissenting) (asserting that harm to the publishers should be proved, not presumed).

⁸² See *id.* at 1383, 1397.

⁸³ See 17 U.S.C. § 504.

⁸⁴ See, e.g., *Davis v. The Gap, Inc.*, 246 F.3d 152, 159 (2d Cir. 2001) (plaintiff's actual damages and defendant's profits are treated as separate categories, and "[t]he award of the infringer's profits examines the facts only from the infringer's point of view"); *Engel v. Wild Oats, Inc.*, 644 F. Supp. 1089, 1091-92 (S.D.N.Y. 1986) (availability of statutory damages not limited by either actual damages or defendant's profits).

⁸⁵ 772 F.2d 505 (9th Cir. 1985). Although the case was governed by the 1909 Act, the damages provisions of the 1976 Act are the same on all relevant issues.

⁸⁶ See *id.* at 513 (discussing lower court's opinion) (emphasis in original).

⁸⁷ See *id.*

telling any of the story of the play, would not significantly impair the prospects for presenting a full production of that play.”⁸⁸ Given these findings, it is highly unlikely that the defendant’s use of the plaintiff’s copyrighted music would have harmed the plaintiff’s incentives to create or disseminate the play or music. Nevertheless, the court held that the defendant would have to pay tens and maybe hundreds of thousands of dollars in damages based on profits earned from the use. Indeed, the court held that the lower court’s assessment of \$22,000 in damages seemed “grossly inadequate” in light of the hotel’s direct profits from the show and indirect profits from hotel and gaming activities which could be attributed in part to the show.⁸⁹

In addition, in applying the fair use and damages provisions, courts do not take into account any increased sales or profits that the defendant’s use generates for the copyrighted work. Yet, in many cases, the defendant’s use helps the plaintiff’s sales much more than it hurts them, often by stimulating interest in the plaintiff’s work.⁹⁰ Where courts do not take evidence of increased profits into account, their assessment of harm is necessarily one-sided and incomplete.

Because these findings of infringement and damages restricted the defendant’s ability to speak freely, the courts should have applied First Amendment scrutiny. If they had, they would have assessed whether the government’s interest in enforcing copyrights was sufficient to justify the restriction on the defendant’s speech. As we shall see, where there is so little evidence of harm to a copyright holder’s incentives to create or distribute copyrighted works, there is simply not a sufficient government interest to justify suppressing speech. Yet, courts do not pay sufficient attention to harm either under direct First Amendment scrutiny or under statutory doctrines regarding fair use and damages.

B. The Role of Harm in First Amendment Scrutiny of Copyright Infringement Claims

This article is not the first to argue that copyright infringement suits should be subject to First Amendment scrutiny. While earlier writers argued that First Amendment scrutiny is not necessary in most copyright cases,⁹¹ in the past decade several articles

⁸⁸ See *id.*

⁸⁹ See *id.* at 518.

⁹⁰ One noteworthy example, albeit a British one, was the copyright infringement case against Dan Brown, author of *The Da Vinci Code*, for his use of material from the non-fiction book *Holy Blood, Holy Grail*. Following news reports of the litigation, sales in the United Kingdom increased by 745%, and Amazon.com reported a 3,500% increase. See Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, *supra* note __, at 1029 n. 243 (citing Richard Roth, CBS News, *Mining Da Vinci*, http://www.cbsnews.com/stories/2006/03/10/listening_post/main1390534.shtml (Mar. 13, 2006) and other news stories). See also Bohannon, *Reclaiming Copyright*, *supra* note __, at 596-97 (discussing anecdotal evidence from Amazon.com indicating that derivative works often enhance sales of the works on which they are based); *Ty, Inc. v. Publications Intern. Ltd.*, 292 F.3d 512, 518-19 (7th Cir. 2002) (discussing difference between “substitutional” copying and “complementary” copying).

⁹¹ See Nimmer, *supra* note 1 (arguing that copyright’s own statutory framework, especially the idea-expression dichotomy, provides most of the necessary protection for speech in copyright law); Goldstein, *supra* note 1 (arguing that copyright law is mostly consistent with First Amendment principles except in the case of enterprise monopoly regulation).

have made a strong case for it.⁹² Ten years ago, Mark Lemley and Eugene Volokh argued that because copyright law is a content-based speech regulation, most preliminary injunctions granted in copyright cases constitute unlawful prior restraints.⁹³ More recently, but prior to the Supreme Court’s decision in *Eldred*, Professors Yochai Benkler and Neil Netanel argued (separately) that First Amendment rules regulating the media should apply in copyright law, because like laws regulating the media, copyright law regulates the production and use of information.⁹⁴ In making this argument, both Benkler and Netanel relied on the Supreme Court’s decision in *Turner Broadcasting System, Inc. v. Federal Communications Commission (Turner II)*.⁹⁵ In *Turner II*, the Court considered the constitutionality of federal legislation requiring cable television systems to allocate some of their channels to local broadcast stations.⁹⁶ The Court determined that the “must-carry” provisions were content-neutral speech restrictions and therefore subject to intermediate scrutiny.⁹⁷ In light of substantial evidence showing that cable television providers have monopolies over local television programming, the Court held that the government met the requirements of intermediate scrutiny by establishing that it had an important interest in maintaining or increasing consumer access to diverse programming and that the legislation did not burden substantially more speech than was necessary to further that interest.⁹⁸

Benkler argued that, as applied to copyright law, “[t]his approach would begin with the assumption that government will not, in the first instance, prevent anyone from reading or using this part or that part of the information environment...”⁹⁹ Moreover, “[d]epartures from this baseline must be limited to instances where government has the kind of good reasons that would justify any other regulation of information production and exchange: necessity, reason, and a scope that is no broader than necessary.”¹⁰⁰ Similarly, Netanel argued that just as cable’s monopolistic control over local television warranted intermediate scrutiny, so too the concentration of speech entitlements to content owners in copyright law requires rigorous intermediate scrutiny.¹⁰¹

⁹² *But see* David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281 (2004) (arguing against First Amendment scrutiny of copyright law).

⁹³ *See* Lemley & Volokh, *Injunctions*, *supra* note 1, at 151.

⁹⁴ *See* Netanel, *Locating Copyright*, *supra* note 1, at 55-59; Benkler, *supra* note 1, at 357.

⁹⁵ 520 U.S. 180, 192 (1997); Benkler, *supra* note 1, at 446 (*Turner*’s scrutiny should apply in copyright law because *Turner* Court’s concerns with concentration in markets for information production and exchange are present in copyright law); Netanel, *Locating Copyright*, *supra* note 1, at 54-59 (*Turner* scrutiny should apply to “both speech entitlement allocation in general and copyright in particular”).

⁹⁶ *See Turner II*, 520 U.S. at 185.

⁹⁷ *See id.* (discussing decision in *Turner I*).

⁹⁸ *See id.* at 196-200.

⁹⁹ Benkler, *supra* note 1, at 357.

¹⁰⁰ *Id.* In *Eldred*, the petitioners ran with this point, arguing that intermediate scrutiny should apply to copyright laws just as they do to laws regulating the media. The Court refused to apply *Turner* scrutiny, however, distinguishing between ordinary copyright law and the “must-carry” media regulations that the Court held unconstitutional in *Turner*. Thus, the Court refused to apply heightened constitutional scrutiny in order to limit copyright protection or achieve greater diversity in speech.

¹⁰¹ *See* Netanel, *Locating Copyright*, *supra* note 1, at 69 (“[W]here, as with copyright law, speech entitlements are so brazenly and consistently dispensed to industry bidders and the consequent speech burdens are imposed on the public at large, the First Amendment should require rigorous judicial scrutiny.”).

While excellent scholarship has argued for greater First Amendment scrutiny of copyright law, none has examined specifically the role that copyright harm should play in protecting speech. But the harm caused by copyright infringement should play a key role in First Amendment scrutiny. It is crucial in determining the sufficiency of the government's interest in enforcing copyrights in particular cases.

Copyright law is either a content-based restriction subject to strict scrutiny or a content-neutral speech restriction subject to intermediate scrutiny.¹⁰² Significantly, although strict scrutiny is a more demanding standard, both strict and intermediate scrutiny require (at a minimum) that the government's interest in enacting and enforcing a speech restriction is sufficient to justify the speech regulation and that the speech restriction is not substantially broader than necessary to achieve that interest. Assessment of the governmental interest requires courts to consider the harm that the government is attempting to prevent or remedy. Thus, courts do not simply accept the government's interest at face value. Rather, they scrutinize the government's interest carefully to see, among other things, whether that interest is implicated in the particular case. As such, they must determine whether the harm that the government is trying to prevent is actually likely to occur on the facts of the case. In copyright law, the government's interest would be sufficient only if the copyright holder suffered or was likely to suffer harm that would be likely to reduce her incentives to create or disseminate the copyrighted work. The harm requirement would also ensure that the speech restriction is no broader than necessary to serve the interest in providing copyright incentives.

C. Copyright Law as Content-Based or Content-Neutral Speech Regulation

Several writers have debated whether copyright law should be viewed as a content-based or content-neutral speech restriction. For instance, Eugene Volokh and Mark Lemley have argued that copyright law is a content-based regulation because liability turns on examination of the content of the copying.¹⁰³ In addition, Volokh has separately argued that copyright law is content-based because it prohibits only speech that is "substantially similar" to copyrighted expression, and the fair use defense privileges copying for certain purposes such as news reporting, parody, and educational purposes.¹⁰⁴ As such, he maintains that there is no meaningful way to distinguish between fair use's "purpose and character" factor and the Supreme Court's analysis in "*Regan v. Time, Inc.*," which held that a ban on photographic reproductions of currency

¹⁰² Because copyright law is not a "time, place, or manner" restriction and does not merely place incidental burdens on speech, it is not subject to the deferential review applicable to those kinds of speech restrictions. *See id.* at 45 (copyright law "imposes far more than an incidental burden on speech," which precludes application of less rigorous form of intermediate scrutiny). *See also* *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (conduct regulations imposing only incidental burdens on speech are subject to less demanding intermediate scrutiny that is more deferential to the government's speech restriction).

¹⁰³ *See* Lemley & Volokh, *Injunctions*, *supra* note 1, at 186.

¹⁰⁴ *See* Volokh, *Some Thoughts*, *supra* note 1, at 706-07 (arguing that intellectual property laws are "practically significant and doctrinally complex speech restrictions, which deserve more attention than the Supreme Court has so far given them").

was content-based because it contained an exception ‘for philatelic, numismatic, educational, historical, or newsworthy purposes.’”¹⁰⁵

On the other hand, Neil Netanel has argued that while a content-based characterization “is not entirely implausible,” copyright is best viewed as a content-neutral regulation.¹⁰⁶ He argues that the fact that “copyright law is content-sensitive does not mean that it is ‘content-based’ within the meaning of the First Amendment.”¹⁰⁷ Specifically, he claims that copyright law does not reflect an improper government motive to discriminate against some forms of speech, which is the driving concern behind applying strict scrutiny to content-based regulations.¹⁰⁸ That is, the target of copyright law “is not the viewpoint, subject matter, or even communicative impact of the infringer’s speech, but rather the infringement’s deleterious impact on the copyright incentive.”¹⁰⁹

Accordingly, whether copyright law is content-based or content-neutral might depend on whether the content-based designation applies to speech regulations that *distinguish* on the basis of content or only to those that *discriminate* on the basis of content. If content-based distinctions are sufficient, then copyright law is almost certainly a content-based law. Unlike wiretapping statutes that are viewed as content-neutral because they “do[] not distinguish based on the content of the intercepted conversations” but rather based on “the fact that they were illegally intercepted,”¹¹⁰ copyright infringement turns on examination of the content of the defendant’s speech. In *prima facie* infringement, the court must determine whether the defendant has copied an improper amount of copyrightable expression from the copyright holder. That determination depends in part on whether the defendant borrowed copyrightable expression or only uncopyrightable ideas. Anyone who has ever attempted to apply the idea/expression dichotomy in a copyright infringement case knows that the doctrine requires a serious examination of the content of both the plaintiff’s and defendant’s works. Moreover, in the many cases in which the defendant asserts fair use as a defense (as in parody cases), infringement depends largely on the defendant’s message. If the defendant’s message is to criticize, comment upon, or add new meaning to the plaintiff’s work – in other words, if it “transforms” the plaintiff’s work – then it is much less likely to be deemed infringing.¹¹¹

¹⁰⁵ *See id.*

¹⁰⁶ *See* Netanel, *Locating Copyright*, *supra* note 1, at 48 (arguing that the courts’ almost categorical refusal to apply First Amendment scrutiny to copyright law is wrong and that copyright law should be subject to intermediate scrutiny).

¹⁰⁷ *See id.*

¹⁰⁸ *See id.*

¹⁰⁹ *See id.* at 49.

¹¹⁰ *See Bartnicki*, 532 U.S. at 526.

¹¹¹ *See, e.g.,* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994); *NXIVM Corp v. Ross Inst.*, 364 F.3d 471, 477-78 (2d Cir. 2004); *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801, 806 (9th Cir. 2003).

(transformative use entitled to greater fair use protection).

Even if content-based restrictions apply only to laws used to discriminate against some kinds of speech or viewpoints, copyright law is capable of being applied in such a discriminatory manner. As we will see more in part VI *infra*, copyright holders sometimes bring infringement actions against the use of a copyrighted work that “tarnishes” the image of the original work. For instance, Mattel sued a photographer for taking nude photographs of Barbie, among kitchen appliances and the like, that attempted to expose “Barbie’s influence on gender roles and the position of women in society.”¹¹² In another case, a photographer sued subversive sculptor Jeff Koons for making a sculpture that attempted to ridicule the banality of his photograph of a litter of cute puppies.¹¹³ In addition, MCA Music Company sued a songwriter who made a sexually humorous version of the 1940’s patriotic song “Boogie Woogie Bugle Boy of Company B.”¹¹⁴ The courts found infringement in two out of these three cases, and the Copyright Act is sufficiently broad to support a finding of infringement in all such cases, even absent a showing of material harm to the copyright holder.

If copyright law is a content-based speech restriction, it is subject to strict scrutiny. Strict scrutiny requires that the law must serve a compelling governmental interest and must be the least speech-restrictive means of achieving that interest. Significantly, in assessing whether the government’s interest is sufficient to justify a content-based speech regulation, it ordinarily does not matter whether the speaker could have avoided the regulation by expressing herself differently. Thus, although individuals could often modify their speech to avoid using copyrighted material, the First Amendment traditionally has not allowed such draconian limitations on speech. In First Amendment cases outside the copyright context, courts have recognized the important difference between, as Mark Twain put it, “the right word and the almost-right word.”¹¹⁵ For instance, in *Cohen v. State of California*, the Supreme Court concluded that individuals have a speech interest not only in conveying their ideas, but in using their preferred words to express those ideas.¹¹⁶ There, the Court overturned Cohen’s conviction for breach of the peace, which he sustained for publicly wearing a jacket that said “Fuck the Draft.”¹¹⁷ The Court explained that “words are often chosen as much for their emotive as their cognitive force” and that it could not “sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated.”¹¹⁸ What is more, because changing even a single word alters the meaning of a statement, the Court said

¹¹² See *Mattel*, 353 F.3d at 806 (defendant’s photographs constituted fair use).

¹¹³ See *Rogers v. Koons*, 960 F.2d 301, 308-09 (2d Cir. 1992) (defendant’s sculpture did not constitute fair use).

¹¹⁴ See *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981) (defendant’s song did not constitute fair use).

¹¹⁵ See *Parks v. LaFace Records*, 329 F.3d 437, 450 (6th Cir. 2006) (quoting Mark Twain from J. BARTLETT, *FAMILIAR QUOTATIONS* 527 (16th ed. 1992)). See also *Rogers v. Grimaldi* (in trademark infringement case involving a defendant’s use of a trademark holder’s song or movie title, court refused to limit the defendant’s First Amendment right to use that title to situations in which there were no alternative avenues of expression besides the use of protected material).

¹¹⁶ 403 U.S. 15, 25-26 (1971).

¹¹⁷ See *id.* at 16.

¹¹⁸ See *id.* at 26.

that it could not “indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.”¹¹⁹

The same is true in copyright law. People choose to speak through others’ words for a variety of reasons, and that choice affects the message that is conveyed.¹²⁰ The fact that a copyright holder might take offense at another’s use of her expression is no more dispositive of its lawfulness than the offense that some would feel at seeing expletive words on another’s clothing in public. In either case, the question is whether the government’s interest in prohibiting the speech is sufficient and relevant in the particular case.

In cases of content-based speech restrictions, the proponent of the restriction bears a heavy burden to show a compelling governmental interest to support the restriction. As the following cases show, the proponent must demonstrate that the harm the government seeks to prevent is real, significant, and likely to occur as a result of the particular speech involved in the case.

In *Texas v. Johnson*, the Supreme Court considered the constitutionality of a Texas statute that prohibited desecration of the United States flag with knowledge that the desecration would “seriously offend one or more persons.”¹²¹ In support of the statute, the state argued its interest in preventing breaches of the peace.¹²² Although it is possible that acts of flag burning can lead, in some circumstances, to breaches of the peace, the Court held that such a breach had not occurred and was not likely to occur on the facts of the case.¹²³ As the Court explained, “The State’s position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption.”¹²⁴ Rather, in order to prohibit speech, a state must show a clear nexus – in the particular circumstances at issue in the case – between the prohibited speech and the harm that the government is trying to prevent. The Court elaborated as follows:

[W]e have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) To accept Texas’ arguments that it need only demonstrate “the potential for a breach of the

¹¹⁹ See *id.*

¹²⁰ See Kasunic, *supra* note __, at 404 (“While it is true that the First Amendment does not guarantee a person the right to make another’s speech, there are times when the purpose of the speech requires, or perhaps simply benefits from, the inclusion of another’s expression in order to more appropriately make a point of where the purpose is referential to the expression of another.”).

¹²¹ 491 U.S. 397, 400 (1989).

¹²² See *id.* at 407-08.

¹²³ See *id.* at 408-09.

¹²⁴ See *id.* at 408.

peace. . .” and that every flag burning necessarily possesses that potential, would be to eviscerate our holding in *Brandenburg*.¹²⁵

Similarly, in the *Cohen* case described above, the Court found that the government’s interest in maintaining the peace was insufficient to justify the prohibition on public profanity. While acknowledging that some people might find the four-letter word on Cohen’s jacket offensive, the Court was unwilling to presume that it would cause a breach of the peace and cited the lack of any evidence showing that “substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen.”¹²⁶ Moreover, the *Gertz* Court held that, in a defamation case brought by a private individual, the First Amendment requires proof of actual injury because “the States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury.”¹²⁷

The Court took the same view in *Zacchini*, a right of publicity case that the Court explicitly compared to copyright. There, the Court held that a state has a valid interest in regulating the defendant’s broadcast where “the broadcast of the petitioner’s entire performance, unlike the unauthorized use of another’s name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner’s ability to earn a living as an entertainer.”¹²⁸ Thus, the Court indicated that speech regulation is appropriate where there is a strong likelihood of harm to the state’s interest in providing a right of publicity, but not where harm to that interest is less certain or minimal. In addition, the Court held that the state could compensate the injured person only for the actual net harm caused by the defendant’s speech.¹²⁹

Perhaps the most important point here, however, is that whether copyright law is content-based or content-neutral, courts must apply at least intermediate scrutiny to copyright infringement cases. Although there is some variation among cases regarding how courts articulate the requirements of intermediate scrutiny,¹³⁰ content-neutral speech restrictions must generally serve an important governmental interest in protecting against harm caused by the prohibited speech and must burden substantially no more speech than is necessary to achieve that interest.

For example, in *Bartnicki v. Vopper*, the Supreme Court considered a state wiretapping statute prohibiting the intentional disclosure of a communication with knowledge or reason to know that the communication was obtained through unauthorized interception.¹³¹ After determining that the statute was a content-neutral restriction on

¹²⁵ See *id.* at 409.

¹²⁶ See *Cohen*, 403 U.S. at 23.

¹²⁷ See *Gertz*, 418 U.S. at 349.

¹²⁸ 433 U.S. at 576.

¹²⁹ See *id.* at 575 n.12.

¹³⁰ See, e.g., Netanel, *Locating Copyright*, *supra* note 1, at 35-36 (“[A] variety of tests, including some explicitly denominated as intermediate scrutiny and some not, have been applied to content-neutral speech restrictions.”).

¹³¹ 532 U.S. at 517-21.

speech, the Court held that the First Amendment prevented its enforcement against a radio host who broadcasted the communication over the air after it was given to him by a third party.¹³² The Court explained that although the government’s interest in “removing an incentive for parties to intercept private conversations” would be relevant in a case against the person who intercepted the conversation, it was not enforceable against a party who innocently received and published the information.¹³³ According to the Court, it would be the “unusual” case in which enforcement of the statute against a non-intercepting publisher of the conversation would have any effect on the incentives of the person who intercepted the conversation.¹³⁴ The Court emphasized that the First Amendment requires more than “mere speculation” that enforcement of the law would serve the government’s interest in the particular case, even where enforcement of the law would be justified in other cases.¹³⁵ Indeed, the Court noted that “even the burden of justifying restrictions on commercial speech requires more than ‘mere speculation or conjecture.’”¹³⁶

Likewise, the *Turner II* Court applied intermediate scrutiny to another content-neutral speech regulation, a “must-carry” provision of federal cable television legislation that required cable providers to dedicate some of their channels to local broadcast stations.¹³⁷ Other scholars have argued persuasively that copyright laws are analogous to these communications laws and should be subject to the same level of scrutiny.¹³⁸ But *Turner II* is also important for how it deals with the harm that the government was trying to prevent. The extensive record allowed the Court to “consider whether the must-carry provisions were designed to address a real harm, and whether those provisions will alleviate it in a material way.”¹³⁹ Thus, the Court did not merely accept on faith the government’s interest in preserving the number and diversity of programs to which cable subscribers had access, but rather recited numerous findings in the record that showed vertical integration among cable operators and cable programming networks as well as monopolistic control by cable providers over local subscribers.¹⁴⁰ Accordingly, it found a real threat to local broadcasting and communications policy generally.¹⁴¹

Thus, applying either strict or intermediate scrutiny to individual copyright infringement suits, it is clear that the copyright holder, as the proponent of the speech restriction, must show that the defendant’s use of copyrighted material is likely to cause

¹³² See *id.* at 526, 535.

¹³³ See *id.* at 529-32.

¹³⁴ See *id.* at 531-32.

¹³⁵ See *id.* at 532.

¹³⁶ See *id.* at 532 n.18 (quoting *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 188 (1999)).

¹³⁷ See *Turner II*, 520 U.S. at 185.

¹³⁸ See *supra* notes ___ and accompanying text.

¹³⁹ See *Turner II*, 520 U.S. at 195.

¹⁴⁰ See *id.* at 197-213.

¹⁴¹ See *id.* at 213. Interestingly, the four-justice dissent would have required even more detailed evidence showing that “the breadth of the must-carry provisions comports with a goal of preventing anticompetitive harms.” See *id.* at 232 (O’Connor, J., dissenting). Although *Turner II* involved a facial challenge rather than an as-applied challenge, the level of scrutiny regarding the harm sought to be prevented is at least instructive in as-applied challenges to copyright infringement claims.

sufficient harm to reduce the copyright holder's incentives to innovate. The copyright holder must show a clear nexus between the copying and a reduction in those incentives. It is not enough for the copyright holder to speculate that the copying could cause some lost sales in the future, that similar copying could cause harm under different facts or circumstances, or that the defendant's failure to pay a small license fee, if it became a widespread practice, could eventually start to diminish copyright holders' incentives.

Unfortunately, by contrast to the careful scrutiny of governmental interests ordinarily given to both content-based and content-neutral speech regulations, courts frequently find copyright infringement absent proof that the defendant's use has caused or will cause harm to the copyright holder's incentives to create or distribute a copyrighted work. Indeed, by refusing to apply any First Amendment scrutiny in most copyright cases, courts avoid inquiring into governmental interests at all. Courts simply see copyright law as different from other forms of speech regulation. The next section will explore the reasons why copyright is viewed as unique with regard to the First Amendment and will show that none of these reasons justify copyright's exceptional treatment.

IV. Copyright Exceptionalism: Why Courts Do Not Apply First Amendment Scrutiny to Copyright Law

There are at least three possible arguments for why ordinary First Amendment scrutiny should not apply to infringement cases under the Copyright Act. The first is that copying is conduct, not speech, and is therefore not subject to the First Amendment. The second is that copying is not *protected* speech because copying is harmful to the speech interest in encouraging the creation and dissemination of copyrighted works. The third is that copyrights are property, and the First Amendment does not require property owners to allow their property to be used for speech purposes. As we shall see, however, none of these arguments provides a valid reason for refusing First Amendment scrutiny in copyright infringement cases.

A. Copying is Not Speech

One possible reason that courts do not apply First Amendment scrutiny to copyright law is that copying is not the same thing as speaking. That is, although a message constitutes speech when the original speaker expresses it, it does not constitute speech when the copyist copies it. This might be what the *Eldred* Court meant when it asserted that "The First Amendment securely protects the freedom to make-or decline to make-one's own speech; it bears less heavily when speakers assert the right to make other people's speeches."¹⁴² Under this view, the Copyright Act regulates primarily conduct, which the First Amendment permits.

Some scholars have made arguments in the same vein. David McGowan has argued that "free riding is not a First Amendment value" and that the *Eldred* Court "was

¹⁴² 537 U.S. at 221.

right to imply that authors who do their own work advance some free speech values that copiers do not.”¹⁴³ And forty years ago, Professor Nimmer claimed that copying of other people’s expression is generally unnecessary to free speech and that the First Amendment should be invoked as a check on copyrights only in very limited circumstances.¹⁴⁴

In the years since Nimmer wrote, however, copyrights have expanded dramatically.¹⁴⁵ The right of reproduction and the right to prepare derivative works, put together, result in copyright protection that prohibits just about any copying from a copyrighted work.¹⁴⁶ In addition, the term has been extended to life of the author plus 70 years, easily making a 100-years-plus term.¹⁴⁷ Perhaps as a response to this expansion, some scholars have proposed a different definitional balance that would privilege some copying of copyrighted expression. One such approach holds that transformative copying – in which someone borrows another’s expression but then adds new material or a new context – is speech even if pure copying is not.¹⁴⁸ This approach is consistent, at least to a large degree, with the current view that copyright’s fair use doctrine protects transformative copying more than pure copying.

Despite thoughtful attempts to distinguish among different kinds of copying, First Amendment values cannot legitimately be raised in support of fair use protection for transformative copying and against it for merely consumptive copying.¹⁴⁹ Both the First

¹⁴³ See McGowan, *supra* note __, at 286.

¹⁴⁴ See Nimmer, *supra* note 1, at 1191-92 (“It is the exposure to ideas, and not to their particular expression, that is vital if self-governing people are to make informed decisions. . . . To reproduce the ‘expression’ of [the] ideas may add flavor, but relatively little substance to the data that must inform the electorate in the decision-making process. Such minimal substance, lost through the copyright prohibition on reproduction of expression, is far out-balanced by the public benefit that accrues through copyright encouragement of creativity.”). Thus, Nimmer said that the idea/expression dichotomy strikes a definitional balance with the First Amendment by allowing the public to use the ideas contained in copyrighted works but not the expression embodying those ideas. See *id.* at 1189 (explaining that “[t]he market place of ideas would be utterly bereft, and the democratic dialogue largely stifled if the only ideas which might be discussed were those original with the speakers”). The Supreme Court later agreed that the idea/expression dichotomy serves First Amendment values by keeping ideas in the public domain. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985).

¹⁴⁵ See Netanel, *Locating Copyright*, *supra* note 1, at 4 (“Nimmer’s conclusions might have been plausible in 1970. But . . . [a]s copyright law has evolved over recent decades, copyright owner prerogatives have steadily become more bloated. This expansion . . . has imposed an increasingly onerous burden on speech.”).

¹⁴⁶ See *infra* notes __ and accompanying text.

¹⁴⁷ See 17 U.S.C. 301. In addition, renewal of the copyright is no longer required for protection, even though under the old required-renewal system, approximately 85% of works were not renewed. See William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 CAL. L. REV. 1639, 1640-41 (2004) (“Not only did renewal provide notice of subsisting copyright, but experience with the requirement of renewal had established that works that have no commercial value are unlikely to be renewed, thus increasing the size of the public domain.”).

¹⁴⁸ See, e.g., NETANEL, COPYRIGHT’S PARADOX, *supra* note __, at 45-46 (arguing that transformative copying is communicative and therefore speech, whereas “the lion’s share” of “consumptive” copying should not be viewed as speech). See generally Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (the justification for findings of fair use “turns on whether, and to what extent, the challenged use is transformative”).

¹⁴⁹ As an initial matter, it is at least worth noting that there is no textual support for this argument in the First Amendment itself. As Professor Melville Nimmer wrote in describing the “largely ignored paradox”

Amendment and the Patent and Copyright Clause of the Constitution favor not only the creation of new expression, but also the dissemination of that expression.¹⁵⁰ The reason for encouraging dissemination of copyrighted works must lie in the hope that they will be consumed, that is, processed or considered. It is only through consumption of these works that copyright law can enhance the marketplace of ideas, and a good deal of harmless copying is done in furtherance of this consumption.

Rebecca Tushnet has provided numerous historical examples of pure copying with significant speech value and argues that the emphasis on transformativeness has “limited our thinking” about fair use.¹⁵¹ She argues that copyrighted works saturate our culture and surroundings, influencing social and political views and providing a vernacular for expressing those views. Thus, “when moments of political choice do come, our responses are shaped by the culture around us. As a result, freedom to participate in shaping culture is an overriding concern of the democratic self-governance view [of the First Amendment].”¹⁵² Similarly, Eugene Volokh has emphasized that copied speech has just as much value *to listeners* as original speech.¹⁵³ Thus, in many cases of copyright infringement, the copied “work is materially more valuable to readers than the original that they can’t get, that costs too much, or that they don’t know about . . .”¹⁵⁴

The copyshop case described above provides a good example of how pure (non-transformative) copying furthers the First Amendment’s goal of enhancing democratic self-governance. In that case, it was clear that neither the professor nor the copyshop transformed the copyrighted works in any way. Yet, the First Amendment value of such copying is obvious. Exposing college students to more literary, historical and other kinds of works clearly contributes to a more educated citizenry, which in turn improves democratic self-governance. The fair use provision of the Copyright Act recognizes the

between copyright law and the First Amendment, the First Amendment does not distinguish between different kinds of speech.

The first amendment tells us that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” Does not the Copyright Act fly directly in the face of that command? . . . The language of the first amendment does not limit its protection to speech which is original with the speaker, but rather states that Congress shall make “no law” abridging freedom of speech . . .

See Nimmer, *supra* note 1, at 1181 (adding that “Mr. Justice Black has said that this reference to ‘no law’ means no law, ‘without any ‘ifs’ or ‘buts’ or ‘whereases.’” (quoting Cahn, *Justice Black and First Amendment “Absolutes”: A Public Interview*, 37 NYU L. REV. 549, 553, 559 (1962))). Of course, the Supreme Court has never adopted this absolutist view of the First Amendment. Thus, despite the lack of support in the constitutional language, First Amendment case law is full of distinctions among different kinds of speech. I argue, however, that the distinction between transformative and non-transformative uses of copyrighted material in speech is particularly problematic, and that a harm requirement is a better way to resolve the conflict between copyright and the First Amendment.

¹⁵⁰ See L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 6-7 (1987) (arguing that “copyright’s purpose is best served by encouraging the distribution of works” through a regulatory copyright regime, not by encouraging the creation of works through a proprietary copyright regime).

¹⁵¹ See Tushnet, *supra* note 1, at 540.

¹⁵² See *id.*

¹⁵³ See Volokh, *Some Thoughts*, *supra* note 1, at 726.

¹⁵⁴ See *id.*

value of copying for educational purposes, stating that “the fair use of a copyrighted work, for purposes such as . . . teaching (including multiple copies for classroom use), . . . is not an infringement of copyright.” In applying the four fair use factors, however, courts have limited the availability of fair use for educational purposes.

The speech value of copying is also apparent under an autonomy-based account of the First Amendment. Copying of copyrighted works is a means of self-expression as the copier surveys available works, chooses those with which she identifies or disagrees, and copies the portions that best capture her thoughts or feelings. Indeed, the Supreme Court has explicitly held that choices in selecting which *of others’ speech* to include in one’s own message constitutes protected speech. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, the Court held that the choices of parade organizers in selecting who could participate in a parade constituted protected speech.¹⁵⁵ Accordingly, the Court concluded that state anti-discrimination laws requiring the organizers to allow a gay and lesbian group to participate violated the organizers’ First Amendment right not to speak.¹⁵⁶ The Copyright Act also recognizes the expressive value of choices involved in the “selection, coordination, or arrangement” of pre-existing materials by granting copyright protection to compilations of such materials.¹⁵⁷

The real issue in determining whether copying – or any other conduct – constitutes speech should be “whether [the] particular conduct possesses sufficient communicative elements to bring the First Amendment into play.”¹⁵⁸ The Supreme Court explained in *Texas v. Johnson* that conduct constitutes speech, giving rise to First Amendment protection, when the conduct is accompanied by “[a]n intent to convey a particularized message” and “the likelihood [is] great that the message would be understood by those who viewed it.”¹⁵⁹

These elements are clearly met in many, if not most, cases of copyright infringement. The intent and likelihood of conveying a message are perhaps most obvious in transformative copying. For instance, when the rap group 2 Live Crew writes a new, parodic version of Roy Orbison’s song *Pretty Woman*, the message is a rejection of the banality and sentimentality (or maybe the whiteness?) of the original.¹⁶⁰

¹⁵⁵ 515 U.S. 557, 572-73 1995 (“Since every participating unit affects the message conveyed by the private organizers, the state courts’ application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade.”). See also *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (newspaper’s editing of speech of others for inclusion in paper constitutes protected speech under First Amendment).

¹⁵⁶ See *Hurley*, 515 U.S. at 559.

¹⁵⁷ See 17 U.S.C. § 101 (defining a copyrightable “compilation”). Further, even if the “speech” component of copying is not obvious, such copying clearly implicates the freedom of association because it provides the means for the copier to associate with another’s ideas and expression. The freedom of association is a fundamental right under the First Amendment, as it is “integral to the speech and assembly protected by the First Amendment.” See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 1113 (2d ed. 2002).

¹⁵⁸ See *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (citing *Spence v. Washington*, 418 U.S. 405 (1974)).

¹⁵⁹ See *id.* (quoting *Spence*, 418 U.S. at 410-11).

¹⁶⁰ See *Campbell*, 510 U.S. at 583.

Yet, such a message is often evident in cases of pure copying as well. Surely the evangelist who reads the Bible aloud in a public place intends to and does convey a message, even though he did not write the Bible himself and did not add to it in any way. The same would be true if he copies portions of the Bible in a written document and distributes copies of the document at large. Moreover, since the Bible is in the public domain, the speech should be protected. With regard to copyrighted material, although one might argue that some uses of copyrighted material should not constitute *protected* speech,¹⁶¹ there is no reason to treat copying of copyrighted material differently in determining whether it constitutes speech at all.¹⁶² Either way, the copyist is not the speaker who originally generated the message. Thus, if a person reads aloud or copies from Barack Obama's *The Audacity of Hope* in order to show his support for the new president, he is engaging in speech, even though he did not write the book himself, and even though the use violates the public performance right under the Copyright Act.¹⁶³

Copyright case law is full of examples of copying that is communicative under the First Amendment but viewed as non-transformative under the Copyright Act. In the copyshop case described above, it is clear that in selecting and copying materials for students to read, the professors intended to and did convey the message that the assigned materials are worth reading and thinking about. In addition, in *Koons*, the court held that the artist's small, subtle changes to the plaintiff's puppies photograph were not transformative, yet the context and the artist's subversive style clearly conveyed a critical message to viewers.

Finally, the transformativeness inquiry is too vague and malleable to provide a meaningful standard for protecting free speech. How much material must the copier add before he or she will be deemed to be speaking? If the copier does not add new meaning or message but uses a copyrighted work for a different purpose or in a way that increases access, is that enough? Should courts consider transformativeness from the copier's or viewer's point of view?¹⁶⁴ Under a definitional approach to speech protection that protects only transformative uses of copyrighted material, these troublesome questions would take on a constitutional dimension. Other attempts to provide a definitional rule are similarly problematic. For instance, Professor Nimmer suggested very limited First Amendment protection for certain categories of copying necessary to the public interest, such as the copying of news photographs.¹⁶⁵ Yet, even he conceded the difficulty in distinguishing between the political and the social.¹⁶⁶ Moreover, in other First

¹⁶¹ For a discussion of this issue, see *infra* text accompanying notes ____.

¹⁶² See generally Tushnet, *supra* note 1, at 564 (arguing that if "the government . . . banned speakers from copying directly from the public domain" it "would be an enormous, intolerable burden on speech, no less so because someone else said the words first, a long time ago.").

¹⁶³ See 17 U.S.C. § 106(5) (granting copyright holders exclusive right to "perform the copyrighted work publicly").

¹⁶⁴ See Laura A. Heymann, *Everything is Transformative: Fair Use and Reader Response*, 31 COLUM. J. L. & ARTS 445, 466 (2008) ("if we are to retain transformativeness as a relevant answer, then, let us at least ask the right question – not "Who is speaking?" but "Who is listening?").

¹⁶⁵ See Nimmer, *supra* note 1, at 1199.

¹⁶⁶ See *id.* ("There is a definitional problem as to when a photograph is a news photograph. This, too, is a concept of great elasticity.").

Amendment cases, courts tend to reject such categorical treatment of speech. As one court has said, “[s]peech that entertains, like speech that informs, is protected by the First Amendment because ‘[t]he line between the informing and the entertaining is too elusive for the protection of that basic right.’”¹⁶⁷

B. Copying is Not Protected Speech Because It is Harmful to Copyright’s Interest in Enhancing Speech

A second possible reason for courts’ refusal to apply First Amendment scrutiny to copyright law is that copying is not protected speech because it is harmful to the speech interest underlying the Copyright Act. In the *Eldred* Court’s words, the constitutional framers intended copyright itself to be “the engine of free expression.” As such, the Court concluded that copyright’s own “traditional contours” – including statutory doctrines such as the idea/expression dichotomy and the fair use doctrine – ordinarily would be sufficient to protect speech interests in copyright infringement claims.¹⁶⁸

Thus, while copyright law has much in common with other speech-regulating laws, it is somewhat unique in that the governmental interest in enforcing copyright law is itself related to furthering speech. That interest includes encouraging the production and dissemination of speech by granting exclusive rights over copyrighted expression. Paradoxically, then, copyright law burdens speech in order to encourage it.

Of course, there is some truth in the idea that copyright law can help to advance the goals of free speech. Copyright law is arguably consistent with the First Amendment to the extent that copyright law encourages free expression by granting exclusive rights over expressive works. But as we have seen, copying – even a good deal of copying that violates a copyright holder’s rights – also has speech value. Insofar as copyright law prohibits copying that does *not* diminish a copyright holder’s incentives to create or distribute expressive works, it prohibits or chills some speech without providing offsetting gains to speech elsewhere.¹⁶⁹ Such cases present false conflicts between copyright law and the First Amendment, where there is a speech interest in allowing the copying but no copyright (or speech) interest in prohibiting it.

The key here is that copyright’s speech-enhancing purpose does not obviate or preclude First Amendment scrutiny; it merely identifies the governmental interest to be assessed in applying that scrutiny to the Copyright Act. Thus, it is not true that First Amendment scrutiny of copyright law is impossible because “First Amendment values are on both sides. . . .”¹⁷⁰ Rather, First Amendment scrutiny mediates between the speech

¹⁶⁷ See *Winters v. New York*, 333 U.S. 507, 510 (1948); *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 969 (10th Cir. 1996) (quoting *Winters*).

¹⁶⁸ See *Eldred*, 537 U.S. at 219-21.

¹⁶⁹ See generally Steven J. Horowitz, *A Free Speech Theory of Copyright*, 2009 STAN. TECH. L. REV. 2, 49 (2009) (“If the Copyright Clause embodies First Amendment values in its limits such that an independent free speech analysis is typically unnecessary, then the clause’s limits ought to be interpreted as . . . free speech limits . . . [having] the force of the First Amendment.”).

¹⁷⁰ See McGowan, *supra* note ___, at 295-96.

interests “on both sides” by requiring courts to determine in each case whether the defendant’s particular use is likely to cause harm to the incentives to create or distribute copyrighted works.

C. Copyrights Are Not Subject to Ordinary First Amendment Scrutiny Because They Are Property

The third potential reason for refusing to apply First Amendment scrutiny to copyright law relates to the property-like nature of copyrights. Copyrights are property, the argument goes, and the First Amendment does not require property holders to let others use their property for speech purposes. The property-rights advocate might point to *Lloyd Corp. v. Tanner*, in which the Supreme Court held that the First Amendment does not require an owner of real property (a shopping center) to grant access to persons exercising their constitutional rights of free speech when adequate alternative avenues of communication exist.¹⁷¹ Real property is unusual in that claims for trespass to real property do not require a showing of harm, even when the alleged trespasser wishes to use the property for speech purposes. Rather, given real property’s unique status in American history and culture, the law presumes harm from trespass onto real property.¹⁷² As such, the First Amendment does not compel property holders to make it available for speech.

As Mark Lemley and Eugene Volokh have argued, however, Congress cannot get around First Amendment speech restrictions simply by designating as “property” the thing or interest that is harmed by speech.¹⁷³ For instance, defamation claims are still subject to the First Amendment, even though a person’s right in his reputation might be deemed a property right. The same may be said of the right of publicity and other rights.

Moreover, the nature of the property right in copyrights is fundamentally different from the nature of tangible property rights in ways that matter a great deal for First Amendment purposes. Copyrights are granted in order to encourage the creation and dissemination of ideas and expression, while real property rights – such as the shopping mall property rights at issue in *Lloyd* – are granted for other reasons unrelated to the First Amendment.¹⁷⁴ In addition, the boundaries of real property are delineated without regard to speech concerns. By contrast, the *Eldred* Court held that the boundaries of copyright, especially the idea/expression dichotomy and the fair use doctrine, are responsible for striking a balance between ownership of copyrights and freedom of speech. Indeed, the Court’s recognition of the need to protect speech by confining copyrights within their

¹⁷¹ 407 U.S. 551 (1972).

¹⁷² See, e.g., *Intel Corp. v. Hamidi*, 71 P.3d 296, 309 (Cal. 2003) (inviolability of real property makes trespass to real property actionable without showing of harm).

¹⁷³ See Lemley & Volokh, *Injunctions*, *supra* note 1, at 183.

¹⁷⁴ See Netanel, *Locating Copyright*, *supra* note 1, at 39 (“[R]eal property rights are general regulations that impose only isolated and incidental burdens on speech. Where property rights are not in land, but in information, expression, or communicative capacity, they are more properly characterized as speech regulations.”).

“traditional contours” shows that a property label does not automatically triumph over speech.¹⁷⁵

In addition, unlike real or personal tangible property, copyrights are nonrivalrous property rights, meaning that many people can enjoy them at the same time.¹⁷⁶ Thus, an unauthorized use of a copyrighted work does not necessarily oust the owner (or her licensees) from using the work. As such, whereas a real property trespass presumptively harms the owner because two people cannot occupy a specific spot on land at the same time, harm cannot always be presumed from copyright infringement.¹⁷⁷ Accordingly, not all copying causes harm that will justify a speech restriction on the use of copyrighted material.

Furthermore, even under a property view, it should be fairly obvious that copyrights are much more akin to personal property than to real property.¹⁷⁸ Unlike claims for trespass to real property, claims for trespass to personal property (or trespass to chattels) require a showing of harm. The *Restatement (Second) of Torts* emphasizes “that some actual injury must have occurred in order for a trespass to chattels to be actionable.”¹⁷⁹ It explains:

The interest in a possessor of a chattel in its inviolability, unlike the similar interest of a possessor of land, is not given legal protection by an action for nominal damages for harmless intermeddlings with the chattel. . . . Therefore, one who intentionally intermeddles with another’s chattel is subject to liability only if his intermeddling is harmful to the possessor’s materially valuable interest in the physical condition, quality, or value of the chattel. . . .¹⁸⁰

Courts have overwhelmingly followed this rule, refusing to extend the real property analogy beyond its obvious bounds.¹⁸¹ For instance, in *Intel Corp. v. Hamidi*, the California Supreme Court held that the defendant’s unauthorized e-mail communications to Intel employees was not governed by the law relating to real property trespass.¹⁸² Rather, the court applied personal property trespass rules, which require a showing of real harm.¹⁸³ Indeed, the court said that Intel would have to show that the property was

¹⁷⁵ See Louis Michael Seidman, *The Dale Problem: Property and Speech Under the Regulatory State*, 75 U. CHI. L. REV. 1541, 1580 (2008).

¹⁷⁶ See Lemley & Volokh, *Injunctions*, *supra* note 1, at 184-85 (intellectual property’s nonrivalrous nature makes it different from other forms of property for purposes of First Amendment).

¹⁷⁷ See Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, *supra* note __, at 970-71 (arguing that harm may not be presumed from use of nonrivalrous copyrighted works).

¹⁷⁸ See *id.* at 984 (observing, for example, that § 201(d) of the Copyright Act provides that “copyright ownership ‘may . . . pass as personal property by the applicable laws of intestate succession’”).

¹⁷⁹ See RESTATEMENT (SECOND) OF TORTS § 218.

¹⁸⁰ See *id.*

¹⁸¹ See, e.g., *Hamidi*, 71 P.3d at 308-309; *Thrifty-Tel, Inc. v. Bezenek*, 54 Cal. Rptr. 2d 468, 473 (Cal. App. 4th Dist. 1996).

¹⁸² 71 P.3d at 311 (rejecting Richard Epstein’s position that Intel’s server is “its castle”).

¹⁸³ See *id.* at 308-10 (in order to prevail on trespass to chattels, Intel would have to show actual harm to property such as impairment to functioning of e-mail or computer system).

actually damaged, not just that Intel suffered consequential damage due to the communication.¹⁸⁴ Thus, the *Hamidi* case protected speech by requiring the plaintiff to show that the defendant's use of its personal property for speech purposes caused real harm to the government's interest in protecting the property.¹⁸⁵ Other cases likewise have held that claims for trespass to personal property require proof of harm, not just proof that the trespasser profited from the trespass and that the property owner could have shared in the profits.¹⁸⁶

Thus, to the extent that copyright infringement may be viewed as a kind of trespass to property, it is most like trespass to personal property, for which harm must be proved. As such, the copyrights-as-property characterization does not defeat or obviate the requirement to show harm in copyright infringement cases but actually supports it.

Finally, the *Lloyd* case merely stands for the proposition that the First Amendment does not, *in and of itself*, require a property owner to allow others to use his property for speech purposes. As will be discussed in more detail in part VI.C. *infra*, the Court has also held that the First Amendment does not prevent another law from requiring a property owner to allow such use so long as the property is not within the exclusive personal control of the property owner (*i.e.*, so long as the property is accessible to the public) and the law does not violate the Takings or Due Process clause. As such, although copyrights are in some sense "property," there is nothing troublesome about limiting these property rights in order to make way for harmless speech.

V. How a Harm-Based Approach Can Protect Free Speech In Copyright Infringement Cases

As the foregoing sections show, whether copyright law is content-based or content-neutral, it is a speech restriction. As such, speech interests must be protected in copyright infringement cases. Probably the best way for courts to address speech issues in copyright law would be to apply First Amendment scrutiny to infringement cases in the same way that they apply it to other kinds of cases. Applying direct First Amendment scrutiny would not require relying on the vagaries of fair use or other statutory litigation to protect important First Amendment values.¹⁸⁷

Under the First Amendment, copyright law must be supported by a legitimate governmental interest. Generally speaking, copyright law can proffer such an interest: the Supreme Court has held many times that the governmental interest behind copyright law is to encourage the creation and dissemination of expressive works. But while this

¹⁸⁴ See *id.* (employee time spent reading and discussing defendant's e-mails did not constitute harm to Intel's property interest).

¹⁸⁵ See *id.* at 311 (acknowledging a potential First Amendment issue but stating that it was unnecessary to address constitutional arguments because no trespass to chattels was proved).

¹⁸⁶ See, e.g., *Thrifty-Tel*, 54 Cal. Rptr. 2d at 475.

¹⁸⁷ See Horowitz, *supra* note __, at 22-26 (highlighting several problems with the Court's view that First Amendment scrutiny should apply only where Congress alters copyright law's traditional contours);

general interest is probably sufficient to save most provisions of the Copyright Act from *facial* constitutional challenges, it is not always sufficient to justify particular findings of infringement against as-applied challenges. As we have seen, the First Amendment does not allow courts to assume that a general governmental interest in suppressing speech is at work in every case. Rather, courts must scrutinize every application of a speech restriction to see whether the defendant's speech is likely to harm the government's interest in that particular case. Thus, in copyright infringement cases, courts should determine whether the defendant's use of copyrighted material causes harm to the copyright holder in a way that is likely to harm her incentives to create or disseminate copyrighted works. Courts should assess the harm caused to the copyright holder's incentives on a case-by-case basis and then balance any such harm against the speech value of the defendant's use. As such, a harm requirement would ensure that findings of infringement and damages are limited to situations in which, as Benkler put it, "government has the kind of good reasons that would justify any other regulation of information production and exchange. . . ." ¹⁸⁸

The *Seinfeld* trivia book case provides a useful illustration of how courts should assess harm in First Amendment scrutiny of copyright infringement cases. There, the defendant produced a *Seinfeld* trivia book, which occupies a market that is quite remote from the market for the television show. Moreover, the plaintiff producers testified that they had no intention of entering the market for trivia books. Thus, the trivia book market did not provide an incentive to create or distribute the copyrighted work (or even obvious derivative works). Unless there is some other harm associated with the defendant's trivia book (as will be discussed in *infra* part VI), there is no copyright interest in prohibiting the defendants' use of the copyrighted material. As a result, the First Amendment interest in allowing the use should prevail.

Of course, there might be some cases in which copying cannot be characterized as speech or expression on the part of the defendant and the copying otherwise has little speech value. These cases are likely to be few in number, because, as we have seen, even pure copying can have speech value to the copyist or listeners. In addition, seemingly innocuous speech (or, as in *Seinfeld*, speech about nothing) has value because it informs political and social views. Nevertheless, if a court decides that the copying was not intended or understood to communicate a message, then it may decide that the copying was not speech at all and therefore that First Amendment scrutiny is unwarranted. Alternatively, courts may wish to focus on the harm associated with the defendant's alleged infringement. Where the speech value of the defendant's copying is dubious, harm to the copyright holder might be clear. Except in cases of personal copying (where harm is unlikely), pure non-expressive copying can cause harm by supplanting the market for the original. Indeed, in at least some cases, harm will be evident and can probably be presumed. Moreover, the harm probably would not be outweighed by the speech value of the copying.

¹⁸⁸ See Benkler, *supra* note 1, at 357.

On the other hand, if courts continue to rely on copyright's own "traditional contours," they will take a less direct approach to protecting speech interests.¹⁸⁹ Even here, however, harm will play a central role. Traditionally, copyright infringement claims originated as tort claims requiring proof of harm. Under the early English copyright statutes on which the American copyright statutes have been based, authors sued for copyright infringement by bringing an action for trespass on the case.¹⁹⁰ Unlike actions for trespass, which have allowed recovery without a showing of harm, actions for trespass on the case have always required a showing of actual harm in the form of physical injury or monetary loss.¹⁹¹ In addition, early statutory rights themselves were much more limited than they are today. The scope and duration of protection encompassed foreseeable uses of copyrighted material that a copyright holder likely would have relied on in deciding whether to create and disseminate expressive works.¹⁹²

More expansive copyrights are a relatively new development and therefore cannot properly be considered as part of copyright's "traditional contours."¹⁹³ The 1976 Copyright Act brought major changes that prevent or discourage harmless uses of copyrighted material in speech. First, it added a broad derivative works right, which gives copyright holders exclusive rights not only over the original work but also over any work in which the original work might be "modified, transformed, or adapted."¹⁹⁴ As Judge Kozinski has observed, the derivative works right is "hopelessly overbroad" because all new works must build on existing works to some degree.¹⁹⁵ Such broad rights enable copyright holders to demand licensing fees for just about any copying of their works.¹⁹⁶ As such, these rights also prohibit a good deal of harmless speech. While copyright holders can foresee some copying and derivative uses of their copyrighted works, they are not likely to rely on the ability to control all peripheral uses of their copyrighted works in deciding whether to create or distribute copyrighted works.¹⁹⁷

¹⁸⁹ See Kasunic, *supra* note __, at 412-13 (describing the use of copyright's traditional contours as an alternative to "[a]pplying heightened scrutiny to the statute itself").

¹⁹⁰ See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 453 (4th ed. 2002) (discussing the English Copyright Act of 1709).

¹⁹¹ See DAN B. DOBBS, 1 THE LAW OF TORTS 25-26 (2000); RICHARD A. EPSTEIN, TORTS 76 (1999) (same).

¹⁹² See Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, *supra* note __ at 975 (describing evolution of early copyright law).

¹⁹³ See, e.g., Lemley, *Licensing Markets*, *supra* note __, at 190 (arguing that recent developments in copyright law "unmoor fair use from its traditional rationale of market loss"); Bohannon, *Reclaiming Copyright*, *supra* note __, at 581 (tracing evolution of copyright law and arguing that due to special-interest influence, "[i]n the last 30 years, both the size of the copyright statute and the amount of protection it provides have grown by leaps and bounds").

¹⁹⁴ See 17 U.S.C. § 106(2) (granting derivative works right); 17 U.S.C. § 101 (defining "derivative work").

¹⁹⁵ See *Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1110 (9th Cir. 1998) (adding judicial limitations on the derivative works right in light of excessively broad statutory definition).

¹⁹⁶ See, e.g., Lemley, *Licensing Markets*, *supra* note __, at 190 (observing that demands for license fees have "skyrocketed").

¹⁹⁷ See Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, *supra* note __ at 988-89 (arguing that just as the reasonable person in tort law will act with regard to ordinary foreseeable circumstances, reasonable copyright holders will rely only on foreseeable markets for their copyrighted works in deciding whether to create or disseminate copyrighted works); Shyamkrishna Balganes, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. __ (forthcoming 2009) (using bounded rationality to argue that foreseeable copying should be part of the test for infringement).

Where copying does not harm a reasonable copyright holder's incentives to create or distribute copyrighted works, finding infringement cannot be justified by the governmental interest in encouraging the creation and distribution of copyrighted works.

Second, in codifying the common-law fair use doctrine, the 1976 Act altered copyright's traditional contours (perhaps unintentionally) by reducing the scope of fair use. Courts developed the fair use doctrine in the mid-1800's to help determine which uses of copyrighted material were infringing and which ones were not. In the seminal case of *Folsom v. Marsh*, Justice Story enumerated several factors to be considered in "fair abridgement,"¹⁹⁸ and these factors were later codified as the four fair use factors in the 1976 Copyright Act.¹⁹⁹ Although the 1976 Act purported to codify the common-law fair use doctrine without change,²⁰⁰ the version of fair use that we have today is quite different from Justice Story's original. First, Story emphasized that harm to the copyright holder is the cornerstone of the fair use test.²⁰¹ Specifically, he said that liability turns on "the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."²⁰² Second, Justice Story apparently treated the fair use doctrine as a test of infringement, not as an affirmative defense.²⁰³ Thus, the burden to show that the defendant's use of copyrighted material was not fair was presumably on the plaintiff, not on the defendant. Unfortunately, the 1976 Act put fair use in a separate provision from the provision enumerating copyright holders' exclusive rights. As a result, courts now treat fair use as an affirmative defense. This interpretation is not necessarily the best one, however, as section 107 says that "notwithstanding the exclusive rights [listed in section 106] it is not an infringement of copyright to make fair use of copyrighted works...."²⁰⁴

In light of these developments, courts must exercise caution in using statutory doctrines such as fair use to protect free speech in copyright law. As will be discussed below, the First Amendment requires changing some aspects of current copyright law in order to reinstate the traditional focus on harm. Moreover, courts should recognize that statutory doctrines, even when properly applied, cannot always provide the level of protection that the First Amendment requires. Professor Nimmer argued that "a grave danger to copyright may lie in the failure to distinguish between the statutory privilege known as fair use and an emerging constitutional limitation on copyright contained in the first amendment."²⁰⁵ For instance, he noted that "[t]he first amendment privilege, when appropriate, may be invoked despite the fact that the marketability of the copied work is

¹⁹⁸ See *Folsom*, 9 F. Cas. 342, 348-49 (C.C.D. Mass. 1841) (No. 4,901).

¹⁹⁹ See 17 U.S.C. § 107.

²⁰⁰ H.R. REP. NO. 94-1476, at 66 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5680 ("Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.").

²⁰¹ See *Folsom*, 9 F. Cas. at 348-49 (stating several times that liability turns on the extent to which the original author will be injured by the copying).

²⁰² See *id.* at 349.

²⁰³ See *id.*

²⁰⁴ See 17 U.S.C. § 107.

²⁰⁵ See generally Nimmer, *supra* note 1, at 1200.

thereby impaired.”²⁰⁶ Accordingly, it is important to clarify that, even with the proposed harm requirement, direct First Amendment scrutiny will still be needed in some circumstances. For instance, First Amendment scrutiny should be applied where the speech value of the copying clearly outweighs the harm or where copyright law burdens speech in structural ways that cannot be addressed in individual infringement cases.

In ordinary cases of copyright infringement, however, a harm requirement can often provide a way for courts to vindicate both copyright and First Amendment values. Here, Nimmer’s concern seems less valid. For instance, based on the differences between the statutory privilege of fair use and the constitutional protection of the First Amendment, Nimmer disapproved of cases such as *Time, Inc. v. Bernard Geis Associates*.²⁰⁷ In that case, the district court held that it was fair use for the defendant to use in its book still frames from the copyrighted Zapruder film of the Kennedy assassination. The court found fair use because “the effect of the use of certain frames in the Book on . . . [plaintiff’s proposed projects was] speculative.”²⁰⁸ Indeed, the court concluded that “[i]t seems reasonable to speculate that the Book would, if anything, enhance the value of the copyrighted work. . . .”²⁰⁹ Nimmer argued that the court’s analysis improperly conflated First Amendment and fair use issues. He said that the court ignored the defendant’s impairment of the marketability of the copyrighted work²¹⁰ because of First Amendment concerns regarding the “public interest in having the fullest information available on the murder of President Kennedy.”²¹¹

Yet, in this author’s view, the court used copyright’s “built-in First Amendment accommodations” effectively. In light of First Amendment concerns, the court used fair use analysis to determine whether the defendant’s use caused any real harm to the copyright owner’s incentives to create or distribute the copyrighted work. If there was none, there would be no copyright interest in suppressing the speech, and therefore no infringement. The judge found that any such harm was speculative because the plaintiff had no immediate plans to use the work in a manner similar to defendant’s and because the defendant’s use could actually enhance sales of the original work. By requiring real proof of harm in the same way that courts generally require harm in First Amendment cases, the court was able to effectuate both copyright and First Amendment values.

While it is possible to use either constitutional scrutiny or statutory doctrines to protect free speech in copyright infringement cases, the First Amendment requires courts to change the way they deal with the issue of harm. The following proposed changes would serve copyright’s purpose of encouraging creativity by allowing people to use and build upon copyrighted works where doing so does not affect the copyright holder’s

²⁰⁶ See *id.* at 1201.

²⁰⁷ 293 F. Supp. 130 (S.D.N.Y. 1968).

²⁰⁸ See *id.*

²⁰⁹ See *id.*

²¹⁰ See Nimmer, *supra* note 1, at 1201 (“Judge Wyatt, in the *Bernard Geis* (Zapruder film) case, purported to rely upon fair use rather than upon the first amendment. He therefore found it necessary to take the position that the defendant’s activities in publishing a book, containing copied frames of the Zapruder film, did not work any injury to the plaintiff’s market for the same film”).

²¹¹ See *id.* at 1200 (quoting *Bernard Geis*, 293 F. Supp. at 146).

incentives to create or distribute a copyrighted work. They also protect First Amendment values by avoiding unnecessary burdens on speech that causes no harm to copyright's objectives. Significantly, few (if any) of these changes would require statutory amendment.

First, in order to limit copyright protection to that which is necessary to keep the "engine of free expression" running, liability for copyright infringement should turn on proof of harm. This approach would simply require courts to take the harm requirement in fair use more seriously.²¹² Consistent with the government's interest in enacting and enforcing copyright law, harm should be defined as a loss to the copyright holder that is likely to decrease incentives to create or distribute copyrighted works. The harm must be real and not merely speculative, just as it is required to be in other cases involving speech.

Thus, a court should find liability for copyright infringement only if, as in *Zacchini*, the defendant's use directly impacts the plaintiff's ability to make a living by supplanting the market for the plaintiff's work. On the other hand, a court should find that the First Amendment trumps infringement where, as in the Eighth Circuit's fantasy baseball case, the defendant has engaged in copying of a kind or amount that is unlikely to decrease the plaintiff's incentives.²¹³ This approach would often preclude suppressing the defendant's speech where the only apparent harm is the loss of a copyright license fee that the defendant might have paid. As we have seen, the First Amendment requires (at the least) that speech regulations be justified by an important government interest and narrowly tailored to achieve that interest. As such, it allows the government to grant copyright holders "sufficient incentives" but not "perfect control."²¹⁴

In addition, copyright harm must be offset by any increased profits that the copyright holder enjoys as a result of the alleged infringement. This approach follows the Court's admonition in *Zacchini* that the "human cannonball" petitioner would have to show net harm because it was possible that "respondent's newsbroadcast increased the value of petitioner's performance by stimulating the public's interest in seeing the act live."²¹⁵ If there is no provable net harm once offsetting gains have been taken into account, then there is no government interest in suppressing the speech.

²¹² See generally Kasunic, *supra* note __, at 413 ("[I]t would appear that the optimal way to preserve the traditional contours of copyright so as to safeguard free speech values would be for a court to apply or expand the existing free speech safeguards, or, alternatively, to create an appropriate common law doctrine to address the conflict").

²¹³ The right of publicity cases provide a useful illustration, as they are very similar to copyright infringement cases. As the *Zacchini* Court noted, the governmental interest behind both laws is to compensate people in order to give them incentives to produce works or performances that are of interest to the public. Moreover, rights of publicity and copyrights are potentially more detrimental to speech than other laws like defamation because they prohibit speech even when it is not false or misleading. See Lemley & Volokh, *Injunctions*, *supra* note 1, at 227.

²¹⁴ See Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L. J. 433, 435 (2007) (discussing the need to give copyright holders "sufficient incentive" but not "perfect control").

²¹⁵ *Zacchini*, 433 U.S. at 575 n.12.

Moreover, to the extent that courts have begun to emphasize transformativeness over harm, they should reverse that trend. The transformativeness of the defendant's use is relevant to whether the use supplants the market for the copyright holder's work and also to whether the value of the defendant's work outweighs harm to the copyright holder. But transformativeness should not be required where the copyright holder cannot show harm. Where there is no harm, there is no sufficient government interest in suppressing the defendant's use, whether or not the use is transformative.

In addition, courts should reject the view, now prevalent in the case law, that fair use should take into account not only the actual harm caused by the defendant's copying in a particular case, but also the cumulative harm that would occur if such copying should become "widespread."²¹⁶ First Amendment cases including *Texas v. Johnson*, *Brandenburg*, and *Bartnicki* (among others) make clear that only the harm that actually occurs in a particular case, and not speculation about harm that might occur in other cases, can be weighed in assessing the government's interest in that case.²¹⁷

Second, the burden of proof on harm must be assigned appropriately. Where the defendant engages in close copying of the plaintiff's work in the plaintiff's most foreseeable markets, harm to the copyright holder's incentives can probably be presumed. In all other cases, however, the plaintiff (as the proponent of the speech restriction) must bear the burden of proof to show harm in copyright infringement cases just as plaintiffs typically bear the burden of proof to show harm in other types of speech cases. This allocation of the burden of proof is consistent with direct First Amendment scrutiny. But even if courts assess harm as part of fair use analysis, this allocation probably would not require statutory amendment. As was previously noted, the Copyright Act does not characterize fair use as an affirmative defense but simply says that fair use "is not an infringement of copyright."

Third, where possible, damages in copyright infringement claims should be commensurate with actual harm in order to avoid unnecessary burdens on speech. First Amendment scrutiny already limits damages in this way. As the Court made clear in *Gertz*, "the States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury."²¹⁸ In addition, the language of the Copyright Act's damages provision permits this approach in most cases. Because section 504(a) allows the copyright holder to recover her "actual damages *and any additional profits* of the infringer" it may be read to mean that the copyright holder is entitled to recover the infringer's profits only where there are, in fact, actual damages. This view would require infringers to disgorge only those profits resulting from harmful acts of infringement. The effect would be to discourage only harmful speech. On the other hand, because the statutory damages provision grants an award of damages within a

²¹⁶ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) ("The fourth fair use factor . . . requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original." (quoting NIMMER ON COPYRIGHT § 13.05[A][4])).

²¹⁷ See *supra* notes ___ and accompanying text.

²¹⁸ 418 U.S. at 349.

fixed statutory range,²¹⁹ it might have to be amended to allow statutory damages only where the infringement is harmful. Statutory damages would continue to be important where the fact of harm is clear but the precise amount is difficult to prove.

Finally, copyright law must define harm according to free speech principles. The following section will analyze whether the First Amendment permits courts to recognize the various types of harm that might arise in infringement cases.

VI. Defining Copyright Harm According to First Amendment Values

In order to use a copyright harm requirement to protect speech under either direct First Amendment scrutiny or under statutory doctrines such as fair use, it is necessary to determine what kinds of harm may be considered. A copyright holder might argue that unauthorized copying causes a number of different types of harm, any of which might affect her incentives to create or distribute her work. Most obviously, because the Supreme Court has consistently held that the purpose of copyright law is to provide an economic incentive to create and disseminate copyrighted works, copying that supplants the copyright holder's expected markets will likely cause market harm to the copyright holder.

Yet, non-market harms might arise in copyright infringement cases as well. Authors' natural and moral rights in their works or authorship might play at least an implicit role in how courts view the harm caused by copying. Moreover, it is possible that types of harm recognized in other areas of law, such as harm to reputation or violations of privacy, might be recognized in copyright law. In addition, copyright holders might attempt to assert harm to their own First Amendment rights, particularly their rights not to speak or associate when someone else uses their copyrighted works without their permission.

In the following sections, I will address in depth how the First Amendment should inform the definition of harm in copyright infringement cases. I conclude that while copyright harm clearly includes the harm of market substitution, it must not include harm due to criticism or disparagement. This definition of harm precludes a finding of infringement based on what I call "copyright dilution," in which a defendant's use might cause some harm to the image or reputation of a copyrighted work but causes no harm from market substitution. Furthermore, courts should not recognize harm to the plaintiff's right not to speak or right to privacy, except in cases involving the copying of unpublished works.

A. Market Harm and Copyright as the "Engine of Free Expression"

²¹⁹ See 17 U.S.C. § 504(b) (copyright holder entitled to statutory damages "in a sum of not less than \$750 or more than \$30,000 as the court considers just," but the court may increase the maximum award to \$150,000 in cases of willful infringement or decrease the minimum to \$200 in cases of innocent infringement).

The least controversial form of harm that courts might recognize from copyright infringement is the economic harm of market substitution. The following cases suggest how courts can use market harm to protect speech under either direct First Amendment scrutiny or copyright's own statutory doctrines.

In *Sony Corp. of Am. v. Universal City Studios, Inc.*, the owners of copyrights in television programs sued Sony, arguing that Sony's Betamax home video recorder machines contributed to copyright infringement by home viewers who used the machines to copy the programs.²²⁰ In considering whether Sony was liable for contributory copyright infringement, the Court first had to determine whether the viewers' main use of the machine ("time-shifting" television programs to watch them at a different time) was fair use.²²¹ Summarizing the District Court's findings on this issue, the Supreme Court described how the lower court had used fair use to protect the First Amendment value in broad dissemination.

The District Court concluded that noncommercial home use recording of material broadcast over the public airwaves was a fair use of copyrighted works and did not constitute copyright infringement. . . . Moreover, the court found that the purpose of this use served the public interest in increasing access to television programming, an interest that is consistent with the First Amendment policy of providing the fullest possible access to information through the public airwaves. Even when an entire copyrighted work was recorded, the District Court regarded the copying as fair use "because there is no accompanying reduction in the market for plaintiff's original work."²²²

In deciding that the home viewers' verbatim copying of television programs was fair use, the Court rejected the view that fair use should be limited to transformative or socially productive uses. The Court said that "the notion of social 'productivity' cannot be a complete answer to this analysis" because there is value in many different kinds of copying. It explained: "A teacher who copies to prepare lecture notes is clearly productive. But so is a teacher who copies for the sake of broadening his personal understanding of his specialty. Or a legislator who copies for the sake of broadening her understanding of what her constituents are watching; or a constituent who copies a news program to help make a decision on how to vote. . . ."²²³

Having acknowledged the personal and social value in copying, the Court applied a harm-based approach to fair use that mediates between the owners and users of

²²⁰ 464 U.S. 417, 420 (1984).

²²¹ *See id.* at 443.

²²² *See id.* at 425-26 (citing *Sony*, 480 F.Supp. 429, 432-433, 442 (1979)) (some internal citations and quotations omitted).

²²³ *See id.* at 455 n.40.

copyrighted materials by limiting copyright protection to that which is necessary to serve the purpose of copyright.²²⁴ The Court stated:

The purpose of copyright is to create incentives for creative effort. . . . [A] use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create What is necessary is a showing by a preponderance of the evidence that *some meaningful likelihood of future harm exists*.²²⁵

Using harm as the touchstone of fair use analysis, the Court reviewed the district court's decision to determine whether there was any evidence that the home viewers' taping of television programs was likely to cause any real harm to copyright holders and their incentives to create copyrighted works. The Court concluded that "the District Court restated its overall conclusion several times, and in several different ways. 'Harm from time-shifting is speculative and, at best, minimal.'"²²⁶

As such, the *Sony* case was essentially a false conflict between copyright law and the First Amendment. There was, as the district court had said, a First Amendment interest in allowing the "fullest possible access" to information. But because there was no harm to the copyright holders' incentives to create or distribute the work, there was no copyright interest in enforcing the copyright.

The dissent disagreed with the majority's emphasis on proof of harm, asserting that copyright holders should be "entitled to share in the benefits of [the] new market" for time-shifted viewing of their programs.²²⁷ This view essentially holds that copyright holders are entitled to share in all benefits deriving from uses of their works, regardless of whether the use would impair the copyright holders' incentives to create and distribute copyrighted works. As I have argued, this view clearly conflicts with the First Amendment. The majority approach, on the other hand, serves First Amendment values. The majority indicated that harm can be presumed only where the facts make harm very likely, such as where the defendant copies an entire work verbatim and uses it for commercial purposes. Otherwise, the plaintiff has to prove harm. This approach harmonizes copyright law and the First Amendment by presuming harm only where it is foreseeable enough to affect incentives to create or distribute the work.

Harper & Row Publishers, Inc. v. The Nation Enterprises.²²⁸ is the other side of the same coin. There, the defendant surreptitiously obtained and published in its news

²²⁴ See Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, *supra* note ___, at 991-96.

²²⁵ *Sony*, 464 U.S. at 450-51 (emphasis added in part) (footnotes omitted).

²²⁶ See *id.* at 454 (quoting *Universal City Studios, Inc. v. Sony Corp. Of Am.*, 480 F. Supp. 429, 469 (C.D. Cal. 1979)).

²²⁷ See *id.* at 497-98 (Blackmun, J., dissenting).

²²⁸ 471 U.S. 539 (1985).

magazine excerpts of President Ford’s memoirs just before portions of the memoirs were to be published in Time Magazine. Time Magazine cancelled its contract with Harper & Row and refused further payment. The defendant argued that its use was fair because it used the copyrighted material for news reporting and because there was a First Amendment interest in allowing access to material of public importance. The Supreme Court rejected the defendant’s argument, holding that such clear evidence of harm precluded a finding of fair use.²²⁹

Having found this harm, the Court did not go on to apply First Amendment scrutiny, and with good reason. Despite the defendant’s argument that “First Amendment values” necessitated broader fair use protection for information “relate[d] to matters of high public concern,”²³⁰ the Court reasoned that First Amendment values militated against a finding of fair use. The defendant’s use did not enhance free speech any more than the plaintiff’s use would have; indeed, the reason the harm was so clear was that the defendant’s use simply supplanted the plaintiff’s own intended use.²³¹ Thus, this was another false conflict, but one in which the defendant’s use caused demonstrable harm to a copyright owner’s distribution of a copyrighted work and did not serve First Amendment interests.²³²

The foregoing cases show how the presence or absence of market harm can help to resolve the conflict between copyright law and the First Amendment. The remaining sections address whether the First Amendment permits recognition of non-market harms in copyright infringement cases.

B. Non-Market Harm: Reputational Harm and the Marketplace of Ideas

As the foregoing shows, a statutory harm requirement can help to reconcile copyright and First Amendment values. But the concept of harm is not necessarily limited to market harm. It is also necessary to consider whether protection against non-market harms, such as such as disparagement of a copyrighted work’s image or impairment of harm to the copyright holder’s right not to speak, would serve these values.

²²⁹ *See id.*

²³⁰ *See id.* at 555-56.

²³¹ *See Bohannon, Copyright Harm, Foreseeability, and Fair Use, supra* note __, at 998.

²³² In other cases, however, once harm to the copyright holder is shown, First Amendment values might require courts to balance that harm against the speech value of the defendant’s use. If the speech value of the defendant’s use outweighs the harm to the copyright holder, courts should either find the use non-infringing or award damages but deny injunctive relief. The latter approach allows the defendant’s speech while compensating the copyright holder for her actual harm. *See generally* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 126 S. Ct. 1837, 1839-40 (2006) (in copyright infringement cases, courts may grant injunctive relief, in their discretion, based on “equitable considerations” that include the effect of the injunction on the public interest.) Yet, the proposed approach emphasizes that courts should balance only when there is real harm in the first place. Otherwise, a “balancing” approach might seem to imply that the defendant’s use must always have some social value to justify the infringement. If social value is always required, harmless personal uses of copyrighted material lose out, resulting in a serious and unnecessary burden on speech.

The paradigm copyright infringement case is probably one in which the defendant has merely copied from a copyrighted work without adding to or changing it. In other cases, however, the defendant has not only copied from a copyrighted work but has also changed some aspect of the work, such as its meaning, context, or purpose. These uses are generally referred to as “transformative.” Although there is no precise definition of what constitutes a transformative use, this type of use is generally favored in fair use analysis either because it provides social value or because the transformation renders it a poor substitute for the original work and therefore causes no meaningful likelihood of market harm.²³³

Yet, transformative uses might cause other forms of harm, such as harm to the image of the copyrighted work or to the copyright holder. Sometimes the defendant’s transformation is favorable to the image of the copyrighted work, as when the defendant produces a popular movie based on a copyrighted short story. Other times, however, the transformation is less benign. The transformation might criticize the work, cast it in a negative light, or create an unwholesome association between the plaintiff’s copyrighted work and the defendant’s bawdier one. In these cases, the copyright holder might feel that she or her work has suffered some kind of reputation- or image-related harm, even if the defendant’s use did not cause any meaningful likelihood of market harm. As I have argued elsewhere, this kind of harm might be called “copyright dilution”²³⁴ because of its resemblance to the harm associated with trademark dilution.²³⁵

The Second Circuit’s decision in *MCA, Inc. v. Wilson*²³⁶ provides an example of judicial recognition of harm to the image of a copyrighted work. In that case, the defendant created a song entitled *Cunnilingus Champion of Company C*, which copied the tune of *Boogie Woogie Bugle Boy of Company B* but substituted new lyrics related to the “humorous practice of cunnilingus.”²³⁷ The court was not amused. Rejecting the defendant’s testimony that the purpose of the new song was to “combin[e] the innocent music of the ‘40’s with words often considered to be taboo to make a very funny point,”²³⁸ the court concluded that the new song was neither parody nor satire and was not otherwise transformative.²³⁹ Ultimately, the court held that the song was not fair use, despite major differences between the two songs that made market substitution unlikely.

The Second Circuit’s opinion revealed the court’s offense at the defendant’s blatantly sexual lyrics. Moreover, it seemed concerned that those lyrics would tarnish the

²³³ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994); *NXIVM Corp v. Ross Inst.*, 364 F.3d 471, 477-78 (2d Cir. 2004); *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801, 806 (9th Cir. 2003).

²³⁴ See Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, *supra* note __, at 1022-27 (arguing against copyright dilution and in favor of a harm-based approach to fair use).

²³⁵ See 1995 Federal Trademark Dilution Act (FTDA), 15 U.S.C. § 1125(c)(1), *superseded by* The Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat. 1730 (codified as amended at scattered sections of 15 U.S.C.). See also Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, *supra* note __, at 1022-23 (comparing copyright dilution and trademark dilution).

²³⁶ 677 F.2d 180 (2d Cir. 1981).

²³⁷ See *id.* at 185.

²³⁸ See *id.*

²³⁹ See *id.* at 184.

image of the copyright holder’s wholesome and patriotic song, which, the court said, “achieved its greatest popularity during the tragic and unhappy years of World War II, in which 292,131 Americans lost their lives.”²⁴⁰ Thus, the court concluded, “We are not prepared to hold that a commercial composer can plagiarize a competitor’s copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society.”²⁴¹

As an initial matter, it is important to note that the Copyright Act’s explicit protection for reputation-related harm is very limited. Unlike the Lanham (Trademark) Act, whose broad cause of action against trademark dilution enjoins tarnishing the image of famous trademarks, the Copyright Act protects against this type of harm only in its moral rights provisions under the Visual Artists Rights Act (VARA). The VARA moral rights provide authors with a right of attribution (the right to be recognized as the author of a work), as well as a right to “prevent any intentional distortion, mutilation, or other modification of [a] work which would be prejudicial to his or her honor or reputation.”²⁴² Unlike the right to copy and the other exclusive rights granted by the Act, VARA’s moral rights are very limited in scope. Foremost, they apply only to “work[s] of visual art,” which include paintings, drawings, prints, sculptures, and photographs, “existing in a single copy [or] in a limited edition of 200 copies or fewer. . . .”²⁴³ Thus, moral rights apply only to fine art and not to more common types of works like books or music,²⁴⁴ which are more often the subject of parodies and satires. Moreover, these rights apply only to original works or limited edition copies and not to copies generally. As such, the right against “distortion, mutilation, or other modification” would seem to protect only against modifications of a particular physical copy, not against modifications of the underlying intangible work. Given all of the carefully articulated limitations on moral rights in section 106A, it seems highly unlikely that Congress would have intended for courts to protect against reputation- or image-related harm through other doctrinal means, such as fair use analysis.

Indeed, to the extent that copyright infringement actions burden speech in order to protect against harm to image or reputation, they allow an end-run around important requirements intended to reduce burdens on speech in defamation law. As an initial matter, it is perhaps too obvious even to mention that defamation provides a cause of action for reputational harm to *people*, not reputational harm to books, movies, or Barbie dolls. But even assuming that disparagement of a copyrighted work is likely to spill over onto the author or other copyright holder, liability for defamation requires publication of statements that are false. Indeed, at least with regard to defamation of public figures – and many of the copyright holders in infringement suits are public figures – falsity is a constitutional requirement. As the Supreme Court has explained, “[s]ince *New York Times v. Sullivan*, . . . we have consistently ruled that a public figure may hold a speaker

²⁴⁰ See *id.* at 184 & n.1 (internal quotations omitted).

²⁴¹ See *id.* at 185.

²⁴² See 17 U.S.C. § 106A.

²⁴³ 17 U.S.C. § 101 (definition of “work of visual art”).

²⁴⁴ See *id.* (“A work of visual art does not include . . . any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical data base, electronic information service, electronic publication, or similar publication. . . .”).

liable for [a defamatory statement] . . . only if the statement was made ‘with knowledge that it was false or with reckless disregard of whether it was false or not.’”²⁴⁵

Copyright infringement cases – including cases in which the defendant’s use puts the copyrighted work in a negative light – rarely involve false statements of fact about the work, or its author, publisher, or other copyright holder. Rather, these cases typically involve the use of a copyrighted work in order to convey an idea or opinion, such as to ridicule or comment upon some aspect of the copyrighted work or an associated message. This difference is crucial from a First Amendment perspective. As the Supreme Court said in *Gertz*: “Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correctness not on the conscience of judges and juries but on the competition of other ideas.”²⁴⁶ By contrast, false assertions of fact about a person or product not only lack value but actually “interfere with the truth-seeking function of the marketplace of ideas. . . .”²⁴⁷

Accordingly, First Amendment case law treats parodies and other forms of critical opinion very differently than false assertions of fact. For example, in *Hustler Magazine v. Falwell*, Jerry Falwell, a nationally known religious figure and political commentator, sued Hustler Magazine and Larry Flynt for libel and intentional infliction of emotional distress.²⁴⁸ The claim arose out of the defendants’ publication of a parody advertisement that portrayed Falwell having sex with his mother in an outhouse.²⁴⁹ With regard to the libel claim, the Court accepted the jury’s verdict for Flynt and the magazine, which was based on the jury’s finding that the “parody could not ‘reasonably be understood as describing actual facts about [Falwell] or actual events in which [Falwell] participated.’”²⁵⁰ Likewise, with regard to the intentional infliction of emotional distress claim, the Court held that “public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact. . . .”²⁵¹ As the Court explained, “[t]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection.”²⁵²

The Supreme Court has specifically addressed the issue of reputation-related harm only once in copyright law. In *Campbell v. Acuff-Rose Music, Inc.*, the rap group 2 Live Crew made a rap version of Roy Orbison’s song *Oh, Pretty Woman*.²⁵³ 2 Live Crew’s song incorporated the melody, the opening line, and the guitar riff from the original song, but replaced the original sentimental lyrics with sexually suggestive lyrics that reflected

²⁴⁵ *Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988) (quoting and discussing *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964)) (portions of internal citations omitted).

²⁴⁶ 418 U.S. at 339-40.

²⁴⁷ See *Hustler*, 485 U.S. at 52.

²⁴⁸ See *id.* at 47-48.

²⁴⁹ See *id.* at 48.

²⁵⁰ See *id.* at 57 (quoting application to petition for certiorari C1).

²⁵¹ See *id.* at 56.

²⁵² See *id.* at 55 (internal citations and quotations omitted).

²⁵³ See *Campbell*, 510 U.S. at 573.

“the ugliness of street life.”²⁵⁴ The Court held that 2 Live Crew’s song “reasonably could be perceived” as a parody of the original song²⁵⁵ and therefore was entitled to the same fair use protection as other forms of transformative commentary or criticism.²⁵⁶

Moreover, the Court concluded that “harm to the market for or value of the copyrighted work,” the fourth factor of fair use analysis, does not include the loss of sales or license fees for parodies of the copyrighted work. The Court gave two related reasons for this conclusion. First, the market harm factor of fair use takes into account only the harm of “displacement” and not the harm of “disparagement.”²⁵⁷ That is, market harm considers only the harm that results when the defendant’s work “usurps” demand for the plaintiff’s work, not the harm that results when the defendant’s “[b]iting criticism suppresses [that] demand.”²⁵⁸ Second, a defendant’s parody does not usurp the copyright holder’s market for parody because copyright holders do not control the markets for parodies and other criticism of their works. The Court explained:

The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market. “People ask . . . for criticism, but they only want praise.”²⁵⁹

The Court’s conclusion – that harm resulting from criticism of copyrighted works is not cognizable harm under the Copyright Act – may be viewed as an attempt to use and define a harm requirement so as to protect free speech concerns in copyright infringement cases. Although the Court did not explicitly rely on the First Amendment in its analysis, it seemed intent on enhancing the marketplace of ideas by protecting the freedom to express unflattering opinions of the work of others.

Yet if the Court is truly concerned with protecting speech in copyright infringement cases, its opinion does not go nearly far enough. It falls short in at least two important ways. The first is that the Court’s reasoning is vulnerable to manipulation by copyright holders. The Court stated that copyright holders do not control the markets for parody and other forms of criticism because those are not markets that copyright holders “would in general develop or license others to develop.”²⁶⁰ This would seem to be primarily an empirical observation that might be subject to change as copyright holders adapt their marketing strategies. As Mark Lemley has observed, it would not take a savvy copyright holder long to decide that if a parody is going to be made with or without

²⁵⁴ See *id.* at 583.

²⁵⁵ See *id.*

²⁵⁶ See *id.* at 579 (“Suffice it to say now that parody has an obvious claim to transformative value on an earlier work, and, in the process, creating a new one.”).

²⁵⁷ See *id.* at 592.

²⁵⁸ See *id.* at 591-92 (“when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce harm cognizable under the Copyright Act.”).

²⁵⁹ See *id.* at 592 (quoting W. Somerset Maugham, *OF HUMAN BONDAGE* 241 (Penguin ed. 1992)).

²⁶⁰ See *id.*

her consent, she might as well start licensing it so that she can at least share in the profits.²⁶¹

If copyright holders can gain control over parody and other forms of criticism merely by entering the market for such uses, the result could be devastating to the First Amendment interest in encouraging competition in the marketplace of ideas. Rather, the First Amendment should inform the definition of harm in fair use analysis by putting affirmative limits on the markets that copyright holders can control. Once certain markets are excluded in light of overarching constitutional values, reasonable copyright holders will no longer expect to control those markets. Thus, even if a copyright holder has attempted to license her copyrighted work for purposes of parody or criticism, another's unauthorized use of the work for such purposes should not be deemed to harm the copyright holder's legally protected markets. If no other harm is evident, or if the value of the use outweighs any other harm, the use should be deemed non-infringing.

The second way that the *Campbell* Court's decision fails to provide sufficient First Amendment protection for uses of copyrighted works relates to its treatment of satirical uses. While the Court held that fair use protects parody as transformative criticism or commentary, it suggested that satire is not as deserving of fair use protection. Distinguishing the two art forms, the Court defined parody as criticism of a particular work, and satire as criticism of a broader genre of works or on society at large that "has no critical bearing on the substance or style of the original composition."²⁶² Because satire does not directly criticize the copyrighted work itself, the Court presumably thought (albeit with little evidentiary support) that copyright holders would be more willing to license their works for satirical purposes more than for parodic purposes.

The Court's distinction between parody and satire is very problematic from a First Amendment perspective. First, it flies directly in the face of the First Amendment's concern with promoting the marketplace of ideas. Indeed, the preference for satire over parody is perverse because it gets First Amendment priorities backward. First Amendment protection is at its zenith with respect to speech that contributes to democratic governance.²⁶³ As such, First Amendment case law has always given primacy to speech relating to matters of public importance.²⁶⁴ By contrast, the Court's hierarchy of parody over satire privileges commentary on trivial or whimsical matters over commentary on political and social issues. For instance, in *Dr. Seuss Enters., L.P. v. Penguin Books USA*, the defendant wrote a book entitled *The Cat Not in the Hat* that

²⁶¹ See Lemley, *Licensing Market*, *supra* note ___, at 190-91 ("Once courts announce that a copyright owner can stop uses of their work merely by offering to charge for those uses, it is reasonable to expect that copyright owners will strive to develop just such a licensing market. And indeed they have done so. Not only has the market for photocopy permissions skyrocketed, but copyright owners are charging for rights to home viewing of television programs, rap-music samples, and even the right to parody their works." (citing cases)).

²⁶² See *id.* at 580, 581 n.15.

²⁶³ See *supra* notes ___ and accompanying text.

²⁶⁴ See, e.g., *Bartnicki*, 532 U.S. at 533-34 (explaining that the challenged statute "implicates the core purposes of the First Amendment because it imposes sanctions on the publication of truthful information of public concern").

criticized the O.J. Simpson murder case and the justice system's handling of that case.²⁶⁵ In writing the book, the defendant copied Dr. Seuss's image of the Cat in the Hat and mimicked his lyrical style of story-telling.²⁶⁶ Applying *Campbell's* parody/satire distinction, the Ninth Circuit held that the defendant's work was not fair use because it was a satire of the Simpson case rather than a parody of the Dr. Seuss books.²⁶⁷ Yet, given the First Amendment's emphasis on protecting speech regarding matters of public importance, it would seem that commentary on the legal system's handling of the most controversial murder case in years should receive greater protection than commentary on a book of children's rhymes.

Moreover, *Campbell's* distinction between parody and satire is likely to have a chilling effect on speech because in many cases it is nearly impossible to tell the difference between the two. Indeed, the *Campbell* Court itself acknowledged the blurriness of the lines, conceding that "parody often shades into satire when society is lampooned through its creative artifacts. . . ."²⁶⁸ As such, even those who wish to make parodies will be deterred by the specter of litigation and the uncertainty in how a court would characterize their use.

If copyright holders can suppress opinions and artistic expression in order to maintain their image, they can effectively thwart the First Amendment interest in fostering a robust and diverse marketplace of ideas. Copyright law can be reconciled with the First Amendment by defining harm in keeping with this interest. Thus, outside the context of moral rights under VARA, courts should not recognize harm to image or reputation in copyright infringement cases.

C. Non-Market Harm: Property Rights and The Right Not to Speak or Associate

A copyright holder might also assert that another person's unauthorized copying of his copyrighted work harms his First Amendment right not to speak or associate with another's message. As the Supreme Court held in *Wooley v. Maynard*, "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."²⁶⁹

As the *Wooley* Court indicated, however, the right not to speak applies only against state action. Where there is no state action, there might be involuntary speech, but there is no *government-compelled* speech, which is all the First Amendment prohibits. Accordingly, it seems that the First Amendment would not require copyright law to

²⁶⁵ 109 F.3d 1394, 1396-97 (9th Cir. 1997).

²⁶⁶ *See id.*

²⁶⁷ *See id.* at 1401.

²⁶⁸ *See Campbell*, 510 U.S. at 581. *See also* Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, *supra* note __, at 1009 (arguing, for example, that "any parody of *Gone With the Wind* would seem to satirize the antebellum South, because images of *Gone With the Wind* practically define that era in the minds of many readers").

²⁶⁹ 430 U.S. 705, 714 (1977) (holding that state law punishing drivers for covering up state motto "Live Free or Die" on automobile license plate violated appellee's right not to speak).

intervene to protect a copyright holder from another private party's unauthorized use of her copyrighted material. This is true even if that use intrudes upon the copyright owner's property or extracts a subsidy to support the other's speech (unless the First Amendment requires the existence of a copyright law in the first place, which would be a truly novel proposition).

Yet, state action is a prerequisite only in First Amendment adjudication. Thus, if courts continue to use copyright's statutory doctrines instead of direct First Amendment scrutiny to protect speech in copyright cases, the state action doctrine will not apply. In such cases, courts might recognize competing speech claims between the parties, whether or not those claims would satisfy all constitutional requirements. Thus, the plaintiff would raise the right not to speak as a counterargument to the defendant's right to speak argument. For instance, in *Harper & Row*, the Supreme Court weighed the copyright holder's right not to speak in its fair use analysis. In that case, the defendant, a private news magazine, surreptitiously obtained and published the copyright holder's unpublished manuscript.²⁷⁰ Although no state action was present, the Court nevertheless characterized the copyright holder's right not to speak as a value weighing against a finding of fair use.²⁷¹

Arguably, it is impermissible to equate the interests against state and non-state intrusions on speech rights. The constitution treats these as fundamentally different interests and prohibits only speech restrictions imposed by the government. Assuming that the state action doctrine is no obstacle, however, a copyright holder might argue that a defendant's unauthorized copying of her copyrighted material violates her right not to speak under either of two lines of cases. In the first line of cases, the Supreme Court has held that there is no First Amendment right to use another's property for speech. In another line of cases, the Court has held that the First Amendment prevents the state from forcing a person to subsidize a cause or message with which she disagrees.

In *Lloyd Corp. v. Tanner*,²⁷² the Supreme Court held that the First Amendment does not require a private shopping center owner to grant access to persons exercising their constitutional rights of free speech when adequate alternative avenues of communication exist. Moreover, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, the Court held unconstitutional a utility commission regulation requiring a private utility company to include a public interest group's message along with its billing statements.²⁷³ The Court reasoned that such "compelled access" violates the First Amendment because it "forces speakers to alter their speech to conform with an agenda they do not set."²⁷⁴

Under similar reasoning, copyright holders might argue that unauthorized access to their copyrighted works forces them to allow their property to be used to support or

²⁷⁰ See *Harper & Row*, 471 U.S. at 542.

²⁷¹ See *id.* at 555.

²⁷² See *Lloyd*, 407 U.S. 551 (1972).

²⁷³ See *Pacific Gas & Electric*, 475 U.S. 1 (1986).

²⁷⁴ See *id.* at 9.

facilitate the defendants' views. As such, it might violate the copyright holders' right not to speak or associate with another's message.

The right not to speak or associate does not prohibit most copying of copyrighted material, however. It is true that the Supreme Court has held that the First Amendment does not, in and of itself, require a property owner to allow others to use his property for speech purposes. Significantly, however, the Court has also held that the First Amendment does not prevent the government from passing a law requiring him to allow such use so long as the property is not within the exclusive personal control of the property owner (is accessible to the public) and the law does not violate the Takings or Due Process clause.

Thus, in *Pruneyard Shopping Center v. Robins*, the Court held that a California court ruling did not violate the First Amendment in allowing protestors the right to use shopping centers for speech purposes.²⁷⁵ The Court reasoned that the protestors' views would "not likely be identified with those of the owner," because the shopping centers were not within the exclusive personal control of the property owner but were open to the public, and because the owners could inform the public (by signs or otherwise) that they did not necessarily support the protestors' message.²⁷⁶

Moreover, the *Pruneyard* Court held that the state law requiring the property owner to allow access did not constitute a taking or a deprivation of property without due process. The Court explained, "it is well established that 'not every destruction or injury to property by governmental action has been held to be a "taking" in the constitutional sense.'"²⁷⁷ Rather, the takings analysis requires "inquiry into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations."²⁷⁸ The Court concluded that the law requiring the property owners to allow access for speech purposes clearly did not violate the Takings Clause because the owners "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'"²⁷⁹

To the extent that a copyright holder's right not to speak should be recognized at all, it seems that existing fair use doctrine strikes the proper balance in protecting that right. Fair use protects the copyright holder's right not to speak or associate only in cases involving unpublished works. Where the copyright owner has not yet published his work, it may be said that another's unauthorized publication of that work forces the

²⁷⁵ 447 U.S. 74 (1980).

²⁷⁶ *See id.* at 87.

²⁷⁷ *See id.* at 82 (quoting *Armstrong v. United States*, 364 U.S. 40, 48 (1960)).

²⁷⁸ *See id.* at 83.

²⁷⁹ *See id.* at 84. (recognizing a relationship between the First, Fifth, and Fourteenth Amendments and suggesting that the First Amendment issue in a case like *Pruneyard* is less compelling where the defendant's use of plaintiff's private property does not constitute a taking or a deprivation of property without due process).

copyright owner to “speak” against his will. Thus, courts generally agree that fair use affords less latitude to copy from unpublished works.²⁸⁰

Once copyrighted works are published, however, they are no longer under the exclusive personal control of the copyright owner. As such, when portions of copyrighted works are copied or are used to convey a new or different message, there is no reason to believe that any message will be imputed to the original copyright holder. The copyright holder can also disclaim any connection with the use of his copyrighted work if he so chooses. In addition, where there is no demonstrable market harm, it would be virtually impossible to show that a use of copyrighted material constitutes a taking or due process violation. Accordingly, unless the defendant has taken affirmative steps to mislead the public as to the copyright holder’s sponsorship or affiliation with the defendant’s use, the use should not be deemed to harm the copyright holder’s right not to speak.

Indeed, with regard to published works, fair use traditionally has protected uses of copyrighted material that convey a new or different message (*i.e.*, transformative uses) even – or especially – when the message is one that the copyright owner would find objectionable. In particular, as previously discussed, fair use favors the use of a copyrighted work for purposes of comment or criticism, as in a book review or parody, even if the use puts the work in a negative light. Thus, fair use would seem to grant the greatest protection for uses of copyrighted material with which copyright owners would *least* like to be associated. As we have just seen, the protection of copying in order to convey a new meaning or message, especially a critical message, is necessary to the goal of facilitating diverse viewpoints in a robust marketplace of ideas.

The Supreme Court also has held that it violates the First Amendment for the state to compel a person to pay money in support of a cause or message with which she does not agree.²⁸¹ Professor Nimmer once invoked a forced subsidy argument to reject a First Amendment right to copy in copyright law. Thus, he said that “[t]he first amendment guarantees the right to speak; it does not offer a governmental subsidy for the speaker, and particularly a subsidy at the expense of authors whose well-being is also a matter of public interest.”²⁸²

Yet, a copyright holder provides a subsidy only where he or she gives up payments or royalties that she otherwise would have received but for the defendant’s use of her copyrighted material. In short, where there is no demonstrable harm to the copyright holder, there is no subsidy. To be sure, the defendant benefits from the use of

²⁸⁰ See, e.g., *Campbell*, 510 U.S. at 586; *Harper & Row*, 471 U.S. at 539; *NXIVM Corp v. Ross Inst.*, 364 F.3d 471, 480 (2d Cir. 2004).

²⁸¹ See *Keller v. State Bar of Calif.*, 496 U.S. 1, 14-16 (1990) (compulsory state bar dues may be used to pay for Bar-related activities, such as disciplining members of the Bar, but not to advance ideological causes unrelated to regulating the legal profession); *Abood v. Detroit Board of Education*, 431 U.S. 209, 234 (1977) (union may require payments from both members and nonmembers to subsidize collective bargaining activities from which they benefit but may not require payments to subsidize ideological causes unconnected to the Union’s duties as bargaining representative) .

²⁸² See Nimmer, *supra* note 1, at 1203.

the copyrighted work even if the copyright holder gives up nothing, and one could perhaps argue that such a benefit to the defendant constitutes a subsidy from the copyright holder, regardless of whether it makes the copyright holder worse off. But this argument is merely another manifestation of the circularity of harm in copyright, in which any benefit to the defendant is deemed harm to the plaintiff.²⁸³ As we have seen, the First Amendment does not allow copyright holders to control all uses of their copyrighted works.²⁸⁴

Accordingly, in ordinary cases involving published copyrighted works, courts should not recognize a harm to the copyright holder's right not to speak. As such, where a defendant's use of a copyrighted work does not cause any market harm to the copyright holder, a court should not impose liability in order to protect that right. Significantly, this analysis suggests that a court should not penalize a defendant for using a published copyrighted work in a market that the copyright holder either had decided not to exploit or was unable to exploit, even though it might be argued that the copyright holder chose not to "speak" in that particular way to those particular consumers.

The *Seinfeld* case provides an example of a court that got this issue wrong. The court acknowledged evidence showing that the copyright holders had decided not to exploit the market for trivia books based on the *Seinfeld* television show. Nevertheless, the court decided that it should "respect" the copyright holders' right not to enter that market and found liability despite the lack of any market harm. But because the copyrighted *Seinfeld* television episodes were published, the defendant's use would not have affected the copyright holders' right not to speak. The copyright holders had already distributed the work publicly, so unlike in *Harper & Row*, there was no concern that the defendant's copying would divulge material that the copyright holder had not yet decided to share. Moreover, under *Pruneyard*, there is no reason to think that the message of the trivia books would be attributed to the copyright holders. The copyrighted works were known to be accessible to the public, and the copyright holders could easily disavow any connection to the trivia books. Given the absence of either market or non-market harm, it is clear that the court's decision unnecessarily burdened harmless speech.

D. Non-Market Harm: Violations of Privacy

Copyright holders might also attempt to argue a privacy right against unwanted publicity caused by unauthorized uses of their copyrighted works. Based on many cases addressing the appropriate balance between one person's speech and another's privacy, however, it is clear that copyright infringement generally does not cause sufficient harm to privacy interests to justify prohibiting the allegedly infringing speech.

²⁸³ See, e.g., *supra* notes __ and accompanying text.

²⁸⁴ Moreover, the subsidy argument proves too much, for it would seem to mean that everyone who contributed unknowingly or unwillingly to the defendant's use – right down to the people who unwittingly inspired him to write – could say their rights not to speak were violated.

In *Time, Inc. v. Hill*, Life Magazine ran a story suggesting that a new, fictional play was based on the real-life experience of the plaintiff Hill's family, who had been held hostage in their home by escaped convicts.²⁸⁵ In fact, the play was based only in part on the family's experience and differed in many details. Foremost, while no one was harmed in the family's real experience, the play showed the father and son being beaten and the daughter being subjected to a verbal sexual insult.²⁸⁶

The plaintiff brought an action for unwanted publicity under a New York privacy statute. The statute prohibited "us[ing] for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person . . ."²⁸⁷ The New York state appellate division sustained the trial court's finding of liability. It explained: "Although the play was fictionalized, Life's article portrayed it as a reenactment of the Hills' experience. It is an inescapable conclusion that this was done to advertise and attract further attention to the play, and to increase present and future magazine circulation as well."²⁸⁸ The New York Court of Appeals affirmed.²⁸⁹

The Supreme Court reversed. Although the Court noted that New York judicial decisions had limited causes of action under the statute by providing that "truth is a complete defense," it held that the requirement of falsity was not a sufficient safeguard of First Amendment interests.²⁹⁰ Thus, the Court held that the *New York Times* requirement of actual malice – knowledge or reckless disregard of falsity – should also apply to privacy cases.²⁹¹

The Court's reasoning is highly relevant to resolving the conflict between copyright infringement and speech interests. The Court essentially held that the privacy interest in avoiding unwanted exposure, *including exposure for another's commercial gain*, is insufficient to warrant limiting speech unless the speech is false and is made with knowledge or reckless disregard of its falsity. The Court said that the fact "[t]hat books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment."²⁹² Moreover, although the case involved news reporting on a matter of public concern, the Court's reasoning would extend to all kinds of expression, including many, if not most, uses of copyrighted works. As the Court explained, "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs. . . . One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials."²⁹³ Finally, the Court observed that the right of privacy is inherently limited by

²⁸⁵ 385 U.S. 374, 376-78 (1967).

²⁸⁶ *See id.* at 378-79.

²⁸⁷ *See id.* at 376 n. 1 (discussing New York Civil Rights Law § 50).

²⁸⁸ *See id.* at 379.

²⁸⁹ *See id.*

²⁹⁰ *See id.* at 382-83, 387-88.

²⁹¹ *See id.* at 387-88.

²⁹² *See id.* at 397 (citations and quotations omitted).

²⁹³ *See id.* at 388.

the First Amendment: “Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.”²⁹⁴

The Court’s decision holds that people who live in society must accept some amount of unwanted and unauthorized exposure. The right of privacy, as informed and limited by the First Amendment, does not allow people to meter or control exactly the amount of publicity they receive, especially when they become a matter of public interest. This is true even when others impose that unwanted publicity for their own commercial gain.

The same rule should apply to copyright cases in which the defendant free-rides on the copyrighted work but the copyright holder cannot show any economic harm. In these cases, the copyright holder might argue a privacy-based interest in metering or controlling the precise amount of exposure that her copyrighted work receives.²⁹⁵ Yet, *Time* holds that there is no absolute right against unwanted publicity, and its reasoning would apply with even greater force in most copyright cases. First, as was previously discussed, copyright infringement cases typically do not involve false assertions of fact but rather the use of a copyrighted work to convey opinions or ideas. Such opinions and ideas are entitled to great protection under the First Amendment, especially because they are usually matters of public interest. Second, the privacy interest at stake in most copyright cases is less weighty than in a case like *Time*. Except in cases involving unpublished works, the nature of the interest at stake in copyright infringement cases is more of a commercial interest against free-riding than a privacy interest in avoiding public exposure of one’s personal affairs and life experiences. Moreover, the copyright holder has already made the decision to go public, so that any additional “invasion of privacy” is likely to be marginal.

The Supreme Court’s decision in *Florida Star v. B.J.F.* likewise precludes recognizing a privacy-based right in copyright holders to prevent otherwise harmless uses of their copyrighted works. The Court held that First Amendment protection extended to truthful but unauthorized publication of a rape victim’s name in a widely-circulated newspaper.²⁹⁶ There, B.J.F. filed a police report alleging that she had been robbed and raped by an unknown assailant.²⁹⁷ A reporter lawfully obtained a copy of the police report and copied its information, including the victim’s full name, into a short article in the “Police Reports” section of the paper.²⁹⁸ B.J.F. then sued under a Florida privacy statute that made it unlawful for any person to “print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense within this chapter.”²⁹⁹

²⁹⁴ *See id.*

²⁹⁵ *See, e.g., Ty*, 1998 WL 698922, at *16 (owner of copyrights in Beanie Babies stuffed animals attempted to maintain long-term value of the collectibles by restricting short-term availability and exposure).

²⁹⁶ 491 U.S. 524, 527-29 (1989).

²⁹⁷ *See id.* at 527.

²⁹⁸ *See id.*

²⁹⁹ *See id.* at 524 (quoting Fla. Stat. § 794.03 (1987)).

The Court held that the statute violated the First Amendment. It emphasized that “state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”³⁰⁰ Applying this principle, the Court examined the three government interests behind the statute: “the privacy of victims of sexual offenses; the physical safety of such victims, who may be targeted for retaliation if their names become known to their assailants; and the goal of encouraging victims of such crimes to report these offenses without fear of exposure.”³⁰¹ While acknowledging that “these are highly significant interests,” the Court held that the statute was not necessary to further those interests in that particular case.³⁰² One of the Court’s main objections to the statute was that it did not require “case-by-case findings” regarding the likely harm associated with the invasion of privacy but rather imposed liability broadly based solely on the fact of publication. Thus, the statute essentially presumed harm from the publication “regardless of whether the identity of the victim is already known throughout the community; whether the victim has voluntarily called public attention to the offense; or whether the identity of the victim has otherwise become a reasonable subject of public concern. . . .”³⁰³

If First Amendment concerns are weighty enough to prevent courts and legislatures from presuming harm to privacy from the publication of a rape victim’s name, then surely courts should not presume similar harm from the copying of copyrighted material. It seems indisputable that there are many more situations in which copying does not harm copyright holders than there are situations in which publishing a rape victim’s name does not harm the rape victim. It also seems fairly obvious that the harm to copyright holders, when it does occur, is much less severe than the harm to rape victims. Just as the First Amendment required a showing that application of the Florida Statute was necessary to remedy harm to the governmental interests in protecting rape victims, so too it requires a showing that application of the Copyright Act is necessary to remedy harm to the governmental interest in encouraging innovation.³⁰⁴

Moreover, the Court suggested that it would not find a violation of privacy for unwanted publicity where the identity of the victim was already known or where the victim had already “voluntarily called public attention to the offense.” In those cases, the harm associated with the unwanted publicity would not be substantial enough to outweigh the First Amendment interest in allowing comment on news events. Likewise,

³⁰⁰ See *id.* (quoting *Smith v. Daily Mail Publishing, Inc.*, 443 U.S. 97, 103 (1979)).

³⁰¹ See *id.* at 537.

³⁰² See *id.*

³⁰³ See *id.* at 539.

³⁰⁴ It is perhaps worth noting that both *Florida Star v. B.J.F.* and *Smith v. Daily Mail Publishing* involved content-based speech restrictions and were therefore subject to strict scrutiny. As I have argued at *supra* notes __ and accompanying text, copyright law is arguably an analogous content-based law. Moreover, even if copyright law is content-neutral, it requires similar (though perhaps less demanding) consideration of government interests. Indeed, in *Bartnicki*, which also involved a content-neutral speech regulation, the Court referred to the *Smith* and *B.J.F.* decisions for guidance in evaluating the constitutionality of the speech regulation. See *Bartnicki*, 532 U.S. at 527-28.

in most copyright cases – again, except those involving unpublished works³⁰⁵ – the copyright holder has already put the work out for public consumption and comment. Although the copyright holder has not authorized the defendant’s use, the *Florida Star* case indicates that the additional publicity associated with that particular use probably would not cause sufficient harm to justify prohibiting it.

In summary, in order to satisfy First Amendment concerns, copyright law must require proof of real harm in copyright infringement cases. As the foregoing sections show, copyright harm clearly includes the harm of market substitution, where the defendant’s use of plaintiff’s copyrighted material actually supplants the market for the copyrighted work in a way that is likely to decrease incentives to create or distribute the work. By contrast, the First Amendment severely limits judicial recognition of non-market harms. Thus, courts may not recognize harm to reputation caused by criticism or disparagement. Furthermore, except in cases involving the copying of unpublished works, courts ordinarily should not recognize harm to the plaintiff’s right not to speak or right to privacy.

VII. Conclusion

As copyright law restricts more and more uses of copyrighted works, it encroaches on the ability of others to express themselves through the use of those works. Yet, courts generally do not apply First Amendment scrutiny in copyright cases. As such, copyright law is an anomaly within First Amendment law, which generally holds that the government may not prohibit speech without a showing that the speech causes harm. While other speech-burdening laws, such as defamation and right of publicity laws, require a showing that the plaintiff has been harmed by the speech, copyright law does not make harm a requirement of infringement. Although copyright law considers harm to the market for the copyrighted work as a factor in fair use analysis, harm is not always required and is poorly defined. Moreover, the defendant bears the burden of proof to show the absence of harm in most cases.

The reasons for ignoring speech concerns in copyright law are inapt and unpersuasive. Copying involves speech as well as conduct, and the fact that copyrights can be viewed as property does not justify their exceptional treatment. Moreover, copyright’s role as the “engine of free expression” does not obviate First Amendment concerns. Rather, it provides a way to reconcile copyright law and free speech. By requiring real proof of harm to the copyright holder’s incentives, and defining harm consistent with First Amendment principles, copyright law can enforce copyrights where necessary to serve copyright’s incentive purpose while avoiding unnecessary burdens on harmless speech.

³⁰⁵ See generally *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987) (biographer’s use of unpublished letters belonging to reclusive writer J.D. Salinger did not constitute fair use).